

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-0719V

Filed: August 8, 2011

Not to be Published

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DECLAN MINTZ, a minor, \*  
by his parents and natural guardians, \*  
GARY S. MINTZ and ANN M. DAL SIN, \*

Petitioners, \*

v. \* Petitioners' Motion for a Decision

SECRETARY OF HEALTH \*  
AND HUMAN SERVICES, \*

Respondent. \*

On the Record; Insufficient Proof  
of Causation; Vaccine Act  
Entitlement

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## DECISION<sup>1</sup>

**Golkiewicz**, Special Master.

On October 8, 2008, Gary Mintz and Ann Dalsin (“petitioners”) filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),<sup>2</sup> alleging that various vaccinations injured Declan Mintz (“Declan”).

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in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, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing.** Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.

<sup>2</sup> 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).

On October 24, 2008, petitioners were ordered to file the statutorily required medical records. 42 U.S.C. § 300aa-11(c)(2). Petitioners filed medical records on March 16, 2009. On April 23, 2009, respondent filed a Motion to Dismiss, asking that this case be dismissed as untimely filed.<sup>3</sup> On September 13, 2010, petitioners were informed the Omnibus Autism Proceeding (“OAP”) test cases had been decided and were ordered to file a statement within 30 days informing the court if petitioners wished to proceed with their claim. On October 21, 2010 petitioners filed a request that their case be decided on the record as it now stands. Because the information in the record does not show entitlement to an award under the Program, this case is dismissed.

## I. The Omnibus Autism Proceeding

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as “autism” or “autism spectrum disorders” (“ASD”) were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP, was set forth in the six entitlement decisions issued by three special masters as “test cases” for two theories of causation litigated in the OAP and will not be repeated here.<sup>4</sup>

Ultimately, the Petitioners’ Steering Committee (“PSC”), an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of ASDs. The first theory alleged that the measles portion of the measles, mumps, rubella vaccine could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant’s brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional test cases during several weeks of trial in 2008.

Decisions in each of the three test cases pertaining to the PSC’s first theory rejected the petitioners’ causation theories. *Cedillo*, 2009 WL 331968, *aff’d*, 89 Fed. Cl.

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<sup>3</sup> In relevant part, the Vaccine Act provides “in the case of” a vaccine set forth in the vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury. 42 U.S.C. § 300aa-16(a)(2). I do not resolve the issue of whether the instant Petition was filed within the Vaccine Act’s statute of limitations.

<sup>4</sup> The Theory 1 cases are *Cedillo v. Sec’y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec’y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec’y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are *Dwyer v. Sec’y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec’y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec’y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst*, 2009 WL 332306, *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (2010); *Snyder*, 2009 WL 332044, *aff'd*, 88 Fed. Cl. 706.<sup>5</sup> Decisions in each of the three “test cases” pertaining to the PSC’s second theory also rejected the petitioners’ causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer*, 2010 WL 892250; *King*, 2010 WL 892296; *Mead*, 2010 WL 892248. Thus, the proceedings in these six test cases are concluded. Petitioners remaining in the OAP must now decide whether to pursue their cases, and submit new evidence on causation, or take other action to exit the Program. The petitioners in this case have requested a ruling on the record as it now stands.

## II. Medical Records<sup>6</sup>

Declan was born at full term on May 25, 2003 after an uneventful pregnancy. Petitioners’ Exhibit (“P Ex.”) 1. He received routinely administered childhood vaccinations between July 24, 2003 and January 5, 2005. P Ex. 13.

When Declan was seven months old he began experiencing “episodes of eye fluttering and arm shaking”. P Ex. 6 at 2. His Electroencephalogram (“EEG”) results were normal on both January 9, 2004 and January 26, 2004. P Ex. 6 at 1-2. This condition later abated on its own. P Ex. 59. In addition, Declan had a cystic mass under his umbilicus removed when he was ten months old. See P Ex. 23.

Because Declan has suffered from severe eczema since birth as well as symptoms of sneezing, congestion, and itchy eyes, his parents took him to see an allergist, Dr. Allyson Tevrizian, at the Allergy and Asthma Medical Group of Diablo Valley, Inc., on March 18, 2005. P Ex. 35 at 1. The allergist determined that Declan had moderate allergies to bananas, berries, soy, peanuts, wheat and cats. P Ex. 41 at 1. Declan’s parents adjusted his diet and environment to avoid these items but a colleague of Dr. Tevrizian’s, Dr. David Cook, later advocated slowly introducing the food items back into Declan’s diet (with the exception of nuts and shellfish) as he determined Declan’s allergies were mainly due to pollen and cats. P Ex. 83 at 1.

When Declan was 22 months old,<sup>7</sup> his parents became concerned about his lack of speech. See P Ex. 44 at 1. On October 19, 2005, they took him to see Dr. Erica Buhrmann, a Behavioral and Developmental Pediatrician, and Dr. Joan Wenters, a Clinical Psychologist, at the Children’s Hospital and Research Center at Oakland. P Ex. 44. At that time, Declan was diagnosed with Autism. P Ex. 44 at 7.

Because of his history of having loose bowel movements, Declan’s parents had him examined by a Gastroenterologist, Dr. Susan D. Jeiven, M.D., at the Bay Area

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<sup>5</sup> Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

<sup>6</sup> I will not discuss the medical records in detail in this decision; however I have reviewed and considered all of the medical records and evidence filed by petitioners.

<sup>7</sup> There is some evidence that Declan’s parents may have been concerned by his lack of speech at an earlier date. P Ex. 59 at 1.

Gastroenterology Associates on March 23, 2006. P Ex. 54 at 3. A stool sample from Declan was analyzed and found to contain normal levels of fat globules and ph reducing substances. P Ex. 64. In her last filed report dated August 8, 2006, Dr. Jeiven indicated that Declan had undergone prednisolone therapy for 2 weeks and appeared to have less congestion which she attributed to his daily dose of Prevacid. P Ex. 81. Dr. Jeiven's report also notes "parents wondering if measles virus in gut wall. will ask Dr. Lin Chang".<sup>8</sup> P Ex. 81 at 1.

I note that on June 30, 2006, Declan's father sent a letter to Declan's doctors in which he discusses whether to pursue chelating therapy for Declan and references the advocacy group Defeat Autism Now ! ("DAN!") and their belief that there is a link between Autism and heavy metal toxicity. P Ex. 75 at 3. This letter and Dr. Jevian's report of August 8, 2006 which notes the question posed by Declan's parents concerning the measles virus are the only parts of the medical records that even refer to Declan's vaccinations. Even then, the reference is at best an indirect one. I find there is no evidence in the record demonstrating a causal link between Declan's vaccinations and his autism disorder.

### III. Causation in Fact

To receive compensation under the Program, petitioners must prove either 1) that Declan suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) that Declan suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). An examination of the record did not uncover any evidence that Declan suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Declan's autism spectrum disorder was vaccine-caused.

The Act at 42 U.S.C. § 300aa-13(a) provides that the special master "may not make a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." In this case, because there are insufficient medical records supporting petitioners' claim, a reliable medical opinion must be offered in support. Petitioners, however, have offered no such opinion. Thus, this Petition remains unsupported by either medical records or medical opinion. In accordance with section 13(a), the undersigned has no option but to **deny** petitioners' claim for want of proof.

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<sup>8</sup> It is unclear whether Declan's parents or Dr. Jeiven will be asking Dr. Lin Chang about the measles virus. Dr. Lin Chang appears to be a reference to Dr. Lin Chang who is a Professor of Medicine in the Division of Digestive Diseases and Department of Medicine at the David Geffen School of Medicine at UCLA. However, there is no other mention of her in the medical records.

Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that Declan suffered a “Table Injury” or that his injuries were “actually caused” by a vaccination. **Thus, this case is dismissed for insufficient proof.<sup>9</sup> The clerk shall enter judgment accordingly.**

**IT IS SO ORDERED.**

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**Gary J. Golkiewicz**  
Special Master

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<sup>9</sup> I do not resolve the issue, but note that respondent contends that petitioners have failed to provide evidence establishing that the jurisdictional prerequisites of the Vaccine Act have been met. The undersigned further notes that if petitioner elects to file a Petition for Costs pursuant to § 300aa-15(e), based on current case law petitioner will need to first establish proof of the timely filing of their Petition for Vaccine Compensation, see § 300aa-16(a)(2) and 16(b), prior to any award for costs being granted. See Brice v. Secretary of Health and Human Services, 358 F.3d 865, 869 (2004), citing Martin v. Secretary of Health and Human Services, 62 F.3d 1403, 1406 (1995).