

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

_____)
IN RE: CLAIMS FOR VACCINE)
INJURIES RESULTING IN AUTISM)
SPECTRUM DISORDER, OR A SIMILAR)
NEURODEVELOPMENTAL DISORDER,)
)
Various Petitioners,)
)
v.)
)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Respondent.)
_____)

AUTISM MASTER FILE
Special Master Hastings

**RESPONDENT’S POSITION REGARDING
FURTHER PROCEEDINGS ON THEORY 3**

Pursuant to the Special Masters’ Order of April 16, 2008, respondent herein provides his views on the issue of whether the court should proceed with a trial of test cases on the Petitioners’ Steering Committee’s (“PSC”) third theory of causation: that MMR vaccine alone causes autistic spectrum disorders (“ASDs”). For the reasons set forth below, it is respondent’s position that there is no longer a separate third theory of causation and thus, it is unnecessary for the court to proceed in such a manner.

As reflected in a letter dated April 14, 2008, the PSC expressed its intention, with respect to Theory 3, to “rely on and incorporate the general causation evidence already presented” in the three test cases tried under the PSC’s first theory of causation. See PSC’s April 14, 2008 Letter, pg. 2. Further, instead of identifying three test cases for Theory 3, the PSC would identify only one. Id. The PSC reasoned that “there is nothing to be gained in furtherance of the OAP’s goal of serving as a mechanism for addressing general causation issues by identifying and trying two

more test cases.” Id. In a status conference held on April 14, 2008, counsel for the proposed Theory 3 test case confirmed that he intended to rely upon the general causation evidence adduced during the Theory 1 proceedings and would only introduce fact-specific evidence concerning the individual child.

As the special masters rightly point out in their April 16, 2008 Order, Theory 3 is no longer a separate theory of causation from Theory 1:

[I]t now appears that Theory 3 is simply Theory 1, minus any suggestion of a TCV-weakened or disregulated immune system. Thus, the evidence produced in the Theory 1 cases may allow us to address and answer the question of whether the measles vaccine can cause ASD, independent of any involvement of TCVs on the children in question. Therefore, it appears to us that there may simply be no need for a Theory 3 ‘general causation proceeding’ – i.e., a full-scale proceeding involving both general causation and three individual cases decided by three different special masters.

Order at 4. Respondent agrees.

The PSC no longer has a separate theory of causation comprising Theory 3, and has acknowledged it has no additional “general causation” evidence to offer in any event. Because the PSC’s theory of causation regarding MMR’s alleged role in causing ASDs is the same theory of causation presented in Theory 1, there is no need for any more “test cases” on that theory. A case cannot be a “test case” when there is nothing to test. Rather, the case recently identified by the PSC as the proposed “test case” for Theory 3 should proceed as an individual case before one special master. It should proceed in the same manner as all other cases in the Vaccine Program.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

TIMOTHY P. GARREN
Director
Torts Branch, Civil Division



VINCENT J. MATANOSKI
Acting Deputy Director
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Tel.: (202)-616-4124

DATED: 29 APRIL 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2008, a copy of **RESPONDENT'S**
POSITION REGARDING FURTHER PROCEEDINGS ON THEORY 3 was served by
Federal Express overnight upon:

Thomas B. Powers, Esq.
Williams, Love, et al.
9755 S.W. Barnes Road
Suite 450
Portland, OR 97225

and

John R. Fabry, Esq.
Williams, Kherkher, Hart, Boundas, LLP
8441 Gulf Freeway, Suite 600
Houston, TX 77017-5051

A handwritten signature in black ink, appearing to read "John R. Fabry", is written over a horizontal line.