

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 06-840V
Filed: August 15, 2011**

LYNNA TELLER, Parent and Next
Friend of Naiya N. Namoki, a minor,

Petitioner,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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Damages; Proffer; Stipulation;
DTaP; Febrile Seizure; Seizure
Disorder

Richard Gage, Esq., Cheyenne, WY, for petitioner.
Ryan Pyles, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING DAMAGES¹

Vowell, Special Master:

On December 11, 2006, Lynna Teller filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*² [the “Vaccine Act” or “Program”] on behalf of her son, Naiya N. Namoki [“Naiya”]. The petition [“Pet.”] alleges that, as a result of his vaccinations on February 3, 2004, which included a diphtheria, tetanus, and acellular pertussis [“DTaP”] vaccination, Naiya suffered a febrile seizure that lasted more than thirty minutes, and continues to have

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

seizures, as well as other neurological effects. Pet. at 2-3. In a Ruling on Entitlement issued January 13, 2009, I found that Naiya's DTaP vaccination was a substantial cause of his fever on February 3, 2004, that the fever triggered a febrile seizure, and that the febrile seizure was the first manifestation of Naiya's seizure disorder, which has persisted for more than six months. Accordingly, I held that petitioner had established entitlement to compensation for Naiya's seizure disorder.

Thereafter the parties engaged in determination of damages. Petitioner filed a vocational report as Petitioner's Exhibit 47 on January 25, 2010, and her life care plan as Petitioner's Exhibit 52 on August 2, 2010. Respondent then filed a vocational report as Respondent's Exhibit G and her life care plan as Respondent's Exhibit E on November 12, 2010. In a status conference conducted December 2, 2010, the parties indicated they were unable to resolve certain issues pertaining to a damages award and requested a hearing. See Order filed Dec. 6, 2010. I conducted a hearing in Phoenix, Arizona, on February 17-18, 2011. After taking evidence, I communicated my preliminary impressions to the parties on how I was likely to rule. With this in mind, the parties were able to resolve the remaining issues informally.

On August 3, 2011, respondent filed proffer on award of compensation detailing compensation for life care items, past unreimbursable expenses, and a Medicaid lien ["Proffer"].³ The Proffer indicated that the parties "agreed to settle differences in the parties' positions regarding an appropriate award for actual and projected pain and suffering ... as well as projected lost earnings." The parties filed a stipulation that day memorializing their agreement on pain and suffering and lost future earnings ["Stipulation"]. Also on August 3, 2011, petitioner filed notice that she accepts respondent's Proffer. Pursuant to the terms stated in the attached Proffer and Stipulation, **I award⁴ petitioner:**

- 1. A lump sum payment of \$42,943.00 in the form of a check payable to petitioner as guardian of Naiya N. Namoki**, representing compensation for life care expenses expected to be incurred during the first year and a portion of years two and three after judgment;
- 2. A lump sum payment of \$32,987.23 in the form a check payable jointly to petitioner and State of Arizona, AHCCCS, P.O. Box 10530, Phoenix, Arizona 85064, Attn: Gloria Delgado, Case No: 225053**, representing compensation for satisfaction of the State of Arizona Medicaid lien;

³ The Proffer further indicated the parties agreed that petitioner had incurred no past unreimbursable expenses. Proffer at 2.

⁴ Pursuant to both the Proffer and the Stipulation, payments to petitioner shall not be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian of Naiya N. Namoki's estate.

3. **A lump sum payment of \$580,000.00 in the form of a check payable to petitioner as guardian of Naiya N. Namoki**, representing the parties' agreement on pain and suffering not in excess of any applicable statutory maximums and for lost future earnings, pursuant to the Stipulation; and
4. An amount sufficient to purchase an annuity contract, subject to the conditions described in paragraph II.C. of the Proffer, paid to the life insurance company from which the annuity will be purchased.

These amounts represent compensation for all damages that would be available under § 300aa-15(a).

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance with this decision.⁵

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master

⁵ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party filing a notice renouncing the right to seek review.

B. Medicaid Lien

Respondent proffers that Naiya N. Namoki should be awarded funds to satisfy the State of Arizona Medicaid lien in the amount of \$32,987.23, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Arizona may have against any individual as a result of any Medicaid payments the State of Arizona has made to or on behalf of Naiya N. Namoki from the date of his eligibility for benefits through the date of judgment in this case as a result of his vaccine-related injury, under Title XIX of the Social Security Act.

C. Past Unreimbursable Expenses

Respondent understands that petitioner has incurred no past unreimbursable expenses under the Vaccine Act as a result of Naiya N. Namoki's vaccine-related injury, and accordingly, petitioner makes no claim for past unreimbursable expenses. Petitioner agrees.

D. Lost Wages and Pain and Suffering

Petitioner and respondent have agreed to settle differences in the parties' positions regarding an appropriate award for actual and projected pain and suffering pursuant to 42 U.S.C. § 300aa-15(a)(4), as well as projected lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A), pursuant to a Stipulation filed contemporaneously herewith.

II. Form of the Award

The parties recommend that the compensation provided to Naiya N. Namoki should be made through a combination of lump sum payments and future annuity payments as described below, and request that the special master's decision and the Court's judgment award the following:

A. A lump sum payment of \$42,943.00, representing compensation for life care expenses expected to be incurred during the first year and a portion of years two and three after judgment in the form of a check payable to petitioner as guardian of Naiya N. Namoki. No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian of Naiya N. Namoki's estate.

B. A lump sum payment of \$32,987.23, representing compensation for satisfaction of the State of Arizona Medicaid lien, payable jointly to petitioner and

State of Arizona
AHCCCS
P.O. Box 10530
Phoenix, Arizona 85064
Attn: Gloria Delgado
Case No: 225053.

Petitioner agrees to endorse this payment to the State.

C. An amount sufficient to purchase an annuity contract,² subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company³ from

² In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

³ 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.

which the annuity will be purchased.⁴ Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioner as guardian of the estate of Naiya N. Namoki, only so long as Naiya N. Namoki is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment.

1. Growth Rate

Respondent proffers that a four percent (4%) growth rate should be applied to all non-medical life care items, and a five percent (5%) growth rate should be applied to all medical life care items. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow as follows: four percent (4%) compounded annually from the date of judgment for non-medical items, and five percent (5%) compounded annually from the date of judgment for medical items. Petitioner agrees.

2. Life-contingent annuity

Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as Naiya N. Namoki is alive at the time that a particular payment is due. Written notice shall be provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Naiya N. Namoki's death.

⁴ Petitioner authorizes the disclosure of certain documents filed by the 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.

3. Guardianship

No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian of Naiya N. Namoki's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian of the estate of Naiya N. Namoki, any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of Naiya N. Namoki upon submission of written documentation of such appointment to the Secretary.

III. Summary of Recommended Payments Following Judgment

- | | | |
|----|---|---------------------|
| A. | Lump Sum paid to petitioner as guardian of Naiya N. Namoki's estate: | \$ 42,943.00 |
| B. | Reimbursement for Medicaid lien: | \$ 32,987.23 |
| C. | An amount sufficient to purchase the annuity contract described above in section II. C. | |

Respectfully submitted,

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Assistant Attorney General

MARK W. ROGERS
Acting Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Acting Deputy Director
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GABRIELLE M. FIELDING
Assistant Director
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s/ RYAN D. PYLES

RYAN D. PYLES

Trial Attorney

Torts Branch, Civil Division

U.S. Department of Justice

P.O. Box 146

Benjamin Franklin Station

Washington, D.C. 20044-0146

Telephone: (202) 616-9847

Dated: August 3, 2011

Proffer, Tab A

Summary of Life Care Items

Teller v. HHS, No. 06-840V

Pet. Naiya Namoki (Teller)
D.O.B. 06/15/03

DATE: 07/11/11
TIME: 03:54 PM

SUMMARY OF LIFE CARE ITEMS

ITEM OF CARE	Insurance	Physicans	Ancilliary Services	Transportation	Supplies	Home Services	TOTALS of Items with a 5.0% Growth Rate	TOTALS of Items with a 4.0% Growth Rate	TOTALS OF 4.0% & 5.0% ITEMS & APPLYING THE GROWTH RATE
GROWTH RATE	5.0%	5.0%	4.0%	4.0%	4.0%	4.0%			
AGE	YEAR								
8	2011	1,725	0	14,080	750	2,426	18,725	1,725	37,706
9	2012	1,725	0	14,080	750	309	18,725	1,725	37,030
10	2013	1,725	2,500	14,080	750	309	18,725	4,225	41,286
11	2014	1,725	0	12,910	750	309	18,725	1,725	38,774
12	2015	1,725	0	12,910	750	309	18,725	1,725	40,345
13	2016	1,725	0	12,910	750	1,259	18,725	1,725	43,135
14	2017	1,725	0	12,910	750	309	18,725	1,725	43,681
15	2018	1,725	2,500	12,910	750	309	18,725	4,225	48,969
16	2019	1,725	0	12,910	750	309	19,055	1,725	47,745
17	2020	1,725	0	12,910	750	309	19,055	1,725	49,680
18	2021	1,725	2,500	12,910	750	1,259	19,055	4,225	57,173
19	2022	1,725	0	7,208	750	469	34,580	1,725	69,157
20	2023	1,725	0	7,208	750	469	34,580	1,725	71,953
21	2024	1,725	0	7,208	750	469	34,580	1,725	74,862
22	2025	1,725	0	7,208	750	469	34,580	1,725	77,889
23	2026	1,725	0	7,208	750	469	34,580	1,725	81,039
24	2027	1,725	0	7,208	750	469	34,580	1,725	84,317
25	2028	1,725	0	7,208	750	469	34,580	1,725	87,727
26	2029	1,725	0	7,208	750	469	34,580	1,725	91,275
27	2030	1,725	0	7,208	750	469	34,580	1,725	94,968
28	2031	1,725	0	7,208	750	469	34,580	1,725	98,810
29	2032	1,725	0	7,208	750	469	34,580	1,725	102,809
30	2033	1,725	0	7,208	750	469	34,580	1,725	106,969
31	2034	1,725	0	7,208	750	469	34,580	1,725	111,298
32	2035	1,725	0	7,208	750	469	34,580	1,725	115,803
33	2036	1,725	0	7,208	750	469	34,580	1,725	120,491
34	2037	1,725	0	7,208	750	469	34,580	1,725	125,369
35	2038	1,725	0	7,208	750	469	34,580	1,725	130,445
36	2039	1,725	0	7,208	750	469	34,580	1,725	135,727
37	2040	1,725	0	7,208	750	469	34,580	1,725	141,224
38	2041	1,725	0	7,208	750	469	34,580	1,725	146,944
39	2042	1,725	0	7,208	750	469	34,580	1,725	152,896
40	2043	1,725	0	7,208	750	469	34,580	1,725	159,090
41	2044	1,725	0	7,208	750	469	34,580	1,725	165,536
42	2045	1,725	0	7,208	750	469	34,580	1,725	172,244

Pet. Naiya Namoki (Teller)
D.O.B. 06/15/03

DATE: 07/11/11
TIME: 03:54 PM

SUMMARY OF LIFE CARE ITEMS

ITEM OF CARE	Insurance	Physicans	Ancilliary Services	Transportation	Supplies	Home Services	TOTALS of Items with a 5.0% Growth Rate	TOTALS of Items with a 4.0% Growth Rate	TOTALS OF 4.0% & 5.0% ITEMS & APPLYING THE GROWTH RATE	
GROWTH RATE	5.0%	5.0%	4.0%	4.0%	4.0%	4.0%				
AGE	YEAR									
43	2046	1,725	0	7,208	750	469	34,580	1,725	43,007	179,224
44	2047	1,725	0	7,208	750	469	34,580	1,725	43,007	186,488
45	2048	1,725	0	7,208	750	469	34,580	1,725	43,007	194,048
46	2049	1,725	0	7,208	750	469	34,580	1,725	43,007	201,915
47	2050	1,725	0	7,208	750	469	34,580	1,725	43,007	210,101
48	2051	1,725	0	7,208	750	469	34,580	1,725	43,007	218,621
49	2052	1,725	0	7,208	750	469	34,580	1,725	43,007	227,487
50	2053	1,725	0	7,208	750	469	34,580	1,725	43,007	236,714
51	2054	1,725	0	7,208	750	469	34,580	1,725	43,007	246,317
52	2055	1,725	0	7,208	750	469	34,580	1,725	43,007	256,310
53	2056	1,725	0	7,208	750	469	34,580	1,725	43,007	266,710
54	2057	1,725	0	7,208	750	469	34,580	1,725	43,007	277,533
55	2058	1,725	0	7,208	750	469	34,580	1,725	43,007	288,797
56	2059	1,725	0	7,208	750	469	34,580	1,725	43,007	300,520
57	2060	1,725	0	7,208	750	469	34,580	1,725	43,007	312,720
58	2061	1,725	0	7,208	750	469	34,580	1,725	43,007	325,418
59	2062	1,725	0	7,208	750	469	34,580	1,725	43,007	338,632
60	2063	1,725	0	7,208	750	469	34,580	1,725	43,007	352,385
61	2064	1,725	0	7,208	750	469	34,580	1,725	43,007	366,699
62	2065	1,725	0	7,208	750	469	34,580	1,725	43,007	381,596
63	2066	1,725	0	7,208	750	469	34,580	1,725	43,007	397,100
64	2067	1,725	0	7,208	750	469	34,580	1,725	43,007	413,236
65	2068	1,725	0	7,208	750	469	34,580	1,725	43,007	430,031
66	2069	1,725	0	7,004	750	469	34,580	1,725	42,803	445,526
67	2070	1,725	0	7,004	750	469	34,580	1,725	42,803	463,640
68	2071	1,725	0	7,004	750	469	34,580	1,725	42,803	482,492
69	2072	1,725	0	7,004	750	469	34,580	1,725	42,803	502,114
70	2073	1,725	0	7,004	750	469	34,580	1,725	42,803	522,537
71	2074	1,725	0	7,004	750	469	34,580	1,725	42,803	543,794
72	2075	1,725	0	7,004	750	469	34,580	1,725	42,803	565,918
73	2076	1,725	0	7,004	750	469	34,580	1,725	42,803	588,947
74	2077	1,725	0	7,004	750	469	34,580	1,725	42,803	612,916
		115,575	7,500	547,332	50,250	33,679	2,143,445	123,075	2,774,706	14,540,852
		3.99%	0.26%	18.89%	1.73%	1.16%	73.97%	100.00%		100.00%

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decision.

4. The parties agree that a decision should be entered incorporating an award of the compensation described in paragraph 5 of this Stipulation, which represents partial settlement of damages.

5. As soon as practicable after an entry of judgment reflecting a decision that incorporates 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 payment:

A lump sum of **\$580,000.00** in the form of a check payable to petitioner, as guardian of Naiya's estate. This amount represents compensation for pain and suffering not in excess of any applicable statutory maximums and for lost future earnings.

6. 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.

7. Petitioner and her attorney represent that compensation to be provided pursuant to this Stipulation is not for any items or services for which the Program is not primarily liable under 42 U.S.C. Sec. 15(g), to the extent that payment has been made or can reasonably be expected to be made under any State compensation programs, insurance policies, Federal or State health benefits programs (other than Title XIX of the Social Security Act (42 U.S.C. sec. 1396 et seq.)), or by entities that provide health services on a pre-paid basis.

8. Payment made pursuant to paragraphs 5, and any amounts awarded pursuant to

paragraph 6 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

9. 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 Naiya 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).

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

11. In return for the payments described in paragraphs 5 and 6, petitioner, in her individual capacity and as legal representative of Naiya, on behalf of herself, Naiya, and Naiya's heirs, executors, administrators, successors or assigns, does forever 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 Naiya resulting from, or alleged to have resulted from, the vaccinations, both individually and in combination, administered on February 3, 2004, as alleged by petitioner in a petition for vaccine compensation filed on or about December 11, 2006, in the United States Court of Federal Claims as petition No. 06-840V.

12. If Naiya should die prior to receiving the payment described in paragraph 5, this agreement shall be considered voidable upon proper notice to the Court on behalf of either or both of the parties.

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

14. This Stipulation expresses a partial settlement of liability and damages claimed under the National Childhood Vaccine Injury Act of 1986, as amended. 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.

15. This Stipulation shall not be construed as an admission by the United States or the

Secretary of Health and Human Services that Naiya's vaccination(s) caused his alleged seizure disorder and/or any other injury or his current condition.

16. All rights and obligations of petitioner hereunder shall apply equally to petitioner's successors and assigns as legal representatives of Naiya N. Namoki.

END OF STIPULATION

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Respectfully submitted,

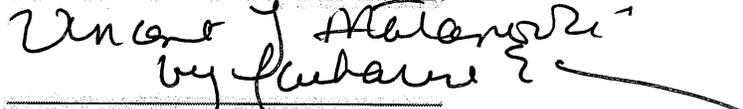
PETITIONER:


LYNNA TELLER

**ATTORNEY OF RECORD FOR
PETITIONER:**


RICHARD GAGE
2515 Warren Avenue, Suite 501
P.O. Box 1223
Cheyenne, WY 82003
Tel: (307) 433-8864

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Dated: August 3, 2011