

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: May 22, 2008)

DO NOT PUBLISH

JAMES L. PATEREK,)
as best friend of his son,)
JAMES L. PATEREK, JR.,)
))
Petitioner,)
))
v.)
))
SECRETARY OF)
HEALTH AND HUMAN SERVICES,)
))
Respondent.)

No. 02-0411V
Entitlement; Witness Credibility

**DECISION
(FACT WITNESS/MEDICAL EXPERT WITNESS CREDIBILITY RULING)¹**

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

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

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

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

BACKGROUND

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

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

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

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

³ Stephanie Paterek (Ms. Paterek), Jimmy's mother, died suddenly in March 2002. *See, e.g.*, Declaration of James L. Paterek, Sr., filed October 2, 2002, ¶ 26.

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

determined that Jimmy was “healthy.” *Id.* Jimmy received a DTaP vaccination, inactive polio vaccine (IPV) and Comvax.⁵ *See* Pet. ex. at 32, 35.

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

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

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

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

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

Jimmy presented to the North Shore University Hospital Division of General Pediatrics on August 19, 1999, for evaluation of an “axillary” temperature of 101° Fahrenheit, a “cough” that had

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

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

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

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

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

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

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

⁶ Strabismus is “deviation of the eye which the patient cannot overcome.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1587 (27th ed. 1988).

The physician determined that Jimmy was a “well infant.” Pet. ex. at 56. The physician administered DT vaccine to Jimmy. Pet. ex. at 57. The physician withheld “pertussis” because of Jimmy’s “r[ea]ction] at 2 mo[n]ths] age.” *Id.*

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

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

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

Jimmy continued to suffer frequent illnesses between February 7, 2000, and March 16, 2000. *See generally* Pet. ex. at 66-69. On March 8, 2000, a physician from the North Shore University Division of General Pediatrics noted possible increased “tone” in Jimmy’s extremities. Pet. ex. at 68. The physician expressed concern regarding Jimmy’s developmental “progression.” *Id.* The physician planned an “E[ar]ly]I[n]tervention]P[ro]gram] eval[ua]tion].” *Id.* In addition, the physician planned a “H[ea]d]U[l]tra]S[ou]nd].” *Id.* On March 16, 2000, a physician from the North Shore University Division of General Pediatrics recommended a referral to an “E[ar]N[ose]T[h]roat]” specialist. Pet. ex. at 69.

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

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

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

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

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

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

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

Dr. Gould evaluated Jimmy on March 30, 2000. *See* Pet. ex. at 179. Dr. Gould attempted various “maneuvers” that Ms. Paterek identified as likely prompts for Jimmy’s “abnormal” eye “movements.” Pet. ex. at 179. Dr. Gould could not elicit any vertical nystagmus. *See id.*

⁹ Nystagmus is “an involuntary, rapid, rhythmic movement of the eyeball.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1162 (27th ed. 1988).

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

Mark N. Goldstein, M.D. (Dr. Goldstein), a pediatric otolaryngologist, *see* Pet. ex. at 143, evaluated Jimmy on April 21, 2000. *See* Pet. ex. at 71. Dr. Goldstein appreciated apparently “effusions” in Jimmy’s ears. Pet. ex. at 75. Dr. Goldstein “scheduled” Jimmy for bilateral myringotomy¹⁰ and placement of “tubes.” *Id.*; *see also* Pet. ex. at 143.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“ear.” Pet. ex. at 103. The treating physician noted emphatically that Jimmy’s “vertical nystagmus” persisted. *Id.* The treating physician planned another evaluation by a neurologist. *See id.*

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

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

By October 6, 2000, Jimmy had undergone “continuous EEG monitoring.” Pet. ex. at 105. Jimmy exhibited apparently some “episodes of eye fluttering during the procedure.” *Id.* Nevertheless, the EEG was normal apparently. *See, e.g.,* Pet. ex. at 134.¹¹

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

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

Upon examining Jimmy, Dr. Slavin did not observe “the nystagmus.” Pet. ex. at 109. Indeed, Dr. Slavin described Jimmy’s examination as essentially “normal.” *Id.* Dr. Slavin recommended simply “observation.” *Id.*

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

¹¹ Mr. Paterek did not produce any records related to Jimmy’s September 2000/October 2000 EEG monitoring.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

Mr. Paterek’s Table Claim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

making any eye contact” because his pupils “were rolled back.” Tr. at 19; *see also* Tr. at 18. Ms. Costello believed that Jimmy’s condition was “urgent.” Tr. at 20. Thus, Ms. Costello offered, she advised Ms. Paterek to “[c]all the doctor.” Tr. at 19-20. Ms. Costello recalled that once Mr. Paterek arrived home, the Patereks “raced out the door” with Jimmy to the emergency room. Tr. at 20.

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

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

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

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

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

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

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

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

Written records which are, themselves, inconsistent, should be accorded less deference than those which are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance. Since medical records typically record only a fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant.

Id. (citation omitted).

Mr. Paterek urges that Jimmy’s medical records as a whole depict inadequately Jimmy’s symptoms on July 20, 1999, as well as the subsequent evolution of Jimmy’s condition. *See, e.g.*, Tr. at 93 (Mr. Paterek stating that “a lot of what” he and Ms. Paterek told Jimmy’s physicians “didn’t

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

The special master observed carefully Mr. Paterek, Ms. Costello and Ms. Dazzo during direct examination and cross-examination. The special master interrogated intently Mr. Paterek, Ms. Costello and Ms. Dazzo. The special master assessed critically each witness’s demeanor and credibility. The special master has evaluated thoroughly his impressions of the testimony. The special master determines that crucial portions of the testimony are not persuasive.

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

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

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

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

At a glance, the special master must judge seemingly in a vacuum the accuracy of Jimmy’s medical records from late July 1999 versus the accuracy of the fact witnesses’ recollections regarding Jimmy’s condition in late July 1999. Yet, in their testimony, Mr. Paterek and Ms. Dazzo provided

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

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

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

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

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

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

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

Mr. Paterek's Actual Causation Claim

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

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

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

Dr. Wiznitzer offered that, considering the totality of the evidence, Jimmy's symptoms on July 20, 1999, represented most likely a hypotonic-hyporesponsive event (HHE). See Tr. at 287, 290, 337. According to Dr. Wiznitzer, HHE is an accepted medical entity that has "been described after vaccinations, specifically after DPT," Tr. at 288-89, comprised of "a change in tone, change in color" and a "limited" alteration in "consciousness" followed by "full recovery." Tr. at 287-88.¹⁵ Dr. Wiznitzer stated that he has evaluated children who have experienced an HHE. See Tr. at 288. However, Dr. Wiznitzer remarked, he has never observed a child "during the spell" because HHE resolves so rapidly. See *id.* Although Dr. Wiznitzer testified that he recommends generally "some" testing for "management" of the child "in the future," Tr. at 288-89, he maintained that HHE does not result in subsequent neurologic complications. See Tr. at 288 ("full recovery"); 337. Dr. Wiznitzer commented that his medical impression of Jimmy's condition on July 20, 1999, is consonant with a treating physician's decision on September 14, 1999, to withhold further pertussis vaccinations based upon the physician's belief that Jimmy exhibited a "hypotonic-[illegible] episode" following his July 20, 1999 DTaP vaccination. See Tr. at 290, citing Pet. ex. at 52.

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

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

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

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

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

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

Respondent’s Alternative Actual Causation Claim

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

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

CONCLUSION

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

John F. Edwards
Special Master