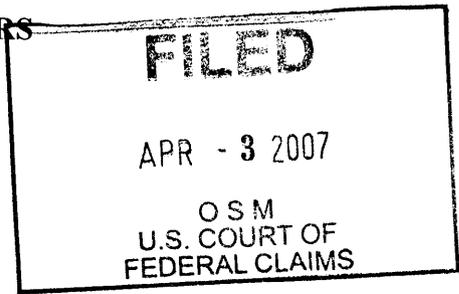


ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS



\_\_\_\_\_)  
 IN RE: CLAIMS FOR VACCINE )  
 INJURIES RESULTING IN AUTISM )  
 SPECTRUM DISORDER OR A SIMILAR )  
 NEURODEVELOPMENTAL DISORDER )  
 )  
 Various Petitioners, )  
 )  
 v. )  
 )  
 SECRETARY OF HEALTH AND )  
 HUMAN SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_)

AUTISM MASTER FILE  
Special Master Hastings

**RESPONDENT'S FORMAL POSITION REGARDING PUBLIC ACCESS TO THE JUNE, 2007 EVIDENTIARY HEARING**

Respondent was asked to provide his position with respect to public access to the trial in Cedillo v HHS, No. 98-916V, currently scheduled to commence in June, 2007. At the outset, respondent notes that this issue was affected by key developments in the Omnibus Autism Proceeding in January, 2007, when the Petitioners' Steering Committee ("PSC") agreed to pursue its causation theory in the context of a test case. The PSC subsequently identified the specific petitioners whose case will be tried, and those petitioners have provided their written consent to disclosure of information under Section 12(d)(4) of the Vaccine Act. In light of those developments, respondent will also provide written consent to disclosure under Section 12(d)(4) in this case, thus eliminating any legal impediment under the Vaccine Act to the disclosure of information adduced at the trial. Accordingly, there is no question that all information produced

at the trial may be publicly disclosed.<sup>1</sup>

Although there is no statutory bar to public access to information disclosed at these proceedings, the manner in which disclosure is made remains extremely important given the presiding Special Masters' responsibilities as judicial officers to ensure the proceedings are conducted with appropriate decorum, in orderly fashion, free from distraction, and focused on achieving a fair and just result. In keeping, the Special Masters are obliged to ensure that all involved in these proceedings are protected from harassment, undue influence, or intimidation – particularly during the actual trial. In respondent's view, there are reasonable means to fairly balance legitimate public interest in these proceedings with the need to preserve the dignity and fairness of the proceedings. It could be accomplished by expedited daily transcription of all testimony made freely available to the parties, the media, and the general public, which approach is fully supported by respondent. Respondent also does not object in principle to opening the courtroom to the public and to a live audio broadcast of the testimony, although respondent believes that such approaches would present substantial risk of disruption and impose a heightened obligation on the presiding Special Masters to oversee and manage the process to ensure appropriate decorum and order. Respondent does object to a televised broadcast of the proceedings, as proposed by the PSC, on the ground that cameras in the courtroom are

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<sup>1</sup> The only exception to public disclosure is potential trade secret information that might be introduced at trial, over which respondent would continue to invoke his right of nondisclosure under Section 12(d)(4) to protect the United States from potential liability from unauthorized disclosure of commercial property. Although respondent does not intend to introduce such information, he may have provided such information to the PSC during discovery of the Product License Applications ("PLAs"). If information from PLAs is to be introduced, such information should be identified beforehand so that appropriate safeguards may be implemented to prevent unauthorized disclosure of proprietary information.

unauthorized and contrary to existing federal practice, and would present an undue risk of disruption and disorder.

A. Publication Of Expedited Daily Transcripts Of All Testimony

Respondent believes that the most appropriate and effective means to accommodate the substantial and legitimate public interest in the proceedings is to produce expedited, daily transcripts of all testimony and make them freely available to all parties and to the media and general public. All testimony is routinely transcribed in Vaccine Act proceedings, so such process would impose no new or unfamiliar requirements and would not present any additional risks of distraction or disruption. Also, the official transcripts of the testimony would provide the most complete and accurate record of the proceedings and ensure complete transparency, as advocated by the PSC.

B. Public Access To The Courtroom

Respondent does not object in principle to allowing full public access to the courtroom during the proceedings. Considering that both the Cedillos and respondent have provided their written consent to disclosure under Section 12(d)(4), a resulting public trial is well within the norms and traditions of federal judicial proceedings. Nonetheless, should the presiding Special Masters opt for an open courtroom, it will present several daunting problems that would have to be carefully examined and addressed in devising the appropriate approach.

First, even the PSC appears to recognize the potential danger presented by broad public identification of the witnesses in these proceedings. Indeed, the PSC specifically cited witness harassment and intimidation and a consequent inability to “remain focused” as reasons arguing against public disclosure of its experts’ names and the substance of their opinions. See Cedillo v.

HHS, No. 98-916V, “Petitioner’s [sic] Response to Order of March 2, 2007,” Mar. 5, 2007, at 2. Of course, those same considerations apply with even greater force during the trial. Therefore, should the presiding Special Masters permit general public access to the trial, they should adopt and vigorously enforce rules guaranteeing witness security and diligently manage and monitor the courtroom and surrounding venues to maintain order.

Second, although the PSC proposes open access to anyone expressing an interest in these proceedings, they made that proposal with seeming disregard for the logistical problems that general public access is likely to present. Respondent has previously stated his concern that all available facilities may prove insufficient to provide seating to the almost 5,000 petitioners in the Omnibus Autism Proceeding, let alone the general public. That is especially true considering the many members of the “public” who might desire a seat during these proceedings, including the media, various interest groups, members of the scientific community, pharmaceutical manufacturers’ representatives, and public health officials.<sup>2</sup>

Respondent’s paramount interest is that the proceedings be conducted in an orderly fashion and in an atmosphere free of coercion and conducive to appropriate judicial deliberation. Respondent has no objection to public access to the proceedings assuming the adoption and enforcement of measures to maintain such standards and on the condition that an appropriate facility is utilized for the proceeding, where it would be feasible to maintain order while fairly accommodating the petitioners and their attorneys and families, as well as the many segments of the public that may seek to attend.

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<sup>2</sup> Of course, the public interest in attending the proceeding as well as the justification for opening the courtroom to the public, would likely be diminished were the presiding Special Masters to authorize a live audio broadcast of the proceedings, as discussed supra, at 5.

### C. Live Audio Broadcast

Respondent also has no objection in principle to a live audio broadcast of the testimony, either by webcast or radio. Respondent believes that a streaming audio feed of the testimony is generally analogous to and consistent with current Vaccine Act practice and procedure of conducting trial proceedings by telephone. Although respondent previously recommended that steps be taken to ensure that the audio feed is available only to petitioners with a stake in the proceedings, respondent's concerns in that regard were subsequently alleviated when test case petitioners were identified and provided specific written consent to disclosure under Section 12(d)(4). Moreover, respondent is mindful of the circumstances presented in this case, with almost 5,000 petitioners having a possible stake in these proceedings. Petitioners live in locations throughout the country, and respondent recognizes that it would present a hardship to many to travel to a central location to personally attend the trial. Accordingly, in light of those special concerns and existing Vaccine Act practice, respondent has no objection in concept to a live audio broadcast of the proceedings. However, as previously emphasized, should the presiding Special Masters opt for such an approach, it should be carefully devised and accompanied with appropriate measures designed to minimize any disruption and distraction from the broadcast and to safeguard witness security.

### D. Televised Broadcasts

Respondent objects to televised broadcasting of trial proceedings as a means of public disclosure. The approach is unprecedented in federal trial courts, unnecessary in light of other means available to achieve disclosure, and would put fair, orderly, and untainted trial process at risk. It would create a substantial danger of witness intimidation and harassment, and promote

courtroom behaviors that could frustrate and impede the presiding Special Masters in their effort to resolve the complex scientific issues in the case. Televised broadcast serves no legitimate purpose that is not well-served by other less intrusive steps previously discussed.

If the presiding Special Masters were to televise trial proceedings, they would break with the policies and practices of the federal judiciary. The specific policy of the federal courts, set by the Judicial Conference of the United States, is that criminal or civil trials may not be televised for purpose of public dissemination. See Guide to Judiciary Policies and Procedures, Vol. 1, Chapter 3, Part E, section 3. In the 1990s, the Conference experimented with televised trials in several district courts and ultimately determined that the ban on broadcast should remain. As the Conference stated in its commentary to its policy banning televised trials: “Following a three-year experiment with cameras in the courtroom, the Judicial Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern.” Id. at section 4. With that policy firmly in place, the Administrative Office of the United States Courts observed that “[n]o federal trial court . . . permits broadcasting of its proceedings. News organizations may intervene in high-profile cases to make a motion to allow broadcasting the trial. No such motion ever has been granted.” Administrative Office of the United States Courts, A Journalist’s Guide to Federal Courts/Types and Sources of Court Information, [http://www.uscourts.gov/journalistguide/district\\_source.html](http://www.uscourts.gov/journalistguide/district_source.html).

The practice of televising trial proceedings has been criticized severely at the highest levels of the Federal judiciary. The Supreme Court aptly described the dangers associated with televised trials in Estes v. State of Tex., 381 U.S. 532 (1965). Though Estes involved a criminal trial, the Court’s observations and rationale apply with equal force to civil proceedings. The

Court observed that “[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial.” Id. at 540. The Court at length described the pernicious affect of cameras in the courtroom:

The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and ‘cranks’ might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot ‘prove’ the existence of such factors. Yet we all know from experience that they exist.

Id. at 547. The Court also recognized the potential impact on the trial judge. Noting that ensuring a fair trial is a difficult task, which requires a judge’s undivided attention, the Court expressed concern that “when television comes into the courtroom [the judge] must also supervise it.” Id. at 548.

The calculus is not affected by the level of public interest in the proceeding, as the Court’s more recent actions demonstrate. In 2000, the Court heard argument concerning the challenge to the United States presidential election results from Florida. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000). The Court denied a request by a major television news network to televise the proceedings, despite both the overwhelming national interest in the case and the fact that, arguably, every citizen had a stake in the outcome. The Chief Justice released an audiotape of the argument shortly after it ended, apparently deeming this a sufficient accommodation to public interest in a case of such monumental national importance. See, e.g., Associated Press, Court to Allow Same-Day Release of Tape Again, Chi. Trib. Dec. 10, 2000, at 21.

Justice Souter expressed deep misgivings about televising courtroom proceedings when Congress was recently considering the issue. “I think the case is so strong,” he told Congress, “that I can tell you the day you see a camera come into our courtroom, it’s going to roll over my dead body.” Associated Press, On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body,’ N.Y. Times, Mar. 30, 1996, at 24. He explained that during his time on the bench in New Hampshire, camera coverage had influenced his questioning because he worried that the courtroom exchanges would be presented on the evening news as fragments taken out of context. Id.

Finally, there is no arguable authorization for live televised broadcasting of Vaccine Act proceedings under the Vaccine Rules or past practice and procedure. The Office of Special Masters constitutes a tribunal under Article I of the United States Constitution and therefore has no more authority than is given under the Vaccine Act and the Rules of the Court of Federal Claims. See Patton v. HHS, 25 F.3d 1021 (Fed. Cir. 1994). While Special Masters have reasonable latitude to conduct proceedings, Vaccine Act proceedings must stay within the rational confines of existing rules. In respondent’s view, public broadcast of these proceedings would constitute such a significant and unprecedented departure from established federal judicial practice, and would be so controversial, that authority for the practice cannot be implied in the existing rules promulgated by the Court of Federal Claims under Section 12(d)(2).

#### CONCLUSION

Respondent provides written consent to disclosure under Section 12(d)(4) in this case, thus removing any legal impediment to public access to evidence adduced in these proceedings. Respondent affirmatively supports public disclosure of expedited daily transcripts of all testimony

in the proceedings as the most appropriate method to fairly accommodate the public's legitimate interests in the proceedings. While respondent does not oppose other avenues of public access to this proceeding, such as open courtroom access and a streaming audio broadcast of the testimony, respondent does not advocate them, as each carries the potential to increase the difficulty in ensuring a trial focused on the pertinent medical issues and free of distraction or disruption. Such approaches would place daunting burdens on the presiding Special Masters to devise measures to ensure that the trial is conducted in an orderly and focused manner, and that witnesses may testify free of intimidation or reprisal. Finally, respondent affirmatively opposes a televised broadcast of the proceedings because that would present undue risks of disruption and distraction, it would be inconsistent with federal judicial practice and procedure, there is no arguable authority for such a broadcast under the Vaccine Act, and there are other less intrusive means to appropriately accommodate legitimate public interest in the proceeding.

Respectfully submitted,

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DATED: 03 APRIL 2007

**CERTIFICATE OF SERVICE**

I certify that on this 3<sup>rd</sup> day of April, 2007, a copy of the foregoing **RESPONDENT'S FORMAL POSITION REGARDING PUBLIC ACCESS TO THE JUNE, 2007 EVIDENTIARY HEARING** was served by Federal Express Overnight upon:

Michael L. Williams, Esq.  
Williams Love, et al.  
9755 SW Barnes Road  
Suite 450  
Portland, OR 97225-6681

As observed at the status conference of April 2, 2007, respondent is unable to fax a copy of **RESPONDENT'S FORMAL POSITION REGARDING PUBLIC ACCESS TO THE JUNE, 2007 EVIDENTIARY HEARING** to Ghada Anis because Ms. Anis has not provided a current facsimile number.

In addition, respondent hereby provides his written consent, pursuant to Section 12(d)(4) of the Vaccine Act, to disclose this pleading on the Court of Federal Claims's website/"Docket of Omnibus Autism Proceeding."

  
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