

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-286V

October 30, 2008

DENISE GORMLEY and JOHN GORMLEY, *
parents of MATTHEW GORMLEY, a minor, *

Petitioners, *

v. * Motion to dismiss

premature

SECRETARY OF THE DEPARTMENT OF *
HEALTH AND HUMAN SERVICES, *

Respondent. *

ORDER¹

On February 10, 2003, petitioners filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., on behalf of their son Matthew Gormley (hereinafter, “Matthew”), using the short form for autism petitions.

¹ Because this order contains a reasoned explanation for the special master's action in this case, the special master intends to post this order on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When an order expressing a reasoned explanation is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

On July 17, 2008, respondent moved to dismiss this case based on the petition's being filed beyond the 36-month statute of limitations. 42 U.S.C. §300aa-16(a)(2). Respondent states that Matthew was diagnosed with pervasive developmental delay, not otherwise specified (PDD-NOS) on May 2, 2002. Motion at p. 3. But a record from his two-year check-up on May 18, 1999 notes he was not talking much and questioned if he had a speech delay. *Id.* On February 10, 2002, Matthew was diagnosed with speech delay. *Id.*

On July 31, 2008, petitioners filed their Reply in Opposition to Respondent's Motion to Dismiss. Petitioners state that having 10 words at 24 months of age is not an objective manifestation of developmental abnormality. Reply at p. 1. In the May 18, 1999 notation, the pediatrician wrote "receptive language good" even though the nurse observed "not talking too much." *Id.* The pediatrician wrote "speech delay?" and ordered a hearing check if Matthew's ears were normal on recheck. Reply at p. 2. Petitioners regard this entry as ambiguous as to the cause as well as the presence of speech delay. *Id.* Only on March 20, 2000 was a mechanical cause for Matthew's delayed speech ruled out, which was within 36 months of the filing of the petition. *Id.* Citing the objective standard the Federal Circuit posited in Markovich v. Sec'y of HHS, 477 F.3d 1353 (Fed. Cir. 2007), petitioners state there was no objectively recognizable sign of a vaccine injury in 1999 or before March 20, 2000. Reply at p. 3.

Without evidentiary presentation of when the objective medical community would consider Matthew to have had a vaccine injury, respondent's motion is premature and DENIED.

IT IS SO ORDERED.

October 30, 2008
DATE

s/Laura D. Millman
Laura D. Millman
Special Master