

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-738V

Filed: March 8, 2012

ANGIE KENNEY and)	
JUSTIN KENNEY, parents of)	
NEVAEH KENNEY, a minor,)	
)	NOT TO BE PUBLISHED
Petitioners,)	
)	
v.)	Stipulation; varicella vaccine;
)	acute cerebellar ataxia;
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

Ronald C. Homer, Conway, Homer & Chin-Caplan, Boston, MA, for Petitioners;
Julia W. McInerney, United States Dep't of Justice, Washington, D.C., for Respondent.

DECISION¹

LORD, Special Master.

On February 16, 2012, the parties in the above-captioned case filed a Stipulation memorializing their agreement as to the appropriate amount of compensation in this case. Petitioners, Angie and Justin Kenney, as parents and natural guardians of their daughter Nevaeh Kenney ("Nevaeh"), allege that Nevaeh suffered injuries related to her receipt of a varicella vaccine on or about December 20, 2007, which vaccine is contained in the Vaccine Injury Table, 42 C.F.R § 100.3(a). Specifically, Petitioners allege that Nevaeh suffered acute cerebellar ataxia as a result of the December 20, 2007, vaccination. Petitioners further allege that Nevaeh experienced the residual effects of this injury for more than six months. Petitioners seek compensation related to these injuries pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10 to 34.

Respondent denies that the varicella vaccine caused Nevaeh to suffer acute cerebellar ataxia or any other injury. Respondent denies that Nevaeh's current disabilities are sequella of her alleged injury and further denies that she experienced the

¹ In accordance with Vaccine Rule 18(b), petitioner has 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Redactions ordered by the special master, if any, will appear in the document as posted on the United States Court of Federal Claims' website.

residual effects of this injury for more than six months. Nonetheless, the parties have agreed informally to resolve this matter.

The Court hereby ADOPTS the parties' said Stipulation, attached hereto as Appendix A, and awards compensation in the amount and on the terms set forth therein. Specifically, Petitioners are awarded:

- (1) A lump sum of \$93,897.16, in the form of a check payable to Petitioners, as guardians/conservators of Nevaeh Kenney's estate,** which amount represents compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a)(1)(A); and
- (2) A lump sum of \$6,102.84, in the form of a check payable to Petitioners,** which amount represents past unreimbursable vaccine-related expenses pursuant to 42 U.S.C. § 300aa-15(a)(1)(B).

The Court thanks the parties for their cooperative efforts in resolving this matter. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment accordingly.²

IT IS SO ORDERED.

s/Dee Lord
Dee Lord
Special Master

² Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

_____)	
ANGIE KENNEY and JUSTIN KENNEY,)	
parents of NEVAEH KENNEY, a minor,)	
)	
Petitioners,)	
)	
v.)	No. 09-738V
)	Special Master Lord
SECRETARY OF HEALTH AND HUMAN)	ECF
SERVICES,)	
)	
Respondent.)	
_____)	

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of their daughter, Nevaeh Kenney ("Nevaeh"), Angie and Justin Kenney, Parents and Natural Guardians of Nevaeh ("petitioners") filed a petition for vaccine compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 to 34 (the "Vaccine Program"). The petition seeks compensation for injuries allegedly related to Nevaeh's receipt of a varicella vaccine, which vaccine is contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. § 100.3 (a).
2. Nevaeh received her varicella vaccine on December 20, 2007.
3. The vaccine was administered within the United States.
4. Petitioners allege that Nevaeh suffered acute cerebellar ataxia as a consequence of her varicella vaccination, and further allege that she experienced residual effects of this injury for more than six months.
5. Petitioners represent that there has been no prior award or settlement of a civil

action for damages as a result of Nevaeh's condition.

6. Respondent denies that the varicella vaccine caused Nevaeh's cerebellar ataxia or any other injury; denies that Nevaeh's current disabilities are sequella of her alleged injury; and denies that Nevaeh experienced the residual effects of this injury for more than six months.

7. Maintaining their above-stated positions, the parties nevertheless now agree that the issues between them shall be settled and that a decision should be entered awarding the compensation described in paragraph 8 of this Stipulation.

8. As soon as practicable after an entry of judgment reflecting a decision consistent with the terms of this Stipulation, and after petitioners have filed an election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1), the Secretary of Health and Human Services will issue the following vaccine compensation payment:

A.) A lump sum of \$93,897.16 in the form of a check payable to petitioners, as guardians/conservators of Nevaeh's estate. This amount represents compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a)(1)(A); and

B.) A lump sum of \$6,102.84 in the form of a check payable to petitioners representing past unreimbursable vaccine-related expenses pursuant to 42 U.S.C. § 300aa-15(a)(1)(B).

9. As soon as practicable after the entry of judgment on entitlement in this case, and after petitioners have filed both a proper and timely election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1), and an application, the parties will submit to further proceedings before the special master to award reasonable attorneys' fees and costs incurred in proceeding upon this petition.

10. Petitioners and their attorney represent that they have identified to respondent all

known sources of payment for items or services for which the Program is not primarily liable under 42 U.S.C. § 300aa-15(g), including State compensation programs, insurance policies, Federal or State health benefits programs (other than Title XIX of the Social Security Act (42 U.S.C. § 1396 et seq.)), or entities that provide health services on a pre-paid basis.

11. Payment made pursuant to paragraph 8 of this Stipulation and any amounts awarded pursuant to paragraph 9 will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

12. The parties and their attorneys further agree and stipulate that, except for any award for attorneys' fees and litigation costs, the money provided pursuant to this Stipulation, will be used solely for the benefit of Nevaeh Kenney as contemplated by a strict construction of 42 U.S.C. § 300aa-15(a) and (d), and subject to the conditions of 42 U.S.C. § 300aa-15(g) and (h).

13. Petitioners represent that they presently are, or within 90 days of the date of judgment will become, duly authorized to serve as guardians/conservators of Nevaeh's estate under the laws of the State of Maine. No payments pursuant to this Stipulation shall be made until petitioners provide the Secretary with documentation establishing their appointment as guardians/conservators of Nevaeh's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardians/conservators of the estate of Nevaeh Kenney at the time a payment pursuant to this Stipulation is to be made, any such payment shall be paid to the party or parties appointed by a court of competent jurisdiction to serve as guardians/conservators of the estate of Nevaeh Kenney upon submission of written documentation of such appointment to the Secretary.

14. In return for the payments described in paragraphs 8 and 9, petitioners, in their

individual capacities and as legal representatives of Nevaeh, on behalf of themselves, Nevaeh, and her heirs, executors, administrators, successors or assigns, do forever irrevocably and unconditionally release, acquit and discharge the United States and the Secretary of Health and Human Services from any and all actions or causes of action (including agreements, judgments, claims, damages, loss of services, expenses and all demands of whatever kind or nature) that have been brought, could have been brought, or could be timely brought in the Court of Federal Claims, under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq., on account of, or in any way growing out of, any and all known or unknown, suspected or unsuspected personal injuries to or death of Nevaeh resulting from, or alleged to have resulted from, the varicella vaccination administered on December 20, 2007, as alleged by petitioners in a petition for vaccine compensation filed on or about October 28, 2009, in the United States Court of Federal Claims as petition No. 09-738V.

15. If Nevaeh should die prior to entry of judgment, this agreement shall be voidable upon proper notice to the Court on behalf of either or both of the parties.

16. If the special master fails to issue a decision in complete conformity with the terms of this Stipulation or if the Court of Federal Claims fails to enter judgment in conformity with a decision that is in complete conformity with the terms of this Stipulation, then the parties' settlement and this Stipulation shall be voidable at the sole discretion of either party.

17. This Stipulation expresses a full and complete negotiated settlement of liability and damages claimed under the National Childhood Vaccine Injury Act of 1986, as amended, except as otherwise noted in paragraph 9 above. There is absolutely no agreement on the part of the parties hereto to make any payment or to do any act or thing other than is herein expressly stated

and clearly agreed to. The parties further agree and understand that the award described in this Stipulation may reflect a compromise of the parties' respective positions as to liability and/or amount of damages, and further, that a change in the nature of the injury or condition or in the items of compensation sought, is not grounds to modify or revise this agreement.

18. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that the varicella vaccine caused Nevaeh's cerebellar ataxia or any other injury; that Nevaeh's current disabilities are sequella of any alleged injury; or that Nevaeh experienced the residual effects of any alleged injury for more than six months.

19. All rights and obligations of petitioners hereunder shall apply equally to petitioners' heirs, executors, administrators, successors, and/or assigns as legal representatives of Nevaeh Kenney.

END OF STIPULATION

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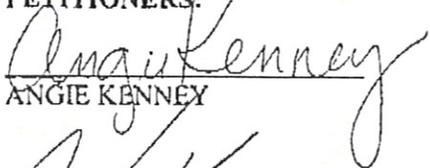
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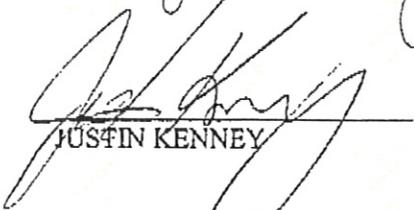
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Respectfully submitted,

PETITIONERS:


ANGIE KENNEY


JUSTIN KENNEY

**ATTORNEY OF RECORD FOR
PETITIONERS:**

By Joseph M. Leppen
Conform Rule 83.1(c)(2)
RONALD C. HOMER
CONWAY, HOMER &
CHIN-CAPLAN
16 Shawmut Street
Boston, MA 02116
(617) 695-1990

**AUTHORIZED REPRESENTATIVE
OF THE ATTORNEY GENERAL:**


VINCENT J. MATANOSKI
Acting Deputy Director
Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, DC 20044-0146

**AUTHORIZED REPRESENTATIVE
OF THE SECRETARY OF HEALTH
AND HUMAN SERVICES:**


GEOFFREY EVANS, M.D.
Director, Division of
Vaccine Injury Compensation
Healthcare Systems Bureau
U.S. Department of Health
and Human Services
5600 Fishers Lane
Parklawn Building, Mail Stop 11C-26
Rockville, MD 20857

**ATTORNEY OF RECORD FOR
RESPONDENT:**


JULIA W. MCINERNEY
Trial Attorney
Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, DC 20044-0146
(202) 353-3919

Dated: 2/16/12