

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 10-316V

E-Filed: July 29, 2011;

Re-issued for Redaction: August 5, 2011

KAY WADDELL, as the Natural	)	PUBLISHED
Parent and Guardian of	)	
H.W., an infant,	)	
	)	MMR, PCV7 and Hib Vaccines;
	)	Vaccine Table Injury Claim of
Petitioner,	)	Encephalopathy Asserted;
	)	Factual Findings
v.	)	
	)	
SECRETARY OF THE DEPARTMENT	)	
OF HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	

Mark Theodore Sadaka, Englewood, NJ, for petitioner.

Lynn Elizabeth Ricciardella, Washington, DC, for respondent.

### **RULING REGARDING FACTUAL FINDINGS<sup>1</sup>**

On May 25, 2010, petitioner Kay Waddell, as natural parent and guardian of H.W., filed a petition pursuant to the National Vaccine Injury Compensation Program<sup>2</sup>

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<sup>1</sup> When this decision was originally issued, the parties were notified that the decision would be posted in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). The parties were also notified that they could seek redaction pursuant to 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b). Petitioners made a timely request for redaction and this decision is being reissued with the name of the minor child redacted to initials. With the exception of this change and a change to this footnote, the re-issued decision is the same as the one originally filed.

<sup>2</sup> The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758,

(the Act or the Program). Petitioner alleges that H.W. suffered injuries resulting from the vaccines he received. Petition at 1. Petitioner alleges that the vaccines administered to H.W. at his twelve month well-child examination on May 29, 2007, resulted in a “vaccine-induced encephalopathy<sup>3</sup> with features of autism, alternating constipation and diarrhea, [a] weakened immune system and developmental delay.” *Id.* at 2 (footnote added). At his twelve month visit, H.W. received the measles, mumps, rubella<sup>4</sup> (MMR), pneumococcal conjugate<sup>5</sup> (PCV), and Haemophilus influenzae type B<sup>6</sup> (Hib) vaccines.

Petitioner asserts that H.W.’s encephalopathy was “caused-in-fact” by the received vaccines. Alternatively, petitioner asserts that H.W.’s May 29, 2007 vaccinations significantly aggravated his autistic condition. Although the Vaccine Table lists encephalopathy as an injury following the MMR vaccine, the record does not support, nor does petitioner contend, that H.W. experienced an encephalopathy within the requisite time period provided on the Table. *See* 42 C.F.R. § 3(a)(III). Nor does H.W.’s condition satisfy the requirements of an encephalopathy set forth in the Qualifications and Aids to interpretation. *See* 42 C.F.R. §100.3(b).

Among the documents filed in support of the petition were: (1) H.W.’s pediatric records (including his vaccination records and reports from his two treating neurologists, Drs. Brennan and Smith), *see* Petitioner’s Exhibit (Pet’r’s Ex.) 1; (2) a collection of H.W.’s medical records as provided by Bright Minds Institute,<sup>7</sup> *see* Pet’r’s Ex. 2; (3)

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codified as amended, 42 U.S.C. §§ 300aa-10 *et. seq.* (2006). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Vaccine Act.

<sup>3</sup> An encephalopathy is defined as “any degenerative disease of the brain.” Dorland’s Illustrated Medical Dictionary, 622 (31st ed. 2007).

<sup>4</sup> The MMR vaccine is “a combination of live attenuated measles, mumps, and rubella viruses, administered subcutaneously for simultaneous immunization against measles, mumps, and rubella.” Dorland’s, *supra* note 3 at 2044.

<sup>5</sup> The PCV7 vaccine is administered intramuscularly and contains “purified polysaccharides of the capsular antigens of [seven] Streptococcus pneumoniae serotypes . . . individually coupled with to a nontoxic variant of diphtheria toxin . . . .” *Id.*

<sup>6</sup> The haemophilus influenzae type b vaccine protects against infection by the haemophilis influenzae type b bacterium. *Id.*

<sup>7</sup> Bright Minds Institute, a multidisciplinary diagnostic and treatment center for children with learning challenges and special physical needs. News, Bright Minds Institute, <http://brightmindsinstitute.com/news.html> (last visited July 29, 2011).

medical records from H.W.'s surgical treatment and follow-up visits at UCLA, see Pet'r's Ex. 3; (4) billing records for medical services that H.W. received from UCLA, see Pet'r's Ex. 4; (5) H.W.'s speech, physical and occupational therapy evaluation records, including report of Emily Whitehouse, a speech pathologist (Pediatric Therapy Clinic), see Pet'r's Ex. 7; (6) comprehensive neurodevelopmental evaluation report of Dr. Ronald E. Brennan, M.D., see Pet'r's Ex. 8; (7) report of Dr. Roderic Smith, M.D., Ph.D., (Pediatric Neurology Clinic), see Pet'r's Ex. 12; (8) Anchorage School District's Evaluation Summary and Eligibility Report, see Pet'r's Ex. 15; (9) Ms. Waddell's prenatal records, see Pet'r's Ex. 17; (10) affidavit of Kay Waddell (H.W.'s mother), see Pet'r's Ex. 18; (11) affidavit of Chris Waddell (H.W.'s father), see Pet'r's Ex. 19; (12) affidavit of Dorothy DeFlorin (H.W.'s great grandmother), see Pet'r's Ex. 20; (13) affidavit of Jaycen Waddell (H.W.'s older brother), see Pet'r's Ex. 21; (14) affidavit of Theresa Arthur (Ms. Waddell's cousin), see Pet'r's Ex. 22; and (15) affidavit of Michelle Nolan (Ms. Waddell's co-worker), see Pet'r's Ex. 23.

The proceedings to date have been conducted to develop a record that will permit an evaluation of petitioner's vaccine injury claim. To this end, the undersigned conducted a fact hearing in Anchorage, Alaska, on November 19, 2010. At hearing, H.W.'s family and friends testified regarding the events surrounding and following H.W.'s immunizations on May 29, 2007.

## **I. DISCUSSION**

### **A. *The Documentary Record***

Kay Waddell was diagnosed with polycystic ovary syndrome and infertility prior to conceiving H.W.. With the assistance of clomiphene, Ms Waddell became pregnant with H.W..<sup>8</sup> Pet'r's Ex. 17H at 123. During her pregnancy with H.W., Ms. Waddell was hospitalized several times for kidney stones and kidney failure. Pet'r's Ex. 17L at 1-2. She also experienced septic shock during her pregnancy with H.W.. Pet'r's Ex. 1 at 53<sup>9</sup>; Pet'r's Ex. 2B at 102; Pet'r's Ex. 15 at 576.

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<sup>8</sup> Clomiphene "induce[s] ovulation (egg production) in women who do not produce ova (eggs) but wish to become pregnant (infertility). Clomiphene is in a class of medications called ovulatory stimulants. It works similarly to estrogen, a female hormone that causes eggs to develop in the ovaries and be released." Clomiphene, PubMed Health, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000752/> (last visited July 28, 2011).

<sup>9</sup> Petitioner's exhibits are not internally paginated. The first 16 exhibits are paginated with consecutive Bates numbers. All page references to the first 16 exhibits will be made to their designated Bates numbers.

H.W. was born on May 26, 2006, by cesarean section. Pet'r's Ex. 1 at 42. He was born with second and third toe syndactyly (webbed toes on both feet), a congenital condition also present in both his brother and father. Id. at 20, 22, 42.

H.W.'s mother noticed that his head was misshapen at birth. Pet'r's Ex. 1 at 74. Two weeks later, H.W. was diagnosed with craniosynostosis (a premature fusing of the skull). Id. at 20, 35. At three and one-half months, H.W. underwent surgery to remold his cranial vault at the University of California at Los Angeles (UCLA) Medical Center. The surgery was conducted to correct the abnormality of his skull shape. Id. at 45; Pet'r's Ex. 3 at 138; Pet'r's Ex. 15 at 576. During this surgery, H.W. also underwent a procedure to release his second and third toes. Pet'r's Ex. 15 at 576.

Scheduled well-child visits to H.W.'s pediatrician after his surgery indicated that he was recovering well. The surgeries did not appear to hinder his development. See Pet'r's Ex. 1 at 13-15, 18; Pet'r's Ex. 5 at 225 (follow-up with Dr. James Bradley, H.W.'s surgeon at UCLA).

Prior to receiving his twelve month vaccinations, H.W. received all of the routinely administered childhood vaccines without reported incident. Pet'r's Ex. 1 at 2, 10, 11. On May 29, 2007, H.W. visited the pediatrician for his scheduled twelve month well-child examination. He received his PCV7 (fourth), MMR (first) and Hib (third) vaccinations. Id. at 2, 11. During this visit, the doctor noted that H.W.'s vocabulary included at least six words. Pet'r's Ex. 1 at 11. On the questionnaire used to evaluate development during the visit, the pediatrician left the boxes indicating that H.W. "[g]ets to sit" and "[b]abbles" unchecked. Id.

H.W. returned to the doctor on January 8, 2008, seven months later, for a scheduled nineteen-month well-child visit.<sup>10</sup> Pet'r's Ex. 1 at 10. At this visit, H.W. was noted to have two words, specifically, "Mama" and "Baba." He was further noted to "struggle with receptive language." Id. H.W. was assessed with a speech delay, but was otherwise noted to be "active, playful and cooperative." Id. The doctor also noted that H.W. was a "g[oo]d eater normally," but could be "picky [at] times." Id. His stools were recorded as normal. Id. During this visit, H.W. received diphtheria, tetanus, and acellular pertussis<sup>11</sup> (DTaP), hepatitis A,<sup>12</sup> and chicken pox (varicella)<sup>13</sup> vaccinations.

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<sup>10</sup> H.W. received the well-child examination that routinely occurs at eighteen months when he was nineteen months old. His medical records refer to this visit as the nineteen-month visit. Pet'r's Ex. 1 at 10.

<sup>11</sup> The DTaP vaccine is a combination of "diphtheria and tetanus toxoids and acellular pertussis vaccine. Dorland's, supra note 3, at 2043.

Pet'r's Ex. 1 at 10. The medical records reflect that the Waddells refused to give their consent for the recommended influenza vaccine. Id.

On February 27, 2008, H.W. was seen by Dr. Monterrosa for an initial developmental assessment. Pet'r's Ex. 2B at 102-04. Dr. Monterrosa determined that H.W. had delayed receptive and expressive language skills. Id. H.W.'s skills were estimated to be at the ten-month and eight-month level respectively. Id.

Two months later, on April 30, 2008, Ms. Whitehouse, a speech and language pathologist, made similar findings regarding H.W.'s receptive and expressive language abilities. Pet'r's Ex. 7 at 279-83. Ms. Whitehouse's report placed H.W. in the mildly to moderately autistic range.<sup>14</sup> Ms. Whitehouse observed that H.W.'s family "appears to be extremely dedicated to his care and his developmental needs." Id. at 283.

On May 28, 2008, H.W. underwent a pediatric neurodevelopmental evaluation by Dr. Ronald Brennan, M.D. Pet'r's Ex. 1 at 53-64. The report includes a detailed family medical history, notable for attention difficulties, refractive glasses, and bipolar disorder. In particular, H.W.'s older brother and maternal first cousin have attention deficit and hyperactivity disorder (ADHD); his father has "some mild attentional issues;" and his aunt was prescribed Ritalin for "attentional difficulties." Id. at 46, 54. Dr. Brennan noted that Ms. Waddell expressed concern about H.W.'s brief staring spells or "squints." Id. at 54. Based on these related concerns, Dr. Brennan scheduled a meeting with Dr. Smith, a neurologist, regarding possible seizures. Id. at 53, 58. According to Dr. Brennan's report, Ms. Waddell shared during the evaluation that "between twelve and eighteen-months of age, . . . [H.W.] did have a number of words but beyond eighteen months of age, he stopped using these words." Pet'r's Ex. 1 at 55. The loss of words occurred at the same time that H.W.'s "new baby sister arrived and [the] family moved to a new home." Id. Dr. Brennan concluded that H.W.'s "history of non-progressive delays in his

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<sup>12</sup> The hepatitis A vaccine is "an inactivated whole virus vaccine derived from an attenuated strain of hepatitis A virus grown in cell culture; administered intramuscularly as an immunizing agent for pre-exposure prophylaxis in susceptible persons at least two years of age." Dorland's, supra note 3, at 2044.

<sup>13</sup> The varicella vaccine is "a modified live virus vaccine against human herpesvirus 3 (varicella-zoster virus) administered subcutaneously for production of immunity to varicella and herpes zoster." Dorland's, supra note 3, at 2045.

<sup>14</sup> Ms. Whitehouse evaluated H.W. using the Childhood Autism Rating Scale (CARS). She assessed H.W. with a numerical score of 35.5 on the scale, which placed him at the far end of the mildly to moderately autistic range. Scores of 30 or greater on a CARS evaluation are interpreted to be suggestive of autism. Pet'r's Ex. 7 at 282-83; Pet'r's Ex. 1 at 56.

early developmental skills” and his “delayed and . . . atypical communication” skills . . . were consistent with autism. *Id.* at 58. Dr. Brennan documented his impression of a static encephalopathy based on “evidence of chronic, non-progressive brain dysfunction as manifested by [H.W.’s] neuromotor dysfunction and his evolving neurodevelopmental and neurobehavioral disorders.” *Id.* at 59.

Two months later, on July 28, 2008, H.W. was evaluated by Dr. Roderic Smith, M.D., Ph.D., a neurologist. Pet’r’s Ex. 1 at 51-52. Dr. Smith indicated that although H.W. was “very slow to develop motor spheres[,]” he can now “walk, run and manipulate small objects with great improvement.” *Id.* at 51. Dr. Smith’s recitation of H.W.’s past medical history indicated that H.W. “ma[de] some consonant sounds, but [his] language ha[d] been slow to progress beyond” that.” *Id.* Dr. Smith reported: “H.W.’s pattern of development is consistent with [a] static encephalopathy or autism as reported by Dr. Brennan.” *Id.* at 52. He did not observe any staring spells during the examination, but he suggested an electroencephalogram (EEG)<sup>15</sup> in response to Ms. Waddell’s concern about seizures. *Id.*

Shortly thereafter, H.W. began receiving treatment for his autism and speech delay at the NeuroCognitive Brain Center, in Anchorage, Alaska. Pet’r’s Ex. 9B at 476-77.

## ***B. The Fact Testimony***

Ms. Waddell (H.W.’s mother), Ms. Nolan, Ms. DeFlorin (H.W.’s great-grandmother), Ms. Arthur (a family friend), Mr. Waddell (H.W.’s older brother), and Mr. Waddell (H.W.’s father) testified during the fact hearing conducted on November 19, 2010. The witnesses were sequestered prior to giving their testimony.

### **1. Ms. Michelle Nolan**

Ms. Nolan is a co-worker of Ms. Waddell. The two have worked together for the State of Alaska, Division of Public Assistance Fraud Unit, since the mid 1990’s at the. Transcript<sup>16</sup> (Tr.) at 10. Prior to May 29, 2007, Ms. Nolan recalled seeing H.W. on two distinct occasions. The first was in February 2007 at a hockey game for Ms. Waddell’s daughter, Sierra. The second was in March or April of 2007 at the Waddell’s home. Tr. at 11. Ms. Nolan recalled H.W. looking happy and healthy on both occasions. He did not appear sick. *Id.* Ms. Nolan saw H.W. in July 2007 when she took his first birthday

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<sup>15</sup> An EEG measures the frequency, amplitude and characteristics of brain waves. It is used to identify and evaluate seizures as well as to detect the presence of tumors and infections. *Mosby’s Manual of Diagnostic & Lab. Tests*, 573 (4th ed. 2010).

<sup>16</sup> For reference, the pinpoint cites refer to the internal pagination of the transcript.

milestone pictures. She recalls he was “a lot less interactive” then and not “as willing to smile or make eye contact” as he had been on the two occasions prior to May 29, 2007. Tr. at 12. However, in July 2007, Ms. Nolan did not believe there was anything wrong with H.W. that required immediate medical attention. Tr. at 15.

## **2. Ms. Dorothy DeFlorin**

Ms. Dorothy DeFlorin is H.W.’s great-grandmother. Tr. at 17. Ms. DeFlorin testified that she saw H.W. when he and Ms. Waddell visited her home in early May 2007, prior to H.W.’s May 29, 2007 vaccinations. Tr. at 18. Ms. DeFlorin describes H.W. as a “seemingly happy baby” who enjoyed crawling on the floor and laughing during their visit. Id. Prior to that time, Ms. DeFlorin saw H.W. for Christmas (in 2006) when he also “seemed to be very good.” Id. The next time Ms. DeFlorin saw H.W. was in July 2007, at his older brother Jaycen’s birthday party. Tr. at 19. Ms. DeFlorin had not seen H.W. in June of 2007 because “he had gotten his . . . shots . . . [and] . . . he was very ill always after those shots . . . . So [Ms. Waddell] never brought him out.” Tr. at 19 (emphasis added). After his vaccinations, she believed H.W. regularly “seemed to have a little temp[erature] and carr[y] a little bit of a rash.” Because Ms. Waddell was afraid Ms. DeFlorin would become ill from contact with H.W., she limited their visits. Id. Ms. DeFlorin testified that when she saw H.W. again in July 2007, he seemed “very withdrawn and very quiet,” “did not communicate or look at . . . [anyone],” and “seemed sort of oblivious.” Id. She also noted a change in his physical appearance as he looked “rather worn and very tired out.” Tr. at 20.

Ms. DeFlorin testified that Ms. Waddell was “perturbed” by her doctor’s staff because they “played down” her concerns about H.W.’s health. Tr. at 21. Ms. DeFlorin believed that Ms. Waddell would be able to tell when H.W. needed to go to the doctor but she may have hesitated in going because “she wasn’t too keen on that staff there.” Tr. at 22. Nonetheless, Ms. DeFlorin believed that if H.W. needed medical attention, Ms. Waddell would take him to the doctor. Tr. at 22.

## **3. Ms. Theresa Arthur**

Ms. Theresa Arthur is Ms. Waddell’s cousin. Tr. at 24. Ms. Arthur testified that she saw H.W. often (“every other week”) both before and after May 29, 2007, because her son and H.W. played together. Tr. at 24-25. Prior to May 29, 2007, she describes him as fairly normal for a one year old. Tr. at 24 (“He crawled. He babbled. He was smiley, drooly.”)

Ms. Arthur testified that from the time of H.W.’s birth (May 26, 2006) up to Christmas 2006, she believed H.W. to be a fairly normal newborn. Tr. at 25. H.W.’s early surgery required that his family exercise care with his head, but Ms. Arthur was “impressed” with how well he was developing. Id. She did not recall specifically the

first time she saw H.W. in 2007 but did recall: (1) several play dates, including the one when she took an “ExerSaucer” toy to H.W. once her son had begun to walk; (2) watching H.W. while Ms. Waddell kept an appointment in April 2007; and (3) H.W.’s attendance at her son, Hunter’s birthday party on March 18, 2007, from which event Ms. Arthur has pictures of H.W. holding a fishing pole and trying to catch a toy. H.W.’s family continued to show concern about the fragility of H.W.’s head at the birthday party because there were so many children present. Tr. at 26-28. But Ms. Arthur recalls H.W. being “really interactive” at the March party. Tr. at 27. Ms. Arthur testified that subsequently in April, H.W. was crawling and smiling; was able to be held by her daughter, and played with her son. Tr. at 28.

Ms. Arthur next saw H.W. at his own birthday party in May 2007 where she described him as active, excited, crawling on the floor, and walking with a toy walker. Tr. at 28-29. Ms. Arthur testified that she did not see H.W. again until June or July of 2007. Id. Ms. Waddell had cancelled an earlier play date because H.W. was not feeling well, was lethargic, and had bad diarrhea. Tr. at 29, 32. When she saw H.W. next his “affect” had changed. He was less interactive and less playful. Tr. at 30.

Ms. Arthur and Ms. Waddell use the same pediatric group (Anchorage Pediatric Group). Tr. at 30. As a mother of three, Ms. Arthur related that she uses the experiences she had with her first child to help her treat her other children. Tr. at 31. She noted that instead of going to the doctor on some occasions, she has called the doctor to list her children’s symptoms and to determine whether she should take the child in to the pediatrician’s office. Tr. at 33. Ms. Arthur testified that, given the description of H.W.’s condition in June 2007 (and the cancellation of the play date); Ms. Waddell was doing what Ms. Arthur “would have done had [her] child had the same symptoms.” Tr. at 34.

#### **4. Mr. Jaycen Waddell**

Mr. Jaycen Waddell is H.W.’s brother. Tr. at 36. At the time of the hearing he was 18 years of age and had lived with his parents, the Waddells, until July 16, 2010. Id. Jaycen described his parents as having wonderful parenting skills. Tr. at 37. He is the eldest of four siblings. Id.

Jaycen was present at the hospital the day H.W. was born. Tr. at 41. Jaycen testified that H.W. appeared very happy, smiling and googly-eyed from the time H.W. left the hospital (three days after birth) until July 2006. Id.

Jaycen testified he was in the room at the doctor’s office when H.W. received the vaccine at issue. Prior to receiving the vaccine he was “happy, smiling . . . and he was in a good mood.” Tr. at 38. Jaycen testified that nothing happened right after the vaccine but “at least [twenty] minutes afterwards, he wouldn’t talk, [and] wouldn’t make eye contact.” Tr. at 38. During the ride home from the doctor’s office and for much of the



day, H.W. appeared sleepy and “just not happy.” Tr. at 40. Between May 29, 2007 and July 2007, Jaycen testified that H.W. “slowly looked worse and worse like he was sick and like he was really tired.” Tr. at 40-41 (emphasis added).

Jaycen testified that H.W. said 50 to 60 words prior to his receipt of the May 2007 vaccinations.<sup>17</sup> Tr. at 42. But by July or August 2007, he could say only a few words, and most were merely gibberish. Id. (“You couldn’t understand a word he said.”). By September 2007, however, H.W.’s speech was “[a] little better.” Tr. at 43.

## **5. Ms. Kay Waddell**

Ms. Kay Waddell is H.W.’s mother. Tr. at 50. She testified that there were no complications with H.W.’s birth. He was born following a routine repeat cesarean delivery, and he came home at two days of age. Tr. at 52.

Ms. Waddell noticed a ridge on H.W.’s head shortly after he was born. Tr. at 52-53. At his two-week checkup, she was informed that H.W. had craniosynostosis (a premature fusing of the skull) and required surgery. Tr. at 53. Ms. Waddell conducted research online for providers who could perform the procedure. Id. She then visited with doctors in Los Angeles and San Diego, consulted with a doctor in Texas, and selected a surgeon from UCLA Medical Hospital in Los Angeles. Tr. at 53-54. Ms. Waddell chose UCLA because the surgeon offered a solution, without helmet therapy, that involved a procedure to remodel H.W.’s skull during surgery. Additionally, the UCLA surgeon required only routine follow-ups after H.W.’s surgery. Tr. at 54. This choice of surgical procedure required a three week stay in Los Angeles. Id.

Before his skull surgery, H.W. was “always pretty happy, [a] real easy-going baby, rarely fussed, smiled a lot, and actually giggled a lot.” Tr. at 55. After the surgery, he was “the same child, only he had a big bandage on his head.” Tr. at 55. On October 3, 2006, Ms. Waddell visited the pediatrician who commented that H.W. “looked happy and healthy.” Tr. at 58. The pediatrician did not mention anything about H.W. suffering from developmental delay. Id.

H.W. received a flu shot on December 1, 2006, at his six-month well-child pediatric visit. Tr. at 58-59. Following the shot, H.W. became “very sick” with a fever, rash, diarrhea, and then constipation. Tr. at 59. The symptoms lasted between one and two weeks. Id. Ms. Waddell told the pediatrician, at the next well-child visit, that H.W. got the flu from his flu vaccine. The doctor dismissed his illness as a coincidence

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<sup>17</sup> H.W. was twelve months old when he received the May 29, 2007 vaccines. According to Nelson’s Pediatric Textbook, children at one year have only a few words other than mama and dada. Nelson Textbook of Pediatrics, 45 (18th ed. 2010). The average age of attainment of a fifty-word vocabulary is nineteen months of age. Id. at 44.

because the vaccine did not contain a live virus. Tr. at 59, 61. On February 26, 2007, Ms. Waddell declined H.W.'s second flu shot. Tr. at 60.

In a photograph dated March 9, 2007, Ms. Waddell described H.W. as "very happy, cheerful, playful, and at that time . . . crawling," all of which was typical behavior for H.W.. Tr. at 62. In a later photograph, dated April 16, 2007, Ms. Waddell recalls a play date with Ms. Arthur's son where H.W. crawled around a lot and played with other children. Tr. at 62-63.

On May 1, 2007, Ms. Waddell took H.W. to the doctor for a cold. H.W. had a runny nose, watery eyes, and a "seal barking kind of cough." Tr. at 63. The doctor gave Ms. Waddell an oral steroid to administer to H.W.. Id. By May 8, 2007, H.W. could crawl, stand and "cruise." Tr. at 65-66. Ms. Waddell described his development by this time as "slightly more advanced than [her] two older children . . . . He [also] had some words . . . as early as eight to nine months." Tr. at 64.

Immediately following his May 29, 2007 vaccinations, Ms. Waddell described H.W. as "kind of more tired than usual, didn't want to take food at all. He was more fussy than normal." Tr. at 70. That night, H.W. was "[e]xtremely fussy, crying, inconsolable . . . [and] none of [her] usual tricks worked." Tr. at 71. H.W. had a low-grade fever following his vaccinations. Id. Four or five days after the vaccines, his temperature spiked to 104-104.5 degrees Fahrenheit (as recorded by a digital thermometer placed on the forehead and under his armpit). Tr. at 72-73. Ms. Waddell testified that she did not take H.W. to the hospital because she did not want to go through the insurance procedures for an emergency room visit and, based on her past experiences with her oldest son, she believed she could handle the fever herself without going to a doctor. Tr. at 73-74. She administered baby Tylenol, placed H.W. in a cool bath, and used cold wash cloths. Tr. at 74-75. Within two hours of the spike, his temperature had dropped to the 102 degrees Fahrenheit range. Id.

Ms. Waddell testified that by June 5, 2007, H.W.'s speaking ability and motor skills had begun to decline. Tr. at 76-77. By June 26, 2007, H.W. developed a sensitivity to light and staring spells. Tr. at 81-82. By July 15, 2007, H.W. had difficulty talking and making eye contact. Tr. at 81, 84. He became unresponsive and did not want to play with his toys. Tr. at 83. At fifteen to eighteen months, H.W. began to recover his motor skills. Tr. at 101-02.

Ms. Waddell testified that all of her children were treated at the Anchorage Pediatric Group and that she is comfortable enough with the practice to remain with it. Tr. at 106.

## **6. Mr. Christopher Waddell**

Mr. Christopher Waddell is H.W.'s father. Tr. at 116. Mr. Waddell testified that prior to the May 29, 2007 vaccinations, H.W. was a very happy child, always smiling, and easy to please. Id. He would use simple words (sissy, mama, da-da, baby, ba-ba) and was similar in development to the couple's two older children. Tr. at 118.

Prior to H.W.'s receipt of the vaccines in question, Mr. Waddell would return from work every day and say "baby, hi." In turn, H.W. would crawl over, and Mr. Waddell would pick him up. Tr. at 118-19. On the night of May 29, 2007, Mr. Waddell got home around 5:30 or 6:00 P.M. and H.W. "was just laying there," looking "kind of upset." Id. H.W. responded to Mr. Waddell only by rolling his head in Mr. Waddell's direction. Tr. at 119. When Mr. Waddell asked his wife what was wrong, she told him that H.W. "had his vaccinations today." Id. Mr. Waddell testified that "we've seen [this] plenty of times where . . . after they get vaccines . . . they just don't feel well." Id. That night, Mr. Waddell described H.W. as fussy and mostly lying around, but not screaming (symptoms that Mr. Waddell described as flu-like). Tr. at 119-20.

Mr. Waddell recalled H.W.'s fever spiking but was not sure when it did. He believed the spike occurred several days after H.W.'s vaccination. Tr. at 120-21. Mr. Waddell discussed his concerns with his wife but the couple decided there was no reason to go to the doctor. Tr. at 121. Mr. Waddell recalls seeing a rash develop but is not sure when it did. He testified that H.W. did "have it for a long time." Tr. at 122. Mr. Waddell describes the rash as "real light, just kind of red" and resembling sunburn with "maybe some little tiny spots." Id. Mr. Waddell did not express concern to his wife regarding the rash because after being extremely cautious with their first child and frequently "[running] to the doctor or emergency room" and "constantly being told that it's no big deal and to go home," he had become less concerned. Tr. at 122. Mr. Waddell testified that he does not remember specifically when H.W.'s fever dissipated but believes it was a week or two later. Tr. at 123. He testified that the actual spike of the fever lasted only a day or two but a low fever persisted. Id. As his fever dissipated, Mr. Waddell noticed H.W. could not walk anymore (something he could do previously when assisted). He did not want to eat or drink a bottle, and he had diarrhea. Tr. at 123-24. Mr. Waddell testified that after the vaccination, H.W. could not sit up, walk, or hold his bottle. Tr. at 125-26. Mr. Waddell believed he had weak muscle tone. Tr. at 126. Mr. Waddell testified that he and his wife "figured [H.W. would be] sick for a little while and . . . would get better." Tr. at 124.

Mr. Waddell believed that H.W. used about 15-20 simple words before the May 2007 vaccines but he did not talk after the vaccines. Instead, he communicated by babbling and speaking gibberish, with his only recognizable and repeated word being "da-da." Tr. at 124-25. H.W.'s speech returned over time but "it sounds funny [now] when he talks." Tr. at 125. By July 16, 2007, H.W. still spoke in gibberish but physically "[h]e was starting to crawl around again and sit up" as well as hold his bottle. Tr. at 126.

At the next visit to Dr. Monterrosa, the pediatrician, the Waddells addressed their concerns about H.W.'s language. Tr. at 127. Dr. Monterrosa referred them to a specialist (Mr. Waddell did not recall the name of the specialist). *Id.* Mr. Waddell testified that it took many months to get in to see the doctor and as time went on, the couple began to realize "there's something wrong here." *Id.* Mr. Waddell asserted that there is no history of autism in the family. *Id.*

### **C. Uncontested Facts<sup>18</sup>**

Certain facts are uncontested in this case. Specifically, the parties agree that H.W. was diagnosed with craniosynostosis, and a computed tomography (CT)<sup>19</sup> scan of his brain showed fusion of his sagittal suture.<sup>20</sup> Pet'r's Ex. 1 at 35, 72. He underwent neurosurgery to remold his cranial vault. He appeared to recover successfully. Tr. at 57-58; Pet'r's Ex. 1 at 15.

At his six-month well-child visit on December 1, 2006, H.W. received his DTaP, IPV, hepatitis B, PCV7 and influenza vaccines. Pet'r's Ex. 1 at 2; Pet'r's Ex. 1 at 14.

Following the administration of these vaccinations, H.W. had a rash, fever and diarrhea, followed by constipation, which lasted for one or two weeks. Tr. at 59. Ms. Waddell attributed these symptoms to H.W.'s receipt of the influenza vaccine.<sup>21</sup> *Id.* She reported this to H.W.'s pediatrician, Dr. Monterrosa, who dismissed H.W.'s illness as a

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<sup>18</sup> The uncontested facts in this case are drawn largely from the Joint Stipulation of Findings of Fact filed on February 7, 2011. *See* Joint Stipulation.

<sup>19</sup> A CT scan is used to evaluate the brain, and can assist in the diagnosis of brain tumors, infarction, bleeding, and hematomas. Mosby's, *supra*, note 15, at 1080.

<sup>20</sup> The sagittal suture is defined as "the line of junction between the two parietal bones." *Dorland's* at 1836. The development of a sagittal suture creates "a type of fibrous joint in which the apposed bony surfaces are closely united by [a] thin layer of fibrous connective tissue [such] that no movement can occur." *Id.*

<sup>21</sup> The flu is a "contagious respiratory illness caused by influenza viruses that infect the nose, throat, and lungs." *Seasonal Influenza (flu)*, Centers for Disease Control, <http://www.cdc.gov/flu/keyfacts.htm#symptoms> (last visited on July 28, 2010). People with the flu will often feel some or all of these symptoms: fever or feeling feverish/chills, cough, sore throat, runny or stuffy nose, muscle or body aches, headaches, and fatigue. Vomiting and diarrhea is more common in children than adults. *Id.*

coincidence. Id. As a result of her suspicions that H.W. had reacted to the flu vaccine, Ms. Waddell refused H.W.'s next influenza vaccination. Tr. at 60-61; Pet'r's Ex. 1 at 13.

By May of 2007, H.W. could pull, stand, walk and "cruise" behind his push-toy walker. Tr. at 65-66; Pet'r's Ex. 1 at 12. On May 1, 2007, Ms. Waddell took H.W. to the pediatrician's office for a cough and congestion. Tr. at 63; Pet'r's Ex. 1 at 12. Ms. Waddell suspected that H.W. had croup, a diagnosis confirmed by the doctor. Id. At the time of his May 29, 2007 vaccination, H.W. was described as a happy and responsive child. Tr. at 66-67.

At his twelve-month well child visit, on May 29, 2007, H.W. received his MMR, PCV, and Hib vaccines. Pet'r's Ex. 1 at 2. During this pediatric visit, Ms. Waddell expressed concern about H.W.'s bulging scalp because it had not decreased in size since February 2007. The pediatrician did not believe his scalp required an urgent evaluation. Pet'r's Ex. 1 at 11. But, the pediatrician did discontinue H.W.'s use of Tylenol cold medication. Id.

Shortly after receiving the May 2007 vaccinations, H.W. became "fussy," "crabby," and would not smile. Tr. at 80, 120, 123. He also had diarrhea and did not readily take his bottle. Tr. at 124. On the night of May 29, 2007, H.W. felt warm to the touch, but his temperature was not taken with a thermometer. Tr. at 72-73.

Approximately four to five days later, H.W.'s temperature was measured at 104-104.5 degrees Fahrenheit, by a thermometer applied to his forehead and then placed under his armpit. Tr. at 72, 122. H.W. also developed a rash that was described as light red. Tr. at 122.

The Waddells were able to bring H.W.'s highest temperature down after about two hours, using baby Tylenol, cool bath water, and cold compresses. Tr. at 74, 89, 123. His temperature dropped to the 100-101 degree range where it stayed for about two days. Id. For about a week after that, H.W. remained warmer than usual. Tr. at 89, 123.

Following his May 29, 2007 vaccinations, H.W. did not see a doctor again until his nineteen-month, well-child visit. That visit was more than seven months after he had received the May 29, 2007 vaccines. Tr. at 109.

All of Ms. Waddell's children were treated at the same pediatric practice. Tr. at 106. Ms. Waddell continues to take her children to this practice. Id.

#### ***D. Contested Facts***

The parties' disagree on several facts pertaining to the symptoms H.W. experienced following the receipt of his MMR, PCV7, and Hib vaccines. In particular,

the parties do not agree either on the severity of H.W.'s symptoms or the suddenness of the appearance of the symptoms during the period of time after the May 29, 2007 administration of the vaccines and before the January 8, 2008 nineteen-month well-child visit to the pediatrician.

The parties' disagreement stems primarily from the lack of corroboration in the medical records of the testimonial account provided by the Waddells for the time period of interest for petitioner's vaccine injury claim.

At the hearing, petitioner asserted that on May 29, 2007, the day that H.W. received the MMR, PCV7 and Hib vaccines, he had a fever and was "[e]xtremely fussy, crying, [and] inconsolable." Tr. at 71. Petitioner further asserts that "about four to five days after the vaccines," H.W.'s temperature spiked to 104 to 104.5 degrees. Tr. at 73. Notwithstanding petitioner's assertions that H.W. became very ill, petitioner did not seek medical attention for him.

Petitioner gave several reasons for not taking H.W. to see a doctor at that time. First, petitioner testified, she had experiences with her older child involving symptoms similar to H.W.'s, and the doctors did not do anything she could not do herself. Tr. at 73-74. Second, getting treatment for H.W. would have required an emergency room visit because the pediatrician's office was closed. *Id.* Petitioner explained that her insurer would not cover the emergency room visit without first obtaining precertification, and petitioner explained she did not want to do that. *Id.*

Respondent does not challenge petitioner's testimony about the symptoms with which H.W. presented after his vaccinations. Rather, respondent challenges petitioner's characterization of the seriousness of H.W.'s condition because H.W. "did not appear to need urgent medical attention following his May 29, 2007 vaccination." Resp't's Proposed Facts at 1. In support of this position, respondent points first to the testimony of H.W.'s great grandmother, Dorothy DeFlorin, who described Ms. Waddell as a "wonderful mother" who would not let a sick child go untreated. Tr. at 21-22. Respondent then points to Ms. Waddell's own testimony that "[she] didn't feel that there was any kind of emergency with the situation because those were reactions I was told he might get." Tr. at 108. Finally, respondent points to the testimony of H.W.'s father, Chris Waddell, who testified that "we've been through plenty of doctor's visits and emergency room visits and everything else with [the] kids. We discussed it and we didn't really see any . . . reason to go." Tr. at 121.

Petitioner also contended that by June 5, 2007, H.W. had begun to lose words. Tr. at 76-77. Petitioner further contended that by June 6, 2007, H.W. could no longer hold his head up. Affidavit of Kay Waddell, ¶¶ 6, 7. Respondent does challenge petitioner's testimony on these points, arguing that no contemporaneous record exists from any of H.W.'s doctors to corroborate a decline in vocabulary or a loss of motor skills during that

time. See Resp't's Proposed Facts at 1; Resp't's Report at 9. Respondent notes that the earliest contemporaneous record of H.W.'s loss of vocabulary was on January 8, 2009, during his nineteen-month well-child visit with his pediatrician. Under the assessment section, the medical record from H.W.'s nineteen-month examination explicitly refers to "speech delay." However, H.W. is noted to have only two spoken words at the nineteen-month visit as compared to the six spoken words he was noted to have had at the twelve-month visit. Compare Pet'r's Ex. 1 at 10, and Pet'r's Ex. 1 at 11.

While a speech issue is mentioned, nothing in the nineteen-month record, or H.W.'s later ones, refers to a loss of gross motor skills. Resp't's Report at 9 (citing Pet'r's Ex. 1 at 45, 54-55). Rather, the medical records reflect that H.W. experienced "delays in his fine motor skills," a notation suggesting that H.W. had not lost the skills but was delayed in developing them. Pet'r's Ex. 1 at 54. In the absence of corroborating contemporaneous medical records, respondent challenges the timeline petitioner presented regarding the alleged degree of loss of H.W.'s language and motor skills. Respondent also challenges the testimony concerning the abrupt change in H.W.'s social interactions because that testimony is not supported by the contemporaneous documentary record either. See Resp't's Report at 9.

The undersigned must resolve the pending factual disputes regarding the nature and scope of H.W.'s reactions to the vaccinations on May 29, 2007, before addressing the issue of whether H.W. is entitled to Program compensation in this case (a matter not yet ripe for decision, but to be addressed in due course). This ruling is limited to resolving the parties' factual disputes, and providing a factual predicate for further proceedings in this case.

#### ***E. Applicable Legal Standard and Analysis***

In determining whether a petitioner is entitled to compensation under the Vaccine Act, a special master must consider "all . . . relevant medical or scientific evidence contained in the record," including "any diagnosis, conclusion, medical judgment, or autopsy or coroner's report . . . regarding the nature, causation, and aggravation of the petitioner's illness, disability, injury, condition, or death . . ." § 300aa-13(b)(1)(A). The special master must consider "the record as a whole," § 300aa-13(a)(1), and cannot make a finding of entitlement based on the claims of a petitioner that are not substantiated by medical records or medical opinion. Id. The special master's decision regarding entitlement must include findings of fact and conclusions of law. § 300aa-12(d)(3)(A)(i).

Before an entitlement determination can be made in this case, the undersigned must first resolve the pending factual dispute regarding what symptoms H.W. Waddell manifested after he received his MMR, PCV7, and Hib vaccines on May 29, 2007, and

when he first manifested the alleged symptoms. This ruling is limited to resolving the parties' disagreement on these factual issues.

In Vaccine Act cases, a petitioner must prove, by a preponderance of the evidence, the factual circumstances surrounding her claim. § 300aa-13(a)(1)(A). This evidentiary standard requires that the Special Master “believe that the existence of a fact is more probable than its nonexistence before [she] may find in favor of the party who has the burden to persuade the [special master] of the fact’s existence. In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965)).

To resolve factual disputes, the undersigned must determine what weight to assign the documentary record, which includes the contemporaneous medical records, and what weight to assign the later-given oral testimony that includes certain factual details that are absent from the existing documentary record. The case law instructs that oral testimony that conflicts with contemporaneous documentary evidence generally receives less evidentiary weight. See United States v. U.S. Gypsum Co., 333 U.S. 364, 396 (1948) (“Where [witness] testimony is in conflict with contemporaneous documents we can give it little weight[.]”); Montgomery Coca-Cola Bottling Co., Inc. v. United States, 615 F.2d 1318, 1327 (Ct. Cl. 1980) (“The subjective intent testimony of the plaintiff can only be seriously considered to the extent it is consistent with the objective evidence.”); Cucuras v. Sec’y of Dep’t of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993) (Conflicting oral testimony is afforded less evidentiary weight than written medical records).

The usefulness of record evidence in the court’s analysis of a case, however, turns on what is contained in the records. As the United States Claims Court observed:

[T]he absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance. Since medical records typically record only a fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant.

Murphy v. Sec’y of Dep’t of Health & Human Servs., 23 Cl. Ct. 726, 733 (Cl. Ct. 1991), aff’d, 968 F.2d 1226 (Fed. Cir. 1992) (citations omitted). The Federal Circuit has stated that a decision concerning whether to accord greater evidentiary weight to contemporaneous medical records or to later-given oral testimony falls “within the purview of the special master” and must be rationally supported. Burns v. Sec’y of Dep’t of Health & Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993).



Here, while the undersigned found petitioner and the other fact witnesses to be earnest in their testimony, it is difficult to reconcile petitioner's later-recalled accounts of certain dramatic events following H.W.'s vaccination with the dearth of medical records corroborating their account. Rather, from the lack of mention in the contemporaneous medical records of any of the striking symptoms that petitioner described at hearing, the undersigned infers that the symptoms were not as severe as described or did not occur as abruptly as petitioner later recalled.

A review of the filed medical records does suggest that the petitioner (as well as the other fact witnesses) may have recalled, during the fact hearing, events of importance that actually occurred later than the time period in question, or may have occurred more subtly over time. But, in the absence of other evidence that supports the account that the fact witnesses provided, the undersigned cannot credit certain parts of the testimony offered at hearing. Specifically, the undersigned cannot credit the testimony concerning the severity of H.W.'s condition between the administration of the May 29, 2007 vaccinations and the scheduled nineteen-month well-child visit seven months later. The undersigned finds the testimony regarding the rapid progression of H.W.'s alleged loss of language, the abrupt change in H.W.'s social interaction, and the sudden loss of H.W.'s gross motor skills in the two weeks following the May 29, 2007 vaccinations particularly difficult to credit.

The record does support a finding that the Waddells, particularly Ms. Waddell, paid careful attention to H.W.'s health issues. H.W.'s family and friends testified that if Ms. Waddell had any serious concern about H.W.'s health, she would promptly seek appropriate medical attention. These characterizations of Ms. Waddell's concern for H.W.'s health are consistent with other record evidence of Ms. Waddell's careful efforts to safeguard H.W.'s health, including her detailed research regarding the type of surgical procedure best suited for repair of H.W.'s craniosynostosis, and her steadfast refusal to allow H.W. to receive a second flu vaccine.

The described symptoms of fever and lack of energy, by petitioner's own admission, were symptoms expected to follow vaccination. The described loss of language, change in social interaction and loss of motor skills, however, are not the type of routine symptoms expected to follow vaccinations. If such symptoms had occurred as quickly and as noticeably as petitioner testified, the undersigned is persuaded that petitioner more likely than not would have sought medical attention whether on an emergent basis or as a sick-child pediatric visit. The seven-month delay between H.W.'s received vaccines and his next record of medical treatment is difficult to accept unless the undersigned is persuaded that the presentation of H.W.'s symptoms during the intervening period was not as dire as was suggested by the fact witnesses during the hearing. The testimony from the fact witnesses was consistent that Ms. Waddell would have sought appropriate medical treatment should H.W. have needed it, and the documentary record reflects that H.W.'s parents were conscientious caretakers who

sought medical attention for their concerns related to H.W.'s health. See Pet'r's Ex. 1 at 12 (medical record for a sick visit for H.W. on May 1, 2007). That Ms. Waddell waited seven months to seek medical attention for serious concerns about a loss in language, motor skills, and social activity cannot be easily reconciled with her refusal to wait one month for H.W.'s scheduled twelve month well-child visit when she elected to take H.W. to the pediatrician for a "seal barking kind of cough" that developed in early May 2007. Tr. at 63; Pet'r's Ex. 1 at 11, 12.

Ms. Waddell's willingness to seek medical treatment within the month that H.W. received his vaccines and her unwillingness to seek treatment for the alleged striking changes that occurred two weeks after H.W.'s vaccinations is stark. Her willingness to wait seven months for the next scheduled office visit after H.W.'s vaccinations is more consistent with her expressed belief during her testimony that H.W.'s condition was not serious enough to warrant more urgent medical attention. Tr. at 73-74, 81, 90-91.

This belief was shared by the other fact witnesses. Ms. Nolan testified that when she saw H.W. in July 2007, "he was a lot less interactive" and "he wasn't a sociable" as he had been on occasions prior to the May 29, 2007 vaccinations. Tr. at 12. But she did not observe any symptoms that required immediate medical attention. Tr. at 15. Ms. Arthur testified that based on H.W.'s symptoms described to her by Ms. Waddell when she called in June 2007 to cancel H.W.'s play date with Hunter (Ms. Arthur's son), Ms. Arthur would not have sought medical attention. Tr. at 34 (stating "she was doing all the things that I would have done had my child had the same symptoms."). Mr. Waddell similarly testified that H.W.'s "fever and . . . [not] feeling well" did not rise to the level of "going to see a doctor about it." Tr. at 121. Moreover, Ms. DeFlorin testified that Ms. Waddell would have sought medical attention for H.W. if she believed that he required "medical attention." Tr. at 22.

The record evidence clearly documents the diligence with which the Waddells have cared for H.W.. In addition, the Waddells, Ms. DeFlorin and Ms. Arthur all testified that they believed that H.W. was not in need of urgent care in the weeks following his May 2007 vaccination. Considering the dearth of documentary evidence corroborating the testimony about H.W.'s symptoms two weeks after his May 2007 vaccines and considering the Waddells' past record of care for H.W., the undersigned is not persuaded that H.W. Waddell exhibited symptoms requiring emergent medical attention during the weeks following the administration of the May 29, 2007 vaccinations at his twelve-month well-child examination.

## **II. FINDINGS OF FACT**

For the foregoing reasons, the undersigned determines that a preponderance of the evidence supports the following:

1. H.W.'s birth on May 26, 2006 was uneventful. Pet'r's Ex. 1 at 36.
2. Two weeks after his birth, H.W. Waddell was diagnosed with craniosynostosis, and a CT scan of his brain showed fusion of his sagittal suture. Pet'r's Ex. 1 at 35, 72.
3. At three and one half months of age, H.W. underwent neurosurgery to remold his cranial vault. He appeared to recover successfully from that surgery. Tr. at 57-58; Pet'r's Ex. 1 at 45. During the surgery to repair his skull, H.W. underwent a bilateral syndactyly procedure to release his second and third toes. Pet'r's Ex. 1 at 46.
4. At his six-month well child visit on December 1, 2006, H.W. received DTaP, IPV, Hepatitis B, PCV7, and influenza vaccines. Pet'r's Ex. 1 at 14.
5. After his December 1, 2006 vaccinations H.W. had a fever, rash, and diarrhea followed by constipation, and that the symptoms lasted one to two weeks. Tr. at 59.
6. Ms. Waddell told H.W.'s pediatrician, Dr. Monterossa, about the symptoms that developed after H.W. received the flu vaccine. Dr. Monterossa dismissed the onset of symptoms as coincidence. Tr. at 59.
7. Ms. Waddell refused H.W.'s next influenza immunization. Tr. at 60 -61; Pet'r's Ex. 1 at 13.
8. Ms. Waddell took H.W. to his pediatrician on May 1, 2007, for a cough and congestion. H.W. was diagnosed with croup at that visit. Tr. at 63; Pet'r's Ex. 1 at 12.
9. In May 2007, H.W. was able to pull to a stand, walk behind push-toy walkers, and "cruise." Tr. at 65-66; Pet'r's Ex. 1 at 11.
10. H.W. was generally described as a happy and responsive child prior to his May 29, 2007 vaccination. Tr. at 66-67; Pet'r's Ex. 1 at 11, 13.
11. At this twelve-month well-child visit on May 29, 2007, H.W. received his MMR, PCV, and Hib vaccines. Pet'r's Ex. 1 at 2.
12. During H.W.'s May 29, 2007 office visit, Ms. Waddell expressed concern about his bulging scalp because the size of the bulge had not decreased since February 2007. The pediatrician did not think the residual bulge in H.W.'s scalp needed urgent evaluation. Pet'r's Ex. 1 at 11.

13. Shortly after his vaccination, H.W. was fussy, crabby, and would not smile. Tr. at 80-81, 119-20, 123-24.
14. H.W. had diarrhea after his vaccination, and did not readily take his bottle. Tr. at 124.
15. H.W. felt warm to the touch on the night of May 29, 2007, but his temperature was not measured with a thermometer. Tr. at 72-73.
16. About four or five days after the vaccinations, H.W. had a fever that measured between 104 and 104.5 degrees Fahrenheit. His temperature was taken on his forehead and under his armpit. He developed a rash that was light red in coloration. Tr. at 72-73, 122.
17. H.W.'s fever responded readily to baby Tylenol, a cool bath and cold compresses. His fever eventually dropped over the course of a few hours to the 100-101 degrees Fahrenheit range, where it remained for about two days. Tr. at 74-75, 89, 123. His rash resolved as well.
18. H.W. continued to feel warmer than usual for at least another week. Tr. at 89, 123.
19. H.W.'s next medical appointment after receiving the May 29, 2007 vaccinations was seven months later, for his nineteen-month well child pediatric visit. That visit occurred on January 8, 2008. Tr. at 109; Pet'r's Ex. 1 at 10. The Waddells did not report any concerns during this visit about H.W.'s high temperature, rash, abrupt loss of motor skills, sudden loss of language or loss of interest in social interactions during the first four weeks following his May 2007 vaccines.
20. Ms. Waddell took all of her children to the same pediatric practice for care. Tr. at 106. Ms. Waddell continues to visit this pediatric group for the care of her children. Id.

The undersigned would like to address with the parties her views concerning the factual findings and her thoughts about further proceedings. **On or before Friday, August 19, 2011**, the parties shall contact the undersigned's chambers to schedule a status conference.

**IT IS SO ORDERED.**

Patricia E. Campbell-Smith

Patricia E. Campbell-Smith  
Chief Special Master