

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-345 V

Filed: November 30, 2011

Not for Publication

SONYIA FAYAL, legal representative *
of a minor child, BRANDON FAYAL, *

Petitioner, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

James R. Kneisler, Santa Rosa, CA, for petitioner.
Ryan D. Pyles, Washington, DC, for respondent.

Damages Decision Based on Stipulation;
DTaP, Hep B, Hib, IPV, and PCV;
Encephalopathy; Seizure Disorder

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On November 30, 2011, the parties filed the attached stipulation, in which they agreed to settle this case and described the settlement terms. Petitioner alleges that the vaccinee suffered from an encephalopathy, developmental delay, and a seizure disorder following diphtheria-tetanus-acellular-pertussis (“DTaP”), Hepatitis B (“Hep B”)/haemophilus influenzae b (“Hib”), inactivated polio virus (“IPV”), and pneumococcal conjugate (“PCV”) vaccines. Respondent denies that the vaccinee’s encephalopathy, developmental delay, and seizure disorder were caused in fact by his DTaP, Hep B, Hib, IPV, and PCV vaccines. Nonetheless, the parties

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 such a decision is filed, petitioner has 14 days to identify and move to redact 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 redact such material from public access.

agreed to resolve this matter informally.

The court finds the terms of the stipulation to be reasonable, hereby adopts the parties' stipulation, and awards compensation in the amount and on the terms set forth therein. Pursuant to the stipulation, the court awards:

- a. A lump sum of **\$351,313.20**, representing compensation for first year life expenses (\$101,105.70) and trust seed funds (\$250,207.50). The award shall be in the form of a check payable to Regions Bank, as trustee of the grantor reversionary trust established for the benefit of Brandon Fayal;
- b. A lump sum of **\$457,810.03**, representing compensation for partial lost future earnings (\$317,379.26) and pain and suffering (\$140,430.77). The award shall be in the form of check payable to petitioner as guardian/conservator of the estate of Brandon Fayal for the benefit of Brandon Fayal;
- c. A lump sum of **\$6,000.00**, representing compensation for past unreimbursable expenses. The award shall be in the form of a check payable to petitioner, Sonyia Fayal;
- d. A lump sum of **\$28,802.51**, representing reimbursement of a State of Tennessee Medicaid lien. The award shall be in the form of a check jointly payable to petitioner and

BlueCross BlueShield of Tennessee
1 Cameron Hill Circle
Chattanooga, TN 37402
Attn: Deborah Turley
Medicaid # M14212597;

- e. A lump sum of **\$6,085.05**, representing reimbursement of the State of Alabama Medicaid lien. The award shall be in the form of a check jointly payable to petitioner and

HMS
Attn: AL Medicaid Subrogation Unit
5616 High Point Drive, Suite 100
Irving, TX 75038;

- f. A lump sum of **\$10,583.82**, representing reimbursement of a second State of Tennessee Medicaid lien. The award shall be in the form of a check jointly payable to petitioner and

Bureau of TennCare
Attn: Bart Leathers, Deputy General Counsel

310 Great Circle Road, 4th Floor
Nashville, Tennessee 37243;

- g. An amount sufficient to purchase the annuity contract described in paragraph 10 of the attached stipulation.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

Dated: November 30, 2011

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

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.

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

SONYIA FAYAL, legal)	
representative of a minor child,)	
BRANDON FAYAL,)	
)	
Petitioner,)	
v.)	No. 09-345V
)	Special Master Laura D. Millman
SECRETARY OF HEALTH AND)	ECF
HUMAN SERVICES,)	
)	
Respondent.)	

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of her son, Brandon Fayal ("Brandon"), petitioner 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 Brandon's receipt of the diphtheria-tetanus-acellular pertussis (DTaP), hepatitis b/haemophilus influenzae b, inactivated polio virus, and pneumococcal conjugate vaccines, which vaccines are contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. § 100.3(a).
2. Brandon received his immunizations on or about June 1, 2006.
3. The vaccines were administered within the United States.
4. Petitioner alleges that Brandon sustained the first symptom or manifestation of the onset of an encephalopathy in the time period set forth in the Table. Petitioner further alleges that Brandon suffers from developmental delay and a seizure disorder as sequelae of his Table injury, and that he experienced residual effects of this injury for more than six months.

Petitioner alleges in the alternative that Brandon's vaccinations actually caused him to develop an encephalopathy, seizure disorder, and/or developmental delay and that he experienced residual effects of this injury for more than six months.

5. Petitioner represents that there has been no prior award or settlement of a civil action for damages on behalf of Brandon as a result of his condition.

6. Respondent denies that Brandon suffered the onset of an encephalopathy within the time period set forth in the Table; denies that the vaccines, either singly or in combination, caused his alleged encephalopathy, seizure disorder, and/or developmental delay; denies that his current condition is a sequela of his alleged injury; and denies that Brandon 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 paragraphs 8 and 12 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 petitioner has 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 payments:

- a. A lump sum of \$351,313.20, which amount represents compensation for first year life care expenses (\$101,105.70) and trust seed funds (\$250,207.50), in the form of a check payable to Regions Bank, as trustee of the grantor reversionary trust established for the benefit of Brandon Fayal;
- b. A lump sum of \$457,810.03, which amount represents compensation for partial lost future earnings (\$317,379.26) and pain and suffering (\$140,430.77), in the form of a check payable to petitioner as guardian/conservator of the estate of Brandon Fayal for the benefit of Brandon Fayal. No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the

guardian/conservator of Brandon Fayal's estate;

c. A lump sum of \$6,000.00, which amount represents compensation for past unreimbursable expenses, in the form of a check payable to petitioner, Sonyia Fayal;

d. A lump sum of \$28,802.51, which amount represents reimbursement of a State of Tennessee Medicaid lien, in the form of a check payable jointly to petitioner and

BlueCross BlueShield of Tennessee
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f. A lump sum of \$10,583.82, which amount represents reimbursement of a second State of Tennessee Medicaid lien, in the form of a check payable jointly to petitioner and

Bureau of TennCare
Attn: Bart Leathers, Deputy General Counsel
310 Great Circle Road, 4th Floor
Nashville, Tennessee 37243;

and

g. An amount sufficient to purchase the annuity contract described in paragraph 10 below, paid to the life insurance company from which the annuity will be purchased (the "Life Insurance Company").

9. The Life Insurance Company must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

a. A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;

- b. Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;
- c. Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;
- d. Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

10. The Secretary of Health and Human Services agrees to purchase an annuity contract from the Life Insurance Company for the benefit of Brandon, pursuant to which the Life Insurance Company will agree to make payments periodically to petitioner for the following items of compensation:

- a. For future unreimbursable Cover Kids Premium, Access TN, Access TN MOP, and VNS Programming expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$2,948.00 to be paid up to the anniversary of the date of judgment in year 2025; then, beginning on the anniversary of the date of judgment in year 2025, an annual amount of \$9,720.00 to be paid up to the anniversary of the date of judgment in year 2036; then, beginning on the anniversary of the date of judgment in year 2036, an annual amount of \$10,524.00 to be paid up to the anniversary of the date of judgment in year 2038, all amounts increasing at the rate of five percent (5%), compounded annually from the date of judgment.
- b. For future unreimbursable Medicare Part B Premium & Deductible, Medigap, and Medicare Part D expenses, beginning on anniversary of the date of judgment in year 2038, an annual amount of \$7,762.10 to be paid up to the anniversary of the date of judgment in year 2071; thereafter, beginning on the anniversary of the date of judgment in year 2071, an annual amount of \$3,955.46 to be paid for the remainder of Brandon's life, all amounts increasing at the rate of five percent (5%), compounded annually from the date of judgment.
- c. For future unreimbursable Neurologist and Psychiatrist expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$160.00 to be paid up to the anniversary of the date of judgment in year 2025, increasing at the rate of four percent (4%), compounded annually from the date of judgment.
- d. For future unreimbursable Dental expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$300.00 to be paid for the remainder of Brandon's life, increasing at the rate of four percent (4%), compounded annually from the date of judgment.

e. For future unreimbursable OT and PT Evaluation, OT, PT, ST Evaluation, ST, Alternative Therapy, and Case Management expenses, beginning on the first anniversary of the date of judgment, a lump sum of \$9,405.00; then, beginning on the anniversary of the date of judgment in year 2013, an annual amount of \$2,205.00 to be paid up to the anniversary of the date of judgment in year 2019; then, beginning on the anniversary of the date of judgment in year 2019, an annual amount of \$1,035.00 to be paid up to the anniversary of the date of judgment in year 2025; then, on the anniversary of the date of judgment in 2025, a lump sum of \$2,655.00; then, on the anniversary of the date of judgment in year 2028, a lump sum of \$2,280.00, all amounts increasing at the rate of three percent (3%), compounded annually from the date of judgment.

f. For future unreimbursable ER and Vagal Nerve Stimulator expenses, on the anniversary of the date of judgment in year 2017, a lump sum of \$100.00; then, on the anniversary of the date of judgment in year 2023, a lump sum of \$100.00; then, on the anniversary of the date of judgment in year 2025, a lump sum of \$50.00; then, on the anniversary of the date of judgment in year 2028, a lump sum of \$100.00, all amounts increasing at the rate of five percent (5%), compounded annually from the date of judgment.

g. For future unreimbursable Diastat expenses, on the anniversary of the date of judgment in year 2013, a lump sum of \$423.95; then, on the anniversary of the date of judgment in year 2015, a lump sum of \$423.95; then, on the anniversary of the date of judgment in year 2017, a lump sum of \$423.95; then, on the anniversary of the date of judgment in year 2020, a lump sum of \$423.95; then, on the anniversary of the date of judgment in year 2023, a lump sum of \$423.95; then, on the anniversary of the date of judgment in year 2026, a lump sum of \$423.95; then, on the anniversary of the date of judgment in year 2029, a lump sum of \$423.95; thereafter, beginning on the anniversary of the date of judgment in year 2030, an annual amount of \$141.32 to be paid for the remainder of Brandon's life, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment.

h. For future unreimbursable Tenex, Vimpat, and Clonidine (prescription medication) expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$600.00 to be paid up to the anniversary of the date of judgment in year 2025; then, beginning on the anniversary of the date of judgment in year 2025, an annual amount of \$1,440.00 to be paid up to the anniversary of the date of judgment in year 2038, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment.

i. For future unreimbursable Diaper, Ointment, and Clothing Adaptation expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$789.98 to be paid up to the anniversary of the date of judgment in year 2015; then, beginning on the anniversary of the date of judgment in year 2015, an annual amount of \$1,154.98 to be paid up to the anniversary of the date of judgment in year 2018; thereafter, beginning

on the anniversary of the date of judgment in year 2018, an annual amount of \$1,104.98 to be paid for the remainder of Brandon's life, all amounts increasing at the rate of three percent (3%), compounded annually from the date of judgment.

j. For future unreimbursable Wheelchair Maintenance expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$120.00 to be paid up to the anniversary of the date of judgment in year 2038, increasing at the rate of three percent (3%), compounded annually from the date of judgment.

k. For future unreimbursable Picture Exchange System/Dynavox expenses, on the anniversary of the date of judgment in year 2014, a lump sum of \$8,120.00; then, on the anniversary of the date of judgment in year 2019, a lump sum of \$8,120.00; then, on the anniversary of the date of judgment in year 2024, a lump sum of \$8,120.00; then, on the anniversary of the date of judgment in year 2029, a lump sum of \$8,120.00; thereafter, beginning on the anniversary of the date of judgment in year 2030, an annual amount of \$1,624.00 to be paid for the remainder of Brandon's life, all amounts increasing at the rate of three percent (3%), compounded annually from the date of judgment.

l. For future unreimbursable Shower Chair, Therapy Balls, and Tumble Mat expenses, on the anniversary of the date of judgment in year 2014, a lump sum of \$313.62; then, on the anniversary of the date of judgment in year 2017, a lump sum of \$163.62; then, on the anniversary of the date of judgment in year 2019, a lump sum of \$150.00; then, on the anniversary of the date of judgment in year 2020, a lump sum of \$163.62; then, on the anniversary of the date of judgment in year 2021, a lump sum of \$299.95; then, on the anniversary of the date of judgment in year 2023, a lump sum of \$163.62; then, on the anniversary of the date of judgment in year 2024, a lump sum of \$150.00; then, on the anniversary of the date of judgment in year 2026, a lump sum of \$163.62; all amounts increasing at the rate of three percent (3%), compounded annually from the date of judgment.

m. For future unreimbursable Attendant Care: School Days, Non-School Days, Respite Weekends, and Residential Camp expenses, beginning on the first anniversary of the date of judgment, a lump sum of \$26,203.20; then, beginning on the anniversary of the date of judgment in year 2013, an annual amount of \$26,665.52 to be paid up to the anniversary of the date of judgment in year 2028, all amounts increasing at the rate of three percent (3%), compounded annually from the date of judgment.

n. For future unreimbursable Group Home (including day program) expenses, beginning on anniversary of the date of judgment in year 2031, an annual amount of \$83,402.50 to be paid for the remainder of Brandon's life, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment.

At the sole discretion of the Secretary of Health and Human Services, the periodic payments may

be provided to the trustee in monthly, quarterly, annual or other installments. The “annual amounts” set forth above describe only the total yearly sum to be paid to the trustee and do not require that the payment be made in one annual installment. The trustee will continue to receive the annuity payments from the Life Insurance Company only so long as Brandon is alive at the time that a particular payment is due. Written notice to the Secretary of Health and Human Services, the trustee, and the Life Insurance Company shall be provided within twenty (20) days of Brandon’s death.

11. The annuity contract will be owned solely and exclusively by the Secretary of Health and Human Services and will be purchased as soon as practicable following the entry of a judgment in conformity with this Stipulation. The parties stipulate and agree that the Secretary of Health and Human Services and the United States of America are not responsible for the payment of any sums other than the amounts set forth in paragraph 8 herein and the amounts awarded pursuant to paragraph 12 herein, and that they do not guarantee or insure any of the future annuity payments. Upon the purchase of the annuity contract, the Secretary of Health and Human Services and the United States of America are released from any and all obligations with respect to future annuity payments.

12. As soon as practicable after the entry of judgment on entitlement in this case, and after petitioner has 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.

13. Petitioner and her 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.

14. Payments made pursuant to paragraph 8 and any amounts awarded pursuant to paragraph 12 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

15. The parties and their attorneys further agree and stipulate that, except for any award for attorneys' fees and litigation costs, and past unreimbursable expenses, the money provided pursuant to this Stipulation either immediately or as part of the annuity contract, will be used solely for the benefit of Brandon, 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).

16. Petitioner represents that she presently is, or within 90 days of the date of judgment will become, duly authorized to serve as guardian/conservator of Brandon's estate under the laws of the State of Tennessee. No payments pursuant to this Stipulation shall be made until petitioner provides the Secretary with documentation establishing her appointment as guardian/conservator of Brandon's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian/conservator of the estate of Brandon Fayal 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 guardian/conservator of the estate of Brandon Fayal upon submission of written documentation of such appointment to the Secretary.

17. In return for the payments described in paragraphs 8 and 12, petitioner, in her

individual capacity and as legal representative of Brandon, on behalf of herself, Brandon, and his heirs, executors, administrators, successors or assigns, does 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 Brandon resulting from, or alleged to have resulted from, the vaccinations administered on June 1, 2006, as alleged by petitioner in a petition for vaccine compensation filed on or about May 26, 2009, in the United States Court of Federal Claims as petition No. 09-345V.

18. If Brandon 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.

19. 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.

20. 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 12 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.

21. Petitioner hereby authorizes respondent to disclose documents filed by petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

22. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that Brandon suffered the onset of an encephalopathy within the time period set forth in the Table; that his developmental delay is a sequelae of his alleged Table injury; that the vaccines, either singly or in combination, caused his alleged encephalopathy, seizure disorder, and/or developmental delay; or that Brandon experienced the residual effects of any alleged injury for more than six months.

23. All rights and obligations of petitioner hereunder shall apply equally to petitioner's heirs, executors, administrators, successors, and/or assigns as legal representatives of Brandon Fayal.

END OF STIPULATION

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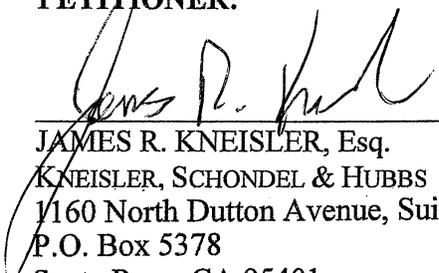
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Respectfully submitted,

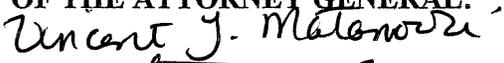
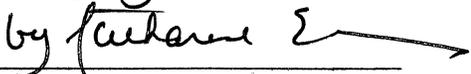
PETITIONER:


SONYIA FAYAL

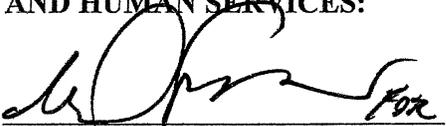
**ATTORNEY OF RECORD FOR
PETITIONER:**


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(707) 542-5132

**AUTHORIZED REPRESENTATIVE
OF THE ATTORNEY GENERAL:**


by 
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:**


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**ATTORNEY OF RECORD FOR
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Washington, DC 20044-0146
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Dated: November 30, 2011