

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(Filed: August 25, 2009)

No. [Redacted]V

TO BE PUBLISHED¹

John Doe/42 and JANE Doe/42,)	
as legal representatives of their minor son,)	
MINOR John Doe/42 ,)	
)	MMR; Alleged Table
Petitioners,)	Encephalopathy that
)	Led to the Development of
v.)	Autism Spectrum Disorder;
)	Denial of Motion for
SECRETARY OF THE DEPARTMENT)	Issuance of Subpoena
OF HEALTH AND HUMAN SERVICES,)	to Former Treating
)	Doctor
Respondent.)	

REVISED ORDER RULING ON PETITIONERS’ MOTION FOR ISSUANCE OF A SUBPOENA AND EXTENSION OF TIME TO FILE ADDITIONAL EVIDENCE IN SUPPORT OF THEIR PETITION²

On August 13, 2009, petitioners’ counsel filed Petitioners’ Motion for Issuance of

¹ Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless an issued decision contains trade secrets or commercial or financial information that is privileged or confidential, or the decision contains medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. When a special master files a decision or substantive order with the Clerk of the Court, each party has 14 days within which to identify and move for the redaction of privileged or confidential information before the document’s public disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. On August 26, 2009, petitioners moved to redact their names from this case. The undersigned **GRANTS** petitioners’ motion with respect to the instant order and issued an order dated August 26, 2009, addressing in greater detail petitioners’ motion.

² This revised order contains summary background information that provides context for the undersigned’s ruling on petitioners’ motion for issuance of subpoena. This order **SUPERCEDES** the order issued on August 19, 2009.

a Subpoena and Extension of Time to File Additional Evidence in Support of Their Petition (Motion for Subpoena).

Petitioners' motion for issuance of subpoena is **DENIED**.³ The undersigned addressed petitioners' motions during the conduct of a status conference on August 19, 2009, and memorializes her reasoning pertaining to the motion for issuance of subpoena herein.

Before addressing the petitioners' motion, however, the undersigned briefly recounts the proceedings of the case to date that inform this ruling. Petitioners alleged that as a result of an administered MMR vaccination, their son, Minor Joe Doe/42, suffered a Table encephalopathy that resulted in "a severe and debilitating injury to his brain, described as Autism Spectrum Disorder."⁴ Petition at 1. As expressed during an early status conference in this case, petitioners' counsel proposed conducting a fact hearing, once the record was complete, to determine whether Minor John Doe/42 suffered a Table encephalopathy as a result of the administered MMR vaccination. See Order of May 8, 2006, at 1. If Minor John Doe/42 were found to have suffered a Table encephalopathy, then petitioners would consider proceeding individually on their claim rather than seeking to be included in the Omnibus Autism Proceeding (OAP). Id.

Consistent with petitioners' proposed course of proceeding, the documentary record was developed further following repeated requests to Kaiser Permanent for Minor John Doe/42's pediatric records.⁵ Minor John Doe/42's parents testified during a recorded fact hearing in San Jose, California on August 14, 2007. As described more fully in the Revised Ruling Regarding Factual Findings (Revised Factual Ruling) issued on May 29, 2009, Mr. John Doe/42 and Mrs. Jane Doe/42 gave an account of certain dramatic events that they claim followed Minor John Doe/42's vaccination, but such events were not referenced in any of the filed medical records. See Revised Factual

³ In the August 19, 2009 status conference, petitioners' counsel indicated that he would not be filing any additional evidence in support of petitioners' claim, thereby mooting petitioners' request for an extension of time to file additional evidence.

⁴ Petitioners also alternatively allege that "as a cumulative result of his receipt of each and every vaccination between March 25, 2003 and February 22, 2005, Minor John Doe/42 has suffered, and continues to suffer, neuroimmunologically mediated dysfunctions in the form of asthma and ASD, which were 'caused-in-fact' by the vaccinations." Petition at 1-2.

⁵ As noted in the Revised Ruling Regarding Factual Findings (Revised Factual Ruling) issued on May 29, 2009, "the proceedings to date have been conducted to develop a record that will permit an evaluation of petitioners' Vaccine Table Injury claim." Revised Factual Ruling at 2.

Ruling at 17-19. Based on significant differences between the events described by Minor John Doe/42's parents during their testimony and the events described in the medical records, the court asked Richard Armstrong, M.D., Minor John Doe/42's treating pediatrician during the time period of interest, to testify as a court witness, and a second fact hearing was held in San Jose on February 11, 2008.⁶ Having carefully considered the entire record and having heard the testimony of Minor John Doe/42's parents and his pediatrician, the undersigned "found . . . it . . . difficult to reconcile petitioners' later-recalled account of certain dramatic events following Minor John Doe/42's vaccination with the dearth of medical records corroborating their account." Revised Factual Ruling at 17. The undersigned also found petitioners' testimony about aspects of their response to the described events to be "inconsistent with the[ir] prior behavior" as reflected in the medical records. *Id.* at 18-19 (finding that "had Minor John Doe/42's parents suspected he was as ill as they now allege, they would more likely than not have sought medical treatment for him while they were in Paris" because "medical records demonstrate that Minor John Doe/42's parents were very conscientious caretakers who consistently sought medical treatment for relatively minor concerns related to congestion, fussiness from teething, and low-degree fever[, and] . . . consistent with the Doe/42's cautious habits, the Does had delayed Minor John Doe/42's initial hepatitis B vaccination.") (internal citations omitted). After resolving the parties' contested factual issues, the undersigned set forth the factual findings, noting that "[t]he medical significance of the foregoing factual findings remains to be addressed by the parties' respective experts." Revised

⁶ In addition to testifying as a court witness on February 11, 2008, Dr. Armstrong had earlier provided petitioners' counsel with a narrative letter, dated December 27, 2006, and filed as Petitioners' Exhibit 24, describing his "recollections of conversations [he] . . . had with [petitioners] from December 19, 2003 through March 31, 2004 concerning Minor John Doe/42 . . . P's Ex. 24 at 1. Dr. Armstrong's letter states that he performed Minor John Doe/42's twelve-month checkup on December 19, 2003, when Minor John Doe/42 was 11 months old in anticipation of the family's trip to Iran. *See id.* With respect to Minor John Doe/42's illness while in Iran, Dr. Armstrong states that his notes from Minor John Doe/42's March 8, 2004 office visit "reflect what was told to [him]; [Minor John Doe/42] had had a high fever for four or five days and he was worked up for a possible urinary tract infection. *Id.* [Dr. Armstrong's] impression at th[e] time [of Minor John Doe/42's evaluation] was [Minor John Doe/42] might have had roseola." *Id.* Dr. Armstrong's letter notes that there were "multiple phone visits mostly documented relating to refilling [Minor John Doe/42's] polyvitamins with fluoride, as well as clarifying a diphenhydramine dose for [Minor John Doe/42] (December 26, 2003)." *Id.* Dr. Armstrong's letter expressly states that his comments reflect "the extent of his recollection of Minor John Doe/42" between "December 19, 2003 through March 31, 2004." *Id.*

On May 18, 2007, Dr. Armstrong also answered seven questions prepared jointly by petitioners' and respondent's counsel regarding his general medical practices, and specifically inquiring about his record-keeping practices, which respondent filed on July 16, 2007, as Respondent's Exhibit A.

Factual Ruling at 21. By subsequent Order dated July 8, 2009, petitioners were directed to file their expert report by August 27, 2009.

Two weeks prior to the filing date for petitioners' expert report, petitioners filed the instant motion for issuance of a subpoena to Minor John Doe/42's pediatrician, Dr. Armstrong.⁷ Attached to petitioners' motion were Petitioners' Exhibit (Ps' Ex.) 27, consisting of new written questions prepared by petitioners' counsel for Dr. Armstrong to answer, which were delivered to him at his place of employment, and Petitioners' Exhibit 28, a responsive letter from legal counsel at Kaiser Foundation Health Plan, advising petitioners' counsel that further questions to Dr. Armstrong would have to be compelled by subpoena or court order. See Ps' Exs. 27-28. The undersigned turns now to address the filed motion.

Petitioners request that the undersigned authorize petitioners to issue a subpoena to Dr. Armstrong to answer certain written questions prepared by petitioners. Motion for Subpoena at 1. Additionally, or perhaps alternatively, petitioners' counsel also inquires whether Dr. Armstrong would "again be willing to discuss these matters by . . . testimony before Special Master Campbell-Smith." Ps' Ex. 27 at 5. The undersigned observes that the majority of the questions that petitioners now ask Dr. Armstrong to answer in writing appear to pertain to the progression of the autistic disease process and Dr. Armstrong's ability to recognize the initial symptoms of autism around the period of December 2003 through May 2004. See id. at 1-5. Petitioners' request for the information from Dr. Armstrong appears to center on a belief that Dr. Armstrong's appreciation of the symptoms of autism has changed in the past five years, and that had he examined Minor John Doe/42 five years ago with his current knowledge, then his documentation of Minor John Doe/42's presentation might have been different.

The undersigned recognizes that the understanding and recognition of the symptoms of autism by health care professionals may have evolved over the past five years. But, even if Dr. Armstrong's ability to recognize autism symptoms has improved, it does not change the fact that there are no contemporaneous medical records that document a presentation by Minor John Doe/42 to which Dr. Armstrong might now assign more clinical relevance.

⁷ Petitioners' instant motion evolved from an hour long conference on July 13, 2009, between Mr. Doe/42 and Dr. Armstrong, who is no longer Minor John Doe/42's treating pediatrician. See Motion for Subpoena at 1; 2/11/08 Tr. at 134 (Dr. Armstrong stating that Minor John Doe/42 is no longer a patient). As a result of that conversation, "it became clear to Mr. Doe/42" that Dr. Armstrong has "further thoughts" about his observations of Minor John Doe/42 during the last part of 2003 and the first few months of 2004. See id. During this conversation, Dr. Armstrong proffered that he would be willing "to provide written responses to questions posed by petitioners' counsel pertinent to those further thoughts." Id. at 1-2.

In his capacity as a practicing pediatrician, Dr. Armstrong observed and documented what his knowledge, training and experience deemed relevant on the occasions that he examined Minor John Doe/42 . Those observations are what Dr. Armstrong documented in the medical records. Any observations that were not deemed clinically relevant to Dr. Armstrong on the occasions that he treated Minor John Doe/42 are, not surprisingly, absent from the medical records.

That Dr. Armstrong may have viewed Minor John Doe/42 differently based on what he now knows about autism does not establish that he would have viewed Minor John Doe/42 differently when he examined him five years ago. Even if Dr. Armstrong's sensitivity to a possible autism diagnosis has changed, that changed sensitivity does not necessarily provide the undersigned with any specific probative information about Minor John Doe/42's presentation during Dr. Armstrong's evaluations of Minor John Doe/42 between December 2003 and May 2004 (the time period of interest for Minor John Doe/42's symptom onset) that would change the posture of this case. Simply put, that Dr. Armstrong's notations about Minor John Doe/42 could have been different does not establish that his notations would have been different.

The undersigned recognizes that because Minor John Doe/42 has now been diagnosed with autism, he necessarily had symptoms that preceded his diagnosis. But the question still remains in this case when Minor John Doe/42 began to exhibit those symptoms. As addressed in greater detail in the Revised Factual Ruling, when the record (which is admittedly an imperfect one) is viewed as a whole, it does not support a finding that the symptoms petitioners now allege that Minor John Doe/42 exhibited occurred at the time that petitioners now allege.

The undersigned has heard the testimony of petitioners and Dr. Armstrong. Petitioners were present during Dr. Armstrong's testimony, and their counsel was afforded an opportunity to question Dr. Armstrong. Based on the record as developed to permit an evaluation of petitioners' Vaccine Table encephalopathy claim, the undersigned has issued factual findings. See Revised Factual Ruling at 2, 20-21. Under these circumstances, the undersigned is not persuaded that the issuance of the requested subpoena would further the case that petitioners now prosecute. Accordingly, the motion is **DENIED**.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Special Master