IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: May 22, 2008, Reissued: October 14, 2008)

JOHN DOE 21,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 02-0411V
	)	Entitlement; Witness Credibility
SECRETARY OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

DECISION
(FACT WITNESS/MEDICAL EXPERT WITNESS CREDIBILITY RULING)[1]

Petitioner's father, as best friend of his son, Petitioner, seeks compensation under the National Vaccine Injury Compensation Program (Program).[2] In a petition that he filed on April 30, 2002, Petitioner alleges that Petitioner suffered "a shock collapse" resulting in "Encephalopathy" approximately "four hours" after he received several vaccinations, including a diphtheria-tetanus-acellular pertussis (DTaP) vaccination, on July 20, 1999. Petition (Pet.) at 1. According to Petitioner's father, Petitioner is now "significantly developmentally delayed." Pet. ¶ 6.

---

[1] After petitioner filed a motion for review, Judge Braden of the United States Court of Federal Claims issued an order directing the reissuance of the May 22, 2008 decision with the petitioner's name redacted. Judge Braden's October 6, 2008 Memorandum Opinion and Final Order refers to the child as "petitioner." This decision conforms to that nomenclature.

In addition, the margins are sometimes adjusted to ensure that the pagination in this published decision matches the pagination in the decision as reviewed (and cited) by Judge Braden.

[2] The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

The special master convened two hearings. Petitioner's father; [name redacted], Petitioner's maternal grandmother; [name redacted], a petitioner family neighbor in 1999; and Eugene B. Spitz, M.D. (Dr. Spitz), a pediatric neurosurgeon, *see, e.g.*, Transcript (Tr.) at 209, testified during Petitioner's case-in-chief at the first hearing.[3] Max Wiznitzer, M.D. (Dr. Wiznitzer), a pediatric neurologist, *see generally* Respondent's exhibit (R. ex.) B, testified during respondent's rebuttal case at the first hearing. Petitioner's father and John J. Shane, M.D. (Dr. Shane), a pathologist, *see e.g.*, Tr. at 399, testified during Petitioner's surrebuttal case at the second hearing. Dr. Wiznitzer testified also at the second hearing.

BACKGROUND

Petitioner was born on May 11, 1999, at North Shore University Hospital in Manhasset, New York. Petitioner's exhibit (Pet. ex.) at 3. He weighed six pounds, 12 ounces. *Id.* He measured 19½ inches in length. *Id.* His APGAR scores were eight at one minute and eight at five minutes.[4] *Id.*

On May 24, 1999, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 30. Petitioner weighed seven pounds, eight ounces. *Id.* He measured 21 inches in length. *Id.* According to the physician, Petitioner was "beginning to hold" his "head" in an upright position. *Id.* In addition, according to the physician, Petitioner could "fix [and] focus." *Id.* Further, according to the physician, Petitioner "respond[ed] to sounds [and] light." *Id.* The physician determined that Petitioner was "healthy." *Id.*

On June 10, 1999, and on June 21, 1999, Petitioner received medical attention from a physician at the North Shore University Hospital Department of General Pediatrics for "constipation." Pet. ex. at 33.

On July 20, 1999, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 34. Petitioner weighed 12 pounds. *Id.* He measured 23½ inches in length. *Id.* The physician noted that Petitioner's constipation was "better." *Id.* According to the physician, Petitioner could lift his head "well." *Id.* In addition, according to the physician, Petitioner could roll "to [his] side." *Id.* Further, according to the physician, Petitioner could focus on the physician's "face" and would turn toward the sound of the physician's "voice." *Id.* Finally, according to the physician, Petitioner could smile. *Id.* The physician

---

[3] Petitioner's mother, died suddenly in March 2002. *See, e.g.*, Declaration of Petitioner's Father, filed October 2, 2002, ¶ 26.

[4] An APGAR score is "a numerical expression of the condition of a newborn infant, usually determined at 60 seconds after birth, being the sum of points gained on assessment of the heart rate, respiratory effort, muscle tone, reflex irritability, and color." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1498 (27th ed. 1988).

determined that Petitioner was "healthy." *Id.* Petitioner received a DTaP vaccination, inactive polio vaccine (IPV) and Comvax.[5] *See* Pet. ex. at 32, 35.

Petitioner "developed" a "fever" within several hours after his July 20, 1999 vaccinations. Pet. ex. at 34A; *see also* Pet. ex. 34B, 35. Petitioner's mother administered a dose of "Tylenol" at approximately 8:30 p.m, on July 20, 1999. *Id.* Then, Petitioner suffered an "episode of crossed eyes," accompanied by "drooling," that lasted between 10 minutes and 15 minutes. Pet. ex. at 34B; *see also* Pet. ex. at 34A. Petitioner "remained alert" and "pink" during the episode. Pet. ex. at 34A; *see also* Pet. ex. at 34B. Petitioner did not exhibit "tonic/clonic activity" during the episode. Pet. ex. at 34B.

The parents transported Petitioner to the North Shore University Hospital Emergency Department, arriving at 9:47 p.m., on July 20, 1999. *See* Pet. ex. at 34A. Petitioner's mother informed triage personnel that Petitioner was "acting unusual." Pet. ex. at 34A. A resident physician and an attending physician evaluated Petitioner. *See* Pet. ex. at 34B. Petitioner's father informed the physicians that Petitioner was "acting 'strange.'" Pet. ex. at 34B. Petitioner's rectal temperature was 101.3º Fahrenheit. *Id.* Each physician described Petitioner as "alert." *Id.* According to the physicians, Petitioner's neurological examination was normal, showing no "focal deficits." Pet. ex. at 34C. The attending physician remarked that Petitioner's "fontanelle" was "flat." Pet. ex. at 34B. In addition, the attending physician remarked that Petitioner's "neck" was "supple." *Id.* The physicians ordered a battery of tests, including blood and urine cultures. *See* Pet. ex. at 34D. The tests were negative. *See* Pet. ex. at 36-44.

The physicians diagnosed "fever." Pet. ex. at 34D. The physicians released Petitioner from the Emergency Department at 11:00 p.m., on July 20, 1999, in "satisfactory" condition. *Id.* The physicians advised "Tylenol as needed for fever." *Id.* In addition, the physicians instructed Petitioner's mother to "follow up with" Petitioner's pediatrician "in the morning." *Id.*

A physician from North Shore University Hospital "called" Petitioner's mother on July 21, 1999. Pet. ex. at 35. Petitioner's mother reported apparently that Petitioner "still" exhibited a "fever" of 101º Fahrenheit. *Id.* The physician commented that Petitioner's fever "could be due to a viral illness." *Id.* The physician instructed Petitioner's mother "to come [to]/call [the] office for re-evaluation" if Petitioner continued to exhibit a "fever on" July 22, 1999. *Id.*

Petitioner presented to the North Shore University Hospital Division of General Pediatrics on July 28, 1999, for evaluation of "crusty" eyes. Pet. ex. at 48. The treating physician depicted Petitioner as "alert" and "awake." *Id.* The treating physician detected some "yell[ow] d[is]c[harge]" in Petitioner's eyes. *Id.* The treating physician suspected either a "duct obst[ruction]" or "conjunctivitis." *Id.* The treating physician recommended simply observation. *See id.*

Petitioner presented to the North Shore University Hospital Division of General Pediatrics on August 19, 1999, for evaluation of an "axillary" temperature of 101º Fahrenheit, a "cough" that had

---

[5] Haemophilus b conjugate (Hib) vaccine and Hepatitis B vaccine.

persisted for a day, and "loose stools." Pet. ex. at 48. The treating physician noted that Petitioner's "older sister" was "sick." *Id.* The treating physician depicted Petitioner as "alert" and "active" and in "n[o]a[cute]d[istress]." *Id.* The treating physician determined that predominant aspects of Petitioner's physical examination were normal. *See id.* The treating physician suspected either a "viral syndrome" or a "u[rinary]t[ract]i[nfection]." *Id.* The treating physician ordered a "u[rin]a[lysis]" and a "u[rine] [culture]." *Id.* The tests were negative. *See* Pet. ex. at 50.

On September 14, 1999, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 51. Petitioner weighed 14 pounds, 15 ounces. *Id.* He measured 25½ inches in length. *Id.* As part of Petitioner's "interval history," the physician noted only periodic "discharge" from the left eye representing possibly a duct "obstruction." *Id.* According to the physician, Petitioner was able to sit. *Id.* In addition, according to the physician, Petitioner could reach "for toys." *Id.* Further, according to the physician, Petitioner could babble. *Id.* The physician determined that Petitioner was "well." *Id.*

The physician engaged Petitioner's mother in a "long discussion" regarding the "pro-con" of vaccination. Pet. ex. at 52. The physician chose to administer "d[iphtheria]T[etanus] (pediatric)" vaccine to Petitioner "because of" Petitioner's "prev[ious] hypotonic-[illegible] episode" following Petitioner's July 20, 1999 vaccinations. *Id.* Petitioner received also IPV and Comvax. *Id.*

Between September 23, 1999, and October 7, 1999, Petitioner presented to physicians at the North Shore University Division of General Pediatrics on at least five occasions for evaluation of thrush and for evaluation of otitis media. *See generally* Pet. ex. at 53-55. On October 4, 1999, a physician questioned whether Petitioner exhibited a "l[eft] strabismus"[6] or a "psuedostrabismus." Pet. ex. at 54. The physician recommended an ophthalmologic consultation. *See id.*; *see also* Pet. ex. at 57 (confirming referral "for l[eft] eye deviation medially").

On November 8, 1999, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 56. Petitioner weighed 16 pounds, 13½ ounces. *Id.* He measured 27¼ inches in length. *Id.* Petitioner exhibited an "u[pper]r[espiratory]i[llness]" with "nasal congestion." *Id.* Petitioner's older sister was ill, too, apparently. *See id.*

According to the physician, Petitioner had not "rolled over yet." Pet. ex. at 56. In addition, according to the physician, Petitioner could not "sit up [without] support." *Id.* Nevertheless, according to the physician, Petitioner showed "good head control." *Id.* And, according to the physician, Petitioner could grab "onto objects well." *Id.*

---

[6] Strabismus is "deviation of the eye which the patient cannot overcome." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1587 (27th ed. 1988).

The physician determined that Petitioner was a "well infant." Pet. ex. at 56. The physician administered DT vaccine to Petitioner. Pet. ex. at 57. The physician withheld "pertussis" because of Petitioner's "r[eaction] at 2 mo[nths] age." *Id.*

Steven E. Rubin, M.D. (Dr. Rubin), a pediatric ophthalmologist, examined Petitioner on November 10, 1999. *See* Pet. ex. at 59. Dr. Rubin described Petitioner as a "healthy 6[-]month old baby with suspected esotropia"[7] and frequent "crusting from the left eye." Pet. ex. at 59. However, Dr. Rubin "found no strabismus." *Id.* In addition, because Dr. Rubin believed that Petitioner's eye "lids and lashes" appeared "so normal," Dr. Rubin doubted that Petitioner suffered "any kind of significant" narrowing of a lacrimal duct. *Id.* Rather, Dr. Rubin suggested that Petitioner's condition "would probably spontaneously resolve" after "several months." *Id.*

Between November 15, 1999, and January 19, 2000, Petitioner presented to physicians at the North Shore University Division of General Pediatrics on at least 11 occasions for management of thrush, viral illness and otitis media. *See generally* Pet. ex. at 58, 61-64. On December 4, 1999, a physician recorded an impression of "plagiocephaly."[8] Pet. ex. at 61. The physician planned an appointment in "1 month" to monitor Petitioner's "H[ead]C[ircumference]" and Petitioner's "development." *Id.*

On January 31, 2000, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 65. Petitioner weighed nearly 20 pounds. *Id.* He measured 29½ inches in length. *Id.* According to the physician, Petitioner could sit "indefinitely without support;" use a "pincer grasp;" speak a few words; "wave bye-bye;" and play "peek-a-boo." *Id.* However, according to the physician, Petitioner could not pull "to stand" or cruise. *Id.* Nevertheless, the physician deemed Petitioner to be "well." *Id.* Petitioner received a hepatitis B vaccination. *Id.*

Petitioner continued to suffer frequent illnesses between February 7, 2000, and March 16, 2000. *See generally* Pet. ex. at 66-69. On March 8, 2000, a physician from the North Shore University Division of General Pediatrics noted possible increased "tone" in Petitioner's extremities. Pet. ex. at 68. The physician expressed concern regarding Petitioner's developmental "progression." *Id.* The physician planned an "E[arly]I[ntervention]P[rogram] eval[uation]." *Id.* In addition, the physician planned a "H[ead]U[ltra]S[ound]." *Id.* On March 16, 2000, a physician from the North Shore University Division of General Pediatrics recommended a referral to an "E[ar]N[ose]T[hroat]" specialist. Pet. ex. at 69.

---

[7] Esotropia is a form of strabismus involving "manifest deviation of the visual axis of an eye toward that of the other eye." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 583 (27th ed. 1988).

[8] Plagiocephaly is "an unsymmetrical and twisted condition of the head, resulting from irregular closure of the cranial sutures." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1301 (27th ed. 1988).

Petitioner underwent a "head ultrasound" for his "enlarged head size" on March 17, 2000. Pet. ex. at 70. The ultrasound revealed "[p]rominent extra-axial spaces." *Id.* According to the physician who interpreted the ultrasound, the "[f]indings" were consistent with "benign external hydrocephalus." *Id.*

On March 27, 2000, and on March 29, 2000, Petitioner received medical attention from a physician at the North Shore University Hospital Department of General Pediatrics for otitis media. *See* Pet. ex. at 69. On March 29, 2000, the physician noted "vertical nystagmus."[9] Pet. ex. at 69. The physician provided another "referral" to an ophthalmologist. *Id.* In addition, the physician iterated a "referral" to an "ENT." *Id.*

Based upon the parents' concerns regarding "Gross Motor Development," a service coordinator from the Nassau County Department of Health referred Petitioner to the Louise Oberkotter Early Childhood Center. Pet. ex. at 219. Amanda Buonora, M.A., P.T. (Ms. Buonora), and Arlene Markowitz, M.A. (Ms. Markowitz), assessed Petitioner on March 29, 2000. *See generally* Pet. ex. at 219-23. Ms. Buonora and Ms. Markowitz obtained Petitioner's medical history from Petitioner's mother and Petitioner's "nanny." Pet. ex. at 221. Petitioner's mother reported that although Petitioner had "not sustained any serious injuries," Petitioner "did suffer a reaction to the Pertussis, in a DPT injection, during which his 'eyes crossed and he went limp.'" Pet. ex. at 220. Petitioner's mother offered that Petitioner did not exhibit any "conclusive evidence of seizure activity" during the episode. *Id.*

Ms. Buonora and Ms. Markowitz reviewed "eight areas of development: Gross Motor, Fine Motor, Relationship to Inanimate Objects, Language/Communication, Self-Help, Relationship to Persons, Emotions and Feeling States, and Coping Behavior." Pet. ex. at 221. Ms. Buonora and Ms. Markowitz deemed Petitioner's "scores for Gross Motor, Fine Motor, Language/Communication, and Emotions and Feeling States" to be "'Of Concern.'" *Id.* Ms. Buonora and Ms. Markowitz recommended "Physical Therapy services to address delay in gross motor skill acquisition." Pet. ex. at 223. In addition, Ms. Buonora and Ms. Markowitz recommended monitoring Petitioner's "fine motor function" and Petitioner's "Speech and Language development." *Id.*

On March 30, 2000, Petitioner's mother informed a physician at the North Shore University Hospital Department of General Pediatrics that Petitioner's "vertical nystagmus" was "getting worse." Pet. ex. at 71. The physician examined Petitioner. *See id.* The physician "sent" Petitioner for "consultation" with Robert J. Gould, M.D. (Dr. Gould), a pediatric neurologist. *Id.*

Dr. Gould evaluated Petitioner on March 30, 2000. *See* Pet. ex. at 179. Dr. Gould attempted various "maneuvers" that Petitioner's mother identified as likely prompts for Petitioner's "abnormal" eye "movements." Pet. ex. at 179. Dr. Gould could not elicit any vertical nystagmus. *See id.*

---

[9] Nystagmus is "an involuntary, rapid, rhythmic movement of the eyeball." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1162 (27th ed. 1988).

On April 5, 2000, Petitioner presented to Dr. Rubin for "follow-up" of Petitioner's eye symptoms. Pet. ex. at 72. Dr. Rubin did not observe any nystagmus during the appointment. *See id.* According to Dr. Rubin, Petitioner's "examination" appeared to be "essentially within normal limits." *Id.*

Mark N. Goldstein, M.D. (Dr. Goldstein), a pediatric otolaryngologist, *see* Pet. ex. at 143, evaluated Petitioner on April 21, 2000. *See* Pet. ex. at 71. Dr. Goldstein appreciated apparently "effusions" in Petitioner's ears. Pet. ex. at 75. Dr. Goldstein "scheduled" Petitioner for bilateral myringotomy[10] and placement of "tubes." *Id.*; *see also* Pet. ex. at 143.

On April 24, 2000, Petitioner presented to a physician at the North Shore University Hospital Department of General Pediatrics. *See* Pet. ex. at 75. The physician reviewed Petitioner's recent medical history, including Petitioner's evaluation by Dr. Goldstein and Petitioner's evaluation by Dr. Rubin. *See id.* The physician stressed that Petitioner required "tubes." *Id.* In addition, the physician considered a "neuro[logy] eval[uation]." *Id.*

Steven G. Pavlakis, M.D. (Dr. Pavlakis), a pediatric neurologist, evaluated Petitioner on April 28, 2000, for occasional "up and down eye fluttering" and "upper eyelid fluttering" without "alteration of consciousness." Pet. ex. at 78-79. According to Dr. Pavlakis, Petitioner's mother informed him that the "episodes" could "last for minutes." Pet. ex. at 78. In addition, Dr. Pavlakis evaluated Petitioner for "a mild tremor when excited." Pet. ex. at 79.

Dr. Pavlakis characterized Petitioner as "alert, active and interactive in age-appropriate fashion." Pet. ex. at 79. Dr. Pavlakis noted a report of delay "in regard to motor milestones." Pet. ex. at 78. Upon examining Petitioner, Dr. Pavlakis observed "some mild hypotonia." Pet. ex. at 79. In addition, upon examining Petitioner, Dr. Pavlakis observed "trembling in both arms." Pet. ex. at 78.

Dr. Pavlakis reviewed a "video" of Petitioner's "atypical" eye movements. Pet. ex. at 79. Dr. Pavlakis did not believe that the "episodes" represented "seizures." *Id.* Nevertheless, Dr. Pavlakis recommended an "E[lectro]E[ncephalo]G[ram]." *Id.* And, while Dr. Pavlakis was "not terribly concerned about" Petitioner's "unusual" eye movements, he referred Petitioner to Mark J. Kupersmith, M.D. (Dr. Kupersmith), a neuro-ophthalmologist. *Id.*

Petitioner began apparently physical therapy through an early intervention program on May 3, 2000. *See, e.g.*, Pet. ex. at 75.

Petitioner underwent bilateral myringotomy with "tubes" at some point in May 2000. Pet. ex. at 156; *see also* Pet. ex. at 76 (surgery scheduled for May 12, 2000), 82 (surgery scheduled for May

---

[10] Myringotomy is "tympanocentesis." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1093 (27th ed. 1988). Tympanocentesis is "surgical puncture of the membrana tympani for removal of fluid from the middle ear." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1779 (27th ed. 1988).

23, 2000), 143 (surgery occurred "one month" prior to June 27, 2000), 160 (surgery scheduled for May 12, 2000).

On May 22, 2000, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 82. Petitioner weighed slightly more than 21 pounds. *Id.* He measured 30¼ inches in length. *Id.* The physician noted Petitioner's history of "chronic effusions." *Id.* The physician reviewed Petitioner's development. *See id.* The physician recorded that Petitioner had entered an early intervention program to address Petitioner's developmental "delay." *Id.* The physician planned to "f[ollow]/u[p]" on the EEG that Dr. Pavlakis recommended. *Id.*

Dr. Kupersmith evaluated Petitioner on June 7, 2000, for periodic "abnormal or involuntary movement of his lids" and, possibly, his "eyes." Pet. ex. at 168. According to Dr. Kupersmith, Petitioner's mother "noticed" that Petitioner remained "responsive" during the episodes. *Id.* Although Dr. Kupersmith did not observe any abnormal eye movements upon examining Petitioner, Dr. Kupersmith reviewed a "tape" that Petitioner's mother provided. *Id.* In Dr. Kupersmith's opinion, the tape showed "upper lid retraction," rather than "any significant eye muscle involvement or nystagmus." *Id.*

Dr. Kupersmith did not consider Petitioner's eye movements to be a "seizure phenomenon." Pet. ex. at 168. However, Dr. Kupersmith expressed some concern about Petitioner's "head size." *Id.* Dr. Kupersmith advised "M[agnetic]R[esonance]I[maging]" to ensure that Petitioner did "not have any hydrocephalus causing posterior third ventricle dilation." *Id.*

On June 13, 2000, Petitioner presented to the North Shore University Hospital Outpatient Department for an EEG and an MRI. *See* Pet. ex. at 85-97. The EEG was "within the normal limits." Pet. ex. at 85. Medical personnel could not perform apparently the MRI because Petitioner was "awake, cooing [and] babbling." Pet. ex. at 87.

Petitioner presented to Joseph L. Zito, M.D. (Dr. Zito), on June 22, 2000, for a "cranial" MRI. Pet. ex. at 98. According to Dr. Zito, the MRI revealed "no evidence of mass effect" in the "ventricular system and subarachnoid spaces." *Id.* In addition, according to Dr. Zito, the MRI revealed "no extraaxial mass or fluid collection." *Id.* Dr. Zito interpreted the MRI as "normal." *Id.*

Dr. Goldstein "reevaluated" Petitioner "one month after his bilateral myringotomy and tube insertion." Pet. ex. at 143. Dr. Goldstein stated that Petitioner's "audiogram" reflected "improvement in the hearing with all tones within the normal range or borderline normal." *Id.* However, Dr. Goldstein remarked that Petitioner "still" experienced "some blinking of the eyes." *Id.*

Petitioner received a measles-mumps-rubella (MMR) immunization and a Varivax immunization on July 12, 2000. *See* Pet. ex. at 102.

On August 11, 2000, Petitioner presented to the North Shore University Hospital Department of General Pediatrics for management of an "URI" with "drainage" from the right "eye" and right

"ear." Pet. ex. at 103. The treating physician noted emphatically that Petitioner's "vertical nystagmus" persisted. *Id.* The treating physician planned another evaluation by a neurologist. *See id.*

On September 13, 2000, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 99; *see also* Pet. ex. at 275. The physician noted Petitioner's "developmental delay." *Id.* However, the physician commented that Petitioner was "progressing." *Id.* In addition, the physician noted "intermittent but daily vertical nystagmus." *Id.* Petitioner received a "pediatric DT" vaccination and IPV. *Id.* The physician remarked that the physician avoided "pertussis because of the" reaction that Petitioner experienced at age "2 months." *Id.*

Dr. Pavlakis evaluated Petitioner again on September 21, 2000. *See* Notice of Filing, filed January 30, 2007, Attachment at 3. Dr. Pavlakis recommended apparently a 24-hour EEG. *See id.*; *see also* Pet. ex. at 104. In addition, Dr. Pavlakis referred apparently Petitioner to Dr. Kupersmith. *See* Pet. ex. at 104.

By October 6, 2000, Petitioner had undergone "continuous EEG monitoring." Pet. ex. at 105. Petitioner exhibited apparently some "episodes of eye fluttering during the procedure." *Id.* Nevertheless, the EEG was normal apparently. *See, e.g.*, Pet. ex. at 134.[11]

On October 12, 2000, Petitioner "returned" to Dr. Rubin "for follow-up" of eye symptoms. Pet. ex. at 106. Dr. Rubin "confirmed the presence of an infrequent, intermittent upbeat nystagmus which had apparently evaded detection at [Petitioner's] many prior examinations." *Id.* Dr. Rubin understood that "all" of Petitioner's "work-ups" were "normal." *Id.* Thus, Dr. Rubin offered that he could "still find no good explanation for the upbeat nystagmus." *Id.*

Dr. Rubin referred apparently Petitioner to Michael L. Slavin, M.D. (Dr. Slavin), a neuro-ophthalmologist. *See* Pet. ex. at 109-10. Dr. Slavin evaluated Petitioner on November 7, 2000, for "intermittent vertical nystagmus" that began when Petitioner was "age 6 months." Pet. ex. at 109. Petitioner's mother reported apparently that although Petitioner's nystagmus was "much less noticeable" in November 2000, Petitioner had "balance problems." *Id.* Dr. Slavin noted that Petitioner's "[m]ilestones" were "delayed." *Id.*

Upon examining Petitioner, Dr. Slavin did not observe "the nystagmus." Pet. ex. at 109. Indeed, Dr. Slavin described Petitioner's examination as essentially "normal." *Id.* Dr. Slavin recommended simply "observation." *Id.*

On November 27, 2000, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 112. According to the physician, Petitioner exhibited still "variable" eye "fluttering." *Id.* The physician

[11] Petitioner did not produce any records related to Petitioner's September 2000/October 2000 EEG monitoring.

reviewed Petitioner's developmental progress. *See id.* The physician noted that Petitioner had begun occupational therapy through an early intervention program. *See id.* In addition, the physician noted that Petitioner had completed a "recent speech eval[uation]." *Id.* The physician observed that Petitioner's "gait" was "wide." *Id.* The physician planned an "ortho[pedic] eval[uation]." *Id.* Petitioner received two vaccinations, "Prevnar" and Hib. *Id.*

Between mid-December 2000 and May 2001, Petitioner presented to physicians at the North Shore University Division of General Pediatrics on numerous occasions for evaluation of rashes and a variety of illnesses *See generally* Pet. ex. at 113-23; *see also* Pet. ex. 183-85, 187-98 (pediatric dermatology records).

Dr. Rubin examined Petitioner again in early May 2001. *See* Pet. ex. at 125. Petitioner's mother reported apparently that Petitioner had exhibited "nystagmus" and "esotropia" during the preceding "several weeks." Pet. ex. at 125. According to Dr. Rubin, the examination "was really quiet [sic] normal." *Id.* Dr. Rubin suggested "a good explanation" for Petitioner's nystagmus: Petitioner was "slightly more hyperopic than other children." *Id.* However, Dr. Rubin did not recommend "treatment (spectacles)." *Id.*

On May 18, 2001, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Pet. ex. at 126. Petitioner was "24 months" old. *Id.* The physician reviewed Petitioner's development. *See id.* The physician noted that Petitioner participated in physical therapy, occupational therapy and speech therapy through an early intervention program. *See id.* According to the physician, Petitioner was working with a "specialist" for the "visually[-]impaired" to address "disorientation in movem[en]ts." *Id.* In addition, the physician noted that Petitioner continued to experience "intermitt[ent]" nystagmus. *Id.* Petitioner received a "Prevnar" vaccination. Pet. ex. at 127.

Petitioner presented to Lydia Eviatar, M.D. (Dr. Eviatar), professor of neurology and pediatrics at the Long Island Campus of the Albert Einstein College of Medicine, on August 14, 2001, "for a neurological consultation" regarding Petitioner's "poor balance and episodes of upward gaze nystagmus with eye fluttering." Pet. ex. at 134. Dr. Eviatar reviewed Petitioner's "[p]ast medical history." *Id.* Dr. Eviatar believed apparently that Petitioner "was doing well until 6 months of age after he received a Pertussin [sic] shot." *Id.* Then, according to the chronology that Dr. Eviatar recorded, the parents "noted [Petitioner's] eyes crossing, unresponsiveness and limpness that lasted about 15 minutes." *Id.* Dr. Eviatar understood apparently that Petitioner "was seen at the time in the emergency room and the work-up was essentially unremarkable, including a CT scan, which showed slightly enlarged subarachnoid space." *Id.* In addition, Dr. Eviatar understood apparently that the parents "[s]ubsequently" observed "episodes of involuntary eye movements, primarily in the vertical direction, associated with an eye flutter," prompting "evaluation by Dr. Pavlokis [sic] and Dr. Coopersmith [sic]." *Id.* Dr. Eviatar noted that Petitioner's "[d]evelopment proceeded slowly." Pet. ex. at 135.

Dr. Eviatar characterized Petitioner as "interactive" and "playful," but "nonverbal" with "a fleeting gaze." Pet. ex. at 135. During the examination, Dr. Eviatar saw "an episode of eye flutter." *Id.* However, Dr. Eviatar saw "no nystagmus or opsoclonus."[12] *Id.* In Dr. Eviatar's view, Petitioner's "[m]otor tone" was "decreased." *Id.* Dr. Eviatar noted "a broad-based ataxic gait and poor gross motor coordination." *Id.* Dr. Eviatar described several "[s]elf-stimulatory behaviors" accompanied by "perseveration of objects." *Id.*

Dr. Eviatar concluded that Petitioner exhibited "generalized gross motor and fine motor delay, as well as speech and language delay and some very mild pervasive developmental disorder features." Pet. ex. at 135-36. Dr. Eviatar labeled Petitioner's "onset of eye movements immediately after the Pertussin [sic] shot" as "puzzling." Pet. ex. at 136. Dr. Eviatar offered that "episodes of flutter or opsoclonus and developmental delay" can be "a result of autoimmune encephalitis known as encephalopathy." *Id.*; *see also* Pet. ex. at 132 ("Provisional Diagnosis" of "eye flutter/eyelid flutter s[tatus]/p[ost] myoclonic encephalopathy"). Dr. Eviatar recommended a battery of tests. *See* Pet. ex. at 136; *see also* Pet. ex. at 132.

On October 22, 2001, Petitioner presented to Dr. Rubin for "follow-up." Pet. ex. at 138. Dr. Rubin did not observe any nystagmus or strabismus during the appointment. *See id.* Dr. Rubin remarked that he could "provide no help in search of any underlying diagnosis." *Id.*

In November 2001, the Manhasset Public School District referred Petitioner to the Early Childhood Development Program at Schneider Children's Hospital for comprehensive evaluation. *See* Pet. ex. at 249-72. The parents expressed "concerns" regarding Petitioner's "speech and language, fine and gross motor development, and sensory issues." Pet. ex. at 252. The evaluation revealed "global delays in functioning." *Id.*

In early 2002, Petitioner experienced an "increased frequency of episodes of vertical nystagmus with a chin-up head position." Pet. ex. at 142. Dr. Rubin evaluated Petitioner on February 13, 2002. *See id.* Dr. Rubin determined that Petitioner's "examination" was still "essentially normal." *Id.* Dr. Rubin advised "follow-up with a neuro-ophthalmologist" and a repeat "neurological evaluation." *Id.*

Petitioner presented "for neuro-ophthalmic follow[-]up" with Dr. Kupersmith on February 28, 2002. Pet. ex. at 175. Petitioner's mother reported apparently "marked nystagmus" accompanied by "worse balance." *Id.* According to Dr. Kupersmith, Petitioner's "examination" was "really unchanged from" Petitioner's "previous" examination in June 2000. *Id.* Dr. Kupersmith commented that Petitioner's condition "may be some type of neuronal discharge phenomenon." *Id.* Dr. Kupersmith recommended "a trial of" an "anticonvulsant" or of "Baclofen," monitored by "a pediatric neurologist." *Id.*

---

[12] Opsoclonus is "a condition characterized by nonrhythmic horizontal and vertical oscillations of the eyes, observed in various disorders of the brain stem or cerebellum." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1185 (27th ed. 1988).

In April 2002, Dr. Pavlakis examined Petitioner for an "event that was consistent with seizure." Notice of Filing Documents, filed October 10, 2002, Letter of Steven Pavlakis, M.D., at 1; *see also* Notice of Filing Documents, filed July 11, 2006, Exhibit B at 4 ("Addendum: had a possible seizure that I observed."). According to Dr. Pavlakis, Petitioner "had alteration of consciousness over a long period of time, lasting 20 minutes to hours." *Id.* In addition, according to Dr. Pavlakis, Petitioner exhibited "some change in color." *Id.* In Dr. Pavlakis's view, Petitioner's April 2002 episode "was not dissimilar to" Petitioner's July 20, 1999 episode. *Id.* However, Dr. Pavlakis concluded that Petitioner's persistent "eye fluttering" was "different" from Petitioner's July 20, 1999 episode and from Petitioner's April 20, 2002 episode. *Id.* Dr. Pavlakis referred apparently Petitioner for an EEG. *See* Notice of Filing Documents, filed April 16, 2004, Report of EEG dated May 2002. The EEG was "normal," showing "[n]o frank epileptiform activity." *See id.*

Petitioner underwent a magnetic resonance angiography (MRA) on May 3, 2002, "[t]o rule out aneurysm." Notice of Filing Documents, filed July 24, 2006, Exhibit A at 1. The radiologist observed "[n]o intracranial vascular anomalies." *Id.* The radiologist interpreted the MRA as "unremarkable." *Id.*

By late Summer 2002, Petitioner was too old for Early Intervention Program services. *See, e.g.*, Pet. ex. at 204. However, Petitioner qualified for Preschool Special Education services from the Manhasset Public School District. *See, e.g.*, Pet. ex. at 204. Petitioner was slated to attend "Variety Preschoolers Workshop" in September 2002. Pet. ex. at 204.

On August 11, 2003, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Notice of Filing Documents, filed July 11, 2006, Exhibit A at 79. Petitioner was four years old. *See id.* The physician noted that Petitioner attended "Variety Preschool," where he received occupational therapy services, physical therapy services and speech therapy services. *Id.* According to the physician, Petitioner was "making progress." *Id.*

On August 12, 2004, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Notice of Filing Documents, filed July 11, 2006, Exhibit A at 85. Petitioner was five years old. *See id.* The physician reviewed Petitioner's development. *See id.* The physician recorded that Petitioner was scheduled "to start" kindergarten in an "inclusion prog[ram]" at "Shelter Rock." *Id.* The physician indicated that Petitioner would receive occupational therapy services, physical therapy services and speech therapy services in kindergarten. *See id.* The physician administered "DT pediatric" vaccine and IPV to Petitioner. *Id.* at 86.

On April 27, 2005, the radiologist who interpreted Petitioner's May 3, 2002 MRA "reviewed" Petitioner's films "in light of [Petitioner's] persistent symptoms of vertigo." Notice of Filing Documents, filed July 24, 2006, Exhibit B at 1. The radiologist appreciated "no evidence of temporal lobe

pathology." *Id.* However, the radiologist found "evidence of bilateral tonsillar herniation of the cerebellar tonsils of approximately 7-8 mm." *Id.*

Neil A. Feldstein, M.D. (Dr. Feldstein), a neurosurgeon associated with the New York Presbyterian Medical Center, examined Petitioner on April 28, 2005, during a "New Outpatient Consultation" regarding a "Chiari Malformation."[13] Notice of Filing, filed August 3, 2005, Exhibit B at 1. According to Dr. Feldstein, Petitioner's father recounted that in "mid[-]infancy," Petitioner received medical attention in an "emergency room" for "an adverse reaction" to "a series of immunizations." *Id.* Petitioner's father described Petitioner as "turning blue and limp and drooling with his eyes crossed." *Id.* Then, according to Dr. Feldstein, Petitioner's father related that Petitioner developed "delays in both fine and gross motor movements, as well as in speech." *Id.*

Dr. Feldstein noted that Petitioner had "been evaluated by several neurologists and ophthalmologists." Notice of Filing, filed August 3, 2005, Exhibit B at 1. Dr. Feldstein remarked that "all of" the specialists found a "consistent pathology in the posterior fossa." *Id.* Dr. Feldstein indicated that the specialists based their conclusions upon the presence of "upward nystagmus" accompanied by "an arching of the neck." *Id.* While examining Petitioner, Dr. Feldstein observed "a mild upbeat nystagmus" with extension of the "head at neck." *Id.*

Dr. Feldstein "reviewed" two MRIs: "the original study" and a "scan from 2002." Notice of Filing, filed August 3, 2005, Exhibit B at 1. In Dr. Feldstein's view, "the first study shows fullness to the posterior fossa without tonsillar herniation." *Id.* In Dr. Feldstein's view, "the second study is consistent with a Chiari malformation." *Id.* Dr. Feldstein identified "a 6-7 mm tonsillar herniation and significant deformation and compression of the inferior portion of the cerebellum at the level of foramen magnum." *Id.*

Dr. Feldstein believed that Petitioner's "fairly diffuse history with various symptoms" suggested "posterior fossa abnormalities." Notice of Filing, filed August 3, 2005, Exhibit B at 2. Indeed, Dr. Feldstein offered that "Chiari malformation" was the "single" explanation that "tied" the constellation of Petitioner's symptoms "together." *Id.* Dr. Feldstein planned "an MRI scan of the entire spinal cord," in part "to reassess the anatomy in the posterior fossa." *Id.* Dr. Feldstein was "confident" that Petitioner "would benefit from" surgical intervention, specifically a "suboccipital decompression." *Id.*

On May 10, 2005, Petitioner underwent an MRI of his "brain" and of his "cervical/thoracic/lumbar spine." Notice of Filing Documents, filed December 29, 2005, at 3-4. In addition, Petitioner underwent "a cerebral spinal [sic] fluid flow study." *Id.* According to the physician who interpreted the MRI, the "[f]indings" were "consistent with Chiari I malformation."

---

[13] A Chiari Malformation or deformity is "a congenital anomaly in which the cerebellum and medulla oblongata, which is elongated and flattened, protrude down into the spinal canal through the foramen magnum." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 438 (27th ed. 1988).

Id. The physician stated that the "cerebrospinal fluid flow study" showed "less flow" possibly "below the foramen magnum compared to above the foramen magnum." *Id.*

Petitioner entered Columbia Presbyterian Medical Center on May 16, 2005, for "elective suboccipital decompression." Pet. ex. at 368. Dr. Feldstein performed the surgery. *See* Notice of Filing, filed August 3, 2005, Exhibit A. Throughout the operation, Dr. Feldstein employed "B[rain stem]A[uditory]E[voked]R[esponse] and S[omato]S[ensory]E[voked]P[otential] monitoring." Pet. ex. at 392. Dr. Feldstein noted that the "monitorings" improved, "primarily during the suboccipital bony decompression." In addition, Dr. Feldstein noted "improvement in pulsation of the cerebellum and upper cervical canal." Pet. ex. at 393. Dr. Feldstein completed surgery without "complications." Pet. ex. at 368.

Following surgery, Petitioner transferred to the pediatric intensive care unit "for post-op management." Pet. ex. at 368. In recording Petitioner's medical history, the pediatric resident indicated that Petitioner's "first medical problem" occurred "when he turned blue, became limp and started drooling after his first immunizations." *Id.* The pediatric resident listed many other maladies, including developmental "delay" and "chronic vertical nystagmus." *Id.* Except for pain, Petitioner was stable during his hospital course. *See generally* Pet. ex. at 368-377. Petitioner remained in the hospital until May 18, 2005. *See* Pet. ex. at 377.

Petitioner presented to Dr. Feldstein on June 7, 2005, for a "first post-op check." Notice of Filing, filed December 29, 2005, at 5. Petitioner's father did not report apparently any "specific post-operative problems." *Id.* Dr. Feldstein concluded that although Petitioner experienced still "some minor pain and irritability," he was "healing nicely." *Id.* Dr. Feldstein planned to "liberalize" Petitioner's "activities, both for sports and for travel." *Id.*

On June 29, 2005, Petitioner presented to the North Shore University Hospital Division of General Pediatrics for evaluation of stomach "pain." Notice of Filing Documents, filed July 11, 2006, Exhibit A at 91. The physician commented that Petitioner "had surg[ery]" on May 16, 2005, "for Chiari." *Id.* The physician described Petitioner's general neurological examination following surgery as "much improved" in "balance, speech [and] fine motor skills." *Id.*

On September 13, 2005, a physician from the North Shore University Hospital Division of General Pediatrics evaluated Petitioner during a "Health Maintenance Visit." Notice of Filing Documents, filed July 11, 2006, Exhibit A at 93. Petitioner was six years old. *See id.* He was in the first grade. *Id.* Again, the physician described Petitioner's neurological condition following surgery as "much improved," especially in "balance" and "fine motor" development. *Id.* Although the physician acknowledged that Petitioner received "special ed[ucation]" services in a "contained class" at school, the physician stated that Petitioner had "improved" also in "cognitive issues." *Id.* Nevertheless, the physician observed that Petitioner was "hyper-impulsive." *Id.* The physician contemplated an "eval[uation] for A[ttention]D[eficit](H)[yperactivity]D[isorder]. *Id.* at 94.

A March 29, 2006 Individualized Education Program (IEP) review classified Petitioner with "[m]ultiple [d]isabilities," necessitating "special education" involving several services, including "an extended school year." Notice of Filing Documents, filed January 5, 2007, Individual Education Plan at 1.

DISCUSSION

Petitioner may pursue two distinct legal theories. One legal theory, referred to commonly as a Table claim, confers a presumption of causation in certain circumstances. *See* §§ 300aa-11(c)(1)(A)-(C)(i) & (D)(i); 300aa-13(a)(1)(A). The other legal theory is based upon the legal principles for actual causation that apply in traditional tort litigation. *See, e.g.*, § 300aa-11(c)(1)(C)(ii)(I); *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Petitioner's Table Claim

The Act contains the Vaccine Injury Table (Table) that lists vaccines covered by the Act and certain injuries and conditions that may stem from the vaccines. *See* 42 C.F.R. § 100.3(a); *see also* § 300aa-14. If the special master finds by a preponderance of the evidence that Petitioner received a vaccine listed in the Table, and suffered the onset of an injury listed in the Table, within the time period provided by the Table, then Petitioner is entitled to a presumption that the vaccine caused Petitioner's injury. *See* §§ 300aa-11(c)(1)(A)-(C)(i) & (D)(i); 300aa-13(a)(1)(A).[14] Respondent may rebut the presumption of causation with a preponderance of the evidence that the injury or condition was "due to factors unrelated to the administration of" the vaccine. § 300aa-13(a)(1)(B); *see also Knudsen v. Secretary of HHS*, 35 F.3d 543 (Fed. Cir. 1994).

Petitioner asserts specifically that following the July 20, 1999 administration of a vaccine–*DTaP*–included in the Table, 42 C.F.R. §100.3(a)(II), Petitioner sustained the first symptom or manifestation of onset of an injury–*encephalopathy*–listed in the Table for DTaP, 42 C.F.R. § 100.3(a)(II)(B), within the period–*72 hours*–contained in the Table for DTaP, *id.*, and that his current condition represents the acute complication, sequela or pathological consequence of the encephalopathy, 42 C.F.R. § 100.3(a)(II)(C). *See* Tr. at 4-6. A regulatory definition of encephalopathy contained in the qualifications and aids to interpretation (QAI) that apply to the Table governs Petitioner's Table claim. *See* 42 C.F.R. § 100.3(b)(2). According to the QAI, "a vaccine recipient shall be considered to have suffered an encephalopathy only if such recipient

---

[14] The preponderance of the evidence standard requires the special master to believe that the existence of a fact is more likely than not. *See, e.g.*, *Thornton v. Secretary of HHS,* 35 Fed. Cl. 432, 440 (1996); *see also In re Winship,* 397 U.S. 358, 372-73 (1970) (Harlan, J., concurring), *quoting* F. James, CIVIL PROCEDURE 250-51 (1965). Mere conjecture or speculation will not meet the preponderance of the evidence standard. *Snowbank Enter. v. United States,* 6 Cl. Ct. 476, 486 (1984); *Centmehaiey v. Secretary of HHS*, 32 Fed. Cl. 612 (1995), *aff'd*, 73 F.3d 381 (Fed. Cir. 1995).

manifests, within the applicable period, an injury meeting the description [in 42 C.F.R. § 100.3(b)(2)(i)] of an acute encephalopathy, and then a chronic encephalopathy persists in such person for more than 6 months beyond the date of vaccination." 42 C.F.R. § 100.3(b)(2). "An acute encephalopathy is one that is sufficiently severe so as to require hospitalization (whether or not hospitalization occurred)." 42 C.F.R. § 100.3(b)(2)(i). In a child who is less than 18 months old at the time of vaccination, "an acute encephalopathy is indicated by a significantly decreased level of consciousness lasting for at least 24 hours." 42 C.F.R. § 100.3(b)(2)(i)(A). "A 'significantly decreased level of consciousness' is indicated by the presence of . . . (1) Decreased or absent response to environment (responds, if at all, only to loud voice or painful stimuli); (2) Decreased or absent eye contact (does not fix gaze upon family members or other individuals); or (3) Inconsistent or absent responses to external stimuli (does not recognize familiar people or things)." 42 C.F.R. § 100.3(b)(2)(i)(D). Clinical symptoms such as "[s]leepiness, irritability (fussiness), high-pitched and unusual screaming, persistent inconsolable crying, and bulging fontanelle" either "alone, or in combination, do not demonstrate acute encephalopathy." 42 C.F.R. § 100.3(b)(2)(i)(E).

While the Table relaxes Petitioner's "proof of causation for injuries satisfying the Table," *Grant v. Secretary of HHS*, 956 F.2d 1144, 1148 (Fed. Cir. 1992), Petitioner's Table claim may involve nonetheless a variety of factual, medical and legal issues. For instance, as the United States Court of Federal Claims counseled in *Abbott v. Secretary of HHS*, 27 Fed. Cl. 792 (1993), "Congress intended [the Act] to be understood–and to be applied–as it would be by a medical professional." *Id.* at 794. Thus, Congress prohibited special masters from awarding compensation "based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." § 300aa-13(a). Numerous cases construe § 300aa-13(a). The cases hold uniformly that if an injured person's medical records do not disclose a *diagnosis* that the injured person's symptoms constitute a Table injury, then the petitioner must submit a medical expert's opinion interpreting the injured person's symptoms as a Table injury. *See, e.g.*, *Shaw v. Secretary of HHS*, 18 Cl. Ct. 646, 650 (1989); *Bernard v. Secretary of HHS*, No. 91-1301V, 1992 WL 101097, *1 (Cl. Ct. Spec. Mstr. Apr. 24, 1992); *Dickerson v. Secretary of HHS*, 35 Fed. Cl. 593, 599 (1996). The cases reason that "special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone." *Raley v. Secretary of HHS*, No. 91-0732V, 1998 WL 681467, *9 (Fed. Cl. Spec. Mstr. Aug. 31, 1998).

No one can dispute reasonably that Petitioner received emergent medical attention at North Shore University Hospital within hours after his July 20, 1999 DTaP vaccination. *See* Pet. ex. at 34A-34D. Yet, no one can dispute reasonably that Petitioner's treating physicians at North Shore University Hospital did not conclude that Petitioner exhibited an acute encephalopathy. *See* Pet. ex. 34A-34D. Likewise, no one can dispute reasonably that Petitioner's symptoms, as reflected in Petitioner's medical records from July 20, 1999, do not constitute an acute encephalopathy under the regulatory definition of encephalopathy contained in the QAI that apply to the Table governs Petitioner's Table claim. *See* 42 C.F.R. § 100.3(b)(2). Indeed, Dr. Spitz proclaimed that Petitioner's medical records are "not accurate enough" for him to address the presence of an acute encephalopathy during the three days following Petitioner's July 20, 1999 DTaP vaccination. Tr. at 232-33; *see also* Tr. at 230 (Petitioner's medical records do not "ever reflect the true picture of" Petitioner); 234 (Dr. Spitz "would

not pin [his] faith" on information contained in Petitioner's medical records); 239 (information contained in Petitioner's medical records places Dr. Spitz "at odds" with information he obtained from Petitioner's father, leading Dr. Spitz to deem Petitioner's medical records to be unreliable). Thus, at the outset, the special master must assess the evidentiary value of notations in Petitioner's medical records regarding Petitioner's symptoms on July 20, 1999, and the evidentiary value of the fact witnesses' recollections of Petitioner's symptoms on July 20, 1999, and later.

Petitioner's father recounted that he was "at home" when Petitioner's mother and Petitioner returned from Petitioner's July 20, 1999 examination at the North Shore University Hospital Division of General Pediatrics. Tr. at 76. According to Petitioner's father, Petitioner's mother was "very pale" and "very upset." *Id.* Petitioner's father claimed that Petitioner's mother told him that Petitioner "didn't react well to" his vaccinations. *Id.* Petitioner's father said that Petitioner's mother explained that Petitioner "was behaving differently." Tr. at 77. Petitioner's father related that Petitioner's mother described Petitioner as "listless." *Id.* In addition, Petitioner's father related that Petitioner's mother reported that Petitioner "was not making eye contact with her." *Id.* Petitioner's father stated that he was "concerned" enough about Petitioner's condition to consider cancelling a business dinner scheduled for July 20, 1999. Tr. at 77. However, Petitioner's father indicated that Petitioner's mother encouraged him to attend the business dinner. *See id.*

Petitioner's father testified that while he was at his business dinner, Petitioner's mother telephoned, imploring him "to get home right away" because "something [was] seriously wrong" with Petitioner. Tr. at 77. Petitioner's father estimated that he arrived home "only a couple of minutes" after Petitioner's mother's telephone call. *Id.* Petitioner's father remembered that when he entered his residence, Petitioner's mother was holding Petitioner. Tr. at 78. Petitioner's father offered that two family friends, [name redacted] and the neighbor, were in the house also. *See* Tr. at 77-78. Petitioner's father said that to him, Petitioner's condition "looked life-threatening." Tr. at 79; *see also* Tr. at 81 (Petitioner appeared "like he was on death's doorstep."). Petitioner's father elaborated that Petitioner's "head was tilted forward to the side;" Petitioner's eyes were crossed; Petitioner's "mouth was open;" Petitioner "was drooling;" and Petitioner "was blue, very, very ashed [sic], almost a green color." Tr. at 78; *see also* Tr. at 139. Petitioner's father asserted that Petitioner's mother informed him that Petitioner's condition had persisted "for a good 45 minutes." Tr. at 78. Petitioner's father maintained that although the neighbor was exhorting him and Petitioner's mother to "get [Petitioner] to the hospital" quickly, he tested Petitioner for a "pulse" and for a "heartbeat." Tr. at 78-79. Petitioner's father recounted that after he detected Petitioner's "pulse" and Petitioner's "heartbeat," he and Petitioner's mother departed "immediately" for the hospital. Tr. at 79.

According to Petitioner's father, "some" of Petitioner's "color" had returned by the time he and Petitioner's mother entered the emergency room with Petitioner. Tr. at 79. But, Petitioner's father recalled, Petitioner had developed a "fever." Tr. at 84. Petitioner's father related that medical personnel questioned him and Petitioner's mother about Petitioner's symptoms. *See* Tr. at 80. And, Petitioner's father related, medical personnel observed Petitioner for an "hour or so." Tr. at 81. Petitioner's father maintained that while Petitioner's "color" continued to improve in the emergency room, Petitioner "still was not responsive." *Id.* In addition, Petitioner's father maintained that Petitioner's eyes remained crossed. *See id.* Thus, Petitioner's father insisted that he challenged a doctor's decision to discharge Petitioner from the emergency room on July 20, 1999. *See* Tr. at 81; *see also* Tr. at 138-39. Nevertheless, Petitioner's father indicated that he acquiesced to the

doctor's decision based upon the doctor's assurances that the doctor "would admit" Petitioner to the hospital if Petitioner's symptoms recurred. Tr. at 83; *see also* Tr. at 138-39.

Petitioner's father knew that on July 21, 1999, Petitioner's mother "spoke to the doctor," either by telephone or in the doctor's office, about Petitioner's condition. Tr. at 84-86; *see also* Tr. at 137-38. Petitioner's father understood that the doctor suggested to Petitioner's mother that Petitioner "was coming down with something," such as a "cold." Tr. at 86-87. As a consequence, Petitioner's father said, he and Petitioner's mother just continued "monitoring" Petitioner, as the doctor had recommended. Tr. at 85. Petitioner's father characterized Petitioner as "lifeless," or "almost like a vegetable," for "three to five days" following his July 20, 1999 vaccinations. Tr. at 86-88; *see also* Tr. at 84 (Petitioner "was not the same kid" on July 21, 1999.); 96 (Petitioner seemed different "after the shot."); 102 (Petitioner "was limp" after he returned home on July 20, 1999.); 117 (Petitioner "was jelly" or "mush" on July 21, 1999.). Petitioner's father remarked that Petitioner "didn't make eye contact;" did not respond to attempts at play; could not hold his head upright; could not roll; and could not "swallow" the contents of a bottle normally. Tr. at 87-89.

Petitioner's father indicated that some aspects of Petitioner's condition seemed to improve within one week after Petitioner's July 20, 1999 vaccinations. *See* Tr. at 88-89. But, then, Petitioner's father asserted, Petitioner "became very agitated," exhibiting "wailing at night" and experiencing disrupted sleep. Tr. at 106-107. In addition, Petitioner's father asserted, "Petitioner was constantly sick after" his July 20, 1999 vaccinations. Tr. at 90-91; *see also* Tr. at 123 ("[F]rom the date of the shot forward," Petitioner required medical care "every other week or every week."). Petitioner's father declared that he and Petitioner's mother "absolutely" informed fully Petitioner's various treating physicians about Petitioner's global condition after Petitioner's July 20, 1999 vaccinations. Tr. at 119; *see also* Tr. at 95 (Petitioner's physicians "knew that there was a hiatus" in Petitioner's development following Petitioner's July 20, 1999 vaccinations.); 122-23 (Petitioner's father and Petitioner's mother "would bring" Petitioner's condition "up" with Petitioner's physicians, even during evaluations for "new issues."); 126-28 (Petitioner's father and Petitioner's mother provided "a complete overview" of Petitioner's condition to Dr. Pavlakis and to Dr. Eviatar.); 133 (Petitioner's father and Petitioner's mother recounted Petitioner's medical "history" to Dr. Pavlakis and to Dr. Eviatar). However, Petitioner's father advanced, he, Petitioner's mother and Petitioner's treating physicians were often more focused on addressing Petitioner's acute illnesses than on considering Petitioner's myriad other symptoms. *See* Tr. at 90-91, 96, 120, 123.

The neighbor testified that she "bonded with [Petitioner] very readily" after Petitioner's birth. Tr. at 12; *see also* Tr. at 14. So, the neighbor stated, the "trauma" involving Petitioner that she observed on July 20, 1999, is "frozen in [her] memory." Tr. at 17. The neighbor recounted that Petitioner's mother telephoned in "the evening" on July 20, 1999, Tr. at 36, asking the neighbor "to look at" Petitioner. Tr. at 17. The neighbor related that when she entered the parents' house, she knew that "there was something wrong with" Petitioner. Tr. at 19; *see also* Tr. at 36. According to the neighbor, Petitioner was "bluish" and "drooling." Tr. at 18-19; *see also* Tr. at 21. The neighbor remembered that Petitioner's "head was leaning off to the side" as [a friend] held Petitioner "in her arms." Tr. at 18; *see also* Tr. at 35 (The neighbor identifying the person whom she mentioned in previous testimony as "Angela"). In addition, the neighbor remembered that although Petitioner's "eyes were opened," Petitioner "wasn't

making any eye contact" because his pupils "were rolled back." Tr. at 19; *see also* Tr. at 18. The neighbor believed that Petitioner's condition was "urgent." Tr. at 20. Thus, the neighbor offered, she advised Petitioner's mother to "[c]all the doctor." Tr. at 19-20. The neighbor recalled that once Petitioner's father arrived home, the parents "raced out the door" with Petitioner to the emergency room. Tr. at 20.

The neighbor remarked that she was "surprised" to learn on July 21, 1999, that physicians in the emergency room "didn't keep" Petitioner in the hospital "overnight." Tr. at 21. Indeed, the neighbor asserted, Petitioner appeared to be "a different baby" when she saw him on July 21, 1999. Tr. at 22; *see also* Tr. at 24 ("Something" about Petitioner "changed" after July 20, 1999.). The neighbor commented that Petitioner "didn't look healthy." Tr. at 22. The neighbor commented also that Petitioner's "personality was gone." Tr. at 26. The neighbor explained that Petitioner was "lethargic," with his eyes "off to the side," failing to respond to her as if "he didn't know [her] anymore." Tr. at 22-23. The neighbor added that she "wasn't even sure" that Petitioner was able to hear. Tr. at 22; *see also* Tr. at 36-37 (The neighbor "thought [Petitioner] had a hearing loss.").

The neighbor described Petitioner as "[c]onstantly" ill after July 20, 1999. Tr. at 23-24. In addition, the neighbor maintained that Petitioner became "cranky" or "crabby" in August 1999. Tr. at 37-38. Finally, the neighbor said, Petitioner eventually "seemed to be slow," unable to do "the same things" that her child "had done." Tr. at 24-25; *see also* Tr. at 28. The neighbor emphasized that Petitioner "still needs a lot of help." Tr. at 28.

Petitioner's grandmother stated that she saw Petitioner on July 19, 1999, "the day before" his July 20, 1999 vaccinations. Tr. at 45-46; *see also* Tr. at 66. Then, Petitioner's grandmother recalled that on July 20, 1999, she received a telephone call from Petitioner's mother regarding Petitioner's condition. *See* Tr. at 45-46. Petitioner's grandmother related that Petitioner's mother informed her that Petitioner's parents were "rushing" Petitioner to the hospital because he was "just absolutely immobile" and "drooling." Tr. at 46; *see also* Tr. at 65, 67-68. Petitioner's grandmother offered that after hearing Petitioner's mother's description of Petitioner's symptoms, she "thought" that Petitioner had suffered "a convulsion." Tr. at 68. Thus, Petitioner's grandmother declared that she was "shocked" that Petitioner did not remain in the hospital for at least the night. Tr. at 46; *see also* Tr. at 66, 68.

Petitioner's grandmother stated that she saw Petitioner again during the "early afternoon" on July 21, 1999. Tr. at 46. Petitioner's grandmother claimed that Petitioner was "completely different." Tr. at 66; *see also* Tr. at 46-47 (Petitioner had "changed."); 61-62 ("[T]here was a change in" Petitioner.). According to Petitioner's grandmother, Petitioner was "still" and "flat," showing "no reaction" or emotion to her efforts to engage him. Tr. at 46-48; *see also* Tr. at 59-60 (Petitioner was "not moving around at all" and was not "acknowledging" Petitioner's grandmother on July 21, 1999.); 62 (Petitioner was "not responding to" Petitioner's grandmother."). Indeed, Petitioner's grandmother insisted that "anyone" observing Petitioner on July 21, 1999, "would have to [have] know[n] that there [was] something drastically wrong with" him. Tr. at 60.

Petitioner's grandmother commented that on July 21, 1999, Petitioner began to "almost choke on his formula" during meals. Tr. at 48; *see also* Tr. at 54-55, 58-60. In addition, Petitioner's grandmother commented that at some point, Petitioner became "very uncomfortable," exhibiting "a moan" that interfered with his

ability to "rest." Tr. at 49; *see also* Tr. at 47, 52. Likewise, Petitioner's grandmother commented that at some point, Petitioner appeared to lose "muscle tone," affecting his "balance." Tr. at 56-57; *see also* Tr. at 60. Petitioner's grandmother maintained that some of Petitioner's symptoms lasted "weeks" and some of Petitioner's symptoms have continued "to this very day." Tr. at 48-49; *see also* Tr. at 55.

Petitioner's grandmother said that Petitioner "was sick a lot" after July 1999. Tr. at 53. And, Petitioner's grandmother testified, she accompanied Petitioner's mother and Petitioner to "many" of Petitioner's medical evaluations after July 1999. Tr. at 61-64; *see also* Tr. at 50-53. Describing herself as a "buttinsky," Tr. at 61, Petitioner's grandmother insisted that she did not hesitate to discuss Petitioner's "weird behavior" with Petitioner's physicians. Tr. at 51; *see also* Tr. at 61-63, 65. Indeed, Petitioner's grandmother asserted, at least one of Petitioner's pediatricians "saw the difference" between Petitioner's condition before July 20, 1999, and Petitioner's condition after July 20, 1999. Tr. at 62. Yet, Petitioner's grandmother offered, Petitioner's physicians often could not "definitely define" Petitioner's condition or explain "what happened" to Petitioner. Tr. at 51-52.

The United States Court of Appeals for the Federal Circuit (Federal Circuit) counsels that "[m]edical records, in general, warrant consideration as trustworthy evidence." *Cucuras v. Secretary of HHS*, 993 F.2d 1525, 1528 (1993). The Federal Circuit explains that "generally contemporaneous" medical records "contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions." *Id.* Thus, the Federal Circuit recognizes that "[w]ith proper treatment hanging in the balance, accuracy has an extra premium." *Id.* Moreover, the Federal Circuit counsels that "oral testimony in conflict with contemporaneous documentary evidence deserves little weight." *Id.*, citing *United States Gypsum Co.*, 333 U.S. 364, 396 (1947). However, the contemporaneous medical record rule "should not be applied blindly." *Murphy v. Secretary of HHS*, No. 90-0882V, 1991 WL 74931, at *4 (Cl. Ct. Spec. Mstr. Apr. 25, 1991); *aff'd,* 23 Cl. Ct. 726 (1991); *aff'd per curium* 968 F.2d 1226 (Fed. Cir. 1992); *cert. denied* 113 S.Ct. 463 (1992). The special master in *Murphy* reasoned:

> Written records which are, themselves, inconsistent, should be accorded less deference than those which are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the 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.

Id. (citation omitted).

Petitioner's father urges that Petitioner's medical records as a whole depict inadequately Petitioner's symptoms on July 20, 1999, as well as the subsequent evolution of Petitioner's condition. *See, e.g.*, Tr. at 93 (Petitioner's father stating that "a lot of what" he and Petitioner's mother told Petitioner's physicians "didn't

make the record"). Thus, Petitioner's father wishes the special master to believe that Petitioner's symptoms on July 20, 1999, were far more drastic than the symptoms reflected in the July 20, 1999 notes from the North Shore University Hospital Emergency Department. Likewise, Petitioner's father wishes the special master to believe that many of Petitioner's symptoms persisted approximately seven days–and, perhaps, even longer–after July 20, 1999. Finally, Petitioner's father wishes the special master to believe that a multitude of Petitioner's physicians neglected to include in their treatment summaries, evaluation reports and consultation correspondence important aspects of Petitioner's medical history that the parents provided.

The special master observed carefully Petitioner's father, the neighbor and Petitioner's grandmother during direct examination and cross-examination. The special master interrogated intently Petitioner's father, the neighbor and Petitioner's grandmother. The special master assessed critically each witness's demeanor and credibility. The special master has evaluated thoroughly his impressions of the testimony. The special master determines that crucial portions of the testimony are not persuasive.

The special master does not doubt that Petitioner's father, Petitioner's mother and the neighbor were alarmed by Petitioner's physical appearance during the evening on July 20, 1999. Indeed, like any prudent parents who believe that they are witnessing their child experience a medical crisis, the parents sought expeditiously medical care for Petitioner at the North Shore University Hospital Emergency Department. *See* Pet. ex. 34A-34D. Yet, there exist several marked discrepancies between Petitioner's father's and the neighbor's descriptions at hearing regarding the duration of, and the quality of, Petitioner's symptoms on July 20, 1999, and details of Petitioner's symptoms in the contemporaneous record from the North Shore University Hospital Emergency Department. For instance, Petitioner's father suggested that facets of Petitioner's condition occurred almost abruptly upon vaccination, *see, e.g.*, Tr. at 76-77, and that Petitioner's episode during the evening on July 20, 1999, that prompted medical attention had begun "a good 45 minutes" before Petitioner's father arrived home from a business function. Tr. at 78. However, medical personnel in the North Shore University Hospital Emergency Department indicated that the parents reported that Petitioner's episode had lasted just "15 min[utes]" before "[r]esolving on [its] own" prior to Petitioner's arrival at the hospital. Pet. ex. at 34A. Likewise, Petitioner's father and the neighbor insisted that Petitioner was "blue" during his episode. Tr. at 21, 78. However, medical personnel in the North Shore University Hospital Emergency Department indicated that the parents reported that Petitioner did not experience "cyanosis" with his episode. Pet. ex. at 34B; *see also* Pet. ex. at 34A (Petitioner was "pink" during his episode.). Further, Petitioner's father and the neighbor asserted that Petitioner was not responsive during his episode. *See, e.g.*, Tr. at 18-19, 78-79, 81, 139. However, medical personnel in the North Shore University Hospital Emergency Department indicated that while the parents characterized Petitioner's behavior as "unusual," Pet. ex. at 34A, or "strange," Pet. ex. at 34B, they reported that Petitioner "remained alert" during his episode. Pet. ex. at 34A; *see also* Pet. ex. at 34B.

According to the Federal Circuit, "Congress assigned to a group of specialists, the Special Masters within the Court of Federal Claims, the unenviable job of sorting through these painful cases, and based upon their accumulated expertise in the field, judging the merits of the individual claims." *Hodges v. Secretary of HHS*, 9 F.3d 958, 961 (Fed. Cir. 1993). In his long tenure as a

special master, the special master has heard many treating physicians and exceedingly well-credentialed experts testify for petitioners and respondent alike that even a minimally competent doctor could not mistake clinical manifestations of an acute encephalopathy. On July 20, 1999, at least three different people trained ostensibly in emergency medicine–a triage nurse, a resident physician and an attending physician–obtained Petitioner's medical history from the parents *and* conducted a physical examination of Petitioner in the North Shore University Hospital Emergency Department. *See* Pet. ex. 34A-34D. The resident physician and the attending physician did not direct any type of medical intervention. *See* Pet. ex. 34A-34D. Moreover, the resident physician and the attending physician released Petitioner from the North Shore University Hospital Emergency Department after less than one-and-one-half hours of simple observation, *see* Pet. ex. 34A-34D, recommending only "Tylenol as needed for fever." Pet. ex. 34D. The special master may draw certainly from the physicians' actions solid inferences about the likely seriousness of Petitioner's condition on July 20, 1999. *See, e.g.*, *Cucuras*, 993 F.2d 1525. After all, "[a]n acute encephalopathy is one that is sufficiently severe so as to require hospitalization (whether or not hospitalization occurred)." 42 C.F.R. § 100.3(b)(2)(i) (2002). Thus, for the special master to credit Petitioner's father's and the neighbor's accounts at hearing that Petitioner exhibited a constellation of symptoms consistent with an acute encephalopathy on July 20, 1999, the special master must accept essentially that the triage nurse, the resident physician and the attending physician failed wholly to recognize the gravity of Petitioner's condition on July 20, 1999. The special master does not accept that the triage nurse, the resident physician and the attending physician were wrong in their evaluation of Petitioner on July 20, 1999.

Petitioner's medical records from late July 1999 reveal little about Petitioner's condition following Petitioner's July 20, 1999 episode. On July 21, 1999, Petitioner's mother spoke to a physician about Petitioner's "fever." Pet. ex. at 35. The physician advised Petitioner's mother to seek additional medical care for Petitioner on July 22, 1999, if the fever persisted. *See id.* Petitioner's fever must have resolved by July 22, 1999, because Petitioner's medical records do not reflect that Petitioner's mother sought additional medical care for Petitioner on July 22, 1999. Then, on July 28, 1999, a physician from the North Shore University Hospital Division of General Pediatrics assessed Petitioner for "crusty" eyes. Pet. ex. at 48. In the physician's view, a slight "yell[ow] d[is]c[harge]" in Petitioner's eyes represented either a "duct obst[ruction]" or "conjunctivitis." *Id.* Neither the July 21, 1999 medical record nor the July 28, 1999 medical record suggests that Petitioner's mother expressed to the physician any concern that Petitioner had suffered a dramatic physical change after his July 20, 1999 episode. *See* Pet. ex. at 35, 48. Indeed, on July 28, 1999, the physician commented specifically that Petitioner was "alert" and "awake." Pet. ex. at 48. Nevertheless, Petitioner's father, the neighbor and Petitioner's grandmother insisted that Petitioner was an entirely different child beginning on July 21, 1999, *see, e.g.*, Tr. at 22, 24, 26, 46-47, 60-62, 66, 84, 86-88, 96, 102, 117, using bold adjectives like "lethargic," Tr. at 22, and "still" or immobile, Tr. at 47, and "lifeless," Tr. at 86, to portray Petitioner's appearance during the week following Petitioner's July 20, 1999 episode.

At a glance, the special master must judge seemingly in a vacuum the accuracy of Petitioner's medical records from late July 1999 versus the accuracy of the fact witnesses' recollections regarding Petitioner's condition in late July 1999. Yet, in their testimony, Petitioner's father and Petitioner's grandmother provided

important clues about Petitioner's mother's character that aid the special master in resolving the dichotomy between Petitioner's medical records from late July 1999 and the fact witnesses' recollections regarding Petitioner's condition in late July 1999. Petitioner's father and Petitioner's grandmother indicated that Petitioner's mother was a conscientious mother who addressed quickly and assertively Petitioner's medical issues. *See, e.g.*, Tr. at 67 (Petitioner's grandmother stating that Petitioner's mother "just didn't sit back and just say, you know, well, now they sent me home and [Petitioner]'s fine"); 103 (Petitioner's father stating that Petitioner's mother "immediately got on top of" Petitioner's health care). In fact, the record shows that on July 20, 1999, Petitioner's mother pursued promptly medical attention for Petitioner when he exhibited "unusual" or "strange" behavior within hours after vaccination. Pet. ex. 34A-34D. Thus, the special master finds as incongruous the proposition that is inherent in his attempt to reconcile Petitioner's medical records from late July 1999 with the fact witnesses' recollections regarding Petitioner's condition in late July 1999: Even though Petitioner was supposedly "almost like a vegetable" for days to a week following his July 20, 1999 episode, Tr. at 88, Petitioner's mother did not seek actively additional medical assistance regarding Petitioner's "lifeless" condition, Tr. at 87, either through Petitioner's treating pediatricians or through alternate facilities. The incongruity compels the special master to conclude that the fact witnesses' recollections regarding Petitioner's condition in late July 1999 are not reliable.

Petitioner's medical records spanning years after July 1999 confirm clearly that the parents reviewed Petitioner's July 20, 1999 episode with a number of Petitioner's providers. For instance, in March 2000, Petitioner's mother told therapists associated with the Louise Oberkotter Early Childhood Center about Petitioner's "reaction to the Pertussis, in a DPT injection." Pet. ex. at 220. According to the therapists, Petitioner's mother related that Petitioner "'went limp'" and his "'eyes crossed.'" *Id.* (internal quotation marks reflect quoted material in original). Likewise, in 2001, the parents told Dr. Eviatar that Petitioner exhibited eye-crossing, "unresponsiveness and limpness" lasting "about 15 minutes" after a vaccination. Pet. ex. at 134. The details in the history that Petitioner's mother provided to the therapists associated with the Louise Oberkotter Early Childhood Center in 2000 and in the history that the parents provided to Dr. Eviatar in 2001 are remarkably similar to the details of Petitioner's July 20, 1999 episode contained in the contemporaneous record from the North Shore University Hospital Emergency Department. *See* Pet. ex. 34A-34D. After he filed his Program petition, Petitioner's father varied only slightly his accounts of Petitioner's July 20, 1999 episode. In April 2005, Petitioner's father told Dr. Feldstein that Petitioner experienced "an adverse reaction" to "a series of immunizations." Notice of Filing, filed August 3, 2005, Exhibit B at 1. According to Dr. Feldstein, Petitioner's father related that Petitioner turned "blue;" became "limp;" and displayed "drooling with his eyes crossed." *Id.* Following Petitioner's May 2005 surgery, Petitioner's father reported to a pediatric resident that Petitioner "turned blue, became limp and started drooling after his first immunizations." Pet. ex. at 368. The relative consistency between the histories of Petitioner's condition in July 1999 that the parents provided to Petitioner's physicians over the years, and the notable absence of references in the medical records to the dire symptoms that the fact witnesses said that Petitioner exhibited in the days to week after his July 20, 1999 episode, lead the special master to discount heavily the evidentiary value of the fact witnesses' testimony regarding Petitioner's condition in the week after Petitioner's July 20, 1999 episode.

Dr. Spitz offered readily that he "did not examine" Petitioner on July 20, 1999. Tr. at 233; *see also* Tr. at 232, 234. As a consequence, Dr. Spitz stated, he formulated an opinion in the case based upon his review of "everything," Tr. at 230, including Petitioner's medical records, *see* Tr. at 210, 244-45; "conversations with" Petitioner's father, Tr. at 230; *see also* Tr. at 210, 240; and an evaluation that he conducted in 2004. *See* Tr. at 219-20, 227. Although Dr. Spitz asserted that one "can't separate" the "set of facts" contained in Petitioner's medical records from "another set of facts" provided by the fact witnesses, Tr. at 234; *see also* Tr. at 231, Dr. Spitz acknowledged that he attributed little weight to Petitioner's medical records. *See* Tr. at 245; *see also* Tr. at 237 (Dr. Spitz "would much rather take the father's word" than rely upon a resident's contemporaneous note); 240 (either Petitioner's medical records "are not accurate" or Petitioner's father was not truthful); 250 (histories that "[m]others" give "are much more dependable than" histories that "the physician" transcribes). Thus, Dr. Spitz declared that the "whole description" of Petitioner's symptoms contained in the July 20, 1999 record from the North Shore University Hospital Emergency Department "doesn't make sense because" Petitioner's father and others "reported" just "the opposite." Tr. at 234. Therefore, based upon testimony that "immediately following the inoculation," Petitioner experienced "a profound change" reflecting "neurologic difficulty," Tr. at 210-11, Dr. Spitz opined that Petitioner sustained an acute encephalopathy as defined by the QAI that apply to the Table governing Petitioner's Table claim within 72 hours after his July 20, 1999 DTaP vaccination. *See generally* Tr. at 210-56. In addition, Dr. Spitz opined that Petitioner's "neurologic difficulty" continued at least through 2004. *See, e.g.*, Tr. at 211, 220-21.

Dr. Spitz's opinion does not assist the special master. Dr. Spitz grounds his opinion that Petitioner exhibited an acute encephalopathy within 72 hours after his July 20, 1999 DTaP vaccination solely upon the fact witnesses' current recollections of Petitioner's condition on July 20, 1999, and in the days to week after Petitioner's July 20, 1999 episode. *See, e.g.*, Tr. at 240, 245. Yet, in balancing exhaustively Petitioner's medical records against the fact witnesses' hearing testimony, the special master has determined that the bulk of the fact witnesses' hearing testimony is not correct. Therefore, the special master concludes that Dr. Spitz lacks an appropriate factual basis for his opinion. *See, e.g.*, *Mobley v. Secretary of HHS*, 22 Cl.Ct. 423, 428-29 (1991)(expert's opinion "predicated upon" a petitioner's "inherently suspect" testimony is not entitled to "considerable value"). Moreover, in rejecting Petitioner's medical records–as he must to render his opinion, *see, e.g.*, Tr. at 236, citing Pet. ex. 34B (Dr. Spitz agreeing that attending physician's note characterizing Petitioner as "alert" in the emergency department on July 20, 1999, would not support a proposition that Petitioner was suffering a significantly decreased level of consciousness)–Dr. Spitz offends outright Federal Circuit precedent that respects medical records as "trustworthy evidence." *Cucuras*, 993 F.2d at 1528. The special master deems Dr. Spitz's sweeping criticism that medical professionals are frequently incapable of documenting accurately salient features of a patient's medical history to be particularly unavailing. *See, e.g.*, Tr. at 216, 230-31, 234, 236, 249.

The special master recognizes that in August 2001, slightly more that two years after Petitioner's July 20, 1999 episode, *see* Pet. ex. at 134-36, and again apparently in October 2004, *see* Notice of Filing Documents, filed October 31, 2005, Attachment 1, Dr. Eviatar suggested that Petitioner suffered an "autoimmune encephalitis known as encephalopathy" coinciding with his July 20, 1999 DTaP

vaccination. Pet. ex. at 136; *see also* Notice of Filing Documents, filed October 31, 2005, Attachment 1 (notation on a prescription pad that Petitioner's "intermittent vertical nystagmus" was "most likely secondary to post DPT encephalopathy"). However, Dr. Eviatar's conclusion does not aid Petitioner in the presentation of his Table claim. Nothing in Dr. Eviatar's records allows the special master to find that Dr. Eviatar applied the regulatory definition of encephalopathy, particularly the regulatory definition of acute encephalopathy. *See* 42 C.F.R. § 100.3(b)(2). Rather, Dr. Eviatar's records indicate that Dr. Eviatar understood that Petitioner's July 20, 1999 episode "lasted about 15 minutes." Pet. ex. at 134. In addition, Dr. Eviatar's records indicate that Dr. Eviatar understood that a medical "work-up was essentially unremarkable." *Id.*

Based upon the record as a whole, the special master holds that Petitioner has not established by the preponderance of the evidence his Table claim.

Petitioner's Actual Causation Claim

The Federal Circuit endorses the Restatement (Second) of Torts as a "uniform approach" to resolving actual causation issues in Program cases. *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1351 (Fed. Cir. 1999). Thus, to prevail, Petitioner must demonstrate by the preponderance of the evidence that (1) "but for" the administration of Petitioner's July 20, 1999 DTaP vaccination, Petitioner would not have been injured, and (2) Petitioner's July 20, 1999 DTaP vaccination was "a 'substantial factor' in bringing about" Petitioner's injury. *Id.* at 1352, citing Restatement (Second) of Torts § 431. The simple temporal relationship between a vaccination and an injury, and the absence of other obvious etiologies for the injury, are patently insufficient to prove actual causation. *See Grant*, 956 F.2d at 1148-50. Rather, long-standing, well-established Federal Circuit precedent instructs that Petitioner establishes a *prima facie* actual causation case by adducing "preponderant evidence" of: "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." *Althen v. Secretary of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005); *see also Capizzano v. Secretary of HHS*, 440 F.3d 1317 (Fed. Cir. 2006); *Knudsen*, 35 F.3d at 548, citing *Jay v. Secretary of HHS*, 998 F.2d 979, 984 (Fed. Cir. 1993); *Grant*, 956 F.2d at 1148. The "*prima facie* case" is "a party's production of enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor." BLACK'S LAW DICTIONARY 1228 (8th ed. 2004).

Petitioner must produce "[a] reliable medical or scientific explanation" supporting his medical theory. *Grant*, 956 F.2d at 1148; *see also Knudsen*, 35 F.3d at 548, citing *Jay v. Secretary of HHS*, 998 F.2d 979, 984 (Fed. Cir. 1993). "The analysis undergirding" the medical or scientific explanation must "fall within the range of accepted standards governing" medical or scientific research. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). Petitioner's medical or scientific explanation need not be "medically or scientifically certain." *Knudsen*, 35 F.3d at 549. But, Petitioner's medical or scientific explanation must be "logical" and "probable," given "the circumstances of the particular case." *Id.* at 548-49.

The special master's recitation of Petitioner's *prima facie* actual causation burden is, in a sense, academic. *Respondent concedes that Petitioner sustained a documented adverse reaction to his July 20, 1999 DTaP vaccination. See, e.g.*, Tr. at 266, 388, 405, 468-69. Nevertheless, respondent denies that Petitioner is entitled to Program compensation. Respondent maintains that Petitioner cannot establish that Petitioner's documented adverse reaction to vaccination is associated with any type of neurologic complications. *See, e.g.*, Tr. at 337, 389.

Dr. Wiznitzer offered that, considering the totality of the evidence, Petitioner's symptoms on July 20, 1999, represented most likely a hypotonic-hyporesponsive event (HHE). *See* Tr. at 287, 290, 337. According to Dr. Wiznitzer, HHE is an accepted medical entity that has "been described after vaccinations, specifically after DPT," Tr. at 288-89, comprised of "a change in tone, change in color" and a "limited" alteration in "consciousness" followed by "full recovery." Tr. at 287-88.[15] Dr. Wiznitzer stated that he has evaluated children who have experienced an HHE. *See* Tr. at 288. However, Dr. Wiznitzer remarked, he has never observed a child "during the spell" because HHE resolves so rapidly. *See id.* Although Dr. Wiznitzer testified that he recommends generally "some" testing for "management" of the child "in the future," Tr. at 288-89, he maintained that HHE does not result in subsequent neurologic complications. *See* Tr. at 288 ("full recovery"); 337. Dr. Wiznitzer commented that his medical impression of Petitioner's condition on July 20, 1999, is consonant with a treating physician's decision on September 14, 1999, to withhold further pertussis vaccinations based upon the physician's belief that Petitioner exhibited a "hypotonic-[illegible] episode" following his July 20, 1999 DTaP vaccination. *See* Tr. at 290, citing Pet. ex. at 52.

Dr. Spitz agreed that HHE "describes a child who is flaccid" and "who is not responsive on a temporary basis." Tr. at 251. However, Dr. Spitz said, he has "never" encountered an HHE that he "could verify." Tr. at 230. Moreover, Dr. Spitz asserted, he does not use the term HHE because he does not "believe" that HHE "exists." Tr. at 229-30. In Dr. Spitz's view, HHE is "not a real diagnosis." Tr. at 299. Rather, Dr. Spitz dismissed HHE as "a gimmick." *Id.* As a consequence, Dr. Spitz refused essentially to engage in a meaningful debate regarding the probability that Petitioner's current neurologic deficits are the complications of a vaccine-related HHE.

Again, the special master recognizes that in August 2001, *see* Pet. ex. at 134-36, and apparently in October 2004, *see* Notice of Filing Documents, filed October 31, 2005, Attachment 1, Dr. Eviatar suggested that Petitioner suffered an "autoimmune encephalitis known as encephalopathy" coinciding with his July 20, 1999 DTaP vaccination. Pet. ex. at 136; *see also*

---

[15] The special master notes that the initial Table included "shock-collapse or hypotonic-hyporesponsive collapse," or HHE, as an injury ascribed to any vaccine "containing whole cell pertussis bacteria, extracted or partial cell bacteria, or specific pertussis antigen" for which a petitioner could receive a presumption of causation. § 300aa-14(a)(1). Exercising express statutory authority, *see* § 300aa-14(c), the Secretary of the Department of Health and Human Services removed HHE in a revised Table that the Secretary promulgated in 1995. *See* Revision of the Vaccine Injury Table for the National Vaccine Injury Compensation Program, 60 Fed. Reg. 7678-96 (Feb. 8, 1995).

Notice of Filing Documents, filed October 31, 2005, Attachment 1 (notation on a prescription pad that Petitioner's "intermittent vertical nystagmus" was "most likely secondary to post DPT encephalopathy"). In *Capizzano*, the Federal Circuit proclaimed that "treating physicians are likely to be in the best position to determine whether "'a logical sequence of cause and effect show[s] that the vaccination was the reason for the injury.'" *Capizzano*, 440 F.3d at 1326, citing *Althen*, 418 F.3d at 1280, and § 300aa-13(a)(1). Thus, Dr. Eviatar's records support seemingly an actual causation theory. However, the Vaccine Act provides specifically that a treating physician's "diagnosis, conclusion, judgment, test result, report, or summary shall not be binding on the special master." § 300aa-13(b)(1). Therefore, Congress intended obviously special masters to plumb the reliability of statements in a petitioner's medical records, abrogating any common law or administrative "treating physician" rule–a principle according great deference to a treating physician's opinion. *See, e.g.*, BLACK'S LAW DICTIONARY 1507 (7th ed. 1999).

The special master has reviewed thoroughly Dr. Eviatar's records. The special master cannot discern in Dr. Eviatar's records a reliable "medical theory causally connecting" Petitioner's July 20, 1999 DTaP vaccination to Petitioner's global delays. Moreover, the special master is suspicious regarding the circumstances in October 2004 under which Dr. Eviatar wrote on her prescription pad her cursory conclusion linking Petitioner's "intermittent vertical nystagmus" to a "post DPT encephalopathy." Notice of Filing Documents, filed October 31, 2005, Attachment 1. Petitioner did not produce from Dr. Eviatar any evaluation records corresponding to the date listed on Dr. Eviatar's prescription pad note. In fact, Petitioner produced only one consultation record from Dr. Eviatar. *See* Pet. ex. at 134-36. The consultation record is dated August 2001–more than three years before the date listed on Dr. Eviatar's prescription pad note. *See id.*

After canvassing thoroughly the record, the special master finds that it is more likely than not that Petitioner sustained on July 20, 1999, a vaccine-related HHE. *See, e.g.*, Pet. ex. at 52. Nevertheless, the special master determines that the preponderance of the evidence does not establish that Petitioner "suffered the residual effects or complications of" the HHE "for more than 6 months after the administration of" his July 20, 1999 DTaP vaccination. § 300aa-11(c)(1)(D)(i); *see also* Tr. at 251 (HHE is "temporary); 287-88 (HHE is "of limited duration"). Likewise, the special master determines that the preponderance of the evidence does not establish that Petitioner's vaccine-related HHE is responsible for Petitioner's current neurological condition. *See, e.g.*, *Hossack v. Secretary of HHS*, 32 Fed. Cl. 769, 776 (1995)(petitioner must show the "causal link" between petitioner's vaccine-related injury "and the alleged sequela"); *Gruber v. Secretary of HHS*, 61 Fed. Cl. 674, 684 (2004)(in "[a] separate examination," special master must decide if petitioner has proven that petitioner's current deficits are "the actual acute complications or sequela[e]" of petitioner's vaccine-related injury).

Respondent's Alternative Actual Causation Claim

The special master has decided that Petitioner has not established his *prima facie* Table claim. In addition, the special master has decided that Petitioner has not established his *prima*

facie actual causation claim. In the circumstances, the special master does not need to address respondent's evidence of alternative actual causation. *See Bradley v. Secretary of HHS*, 991 F.2d 1570 (Fed. Cir. 1993). However, the special master observes briefly that Dr. Wiznitzer acceded ultimately that he would attribute only certain aspects of Petitioner's current condition, particularly Petitioner's motor delays and "clumsiness," to respondent's proposed factor unrelated to Petitioner's July 20, 1999 DTaP vaccination: Petitioner's identified Chiari I malformation. Tr. at 470.

CONCLUSION

The special master rules that Petitioner is not entitled to Program compensation. In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition. The clerk of court shall send Petitioner's copy of this decision to Petitioner by overnight express delivery.

_____
John F. Edwards
Special Master