OFFICE OF SPECIAL MASTERS

Filed: December 12, 2005

JILLIAN LOWRIE, parent and next friend of EMILY PAIGE LOWRIE, a minor,	*	
Petitioner,	*	
v.	*	No. 03-1585V
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Robert T. Moxley, Cheyenne, Wisconsin, for Petitioner.

James. A Reistrup, United States Department of Justice, Washington, D.C., for Respondent.

RULING REGARDING ONSET OF SYMPTOMS AND FINDINGS OF FACT[1]

SWEENEY, Special Master

On June 30, 2003, Jillian Lowrie, as the parent and next friend of her daughter Emily Paige Lowrie ("Emily"), filed a petition for compensation under the National Childhood Vaccine Injury Act ("Vaccine Act"). 42 U.S.C. § 300aa-1 to -34 (2000 & Supp. II 2003). Petitioner alleges that on July 6, 2000, Emily received four vaccinations, including a diphtheria, tetanus, and acellular pertussis ("DTaP")[2] vaccination, which she contends caused Emily to suffer an encephalopathy as defined by the Vaccine Injury Table ("Table"), 42 C.F.R. § 100.3(a)(2).

Petitioner argues that although the medical records fail to document Emily's symptoms and injury, they nevertheless occurred. To support her on-Table theory, she offered affidavits and oral testimony to explain and supplement her daughter's recorded medical history.

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[1] The court encourages the parties to review Vaccine Rule 18, which affords each party 14 days to object to disclosure of (1) trade secrets or commercial or financial information that is privileged or confidential or (2) medical information that would constitute "a clearly unwarranted invasion of privacy."

[2] The DTaP vaccine is "a combination of diphtheria toxoid, tetanus toxoid, and pertussis vaccine; administered intramuscularly for simultaneous immunization against diphtheria, tetanus, and pertussis." Dorland's Illustrated Medical Dictionary 1998 (30th ed. 2003).

Conversely, respondent argues that Emily's medical records do not document an encephalopathy and the testimony of petitioner and her witnesses may not supplant the written record of events. Respondent further argues that because Emily did not suffer an encephalopathy within the appropriate time period for an on-Table claim, petitioner is not entitled to an automatic presumption of injury, but rather must prove her claim under a theory of causation in fact.

The special master conducted a fact hearing on May 24, 2005, in Houston, Texas, to determine whether the medical records were vague, incomplete, or otherwise susceptible to interpretation. The special master held a second hearing on August 31, 2005, to take the testimony of Emily's pediatrician, Jean W. Bryant, M.D. Posthearing briefing was completed on November 15, 2005. After reviewing the medical records, affidavits, and testimony at both hearings, the special master finds that the medical records in this case are clear, internally consistent, and complete. Therefore, petitioner may not supplement the written record with contradictory testimony. In arriving at her decision, the special master had the opportunity to observe the witnesses and evaluate their testimony. The special master is convinced that Emily's mother and grandparents are devoted to her best welfare and believes that if Emily had been in the jeopardy her family described, they would have sought immediate medical attention.

I. FACTUAL BACKGROUND

A. The Petition

Petitioner alleges that Emily was a normal, healthy child until she received her July 6, 2000 vaccinations.[3] Pet. ¶¶ 2-3. Within a few hours of vaccination, Emily "start[ed] to run a fever and was screaming and crying as" never before. Id. ¶ 3. Emily experienced "episodes of blank staring" lasting from "thirty seconds to a minute," during which she was "unresponsive and limp." Id. Petitioner alleges that in the following weeks, Emily developed an abnormal gait attributable to the pertussis vaccination. Id. ¶ 8. Emily continues to suffer from "shaking episodes at night" and has "repetitive behaviors including arm flapping and spinning." Id. ¶ 11. Petitioner contends that Emily suffered an encephalopathy within 72 hours of her DTaP vaccination and suffered the effects of the encephalopathy for more than six months. Id. ¶¶ 14-16. In the alternative, petitioner alleges that Emily's July 6, 2000 vaccinations caused in fact her "illness, disability, and condition." Id. ¶ 18.

B. The Medical Records

On March 18, 1999, Jillian Lowrie ("Ms. Lowrie" or "petitioner"), 36 weeks pregnant with Emily, presented to The Methodist Health Center in Sugar Land, Texas, with "a history of contractions." Pet. Ex. 2 at 81. Emily was born on the following day, March 19, 1999, by

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[3] All references to the Petition shall be designated herein as "Pet. ¶ __." All references to the pertinent Petitioner's Exhibit shall be designated herein as "Pet. Ex. __ at __."

Caesarean section. Id. at 3. Emily's Apgar scores[4] were eight and nine at one and five minutes, respectively. Id. at 66. Ms. Lowrie and Emily were discharged from the hospital on March 22, 1999. Id. at 83-84. Emily received her first hepatitis B[5] vaccination on April 8, 1999. Pet. Ex. 3 at 1.

On May 7, 1999, Emily had congestion, cough, and decreased appetite. Id. at 6. At a visit with her pediatrician, Jean W. Bryant, M.D., at Pediatricians of Sugar Land, Emily was diagnosed with an upper respiratory infection ("URI"). Id. On May 20, 1999, Emily received the following vaccinations: DTaP, haemophilus influenzae type b ("Hib"),[6] inactivated poliovirus ("IPV"),[7] hepatitis B, and rotavirus.[8] Id. at 1. Emily visited Dr. Bryant again on June 22, 1999, because she had "swollen eyes," "a few red bumps on [her] legs," and a fever of 100 degrees two days prior. Id. at 6.

At age four months, on July 22, 1999, Emily received DTaP, Hib, and IPV vaccinations. Id. at 1. At an August 6, 1999 visit, Ms. Lowrie reported that while nursing, Emily "acted as if she were choking" and her "color began to change" to "dusky." Id. at 7.

On September 22, 1999, Emily received DTaP, Hib, IPV, and hepatitis B vaccinations. Id. at 1. On October 5, 1999, Ms. Lowrie took Emily to the pediatrician because she was concerned about developmental delay and that Emily "seem[ed] to be far behind other kids." Id.

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[4] An Apgar score is "a numerical expression of the condition of a newborn infant . . . , 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, supra note 2, at 1670.

[5] The hepatitis B vaccine is "a noninfectious viral vaccine derived by recombination from hepatitis B surface antigen and cloned in yeast cells; administered intramuscularly for immunization of children and adolescents and of persons at increased risk for infection." Dorland's Illustrated Medical Dictionary, supra note 2, at 1999.

[6] The Hib vaccine is "designed to prevent diseases caused by Haemophilus influenzae type B," which is "a bacteria responsible for a range of serious 'invasive' diseases including meningitis with potential brain damage and epiglottitis with airway obstruction." MedTerms Medical Dictionary, at http://www.medterms.com/script/main/art.asp?articlekey=3648 (last visited November 22, 2005).

[7] The IPV vaccine is "a suspension of formalin-inactivated poliovirus . . . administered intramuscularly or subcutaneously for immunization against poliomyelitis." Dorland's Illustrated Medical Dictionary, supra note 2, at 2000.

[8] The rotavirus vaccine is a "live virus vaccine produced from a mixture of four rotavirus types grown in fetal rhesus diploid cells" that is "administered orally to immunize infants against rotaviral gastroenteritis." Dorland's Illustrated Medical Dictionary, supra note 2, at 2000.

at 7. Ms. Lowrie was informed that Emily was developing normally but was offered a referral for Early Childhood Interventions ("ECI"). Id.

Emily presented to her pediatrician on October 27, 1999, with a fever, stuffy nose, sneezing, and decreased appetite. Id. at 8. She was diagnosed with bilateral otitis media ("BOM").[9] Id. On November 9, 1999, Emily was "still rubbing [her] ears" and crying. Id. Notes from a visit on November 12, 1999, reflect that Emily's BOM was resolving, and later notes indicate that her BOM had resolved by her November 19, 1999 visit. Id. at 9.

On January 1, 2000, Emily had been "rubbing" her ears, primarily her right ear, for two days, and had "congestion [and] cough" for one week. Id. at 10. Approximately two weeks later, on January 13, 2000, Emily was having a "hard time breathing," and for the past week, had been coughing during the day. Id. at 11. Emily was diagnosed with reactive airway disease ("RAD")[10] and otitis media ("OM"). Id. By January 21, 2000, Emily continued to "pull" at her ears and cough–her OM was "resolving" and her RAD was "better." Id. On January 26, 2000, Emily presented to her pediatrician with a temperature of 101 degrees despite treatment with Tylenol. Id. Ceftriaxone, an antibiotic, was prescribed. Id. The following day, Emily was "eating a little better," but Ms. Lowrie was instructed to continue alternating Tylenol and Motrin, to feed Emily "plenty of fluids," and to give Emily Suprax, another antibiotic. Id. at 12.

Emily had "drainage from both eyes" and a three-day history of fever when she visited the pediatrician on February 11, 2000. Id. She was noted to have BOM and conjunctivitis[11] and was

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[9] Otitis media is the "inflammation of the middle ear . . . ." Dorland's Illustrated Medical Dictionary, supra note 2, at 1339. Bilateral means that the inflammation occurred in both ears. See id. at 216.

[10] Reactive airway disease,

> frequently referred to as asthma, may occur from a variety of bronchial stimuli. Traditional irritants include smoke, exercise, change in weather/humidity, or respiratory infections. Other causes include foreign body aspiration, early pulmonary edema, COPD exacerbation, or bronchiolitis in infants. Pathophysiology involves the production of mucous and bronchospasm. Immediate treatment is directed at these two entities.

Dep't of the Navy, Bureau of Medicine & Surgery, Virtual Naval Hospital: General Medical Officer Manual: Clinical Section, at http://www.vnh.org/GMO/ClinicalSection/91ReactiveAirwayDisease.html (last visited Dec. 8, 1999).

[11] Conjunctivitis is the inflammation of "the delicate membrane that lines the eyelids and covers the exposed surface of the sclera . . . ." Dorland's Illustrated Medical Dictionary, supra note 2, at 409.

prescribed the antibiotic Augmentin. Id. On February 23, 2000, Emily's BOM was reported to be "persistent." Id. On March 1, 2000, Dr. Bryant examined Emily for "recurrent, persistent OM." Id. at 2.

On March 2, 2000, Stanford Shoss, M.D., an ear, nose, and throat specialist, performed a bilateral myringotomy,[12] removed fluid from both middle ear spaces, and then placed a tube in each of Emily's ears for treatment of her recurring OM. Pet. Ex. 5 at 8. On March 13, 2000, Emily had red, bloody drainage from her left ear, in addition to a "poor appetite." Pet. Ex. 3 at 15. The pediatrician diagnosed BOM, prescribed the antibiotic Omnicef, and continued treatment with Floxin, another antibiotic. Id. One week later, Emily's ears were infected and she had "purulent drainage" from both ears. Id. Ms. Lowrie was instructed to start Emily on the antibiotics Pediazole and Rocephin. Id.

By March 23, 2000, Emily's ears "look[ed] great." Id. at 16. On March 25, 2000, the notes from Emily's visit to the pediatrician reflect that she had a pneumococcus infection and chest congestion. Id. at 17. Emily's RAD also was noted. Id. On March 29, 2000, Emily received the following vaccinations: measles, mumps, and rubella ("MMR"),[13] varicella,[14] and Prevnar.[15] Id. at 1. On April 25, 2000, Emily had a fever greater than 101 degrees and a decreased appetite. Id. at 18.

On May 8, 2000, Dr. Shoss remarked that Emily's postoperative course was complicated by recurrent OM caused by penicillin-resistant pneumococcus. Pet. Ex. 5 at 40. On May 9, 2000, Emily visited the pediatrician because she had hit her eye with the corner of a box. Pet. Ex. 3 at 18. Emily was bleeding, and Ms. Lowrie was instructed to watch for any worsening of symptoms. Id. One week later, Ms. Lowrie reported that Emily was having difficulty sleeping because of "night terrors." Id.

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[12] Myringotomy is "the creation of a hole in the tympanic membrane" for the "removal of fluid from the middle ear." Dorland's Illustrated Medical Dictionary, supra note 2, at 1217, 1976.

[13] The MMR vaccine is "a combination of live attenuated measles, mumps, and rubella viruses, administered subcutaneously for simultaneous immunization against measles, mumps, and rubella." Dorland's Illustrated Medical Dictionary, supra note 2, at 1999.

[14] The varicella vaccine is a "preparation of live, attenuated human herpesvirus 3 (varicella-zoster virus) administered subcutaneously for production of immunity to varicella and herpes zoster." Dorland's Illustrated Medical Dictionary, supra note 2, at 2000.

[15] Prevnar is a "trademark for a preparation of pneumococcal heptavalent conjugate vaccine." Dorland's Illustrated Medical Dictionary, supra note 2, at 1505.

At age 15 months, on Thursday, July 6, 2000, Emily had her fourth DTaP vaccination at her pediatrician's office. Id. at 1. That same day, Emily also received Hib, MMR, and Prevnar vaccinations. Id. The pediatrician's records note Emily's "frustration in doing new things" and that she had her ears pierced that day. Id. at 5. She was reported to be sleeping "all night." Id.

Ms. Lowrie called the pediatrician's office on Sunday, July 9, 2000. Id. at 19. The record reflects "bug bites on legs," and Ms. Lowrie was directed to "control" Emily's fever. Id.

On Monday, July 10, 2000, Ms. Lowrie again called the pediatrician's office to report that Emily had a fever that had reached 105 degrees and that her current temperature was 102.5 degrees. Id. Ms. Lowrie was instructed to "watch [Emily] one more day." Id. However, Ms. Lowrie took Emily to the pediatrician later that day. Id. Emily's records note that she had suffered from a temperature of 101 degrees since Thursday and that the previous night, she had a rectal temperature of 105 degrees. Id. Ms. Lowrie was giving Emily Motrin every three to four hours. Id. In addition, Emily had a poor appetite since Saturday and was drinking poorly since the previous day. Id. Ms. Lowrie was able to console Emily's crying. Id. The pediatrician ordered a complete blood count ("CBC")[16] and assessed Emily's condition as a "viral syndrome" with a nontoxic fever. Id. Ms. Lowrie was directed to increase Emily's fluid intake and alternate Emily between treatments with Tylenol and Motrin. Id.

On July 18, 2000, Ms. Lowrie and Ms. Lowrie's mother, Myra Lowrie ("Mrs. Lowrie") met with Dr. Bryant. Id. at 20. They described Emily's chief complaints as inconsistent response, irritability, inconsolability, a three-day history of 101-degree fever, a two-day history of 105-degree fever, decreased response to her environment, a two-day history of decreased eye contact, blank stares, and walking and balance problems. Id. Dr. Bryant recorded the following history: (1) On July 6, Emily had DTaP, Hib, MMR, and Prevnar vaccinations and a 100 to 101-degree fever; (2) On July 9, Emily's fever increased to 104 to 105 degrees and she was very cranky, restless, and almost inconsolable; (3) On July 10, Emily's blood tests were normal; (4) On July 11, Emily still had a fever and continued to "stare off"; and (5) On July 12, Emily had a fever of 102 degrees. Id. Dr. Bryant noted that after Emily's four-month vaccinations, Emily also experienced a limp and directed that Emily not receive any further pertussis vaccine. Id. She further noted that Ms. Lowrie and Mrs. Lowrie appeared to be "very concerned" with the response of her office to Ms. Lowrie's concerns and Emily's illness, a similar concern as the one surrounding Emily's OM and accompanying infection. Id. Dr. Bryant noted that the visit lasted 45 minutes, but there are no notes reflecting that Dr. Bryant actually examined Emily at that meeting. Id.

Notes from a visit to Dr. Bryant on September 7, 2000, indicated that Emily had not been eating for three days and had a three-day history of fever that peaked at 104 degrees the previous

[16] A CBC is "a blood count that includes separate counts for red and white blood cells." Merriam-Webster, Inc., MedlinePlus: Medical Dictionary, at http://www.nlm.nih.gov/medlineplus/mplusdictionary.html (last visited May 4, 2005).

day. Id. The assessment was a nontoxic fever and the plan was to "control" Emily's fever with fluids. Id.

On November 28, 2000, Emily was examined for a cold sore she had since the prior week, for her pulling both of her ears, and for a "greenish discharge" from her right nostril. Id. at 13. Emily was diagnosed with a URI. Id. By December 12, 2000, Emily had a cough and congestion and was diagnosed with sinusitis. Id. Ms. Lowrie called the pediatrician's office on December 28, 2000, because Emily refused to drink, eat, and take any medication. Id. at 21. Because Ms. Lowrie insisted on seeing a doctor, Emily presented to the pediatrician's office with a temperature of "101.0" degrees that "started today." Id. Emily was diagnosed with right OM. Id. Emily continued to visit Dr. Bryant periodically until January 26, 2001, with complaints of cough, congestion, difficulty breathing, and fever. Id. at 22-23. On January 26, 2001, Emily's condition was assessed as bronchiolitis, allergic rhinitis, and OM. Id. at 23.

Emily's problems continue to this day. Although not detailed here, the remaining medical records filed in this case document Emily's treatment by various physicians, hospitals, and other health care professionals relating to her neurological problems.[17] Because those records do not relate to the immediate issue at hand–namely, whether the contemporaneous medical records related to the July 2000 vaccinations are vague, incomplete, or internally inconsistent–those records, which are outside the pertinent time period, need not be discussed.

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[17] For example, the remaining medical records include, inter alia, Emily's visit to: (1) Asthma and Allergy Associates on April 13, 2001, Pet. Ex. 6 at 2-5; (2) the Houston Ear, Nose and Throat Clinic on July 27, 2001, Pet. Ex. 5 at 28; (3) LeAnne Parker, M.S., CCC-SLP, on February 20, 2002, for Emily's disability and educational needs with respect to speech and language, Pet. Ex. 7 at 2-14; (4) Louisa Kalsner, M.D., a pediatric neurologist, on May 9, 2002, who noted that Mrs. Lowrie had staring spells and an abnormal EEG as a child and was treated with an antiseizure medication, and that Mrs. Lowrie's seizures may have been febrile, Pet. Ex. 10 at 3-5; and (5) James Wheless, M.D., another pediatric neurologist, on April 7, 2003, for Emily's neurologic disorder, Pet. Ex. 10 at 10-13; Pet. Ex. 16 at 1.

Dr. Wheless diagnosed Emily with "[e]ncephalopathy characterized by speech delay and probable global developmental delay that occurred in the setting of temporal association with immunizations as an acute encephalopathy." Pet. Ex. 10 at 12. The medical records also show that on May 21, 2003, Emily was admitted to Hermann Hospital for twelve hours of video EEG monitoring. Pet. Ex. 16 at 2-20. Further, Emily visited the emergency room on November 10, 2003, because of a possible seizure. Pet. Ex. 26 at 1-11. These are but a small sampling of Emily's medical records.

C. The Hearings

1. The May 24, 2005 Hearing

The special master conducted the first hearing on May 24, 2005, in Houston, Texas. Petitioner testified on her own behalf and presented the testimony of the following witnesses: Mrs. Lowrie, Emily's grandmother and petitioner's mother; John Lowrie, Emily's grandfather and petitioner's father; Dara Ann Daniel, petitioner's close friend; and Stephanie Marie Yarbrough, petitioner's best friend. All five witnesses also filed affidavits in this case.[18] See Pet. Exs. 15, 30-33. Because the hearing testimony expands upon and does not conflict with the information contained in the affidavits, the special master will refer only to the witnesses' testimony.

a. Emily's Grandmother: Myra Lowrie

Myra Lowrie testifies that she is a lactation consultant and a doula[19] in private practice, as well as a health care educator at Memorial Hermann System.[20] Tr. I at 6. She holds a bachelor of science degree and master of arts degree in psychology, and is a licensed vocational nurse. Id.

According to Mrs. Lowrie, after Emily received her four-month vaccinations, she started "crying" two or three hours after she returned from the doctor's office. Id. at 93. The crying turned into "hysterical screaming that just kept going on and going on." Id.; see also id. at 141. In 1999, petitioner had concerns about Emily's development, but according to Mrs. Lowrie, those concerns were not warranted. Id. at 19. Before her 15-month vaccinations, Mrs. Lowrie states that Emily had recurring ear infections and had been diagnosed with RAD and asthma.[21] Id. at 25, 98; see also id. at 96.

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[18] Although she did not testify at hearing, Sue West Tomlinson, Emily's maternal great aunt, also filed an affidavit in this case on behalf of petitioner. See Pet. Ex. 34. The information presented in Ms. Tomlinson's affidavit did not address whether Emily suffered an encephalopathy within 72 hours of receiving the DTaP vaccine.

[19] A doula is a "woman who assists another woman during labor and provides support to her, the infant, and the family after childbirth." American Heritage Dictionary of the English Language (4th ed. 2000), http://education.yahoo.com/reference/dictionary/ (last visited Dec. 8, 2005).

[20] All references to the Transcript of the hearing conducted on May 24, 2005, shall be designated herein as "Tr. I at __."

[21] The medical records consistently refer to Emily's breathing difficulties as RAD, not asthma.

Mrs. Lowrie testifies that on Thursday, July 6, 2000, within approximately one and one-half hours after returning home postvaccination, she noticed "distinct changes" in Emily. Id. at 21. Though Emily cried while she was receiving her vaccinations, her crying at home became "high-pitched." Id.; see also id. at 110. Mrs. Lowrie states that she telephoned Emily's pediatrician before office hours were over that day.[22] Id. at 22. She informed the nurse who answered, "Caroline or Carolyn," that she believed Emily was having a seizure. Id. Mrs. Lowrie describes Emily as being "very rigid," with clenched fists, "tense all over," and having "fluttering" eyes. Id. at 22-23; see also id. at 32. Mrs. Lowrie feels that the nurse was "put-offish," id. at 23, and that she dismissed her concerns. Id. at 112.

Additionally, according to Mrs. Lowrie, before her vaccinations, Emily nursed six times per day; whereas, on the afternoon of July 6, 2000, after her vaccinations, Emily fed "probably" two times. Id. at 28-29.

Then, during the evening of July 6, 2000, Mrs. Lowrie reports that Emily had an "elevated" temperature. Id. at 30; see also id. at 116. That night, Mrs. Lowrie noted that Emily "was either crying or just laying there," with "a blank stare." Id. at 30-31. Mrs. Lowrie had never seen Emily that sick. Id. at 27. Emily looked "just like a rag doll" because she was not responsive and did not want to eat. Id. On a ten-point scale, with ten representing the most concerned, Mrs. Lowrie testifies that she was an "eight or nine" and was "very concerned." Id. at 116-17. Mrs. Lowrie believes that Emily was having more than one kind of seizure that night. Id. at 33. Emily was nonresponsive for "several seconds" at a time, and when Emily was not crying or nonresponsive, she "just wasn't normal." Id. at 34. Emily was also "significantly lethargic" when she was not "screaming." Id. at 35. Despite this concern, including her fear that Emily was experiencing more than one kind of seizure, neither Mrs. Lowrie–a trained nurse–nor any other family member, sought medical attention for Emily.

Mrs. Lowrie states that the following day, Friday, July 7, 2000, Emily still "wasn't herself at all," id. at 35, and her condition was "same to worse" than the previous day. Id. at 124. Again, Mrs. Lowrie testifies that she "was still very concerned" about Emily. Id. at 125. She also testifies that Emily cried for "probably a couple, three hours" overall that day. Id. at 35. When she was not crying, Mrs. Lowrie states that Emily would either just lay there or "would nap off and on." Id. Mrs. Lowrie observed Emily continuing to scream and gasp for air throughout the day. Id. at 37. Though Emily was conscious, from Mrs. Lowrie's view, she was "not responding to her surroundings in a way that was typical of her." Id. at 123. Her fever was "probably 102" degrees, and she and petitioner "alternate[d] between Tylenol and Motrin" as recommended by the pediatrician. Id. at 38. Mrs. Lowrie states that Emily's feeding was "[n]ot usual . . . it was almost like she was fighting the breast sometimes." Id. at 39. Both petitioner and Mrs. Lowrie "took turns staying up with" Emily throughout the night "trying to console her." Id. According to Mrs. Lowrie, petitioner telephoned the pediatrician's office on Friday, July 7,

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[22] The medical records do not contain a contemporaneous notation of this alleged telephone call.

2000.[23] Id. at 36. Mrs. Lowrie also testifies that she joined her husband, John Lowrie, at the baseball field on that night for "just a few hours." Id. at 124. She notes that her husband was "gone most of the time and just coming in very late at night after tournament play was over." Id. at 36-37.

By Saturday, July 8, 2000, according to Mrs. Lowrie, Emily "didn't look healthy anymore." Id. at 39. Emily's skin color turned "almost a gray color, dusky." Id. at 40. She says that Emily is "much paler than she used to be" and "has a duskiness about her." Id.

Then, according to Mrs. Lowrie, on Sunday, July 9, 2000, Emily's "fever went up again," id. at 41, and Emily "appeared to be getting worse." Id. at 42. Emily had her "highest" fever on Sunday. Id. at 130. While Mrs. Lowrie noticed that Emily's "shaking seemed to slow down," her "nonresponsiveness seemed to be even more prevalent." Id. at 42. Mrs. Lowrie states that over the span of the day, Emily cried for three, "maybe four hours." Id. at 43. Since Dr. Bryant was out of town, she reports that petitioner spoke to another pediatrician in Dr. Bryant's office, Dr. Bishop, on the telephone and relayed Emily's symptoms. Id. at 41. While Mrs. Lowrie heard only petitioner's half of the telephone conversation, id. at 44, she states her impression that Dr. Bishop instructed petitioner to "continue the Tylenol fever measures." Id. at 42. After speaking to Dr. Bishop, petitioner appeared agitated to Mrs. Lowrie because Dr. Bishop "wasn't listening" to her. Id. at 45. Although she "suspect[ed]" that a vaccine may be involved in Emily's condition because her two sons had trips to the emergency room after vaccinations, id. at 46, Mrs. Lowrie acknowledges that she "made some mistakes" by not seeking medical intervention for Emily sooner. Id. at 45.

The next day, Monday, July 10, 2000, Mrs. Lowrie observed that Emily had "huge welts on her legs" where she received the vaccinations that were "easily the size of a half-dollar." Id. at 47. Emily could not sit up by herself and seemed "weak and tired." Id. at 46-47. According to Mrs. Lowrie, petitioner took Emily to the pediatrician that day and blood tests were performed. Id. at 47-48. She says that no treatment decisions were made at that visit. Id. at 48. Mrs. Lowrie testifies that by that night, Emily's fever "started going up again," and she was "barely feeding." Id. at 49.

On Tuesday, July 11, 2000, Mrs. Lowrie was "very concerned" about Emily's fevers and possible seizures, and so she and petitioner attempted "to get [her] temperature down" by soaking Emily in a bathtub, keeping her "uncovered," and giving her Tylenol and Motrin. Id. at 131-33. On Tuesday night, the Lowrie family was concerned gravely about Emily. Id. at 50. Mrs. Lowrie recalls Tuesday night being "the worst night," and, in retrospect, she believes they "should have gone to the hospital." Id. at 146. Mrs. Lowrie states that petitioner spoke to Dr.

[23] The medical records do not contain a contemporaneous notation of this alleged telephone call.

Cassandra Dickerson at the pediatrician's office on the telephone.[24] Id. at 50. Again, while Mrs. Lowrie heard only petitioner's half of the telephone conversation, Dr. Dickerson apparently informed petitioner that taking Emily to the hospital would not do "any good." Id. at 51. Mrs. Lowrie testifies that she "had poor judgment" and "went against [her] guts" when she decided that Emily could "get through the night until tomorrow morning." Id.; see also id. at 117, 119.

By Wednesday, July 12, 2000, Mrs. Lowrie, "started seeing some expression on [Emily's] face." Id. Emily's fever had subsided. Id. at 50. Mrs. Lowrie describes Emily as going "from lifeless to life." Id. at 145. But, by July 13 or 14, 2000, Mrs. Lowrie realized "this [wa]sn't a regular sickness." Id. at 77.

Mrs. Lowrie then discussed a conference with Dr. Bryant that occurred on July 18 or 19, 2000.[25] Id. at 148. Mrs. Lowrie recalls providing a nurse[26] in Dr. Bryant's office with a list of all of Emily's symptoms on tablet paper.[27] Id. at 53, 55. During a visit that lasted "a couple of hours," according to Mrs. Lowrie, she and petitioner discussed their concerns with Dr. Bryant. Id. at 56. Mrs. Lowrie says that they also informed Dr. Bryant that they did not receive "proper medical care for Emily" while Emily was ill. Id. at 148. Mrs. Lowrie reports that she discussed the possibility of seizures with Dr. Bryant, who responded that Emily should no longer be administered vaccinations with the pertussis component. Id. at 150; see also id. at 56. Mrs. Lowrie also informed Dr. Bryant that she was dissatisfied with Dr. Bryant's office's response regarding Emily's treatment. Id. at 150. However, Mrs. Lowrie admits that the advice provided by Dr. Bryant's office during telephone conversations did not impede her family's decision to "handle" Emily's condition without medical intervention. Id. at 150-51. Mrs. Lowrie testifies that she believed that she and petitioner were acting "in Emily's best interest at that time," by "seeing the doctors during the day and then trying to take care of her at night."[28] Id. at 151. She also testifies that Dr. Bryant examined Emily during this visit. Id. at 152.

Mrs. Lowrie testifies that pediatric visits in September 2000, were for Emily's ear infections and "wheezing." Id. at 57. She also states that at Emily's 18-month and 24-month

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[24] The medical records do not contain a contemporaneous notation of this alleged telephone call.

[25] The medical records indicate that this meeting occurred on July 18, 2000. See Pet. Ex. 3 at 20.

[26] Mrs. Lowrie describes the nurse as being in her early 30s and having freckles and curly hair, but could not recall her name. Tr. I at 54.

[27] No such document was included in Dr. Bryant's records.

[28] But, of course, the medical records confirm that after Emily's July 6, 2000 vaccinations, she was not seen by her pediatrician until July 10, 2000.

pediatric visits, Dr. Bryant commented that Emily had a gait when she walked because she dragged her "right foot behind her." Id. at 58.

According to Mrs. Lowrie, Emily currently has a seizure disorder, and most of Emily's seizures are nocturnal. Id. at 31. During her seizures, Emily has "a lot of jerking," a "bowel movement," and "eye-rolling and fluttering." Id. at 31-32. Mrs. Lowrie states that Emily goes to speech therapy five times per week. Id. at 88.

Mrs. Lowrie also testifies about her own childhood medical history. She states that she had febrile seizures as a baby. Id. at 374. Then, at approximately age 12, she had blank staring. Id. Because she "had irregularities in [her] brain wave activity," she was prescribed Dilantin, an antiseizure medication, which she took until she was age 21. Id. at 373-74. She stopped taking the Dilantin because she no longer had seizures. Id. at 374. Mrs. Lowrie's understanding is that "there was no comparison" between her medical history and Emily's condition. Id.

Mrs. Lowrie then reflected upon the times that her two sons, petitioner's brothers, "had emergency room trips after vaccines when they were children." Id. at 45. She testifies that one son, James, had two vaccinations in the morning, diphtheria, tetanus, and pertussis ("DTP")[29] and "something else," id. at 45, 91, and subsequently had seizures "during his nap," id. at 45, a "few hours" after his vaccinations. Id. at 111. While James's "hands and arms" were "just shaking" during this episode, she states that Emily "was more rigid and more tense, so it was different." Id. at 114. Mrs. Lowrie states that she "rushed [James] to the hospital," id. at 45, because James's pediatrician suspected that James was having a seizure based on her description of symptoms. Id. at 111. She also states that James was hospitalized for a few days, and no cause for his seizure was ascertained. Id. at 45-46.

According to Mrs. Lowrie, her other son, Jonathan, experienced "basically the same thing" as James. Id. at 46. Jonathan received the "DTP booster." Id. at 91. Mrs. Lowrie took Jonathan to the emergency room because he "had a seizure," and the hospital "sent [them] home." Id. at 46. That same day after Jonathan had a "seizure again at the pharmacy," Mrs. Lowrie took him back to the hospital, where he was admitted. Id. Jonathan did not suffer any lasting effects. Id. Additionally, Mrs. Lowrie testifies that when her third child, petitioner, received "the measles vaccine," she "broke out in full-blown measle[s]" and was taken to the emergency room. Id. at 91. Despite this family history and her decisions to take her own children to the hospital for immediate evaluation and treatment of postvaccination adverse reactions, Mrs. Lowrie chose not to follow her previous course of conduct with Emily.

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[29] DTP is "a combination of diphtheria toxoid, tetanus toxoid, and pertussis vaccine" which is "administered intramuscularly for simultaneous immunization against diphtheria, tetanus, and pertussis." Dorland's Illustrated Medical Dictionary, supra note 2, at 1998.

b. Emily's Mother: Petitioner Jillian Lowrie

Petitioner testifies that she earned a bachelor's degree in communications from the University of Houston in 2004. Id. at 171. She worked as a "nursery caregiver" from September 1999 until April 2003, and currently works in human resources. Id. at 171-72. Petitioner also states that her parents, Myra and John Lowrie, are co-guardians of Emily. Id. at 173.

Petitioner recalls her pregnancy with Emily to be "non-eventful physically," id. at 174, though Emily was delivered by a Caesarean section. Id. at 175. She says that Emily was a "perfect" baby who "had a real amazing little personality." Id. at 176. At age seven weeks, Emily "started laughing," by age two months, she "was rolling over from her belly to her back," by age four months, she "was rolling over both ways," and at age five months, she began articulating and imitating sounds. Id. at 176, 178-79. According to petitioner, Emily was a "very interactive" child. Id. Emily "gained weight very well . . . within healthy parameters." Id. at 177. Petitioner describes her daughter to be "a very easy-going, fun child." Id. at 178.

Petitioner testifies that after Emily's four-month vaccinations, Emily was "really fussy" and had "blank staring episodes." Id. at 183. She also states that Mrs. Lowrie called Dr. Bryant's office at that time to report Emily's reaction.[30] Id. at 234. Emily received her four-month vaccinations on Thursday, and by Friday night, according to petitioner, "things were going back to normal." Id. at 235. When Emily was six months old, petitioner was concerned that she "wasn't sitting up" as "the other babies" were. Id. at 185. After a developmental assessment, Dr. Bishop informed petitioner that Emily was "normal" and "on target" with respect to motor and verbal skills. Id. at 185-86.

Petitioner reports that during Emily's first year of life, she visited the doctor nine times for "ear problems." Id. at 183. When Emily had ear infections, she also had fevers that, at times, were as high as 103 degrees. Id. at 236.

Petitioner then describes Emily's breathing difficulties in January 2000. Id. at 217-18. Emily began to "cough very, very hard" and her "coloring" began "to change." Id. at 217. Petitioner testifies that "it sounded as though there was mucus . . . that she was trying to cough up." Id. Emily's breathing "had been rapid," but it started to slow as soon as petitioner and Mrs. Lowrie "got her inside." Id. In petitioner's words, Dr. Bryant stated Emily was "turning into a lung baby," said she was "wheezing," and gave Emily "a nebulizer with Albuterol." Id. at 218.

"Painfully vivid" in part and "blurred together" in part is how petitioner describes the events surrounding Emily's 15-month vaccinations. Id. at 186. After Emily received her vaccinations on Thursday, July 6, 2000, petitioner laid Emily down for a nap at about 3:00 p.m. Id. at 187. At approximately 4:30 p.m., Emily "woke up screaming." Id.; see also id. at 247.

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[30] The medical records do not contain a contemporaneous notation of this alleged telephone call.

Petitioner reports that throughout the night, Emily went through "several states," including times when she screamed, experienced blank staring spells, stiffened her body, and slept. Id. at 188. Emily's eyes "seemed to be fixated" during these staring spells, id. at 248, and Emily's body posture reminded petitioner "of a CPR dummy." Id. at 249. Petitioner testifies that she believed that Emily was extremely exhausted. Id. at 250. She further states that based on the vaccine literature she was given when Emily received her vaccinations, she believed that "the doctor needed to be informed" only when Emily's fever reached 105 degrees. Id. at 252. Petitioner states that Mrs. Lowrie called the pediatrician's office that afternoon,[31] but that she "was not in the room at the time she made the phone call." Id. at 199; see also id. at 248. Emily apparently did not have an ear problem or any other symptoms of being sick. Id. at 238.

Petitioner testifies that she believed that Emily's "blank staring spells and body stiffening were seizures." Id. at 188. She states that Emily would not follow her hand and would not blink her eyes when she waved her hand in front of Emily's face. Id. at 189. Petitioner notes that while Emily currently has postictal states where she "complains of nausea," vomiting, and headaches, these are different than the states Emily experienced on the night of her vaccinations. Id. at 188. During the night, out of a six-hour period, petitioner states that Emily spent approximately three hours screaming and sleeping, two hours "awake and nothing else going on," and during the remaining hours, Emily had "staring episodes." Id. at 191-92. Petitioner also states that Emily's fever "was kind of the least of [her] worries" because "we gave Tylenol and Motrin. . . . what else do you do for a fever . . . ?" Id. at 194.

Petitioner states that she telephoned the pediatrician's office on Friday morning, July 7, 2000, to report Emily's symptoms, including a temperature that "rang[ed] between 100 and 102" degrees.[32] Id. at 198-99. The nurse informed Emily's mother that "it's normal for children to be fussy and have a little bit of a fever, so just continue to give her Tylenol and Motrin . . . and call back if she doesn't get better." Id. at 199. Petitioner observed Emily experiencing the "same states" as the previous day. Id. at 196. Emily's crying decreased, but her "other episodes," including blank staring episodes and decreased awareness, "did not." Id. According to petitioner, Emily had four blank staring spells that lasted 20 to 30 seconds each. Id. at 190, 196. She also noticed that Emily's "legs were very hot to the touch." Id. at 246. During the night of July 7, 2000, unlike prevaccination, Emily slept like "a newborn," where she slept for a "few hours and then" would awaken. Id. at 197. Petitioner states that the second 24 hours after Emily's vaccinations was no different than the first 24 hours after her vaccinations. Id. at 201.

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[31] The medical records do not contain a contemporaneous notation of this alleged telephone call.

[32] The medical records do not contain a contemporaneous notation of this alleged telephone call.

Saturday, July 8, 2000, was "the eye of the hurricane," according to petitioner. Id. Emily was no longer screaming. Id. Instead, she decided to "just . . . lay [t]here." Id. Petitioner's "level of concern" decreased on Saturday. Id.

However, when petitioner awoke on Sunday, July 9, 2000, she found Emily's condition to be "worse." Id. She had "these things on" her legs "from where her shots had been," "her eyes were very red," and "she started to feel hot." Id. at 202. Petitioner states that she relayed Emily's symptoms to Dr. Bishop that day, and informed him that Emily's "legs had swollen spots like mosquito bites," and that since Thursday, Emily had a fever and had been crying with high-pitched screaming. Id. at 202, 256-57. According to petitioner, Dr. Bishop told her "to stop overreacting," and if Emily's condition had not improved by Monday, to bring Emily to the pediatrician's office. Id. at 202. Petitioner testifies that Emily's condition "got worse by the hour" on Sunday. Id. Her "fever went up to 105.7" degrees, she "began screaming again," and she was unable to sit up or walk. Id. at 202-03. Petitioner recalls that Emily cried for "at least four or five hours" throughout the day. Id. Emily's cry sounded to petitioner "like she was being tortured." Id. at 204.

According to petitioner, by Monday morning, July 10, 2000, Emily's condition had not resolved. Id. In fact, her condition was "grave." Id. at 261. Emily awoke with a temperature of 104 degrees, and petitioner was concerned because of the length of time Emily's symptoms had persisted. Id. at 262.

Petitioner states that Dr. Dickerson examined Emily on July 10, 2000. Id. at 205. An oral temperature reading stated Emily's temperature was 100.7 degrees; a rectal temperature reading stated Emily's temperature was 104 degrees. Id. Dr. Dickerson informed petitioner that Emily needed her "blood drawn." Id. at 206. Emily's blood test results did not reveal any illnesses. Id. at 265. Petitioner testifies that she asked Dr. Dickerson what was wrong with her daughter. Id. at 206. Dr. Dickerson apparently replied that she did not know, and petitioner decided to take Emily home. Id. Petitioner was not given any prescriptions for Emily. Id. at 266. By Monday night, petitioner "started to get scared, really scared" about Emily's condition. Id. at 207. She testifies that "[t]here were no signs of the child [she] had taken in Thursday." Id.

Petitioner reports that the following evening, Tuesday, July 11, 2000, in the presence of Mrs. Lowrie and Stephanie Yarbrough, she spoke to Dr. Dickerson on the telephone regarding Emily's condition, id. at 208, including her fever, crying, and blank staring.[33] Id. at 269-70. Dr. Dickerson reportedly informed petitioner that taking Emily to the hospital would only "put Emily through pain, because they were going to stick needles in her." Id. at 208; see also id. at 272-73. Petitioner then contacted the Centers for Disease Control and Prevention ("CDC") and was informed that "people [can] have a reaction to a vaccine" and was instructed to take Emily to the hospital. Id. at 292-93. However, based on Dr. Bishop's advice, petitioner decided that a trip to

[33] The medical records do not contain a contemporaneous notation of this alleged telephone call.

the hospital was not necessary because it was "CDC's word against my doctor's" and the "CDC had never met [her] daughter." Id. at 293. Petitioner testifies they "had a family conference," during which they decided to attempt to "bring [Emily's] fever down" by soaking her in the bathtub. Id. at 209.

On Wednesday morning, July 12, 2000, petitioner states that she awoke to discover that Emily's fever "was gone for the first time." Id. However, she describes Emily as being "like a newborn" because she did not "have head control." Id. at 209-10. Petitioner notes that Emily's staring spells continued "at least through . . . the tenth day" after vaccinations. Id. at 281. Then, a few weeks after her vaccinations, petitioner noticed that Emily began "to sit up again and [began] walking again." Id. at 210.

Petitioner brought Emily to see Dr. Bryant on July 18, 2000. Id. Petitioner reports that she relayed to Dr. Bryant that Dr. Dickerson and Dr. Bishop had discounted her opinion and "made [her] feel like [she] wasn't qualified to be a mother." Id. at 214. She also reports that the pediatricians did not examine Emily for a few months when she presented with ear infections, and, therefore, failed to discover that Emily had a pneumococcal ear infection. Id. at 212. Instead, Dr. Shoss, an ear, nose, and throat specialist diagnosed Emily's pneumococcal infection. Id. at 212-13. Although petitioner states that she "was very disappointed in the organization of the office," she had developed a "relationship with Dr. Bryant" that she chose to continue. Id. at 253. Petitioner testifies that the July 18, 2000 meeting felt like it lasted longer than 45 minutes. Id. at 276. She also testifies that Dr. Bryant examined Emily during this visit. Id. at 275.

Petitioner next notes that Mrs. Lowrie completed the Vaccine Adverse Events Reporting System (VAERS)[34] form because she felt that her mother "was more qualified to fill it out." Id. at 215. At hearing, petitioner was asked whether she believed the events surrounding the July 6, 2000 vaccinations and Emily's January 2000 breathing difficulties were related. Id. at 219. She responded that the "events in January 2000 . . . were isolated," and "it was not something that required continuous treatment." Id.

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[34] VAERS is

> a national vaccine safety surveillance program co-sponsored by the Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA). VAERS collects and analyzes information from reports of adverse events following immunization. . . . By monitoring such events, VAERS helps to identify any important new safety concerns and thereby assists in ensuring that the benefits of vaccines continue to be far greater than the risks.

Frequently Asked Questions About VAERS, at http://vaers.hhs.gov/vaers.htm (last visited August 6, 2005). Any person can file a report with VAERS. Id.

Petitioner took Emily to visit Dr. Bryant in September 2000 for "some diarrhea and some upper respiratory stuff," id. at 216, and a "well check-up." Id. at 215. By September, petitioner notes that "there had been minimal improvement from postvaccination." Id. at 216. Also according to petitioner, between September 2000 and March 2001, Emily visited the pediatrician for various illnesses including URIs and ear infections. Id. at 216-17. Additionally, on September 20, 2000, Emily presented to the pediatrician for "night terrors," as well as "the agitation [she] was displaying, the frustration, the inability to communicate, and the refusal to eat foods." Id. at 220-21.

Petitioner then testifies about a visit to the pediatrician when Emily was two years old. Id. at 223. Petitioner and the pediatrician discussed Emily's "complete lack of" speech, and Emily was referred to ECI. Id. Emily was seen at ECI on June 13, 2001, for an initial evaluation. Id. at 224. She received speech therapy through her third birthday at ECI, and then was sent to a public school "because ECI stops at [the] third birthday." Id. at 226. According to petitioner, Emily did not make progress with her speech; instead, the "gap" between "her birth age and her testing developmental and speech age" widened. Id.

Next, petitioner testifies that when she picked Emily up from school in September 2001, the teachers told her that "there was something wrong with" Emily. Id. at 254. Because her concerns about the medical attention Emily was receiving at Dr. Bryant's office persisted, petitioner states that she decided to "find a doctor that would help [her] find the answers." Id.

Petitioner reports that from December 2001 to January 2002, Emily had "a very frightful winter." Id. at 227. She "developed the croup and got very sick." Id. When petitioner arrived at the hospital with Emily, Emily "started to shake." Id. The doctors "gave her some medicine to help open up the trachea to resolve the croup." Id. Petitioner states that in February 2002, Emily "started to develop the flu" and then she began "to have what I know now was a generalized tonic/clonic seizure." Id. at 282. Emily was referred for an electroencephalogram ("EEG"),[35] id. at 282-83, and was seen by neurologist Dr. Kalsner. Id. at 284. Petitioner cannot recall if, during the visit, she or Mrs. Lowrie told Dr. Kalsner of Mrs. Lowrie's history of "epilepsy" with "staring spells in childhood and an abnormal EEG" and the treatment with Dilantin. Id. at 296.

According to petitioner, in April 2003, id. at 286, neurologist Dr. Wheless examined Emily and ordered "an EEG, an MRI,[36] a neuro-psych evaluation," and "DNA tests to determine

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[35] An EEG is "a recording of the potentials on the skull generated by currents emanating spontaneously from nerve cells in the brain. . . . Fluctuations in potential are seen in the form of waves, which correlate well with different neurologic conditions and so are used as diagnostic criteria." Dorland's Illustrated Medical Dictionary, supra note 2, at 596.

[36] An MRI, or magnetic resonance image, is "a method of visualizing soft tissues of the body by applying an external magnetic field that makes it possible to distinguish between

if there was a genetic or underlying cause." Id. at 228-29 (footnote added). Petitioner testifies that Dr. Wheless became aware that Mrs. Lowrie had a history of "irregular brain wave activity," id. at 290, that was treated with medication. Id. at 285. According to petitioner, Dr. Wheless said that Emily had "been injured by a vaccine," and "has epilepsy, encephalopathy, and is going to need a lot of help." Id. at 229.

Finally, petitioner testifies that she is in "grief counseling" because she "lost [her] daughter." Id. at 230. She says that Emily is "not very happy most of the time," and as a result, she "can't have a normal lifestyle." Id. She also states that Emily has "not grown or gained any weight in the past 18 months" and has "been at the same level for the past two years." Id. According to petitioner, Emily's physical therapy has been "suspended" because she was unable to reach the goals, and in school, Emily has not been able to "retain" any information. Id. Emily has attended a "special education school" for children "with language-based differences" since June 2003. Id. at 173.

c. Petitioner's Close Friend: Dara Ann Daniel

Ms. Daniel testifies that she has known petitioner since 1999 and has been her close friend since 2001. Id. at 299. She explains that her daughter, Lillian, is six weeks younger than Emily. Id. at 302. She states that "from the very beginning," Emily was always "a little step" ahead of Lillian. Id. When Lillian learned to walk at approximately 13 months of age, Emily was "walking and cruising a lot sooner than that." Id. at 302-03. While Lillian "wasn't slow," Emily was "just a very active, very happy child." Id. at 303. Although Ms. Daniel did not see Emily in July 2000, she did see Emily in September 2000 and noticed changes. Id. at 315. In October or November of 2000 or spring of 2001, Ms. Daniel recalls seeing Emily "just stare off into space for awhile and be blank." Id. at 316. It was clear that while Ms. Daniel's testimony confirms the medical records' documentation of Emily's decline after her July 6, 2000 vaccinations, it could not confirm that Emily suffered symptoms that petitioner describes as constituting, in her layperson's view, as an encephalopathy occurring within 72 hours of receiving the July 6, 2000 vaccinations.

d. Petitioner's Best Friend: Stephanie Marie Yarbrough

Ms. Yarbrough testifies that she has known petitioner for 20 years and is her best friend. Id. at 320. Ms. Yarbrough recalls Emily's behavior at age 15 months and states that she "was a very happy child," who "could count" and "recognize numbers and some of her letters." Id. at 324.

Ms. Yarbrough testifies that on the evening after Emily's vaccinations, Friday, July 7, 2000, petitioner asked her to come to her house "because something was very wrong." Id. at 322.

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hydrogen atoms in different environments." Dorland's Illustrated Medical Dictionary, supra note 2, at 908.

When Ms. Yarbrough arrived at the Lowrie house, "it looked like there was a doll on the bed." Id. Ms. Yarbrough did not realize until she approached the bed that it was Emily on the bed, not a doll. Id. Emily was "laying there, just with her eyes open, not moving, not blinking, [and] not doing anything." Id. When Ms. Yarbrough sat next to Emily, Emily did not appear to recognize her. Id. at 329. Ms. Yarbrough recalls that members of the Lowrie household "had already been calling the doctor." Id. at 323. The doctor had informed them to "give [Emily] Tylenol," that Emily "would be all right," and that "fevers are associated with immunization shots." Id. Petitioner and Ms. Yarbrough discussed whether they should take Emily to the hospital and decided that "the doctor knew best." Id. at 325. She recalls petitioner mentioning that Emily had a fever. Id. at 328.

After July 6, 2000, Emily "declined greatly in health." Id. at 327. Ms. Yarbrough describes Emily after her 15-month vaccinations as "a computer's hard drive that was completely erased." Id. at 324. Speaking about her current condition, Ms. Yarbrough states Emily is "not at all what she used to be." Id. at 326. Ms. Yarbrough states, "It was just garble what she was talking." Id. at 330. She testifies that today, it still is difficult "to understand everything [Emily] says." Id. Emily is easily frustrated because "she can't communicate fully." Id. Unlike before July 2000, Emily runs "into the wall," spins "around in circles," and gets "naked a lot, because she doesn't like the way her clothes feel." Id. at 331.

e. Emily's Grandfather: John Lowrie

Mr. Lowrie testifies that he has a bachelor's degree in business administration from the University of Houston and a graduate degree in banking from Southern Methodist University. Id. at 339. Mr. Lowrie served as a bank trust officer for 30 years, and for the past year has been a registered financial advisor. Id.

Mr. Lowrie explains that he, his wife, and petitioner became "tri-co-conservators" of Emily, id. at 342, when she was approximately 15 months to two years of age. Id. at 366-67. All three shared guardianship because Emily was "getting so sick" and petitioner "had a hard time coping." Id. at 367.

Mr. Lowrie recalls Emily being a "happy" baby, and "a baby that never really cried." Id. at 345. He also recalls spending "three hours a day with her" and on weekends, "the whole weekend." Id. at 344. He states that between age nine and ten months, Emily began walking. Id. at 345. Then, when Emily was age 12 or 13 months, she had a vocabulary of 20 or 30 words, and he would "do word games" with her, trying "to get her to repeat words." Id. While he recalls Emily needing to have "tubes put in her ears," he did not recall if Emily had "chronic ear infections." Id. at 368. He also believes that Emily, at age 15 months, had "normal development." Id. at 348.

Mr. Lowrie recounts that during the summer of 2000, he was involved "in high school baseball" in "one of the biggest tournaments of the year." Id. Because he was "the leader of the

pack" for the tournament, on Thursday and Friday, July 6 and 7, he was involved from 3:00 p.m. until 10:00 p.m., and on Saturday and Sunday, July 8 and 9, he was involved from 8:00 a.m. until 9:00 p.m. Id. at 351.

When Mr. Lowrie returned home from the tournament at 10:30 p.m., on either Thursday or Friday, id. at 349-50, Emily was "screaming." Id. at 348. He states that he "knew something was wrong." Id. at 349. Emily also "had big welts on her leg," about the size of "silver dollar[s]." Id. at 358. His wife or petitioner informed him that Emily "was also running [a] really high temperature." Id. at 349. Because the baseball tournament commanded all of his time, he decided to "participate" in the tournament because there was "nothing [he] could do" about Emily. Id. at 351. Mr. Lowrie explains that he "did not participate in giving [his] children any medicines" and "didn't play that role in" the family. Id. His wife and daughter were caring for Emily. Id.

The other evenings that Mr. Lowrie returned home after the tournament, he found Emily to be "very listless." Id. Emily "didn't respond," id., and was "in a trance." Id. at 352; see also id. at 363. In addition, Emily was "limp" when Mr. Lowrie held her, and she was "very hot" because "she was running a high fever." Id. at 363. Mr. Lowrie recalls Emily's temperature reaching 104 or 105 degrees, and while his wife and petitioner would give Emily Tylenol, "within a few hours, things would seem to . . . spike themselves back up." Id. at 352. Mr. Lowrie testifies that after Emily received her vaccinations, "[s]omething happened to her and [she] started to get worse and worse for several days." Id. at 358. He also states that Emily had a fever "for over four days," and that she was taken into the pediatrician after the weekend. Id. at 353.

Once Emily's fever subsided, Mr. Lowrie notes that she began to make "eye contact again" and "to respond a little bit." Id. However, Emily did not return to "normal." Id. According to Mr. Lowrie, Emily's verbal skills had deteriorated. Id. She "didn't talk anymore," and she "didn't even babble or gurgle or coo." Id. Her physical skills had deteriorated as well and she "couldn't stand up on her own." Id. at 354. Once Emily did start to walk again, she was "dragging" one of her legs behind the other for "almost a month." Id.

According to Mr. Lowrie, now, when Emily is surrounded by kids of her own age, there is "a little difference" between the kids' and Emily's level of development. Id. at 355. He also says that Emily "doesn't like to be in large groups" and that she is unable to do "the things they can do." Id. Additionally, Emily is "very sensitive" to noise. Id. at 356. He says that her speech between the ages of one-and-a-half and three-and-a-half "was a lot of garble," id., and that she "gets easily frustrated." Id. at 357. Mr. Lowrie reports that Emily now has speech, emotional, and "some hearing disabilities." Id. at 359.

Mr. Lowrie testifies that he does not know whether his wife had seizures or staring spells as a child. Id. at 364. Further, he does not remember "any of [his] children getting violently ill like Emily." Id. at 366. While he recalls taking his sons to the emergency room when they were

children, Mr. Lowrie stated that they were taken for "broken arms, broken fingers, broken hands, a lot of broken things" but he did not "remember" going "for vaccinations." Id.

2. The August 31, 2005 Hearing

The special master conducted the second hearing on August 31, 2005, in Washington, D.C. Petitioner's sole witness was Dr. Bryant.

a. Emily's Pediatrician: Jean W. Bryant, M.D.

Dr. Bryant has been a pediatrician for nine years and was Emily's primary treating pediatrician until September 2001.[37] Tr. II at 5, 49. She began her testimony by describing her standard office policy regarding recordkeeping. Id. at 34. Usually, each child in her practice has a file in which nurses and doctors record any contact with the child or child's parents, including "sick visits, phone calls, well visits, lab results, hospital records, . . . [and] immunization records." Id. When a parent telephones about his or her child, office policy dictates that the nurse or doctor answering the telephone record the symptoms "on a note and put [it] in the chart." Id. at 35; see also id. at 11. If a parent telephones during office hours, a message is written. Id. at 11. If the telephone call occurs after office hours, then "it definitely would be written down." Id. If the answering service answers the telephone, then the "doctor on call" is paged. Id. at 37. The doctors "try to keep the same type of phone message system" at home, and then the following business day, the doctors bring their telephone messages into the office, and a secretary files them "in the charts." Id. If a nurse answers a parent's telephone call, then "a physician needs to review it." Id. at 39.

Dr. Bryant then testifies about her professional relationship with Mrs. Lowrie. Id. at 37. She states that her office makes referrals to Mrs. Lowrie in her capacity as a lactation specialist. Id. at 7. Dr. Bryant feels that Mrs. Lowrie is a truthful person, and that both she and petitioner are good historians. Id. at 7, 52.

On Thursday, July 6, 2000, petitioner and Mrs. Lowrie brought Emily to Dr. Bryant for her vaccinations. Id. at 6. Dr. Bryant testifies that while "there's no note in the chart" reflecting that either petitioner or Mrs. Lowrie called the office that evening, "there is a possibility that [Carolyn, the nurse] did not make a note of it" if "she thought [it] was [a] normal vaccine" reaction. Id. at 9. There is a note in Emily's records about a telephone call from petitioner on Monday, July 10, 2000. Id. at 10. A nurse noted in the record that petitioner "said three hours after her vaccine, [Emily] started with fever." Id. However, there was no note from Carolyn, id., and Dr. Bryant did not "recall" Carolyn "saying anything about" anyone from the Lowrie family calling on Thursday. Id. at 11. Dr. Bryant testifies that when she returned from vacation, "someone" did bring to her attention that Emily was having "these problems." Id. at 12.

[37] All references to the Transcript of the hearing conducted on August 31, 2005, shall be designated herein as "Tr. II at __."

Dr. Bryant does not recall Dr. Bishop speaking with her about Emily. Id. at 14. She states that Dr. Bishop's advice about giving Tylenol and Motrin to control Emily's fever in light of her gasping may have been proper. Id. at 15. According to Dr. Bryant, when a child has a fever, the child's heart rate rises as does the respiratory rate, causing the child to breath faster. Id. Once the fever is controlled, the child's breathing should return to normal. Id. Dr. Bishop noted that he "doubted things were going on this long from the vaccine," id. at 21, because after three days of symptoms, "something else [may be] going on." Id. at 22.

Dr. Bryant does recall that she spoke with Dr. Dickerson because "she's the one that saw her" on Monday. Id. at 14. Dr. Dickerson informed Dr. Bryant that Emily's "fever was down," so Emily "looked okay." Id. at 25. Dr. Bryant notes that Dr. Dickerson was concerned about Emily so she "did send her for some blood work." Id. at 17. Based on the results of the blood tests, Dr. Dickerson thought Emily had a viral syndrome, especially because petitioner and Mrs. Lowrie had called about "some [gastrointestinal] upset." Id. The "main symptom" that the doctor and nurses recorded in Emily's chart was fever. Id. at 18. No other "signs or symptoms" were mentioned. Id.; see also id. at 54. As a result, Dr. Bryant said it "sounds reasonable" to her that Dr. Dickerson would instruct petitioner and Mrs. Lowrie to continue Emily on Tylenol and Motrin. Id. at 18.

Dr. Bryant testifies next that there was no note of a telephone call to her office on July 11, 2000, but she "wouldn't doubt that it occurred." Id. at 19. She testifies that "on occasion," telephone messages go astray. Id. Dr. Bryant also checked the "lab slip" because sometimes doctors or nurses will "make notes on the lab slips instead of a different note in the chart if [they are] talking about . . . a lab." Id. at 20. However, Dr. Bryant did not find any notes on the lab slip. Id.

During the July 18, 2000 meeting, petitioner and Mrs. Lowrie explained to Dr. Bryant that they had "two concerns" about Emily: "how she was doing" and "if [petitioner] was being treated kind of like a young mom . . . that [she didn't] have enough experience to know what's going on." Id. at 23. Dr. Bryant testifies that she does not remember any document that Mrs. Lowrie says she gave to a nurse in her office. Id. at 24. Petitioner and Mrs. Lowrie described Emily's symptoms to Dr. Bryant, and this information was "more detail[ed] than what was in the phone messages or the information they gave at the" July 10, 2000 visit. Id. at 26. The symptoms they relayed to Dr. Bryant were "inconsistent response, irritable, decreased response to environment, decreased eye contact, blank stares, balance and walking bad since immunizations." Id. at 54-55.

Reflecting on notes from the July 18, 2000 visit, Dr. Bryant testifies that a nurse wrote "a blank stare" from the information Myra and Jillian Lowrie gave to the nurse. Id. at 45. The blank stare could be attributed to a seizure, but there is no mention of "shaking or being rigid." Id. Dr. Bryant did not examine Emily at this visit because petitioner and Mrs. Lowrie "wanted to have . . . more like a conference." Id. at 46. Based on the telephone messages in Emily's chart, Dr. Bryant testifies that "there are no notations" in the messages "about seizure activity," and the

messages state "there were no other symptoms." Id. at 48. Dr. Bryant notes that if an upset parent telephones, she always "tell[s] parents if they want to go to the ER, that's their choice." Id. at 42.

II. DISCUSSION

A. The Vaccine Act

Pursuant to 42 U.S.C. § 300aa-13(a)(1), the court shall award compensation if petitioner[38] proves, by a preponderance of the evidence, all of the elements set forth in § 300aa-11(c)(1)[39] of the Vaccine Act and that the illness is not due to factors unrelated to the administration of the vaccine.[40] Petitioner can recover in one of two ways: either by proving a Table injury or by proving causation in fact. If petitioner proves a Table injury, there is an automatic presumption of causation. Petitioner can prove a Table injury if she shows that Emily received a vaccine listed on the Table and suffered an injury, or an acute complication or sequela of that injury, associated with that vaccine within the prescribed time period. 42 U.S.C. §§ 300aa-11(c)(1)(C)(I), -13(a)(1)(A). However, respondent can rebut the presumption by showing that a factor unrelated to the vaccine(s) caused the injury. Id. § 300aa-13(a)(1)(B).

As described above, on July 6, 2000, Emily received the DTaP, Hib, MMR, and Prevnar vaccinations. Petitioner claims that the pertussis component of the DTaP vaccine caused Emily to suffer an encephalopathy within 72 hours of the vaccine's administration and that, as a result,

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[38] Section 11(b)(1) requires that: (1) only the "person who sustained a vaccine-related injury . . . or the legal representative of any person who died as the result of the administration of a [Table vaccine] . . ." can bring an action for vaccine injury-related claims (so long as the requirements of subsection (c)(1) are satisfied) and (2) no previous civil action was filed in the same matter. Petitioner, the legal representative of her minor child who was allegedly injured as the result of the administration of a Table vaccine, is the appropriate person to maintain this action.

[39] Subsection (c)(1) requires, inter alia, that the following elements be satisfied: (1) that the vaccine in question is set forth in the Vaccine Injury Table; (2) that the vaccine was received in the United States or in its trust territories; (3) that the minor child either sustained an injury as a result of the administration of a Table-designated vaccine for a period of more than six months after the administration of the vaccine, suffered illness, disability, injury, or condition from the vaccine which resulted in inpatient hospitalization and surgical intervention, or died from the administration of the vaccine; and (4) that the petitioner, as her daughter's legal representative, has not previously collected an award or settlement of a civil action for damages arising from the alleged vaccine-related injury or death.

[40] Of course, the petition must also be filed within the statutory period. 42 U.S.C. § 300aa-16(a). The petition in this case was timely filed.

she suffers from a seizure disorder. An encephalopathy occurring within 72 hours of the administration of the DTaP vaccination constitutes a Table injury if other statutory requirements are satisfied.

The Table defines encephalopathy as an acute encephalopathy followed by a chronic encephalopathy persisting for more than six months past the date of vaccination. 42 C.F.R. § 100.3(b)(2). For children under the age of 18 months who present without a seizure, an acute encephalopathy is indicated by a "significantly decreased level of consciousness" lasting for at least twenty-four hours. Id. § 100.3(b)(2)(i)(A). For children presenting with a seizure, the significantly decreased level of consciousness must persist more than 24 hours and cannot be attributed to the seizure or medication. Id.

Further, a "significantly decreased level of consciousness" is defined by the presence of at least one of the following three clinical signs for 24 hours or longer: (1) decreased or absent response to the child's environment, (2) decreased or absent eye contact, or (3) inconsistent or absent responses to external stimuli. Id. § 100.3(b)(2)(i)(D). However, "[t]he following clinical features alone, or in combination, do not demonstrate an acute encephalopathy or a significant change in either mental status or level of consciousness . . . : Sleepiness, irritability (fussiness), high-pitched and unusual screaming, persistent inconsolable crying, and bulging fontanelle." Id. § 100.3(b)(2)(i)(E). Further, "[a]n encephalopathy shall not be considered to be a condition set forth in the Table if . . . it is shown by a preponderance of the evidence that the encephalopathy was caused by an infection, a toxin, a metabolic disturbance, a structural lesion, a genetic disorder or trauma . . . ." Id.

B. Greater Weight Is Afforded to Contemporaneous Medical Records

The Vaccine Act explicitly requires that the existence of a fact must be demonstrated by a preponderance of the evidence. 42 U.S.C. § 300aa-13(a)(1). This standard has been explained to mean more than a possibility. The special master must "believe that the existence of a fact is more probable than its nonexistence before . . . find[ing] in favor of the party who has the burden to persuade the [special master] of the fact's existence." Ciotoli v. Sec'y of HHS, 18 Cl. Ct. 576, 588 (1989) (quoting In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965))); see also Hines ex rel. Sevier v. Sec'y of HHS, 940 F.2d 1518, 1525 (Fed. Cir. 1991). Thus, the preponderance of the evidence standard requires the petitioner to "adduce evidence that makes the existence of a contested fact more likely than not." Estate of Arrowood ex rel. Arrowood v. Sec'y of HHS, 28 Fed. Cl. 453, 458 (1993). Mere conjecture or speculation will not establish a probability. Snowbank Enters., Inc. v. United States, 6 Cl. Ct. 476, 486 (1984).

In general, testimony that conflicts with contemporaneous documentary evidence should be accorded little weight. United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948); Cucuras v. Sec'y of HHS, 993 F.2d 1525, 1528 (Fed. Cir. 1993); Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1328 (Ct. Cl. 1980). Contemporaneous records,

especially contemporaneous medical records, are given greater weight because: "Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events." Cucuras, 993 F.2d at 1528. A special master need not always give more weight to the contemporaneous medical records, however:

> 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.

Murphy v. Sec'y of HHS, 23 Cl. Ct. 726, 733 (1991) (quoting with approval the standard used by the special master below), aff'd per curiam, 968 F.2d 1226 (Fed. Cir. 1992).

C. Emily's Medical Records Are Clear and Internally Consistent

Petitioner seeks to supplement the existing medical records via oral testimony and affidavits. The existing medical records in this case are clear and internally consistent. See, e.g., Pet. Ex. 3 at 1-27; Pet. Ex. 4 at 1-34. Thus, the legal issue before the special master is whether the testimony of petitioner and her witnesses, presented five years after the original events occurred, can supplement and fundamentally alter the contemporaneously-made medical records in this case. A review of the medical records and testimony makes plain there are only a few instances where petitioner's testimony can be used to explain the contents of the medical records. However, none of the testimony that contradicts the medical records can be accepted as true. The medical records made at the time treatment was sought or provided are far more reliable than the witnesses' testimony, five years later, to the contrary.

The major discrepancies between the medical records and the oral testimony concern: (1) whether the Lowries telephoned Dr. Bryant's office on July 6 and 7, 2000; (2) whether the Lowries advised anyone in Dr. Bryant's office that Emily had experienced a seizure or that she was demonstrating seizure-like behavior; (3) whether Emily experienced a fever for four days after her July 6, 2000 vaccinations; (4) whether the Lowries informed anyone in Dr. Bryant's office that Emily demonstrated a reduced level of consciousness, and if so, for what period; and (5) whether Emily experienced the extreme distress described by her family, in light of their inaction and the absence of medical records to corroborate their testimony.

1. The Lowries Did Not Telephone Dr. Bryant's Office on July 6 or 7, 2000

Petitioner and Mrs. Lowrie testify that they called Dr. Bryant's office on July 6 and 7, 2000, because they were concerned with Emily's high fever and decreased level of consciousness. Tr. I at 22, 145, 198-99, 234. They claim that Emily appeared "lifeless" or resembled a "CPR dummy" for much of the time after her July 6, 2000 vaccinations. Id. at 140, 145, 249, 269-70. However, there are no contemporaneous medical records that support their assertions.

Dr. Bryant testifies that she maintains medical records in the normal course of her practice. Tr. II at 35-36, 39. Dr. Bryant further explains that her office has an official retention policy regarding, inter alia, the handling and preservation of a patient's telephone inquiry. Id. The policy requires that her staff, usually a nurse, make a written account of the patient's telephone call describing the inquiry, symptom(s), and/or concern. Id. The only exception to this practice is a telephone call that requires only an elementary clarifying response, such as, for example, an inquiry concerning the proper dosage for a medication based upon a child's age and weight. Id. Any concern or inquiry recorded by a nurse or staff member is given to a physician for review, assessment, and response. Id. A copy of the telephone note is placed in the patient's medical file. Id.

In the absence of medial records to support the Lowries' claim that telephone calls were made to Dr. Bryant's office on July 6 and 7, 2000, the special master must reject the attempt to supplement the written medical records. Dr. Bryant's testimony concerning her office policy was clear and reasonable. It is standard practice for a doctor's office to make notes of incoming telephone calls. Moreover, Dr. Bryant was a convincing witness. But, more importantly, the medical records in this case are replete with examples of telephone messages from the Lowries to Dr. Bryant's office seeking medical advice for Emily. Specifically, the medical records contain at least 16 such written telephone messages. See, e.g., Pet. Ex. 3 at 8 (two messages dated November 9, 1999); id. at 9 (one message dated November 26, 1999); id. at 13 (one message dated November 25, 2000); id. at 14 (one message dated March 9, 2000); id. at 15 (one message dated March 20, 2000); id. at 16 (two messages dated March 23 and 24, 2000, respectively); id. at 17 (two messages dated April 17 and 18, 2000, respectively); id. at 19 (two messages dated July 9 and 10, 2000, respectively); id. at 21 (one message dated December 28, 2000); id. at 22 (one message dated January 23, 2001); id. at 23 (one message dated March 16, 2001); id. at 24 (one message dated April 8, 2001); id. at 26 (two messages dated August 17 and 28, 2001, respectively).

Thus, the absence of two written telephone messages, allegedly made during the critical time period for purposes of proving a Table encephalopathy, leads the special master to conclude that the telephone calls were not made. It is not reasonable to credit petitioner's testimony that the message slips are missing from Emily's medical records when so many others were produced. Rather, the special master concludes that, in this instance, the absence of a record is sufficient to preclude oral testimony to supplement the record. The special master also finds, in this regard,

that the discrepancy between the Lowries' testimony and the medical records is the result of faulty memories and good-faith error, not lack of candor by any of the witnesses.

2. The Lowries Did Not Advise Anyone in Dr. Bryant's Office that Emily Experienced a Seizure or Demonstrated Seizure-like Behavior

The medical records in this case similarly are devoid of records of telephone calls or visits to Dr. Bryant's office on any day that Emily allegedly suffered a "seizure" or was demonstrating "seizure-like" behavior as claimed by petitioner and her witnesses. See Tr. I 31-378 passim. The only record that might support such a claim is Dr. Bryant's notes from her July 18, 2000 consultation with the Lowries. Pet Ex. 3 at 20. Dr. Bryant's July 18 notes mention Emily's inconsistent and decreased response, irritability and crankiness, inconsolability, fever, decreased eye contact, blank stares, and walking and balance problems. Id. However, no mention of seizures exists in the record. The special master accepts as credible that, from time to time after her July 6, 2000 vaccinations, Emily would exhibit blank stares. Even though the note was made on July 18, not July 6, it was made within 12 days of vaccination and recorded during a conference with the family. While the special master credits the family's testimony that Emily had blank staring spells, she rejects the contention that they explained to Dr. Bryant that Emily had seizures.

Furthermore, the special master finds that if either witness had described such significant behavior as seizures, then that description would be reflected in the medical records. As described above, given the level of detail in the medical history recorded by Dr. Bryant, it is not reasonable to believe that Dr. Bryant would take the time to record symptoms such as irritability and inconsistent response, but fail to record that Emily had experienced seizures. Clearly, seizure activity is an important symptom that would have been noted by Dr. Bryant. Tr. II at 46. Indeed, the seizure activity that the Lowries claim they communicated to Dr. Bryant's office would be of such magnitude that Dr. Bryant, as a prudent and competent pediatrician, would have referred Emily to a neurologist or, at a minimum, ordered follow-up testing. But most assuredly, if such symptoms had been described, a notation would have been made.

Additionally, the special master notes that two other aspects of the witnesses' testimony concerning the July 18, 2000 meeting suggest that the witnesses' testimony is inaccurate. The discrepancies between the written record and the witnesses' memories illustrate the importance and validity of affording greater weight to the contemporaneous medical records than subsequent testimony. First, Dr. Bryant's July 18, 2000 notes state unambiguously that the meeting lasted 45 minutes. However, Mrs. Lowrie testifies that the meeting lasted a couple of hours, tr. I at 56, and petitioner claims that it lasted "a lot" longer than 45 minutes. Id. at 276. Because Dr. Bryant's record was made at the time of the meeting, it is more reliable than the witnesses' memories. The second discrepancy is petitioner's and Mrs. Lowrie's faulty recollection that Dr. Bryant examined Emily at the July 18, 2000 meeting. Id. at 275. Dr. Bryant's July 18 notes contain no finding from a physical examination of Emily. Pet. Ex. 3 at 20. However, Emily's medical records reflect that at all other exams, Dr. Bryant recorded her findings upon physical

examination. See generally Pet. Ex. 3. Thus, it is reasonable to conclude that no examination occurred. This adverse finding notwithstanding, the special master does not conclude that the witnesses were untruthful, even though she does not accept their testimony as an accurate portrayal of events. Rather, the differences reflect good-faith mistakes resulting from their memories' fading with the passage of time.

3. Emily Experienced a Fever for Four Days After Her July 6, 2000 Vaccinations

Although there is no record of the alleged telephone calls to Dr. Bryant's office on July 6 or 7, 2000, the special master believes it is reasonable, based upon the notes contained in other medical records, that Emily had a fever for several days after vaccination. There are several medical records that support this claim. For example, the medical records document that on July 10, 2000, at 8:40 a.m., petitioner telephoned Dr. Bryant's office and spoke with a nurse practitioner, who made a written record of their conversation. Id. at 19. The nurse's notes of the call reflect petitioner's concerns that Emily had experienced a temperature since July 6, which had peaked at 105 degrees, but had dropped to 102.5 degrees on the day of the call. Id. This call was made within four days of Emily's vaccination and the special master accepts as true the representation that Emily had experienced four days of fever.

This medical record also reflects that the nurse who took the telephone call from petitioner checked the "priority" box in the upper left-hand corner of the message slip indicating that attention/response was needed sooner than later. Id. The fact that several different degrees of fever were recorded and that the "priority" box was checked by the nurse provides convincing evidence that petitioner did convey her belief that Emily was in distress due to a four-day fever. It is also important that at the time of her telephone call on July 10, petitioner was seeking medical advice and treatment for her sick child. Thus, it is reasonable to believe that petitioner provided accurate information to the pediatrician's office so that Emily would receive the best possible medical treatment.

The contemporaneous medical records from that same day, July 10, 2000, also document that despite the advice of the pediatrician's office to "wait one more day" to have Emily seen by a pediatrician, petitioner brought Emily to the doctor. Id. at 19-20. Emily was examined by Dr. Dickerson. Id. at 20. Petitioner told the pediatrician during that visit that Emily had: (1) a temperature of 101 degrees since July 6, the date of vaccination; (2) a 105-degree rectal temperature the night of July 9; (3) a poor appetite since July 8; (4) poor drinking since July 9; and (5) crying which could be consoled. Id. The special master finds that this record also corroborates petitioner's testimony that Emily had experienced a fever since July 6 which continued through July 10. See, e.g., Tr. I at 194, 198-99, 202-03, 262. Petitioner's obvious concern for Emily is evidenced by her ignoring the advice to delay an office visit for one more day and bringing Emily to be checked the same day as her telephone call. Moreover, if Emily had not had a fever, which was high at times, she would not have made that representation to the telephone nurse and Dr. Dickerson. Thus, the special master credits the testimony that Emily

suffered from a fever from July 6, 2000, the date of vaccination, to and including July 10, 2000, the date she was examined by Dr. Dickerson.

4. The Lowries Did Not Inform Anyone in Dr. Bryant's Office that Emily Demonstrated a Reduced Level of Consciousness Within 72 Hours of Her July 6, 2000 Vaccinations

As described above, at the July 18, 2000 meeting, the Lowries expressed concern with what they perceived as Dr. Bryant's office's lack of response to Emily's postvaccination distress. Pet. Ex. 3 at 20. However, the special master cannot accept as true the contention that they described to anyone at the pediatrician's office that Emily had suffered a reduced level of consciousness within 72 hours of her July 6, 2000 vaccinations. To the contrary, Dr. Bryant's notes mention, inter alia, Emily's inconsistent and decreased response, irritability and crankiness, inconsolability, decreased eye contact, and blank stares. Id. Given the level of detail contained throughout Emily's medical history as recorded by Dr. Bryant and her colleagues, had the Lowries described Emily as having a reduced level of consciousness, Dr. Bryant would have recorded that symptom. Moreover, a child who is irritable or cranky cannot be said to have a decreased level of consciousness.

5. Emily Did Not Experience the Extreme Distress Described by Her Family

Emily's family testifies that Emily experienced seizures and exhibited other drastic changes in behavior. See generally Tr. I. Indeed, the events they described clearly place Emily in jeopardy. It is clear that they all love Emily. Thus, it is inconceivable that Emily had been in the perilous state described by the witnesses at hearing and immediate medical attention was not sought.[41]

First, the special master notes that Emily's medical records document that her family did not hesitate to take her to the doctor before her July 6, 2000 vaccinations. See, e.g., Pet. Ex. 3 at 1-4, 6-12, 14-18. Second, Emily's grandmother, Mrs. Lowrie, is a nurse, lactation consultant, doula, and health care educator. Tr. I at 6. Given her education, training, and professional expertise, she would have known to seek medical attention for such serious medical problems. See id. at 45, 51, 117, 119, 146 (Mrs. Lowrie's admission, in hindsight, that she should have taken Emily to the hospital). Mrs. Lowrie has dedicated her professional life to the care of mothers and infants. It is unthinkable that she would afford a lower standard of care for her own granddaughter than she would for a mere client.

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[41] Although the special master finds Ms. Yarbrough a credible witness, her testimony of the events surrounding what she allegedly observed on the night of Friday, July 7, 2000, relies exclusively on her memory of events that occurred five years ago. Moreover, the special master notes that, on the night of July 7, 2000, if indeed that is the date Ms. Yarbrough visited the Lowries, she did not insist that Emily be taken to the hospital.

Third, the medical records do not reflect many of the dramatic details, as described by the witnesses at hearing, that might support petitioner's theory that Emily suffered an on-Table encephalopathy. Taken as a whole, the contemporaneous medical records make no mention of Emily appearing "lifeless" or looking like "a ragdoll" or a "CPR dummy." Rather, they document a sick child with a fever who demonstrated, among other things, irritability, crying, and the ability to be consoled by her mother. Thus, the special master is hard pressed to accept such testimony.

If the events of July 6-9, 2000, occurred as described, the special master believes that (1) petitioner would have taken her daughter to the hospital, despite the alleged advice of her pediatrician's office not to bother or that the crisis would pass; (2) Mrs. Lowrie, a trained nurse, lactation consultant, doula, and health care educator, would have insisted on taking Emily to the hospital as she had done for her other children when they experienced possible vaccine reactions; and (3) Mr. Lowrie would not have valued his personal participation in a baseball tournament more than the health of his granddaughter. The depictions of Emily's appearance and behavior by the witnesses at hearing convinces the special master that, if true, all three family members directly responsible for Emily's well-being would have sought immediate medical attention for Emily. Yet not one did. Based on the foregoing, it is not reasonable to believe that the events occurred as described in the testimony at hearing.

However, the special master's conclusion should not be misconstrued as a finding that petitioner and her witnesses were untruthful. Rather, given the traumatic events they endured over a compressed time period, coupled with the passage of five years, it would not be unusual for memories to fade or for witnesses to misremember events. Given the level of detail contained in Emily's medical records, it is far more likely that Dr. Bryant's office would have chronicled the dramatic events that immediately followed Emily's July 6, 2000 vaccinations, had those events unfolded as petitioner claims. The special master is convinced that had petitioner described many of the dramatic symptoms that she claims occurred, Emily's pediatricians would have sent her to the nearest emergency room or would have been seen by the on-call pediatrician. But those events would be detailed in Emily's medical records.

III. CONCLUSION AND FINDINGS OF FACT

In sum, the special master finds, with certain limited exceptions described below, that petitioner's explanations for the discrepancies between the medical records and her account of the events that occurred within 72 hours after Emily received her July 6, 2000 vaccinations to be insufficient to materially alter the contemporaneous medical records. Specifically, the special master makes the following findings:

1. Emily Lowrie, the daughter of petitioner Jillian Lowrie, was born on March 19, 1999.

2. Other than normal infant and young child ailments, Emily's development was essentially normal prior to her 15-month vaccinations.

3. Prior to July 6, 2000, Emily's family contacted the office of pediatrician Jean W. Bryant, M.D., for advice or brought Emily in for treatment on more than 30 occasions.

4. On July 6, 2000, Dr. Bryant declared Emily to be a well child and administered the following vaccinations to Emily: DTaP, Hib, MMR, and Prevnar.

5. Dr. Bryant maintains medical records in the normal course of her practice.

6. Dr. Bryant's office has an official medical records policy concerning, inter alia, the handling of a patient's telephone inquiry. The policy requires that her staff make a written account of the patient's telephone call describing the inquiry, symptom(s), and/or concern. The concern or inquiry is given to a physician for review, assessment, and response. A copy of the telephone note is placed in the patient's medical file.

7. Dr. Bryant's medical records do not include telephone messages dated July 6, 2000, or July 7, 2000.

8. No member of the Lowrie family telephoned Dr. Bryant's office prior to July 9, 2000.

9. Emily, beginning on July 6, 2000, suffered from a fever, which waxed and waned for at least four days. The fever reached 105 degrees on at least one occasion and 102.5 degrees on another.

10. Emily, during the four days beginning on July 6, 2000, at times experienced a decreased appetite and a decreased level of responsiveness to her family, friends, and surroundings.

11. On July 9, 2000, shortly after 9:00 a.m., Ms. Lowrie telephoned Dr. Bryant's office and spoke with the on-call pediatrician, Dr. Bishop. During that telephone call, Ms. Lowrie expressed concern with Emily's 101-degree fever and with the appearance of markings similar to "bug bites" on Emily's legs. Dr. Bishop, the physician who spoke with Ms. Lowrie, "doubted" the fever was attributable to Emily's then-recent vaccinations.

12. On July 10, 2000, at 8:40 a.m., Ms. Lowrie telephoned Dr. Bryant's office and spoke with a nurse practitioner, who made a written record of their conversation. Ms. Lowrie expressed concern that Emily had experienced a temperature since July 6, 2000, which had peaked at 105 degrees, but had dropped to 102.5 degrees on the day of the telephone call. The nurse who made the note checked the "priority" box in the upper left-hand corner of the telephone slip indicating that attention/response was needed sooner than later. Ms. Lowrie was told to "wait one more day" before bringing Emily in to be examined.

13. On July 10, 2000, despite the advice of her pediatrician's office to "wait one more day," Ms. Lowrie brought Emily to Dr. Bryant's office. Emily was seen by Dr. Dickerson.

During that visit, Ms. Lowrie stated that Emily had: (1) a temperature of 101 degrees since July 6, the date of vaccination; (2) a 105-degree rectal temperature the night of July 9; (3) a poor appetite since July 8; (4) poor drinking since July 9; and (5) crying which could be consoled. Emily's CBC was normal. Dr. Dickerson diagnosed a viral syndrome and nontoxic fever.

14. On July 18, 2000, Myra Lowrie and Ms. Lowrie took Emily to see Dr. Bryant. They described Emily's symptoms subsequent to the July 6, 2000 vaccinations as inconsistent and decreased response, irritability and crankiness, inconsolability, fever, decreased eye contact, blank stares, and walking and balance problems. In addition, they indicated that after Emily's four-month vaccinations, she experienced a limp.

15. At the July 18, 2000 meeting, the Lowries did not inform Dr. Bryant that Emily experienced seizures or seizure-like behavior.

16. Mrs. Lowrie did not provide a list of Emily's symptoms to Dr. Bryant's nurse just before meeting Dr. Bryant on July 18, 2000.

17. Dr. Bryant did not examine Emily on July 18, 2000.

18. Dr. Bryant's July 18, 2000 meeting with the Lowries lasted 45 minutes.

19. At the July 18, 2000 meeting, Dr. Bryant noted that Emily should not receive any further pertussis vaccine.

20. The Lowries did not inform anyone at Dr. Bryant's office, including Dr. Bryant herself, that Emily experienced seizures or seizure-like behavior.

21. At no time did Mrs. Lowrie describe Emily as lifeless or Emily's condition as grave to anyone in Dr. Bryant's office.

22. All of the discrepancies between each of the witnesses' testimony at hearing and the special master's findings of fact is the result of good-faith memory lapse.

Petitioner's counsel shall confer with respondent's counsel and then contact the court to schedule a status conference to discuss further action in this case.

IT IS SO ORDERED.

Margaret M. Sweeney
Special Master