

MEMORANDUM REGARDING MISCONDUCT BY THE UNITED STATES DEPARTMENT OF JUSTICE
AND THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES DURING THE
OMNIBUS AUTISM PROCEEDING AS TO THE EXPERT OPINIONS OF DR. ANDREW ZIMMERMAN

BACKGROUND

In 1986, Congress enacted the National Vaccine Injury Compensation Act (the Vaccine Act). The Vaccine Act prohibits the parents of vaccine injured children from filing lawsuits in State or Federal courts of law until they have first filed an administrative claim in the Court of Federal Claims in what is known as “vaccine court”. Vaccine court is not a court of law. It is an administrative proceeding in which the most basic rules of law do not apply. In vaccine court, the Rules of Discovery, Evidence and Civil Procedure do not apply. There is also no judge or jury. In vaccine court, the American legal system has been replaced by what is known as a special master. A special master is an appointed government attorney.

The filing requirements of The National Vaccine Injury Compensation Act of 1986 are a procedural requirement which kept the vaccine/autism issue out of courts of law for over 25 years. The procedural “catch 22” of vaccine court works as follows. Under the Vaccine Act, before the parents of a vaccine injured child may file a lawsuit in a court of law, they must first timely file a claim in “vaccine court.” However, the Vaccine Act has a 3 year statute of limitations, which begins to run upon the first symptom of injury. Under the CDC vaccine schedule children receive their first vaccinations either at birth or 2 months of age. However, in most cases, children are not diagnosed with autism until they are 3 or 4 years old. Therefore, by the time the child is diagnosed with autism, the statute of limitations has run in “vaccine court” and the parents are forever denied the right to proceed with a lawsuit in a court of law.

After the Vaccine Act was passed in 1986, the CDC modified the childhood immunization schedule and greatly increased the number of vaccines American infants receive before the age of two. In the early 1990’s, there was a dramatic rise in the incidents of autism. According to the CDC, in 1986 the rate was 1 in 10,000. In 2012, the rate is 1 in 88 and rising.

By 2002, the rate of autism had risen to 1 in 500 and several hundred cases had survived the 3 year statute of limitations of vaccine court. In response, the Chief Special Master of vaccine court created the Omnibus Autism Proceeding (O.A.P.).

OMNIBUS AUTISM PROCEEDING

The purpose of the O.A.P. was to determine “if vaccines cause autism and if so under what conditions.” (See Autism General Order number one, attached as Exhibit 1). The O.A.P. consisted of six “test cases,” in which three special masters would hear general and specific

causation evidence. The special master's decisions in the test cases would determine the outcome of almost all of the remaining five thousand cases.

Cedillo v. HHS was designated as the first test case in the O.A.P. Hazlehurst v. HHS was the second test case. Poling v. HHS would have been the fourth test case if the government had not secretly conceded the case and placed it under seal.

THE ZIMMERMAN ISSUE

Dr. Andrew Zimmerman is considered one of the top neurologists in the country. Originally, Dr. Zimmerman was an expert witness for HHS. Dr. Zimmerman wrote an expert opinion for HHS in Cedillo v. HHS (See Respondent's exhibit FF, attached as Exhibit 2), which states, "There is no scientific basis for a connection between measles, mumps and rubella (MMR) vaccine or mercury (Hg) intoxication and autism." This opinion was used as evidence by the government during the O.A.P. to deny compensation to almost every vaccine injured child whose case was pending in the O.A.P.

Dr. Zimmerman subsequently submitted a second expert opinion on behalf of Hannah Poling, which in effect states that she suffers autism as a result of a vaccine injury. The same government officials, who submitted and relied upon Dr. Zimmerman's first expert opinion as evidence in the O.A.P., secretly conceded the case of Hannah Poling and placed it under seal so that the evidence in the case could not be used in the O.A.P. or known by the public.

However, HHS and DOJ continued to assert as evidence in the O.A.P. the first opinion of Dr. Zimmerman despite the fact that HHS and DOJ knew that Dr. Zimmerman had revised his opinion and they were in possession of Dr. Zimmerman's second contrary opinion. This is something which would never be allowed in a court of law.

TIMELINE AND DOCUMENTATION

Cedillo v. HHS began June 11, 2007. During the hearing, the Government announced that it would not be calling Dr. Zimmerman to testify as a witness. However, the expert opinion of Dr. Zimmerman was allowed to be entered in as evidence. This would not be permissible in a court of law. On June 26, 2007, the testimony in the Cedillo case was concluded.

In August, 2007, the Poling case was privately identified by the Petitioner's Steering Committee to D.O.J. as the fourth test case. (See the attached e-mail from Tom Powers dated 11-16-2007, attached as exhibit 3)

On October 15, 2007, the hearing in Hazlehurst v. HHS began. In accordance with the O.A.P. all of the evidence in the Cedillo case was incorporated as evidence in the Hazlehurst case. The petitioners proof in the hearing during the Hazlehurst case largely consisted of the testimony by members of the Hazlehurst family as to the symptoms of Yates Hazlehurst and the expert witness testimony of his treating neurologist.

During the course of the hearing, the Grandmother, Aud Hazlehurst and the Father, Rolf Hazlehurst both testified regarding reporting Yates' symptoms of a constant fever to Dr. Andrew Zimmerman in 2002. (See the transcript of Aud Hazlehurst pages 83-84 and Rolf Hazlehurst pages 125-127, attached as exhibits 4 and 5)

At the time that the Hazlehursts were testifying, they did not know that Dr. Zimmerman had revised his opinion as to the causal link between vaccines and autism or that their testimony about Yates' constant fever is consistent with one of the critical links in Dr. Zimmerman's revised theory of causation.

However, it is inconceivable that the three Department of Justice attorneys that handled all of the six test cases including Hazlehurst and Poling were unaware that Dr. Zimmerman had revised his opinion. DOJ attorney, Vincent J. Matonoski was the lead trial attorney in the O.A.P. Dr. Zimmerman was one of the primary expert witnesses in the field of child neurology for the government. During the hearing in Cedillo, on behalf of DOJ, Matonoski announced to the court that he would not be calling Dr. Zimmerman as a witness.

However, during his closing argument in the Hazlehurst hearing Matonoski argued as follows:

Dr. Zimmerman actually has not appeared here, but he has given evidence on this issue, and it appeared in the Cedillo case. I just wanted to read briefly because his name was mentioned several times by petitioners in this matter. What his views were on these theories, and I'm going to quote from Respondent's Exhibit FF in the Cedillo case, which is part of the record in this case as I understand it:

"There is no scientific basis for a connection between measles, mumps and rubella MMR vaccine or mercury intoxication in autism despite well intentioned and thoughtful hypotheses and widespread beliefs about apparent connection with autism and regression. There's no sound evidence to support a causative relationship with exposure to both or either MMR and / or mercury." (emphasis added)

We know his views on this issue.

(See Transcript of Vincent Matonoski page 695, line 19., attached as exhibit 6)

Approximately 3 weeks later, on November 9, 2007 the same Vincent Matanoski, of the U.S. Department of Justice signed the Rule 4-c report in what would have been the 4th test case in the OAP, Poling v. HHS. (See Poling Rule 4-c.)

It states in part as follows:

"In sum, DVIC has concluded that the facts of this case meet the statutory criteria for demonstrating that the vaccinations CHILD received on July 19, 2000, significantly aggravated an underlying mitochondrial disorder, which predisposed her deficits in cellular energy metabolism, and manifested as a regressive encephalopathy with features of autism spectrum disorder. Therefore, respondent recommends that compensation be

awarded to petitioners in accordance with 42 U.S.C. 300aa-11(c)(1)(C)(ii).” (see Rule 4-c, attached as exhibit 7).

The Rule 4-c report is a confidential document and the minimum the government is required to document in order for a child to be compensated under the VICP. The government never intended for the American people to know about the Poling case and has fought hard to keep it under seal.

By conceding the Poling case, the government prevented Dr. Andrew Zimmerman from taking the witness stand, in which case it could be shown that one expert witness provided two very different reports. The first report was very publically used against the petitioners. The second was used to compensate one child and in the process the government kept the evidence in her case under seal. The evidence placed under seal is strong evidence of how vaccines can cause autism.

Not only did HHS and DOJ conceal critical material evidence of how vaccines can cause autism, including but not limited to Dr. Zimmerman’s second report, but also HHS and DOJ concealed the fact that their own expert witness in the field of neurology concluded and explained how vaccines cause autism.

In March of 2008, approximately four months after the government conceded the Poling case, the Rule 4-c report was leaked to the media and the government concession in Poling became known to the public. At that point, HHS hid behind the technical terminology in the Rule 4-c report which states, “the vaccinations CHILD received on July 19, 2000 significantly aggravated an underlying mitochondrial disorder, which predisposed her to deficits in cellular energy metabolism, and manifested as a regressive encephalopathy with features of autism spectrum disorder.”

What the general public does not understand is the following. The “vaccinations CHILD received on July 19, 2000” were the MMR and at least one thimerosal containing vaccine. The phrase “significantly aggravated an underlying mitochondrial disorder” is another way of saying “significant aggravation of a pre-existing condition,” which is legally a form of causation under the Vaccine Act. In 2002, William Yates Hazlehurst was a patient of Dr. Zimmerman. Dr. Zimmerman’s diagnosis of Yates Hazlehurst’s neurological condition was “regressive encephalopathy with features of autism spectrum disorder,” which is word for word the exact same neurological diagnosis of Hannah Poling by Dr. Zimmerman and the Government concession in the Poling Rule 4-c report. (See the medical record of Yates Hazlehurst, attached as exhibit 8)

Preliminary tests indicate that William Yates Hazlehurst also has a mitochondrial disorder. **The irony is that the stated purpose of the O.A.P., “to determine whether thimerosal containing vaccines and/or MMR vaccines can cause autism and if so under what conditions” was achieved. However, the government covered up the truth and replaced it with what the government wanted the American people to believe.**

After the Poling case became known to the public, the parents of Hannah Poling expressed a desire to talk about their child's case and filed a MOTION FOR COMPLETE TRANSPARENCY OF PROCEEDINGS. HHS and DOJ opposed the motion.

On or about April 10, 2008, according to an ORDER DEFERRING RULING ON PETITIONERS' MOTION FOR COMPLETE TRANSPARENCY OF PROCEEDINGS in POLING v. HHS, the Special Master for "vaccine court" held a status conference with the parties to address the filed Rule 4 Report. Page 3 of the POLING Order reflects that "During the status conference, petitioners stated that they intended to file an expert report from Andrew Zimmerman, M.D., Hannah's treating neurologist, in support of their claim that Hannah's complex partial seizure disorder was a sequela of her vaccine-related injury" (emphasis added). (See ORDER DEFERRING RULING ON PETITIONERS' MOTION FOR COMPLETE TRANSPARENCY OF PROCEEDINGS, attached as exhibit 9)

In accordance with the conference call, the Polings filed the attached expert report by Dr. Zimmerman and the HHS conceded Hannah's seizure disorder was the result of a vaccine injury and eligible for further compensation. By conceding the partial seizure disorder issue, Dr. Zimmerman was again not subject to direct examination on the witness stand and the record in POLING remains confidential.

Attached as exhibit 10 is the revised opinion of Dr. Zimmerman, which HHS and DOJ placed under seal and hid from the American public. The written opinion of the government's own expert witness in the field of neurology clearly reflects that he is of the opinion that the vaccines in question were a direct cause in the development of autism by Hannah Poling. Again, Poling v HHS would have been the fourth test case in the Omnibus Autism Proceeding if the government had not conceded the Poling case. The sealed evidence includes the expert opinion of the government's own expert witness, which explains how vaccines can cause autism.

Based upon the Rule 4-c report, the ORDER DEFERRING RULING ON PETITIONERS' MOTION FOR COMPLETE TRANSPARENCY OF PROCEEDINGS in Poling and the written expert opinion of Dr. Zimmerman, which HHS and DOJ covered up, it is clear that Dr. Zimmerman is of the opinion that Hannah Poling suffered a vaccine injury and as a result suffered "regressive encephalopathy with features of autism disorder." Again, "Regressive encephalopathy with features of autism disorder" is word for word the same diagnosis of Yates Hazlehurst by Dr. Zimmerman.

On February 12, 2009, almost a year and a half after the hearing in Hazlehurst v. HHS was concluded the decisions denying compensation to the first three test cases were released. The petitioners in Hazlehurst appealed. However, since the documents relevant to the Poling case and the opinions of Dr. Zimmerman were under seal, the Hazlehursts could not raise the issue of the government misconduct on appeal.

In 2009, Hazlehurst v. HHS was heard before the United States Court of Appeals for the D. C. Circuit upon an appeal requesting a remand. During oral argument and while responding to the Court's questions regarding the emerging scientific and medical evidence of whether vaccines can cause autism, the DOJ attorney, Lynn Ricciardella stated that "we're not even at the stage where it's medically or scientifically possible." (See transcript attached as exhibit 11) She stated this despite the fact that she signed the Rule 4-c report conceding that Hannah Poling suffered autism as a result of a vaccine injury and she was in possession of Dr. Zimmerman's second opinion that states that Dr. Zimmerman is of the opinion that the vaccines caused Hannah Poling to suffer injuries including autism.

In other words, during the Omnibus Autism Proceeding, the DOJ attorney on behalf of HHS represented to the United States Court of Appeals that "we're not even at the stage where it's medically or scientifically possible" that vaccines cause autism when she herself sealed up the opinion of the government's own medical expert witness which states that the vaccines did cause autism and furthermore the sealed documents explain how the vaccines caused autism. Furthermore the sealed documents are consistent with the symptoms of Yates Hazlehurst as described during the Hazlehurst O.A.P. hearing.

In March of 2011, twenty five years after the enactment of the Vaccine Act and nine years after the claims of the vaccine injured children in the Omnibus Autism Proceeding finally got over the procedural hurdles of vaccine court, The Supreme Court of the United States interpreted a separate provision of the Vaccine Act to grant the vaccine industry immunity from liability for injuries caused by vaccine design defects in the case of Bruesewitz v. Wyeth. Although Bruesewitz was not an autism case, the claimants of the five thousand cases in the Omnibus Autism Proceeding were at the center of the issue before the Supreme Court.

As a result of the decision in Bruesewitz, the issue of whether vaccines can cause autism may never be litigated in a court of law.

It should be noted that The Vaccine Act does not clearly and unambiguously grant the vaccine industry immunity from liability. The Court's decision is based upon language in the statute that during oral arguments Justice Bryer described as "ambiguous," Justice Ginsburg described as "to say the least confusing," and Justice Kennedy implied, "sloppy drafting." (Portions of the transcript of Supreme Court oral arguments in Bruesewitz pages 16 lines 16-18, page 28 lines 14-15, page 43 line 6 are attached as exhibit 12)

In addition, during oral arguments Justice Sotomayor and Chief Justice Roberts were in agreement that if the FDA, which is a division of HHS, did not act to compel the vaccine industry to remove from the market a vaccine which was causing harm to the public then in the words of Chief Justice Roberts "Nothing: the manufacturers have no reason to take the vaccine off the market until the FDA tells them to." (See pages 27-31 Transcripts attached as exhibit 13)

SUMMARY

In 1986, the United States Congress took away the American citizens' right to legitimately question vaccine safety in a court of law. Two of the most fundamental rights of an American, the right to a trial by jury and a trial under the rules of law were taken away by the "ambiguous," "confusing" and "sloppy drafting" of a law which replaced the American legal system with a totalitarian bureaucracy. As a consequence, vaccine injured children's only remedy is an administrative proceeding with the deceptive title of "vaccine court."

The Vaccine Act created a vaccine program which is an invitation for abuse of power. The Zimmerman issue is but one of many deeply disturbing actions which have occurred in the vaccine program. The actions of the United States Department of Health and Human Services and the United States Department of Justice during the Omnibus Autism Proceeding warrant an investigation by the Congress of the United States.

Respectfully Submitted,

Rolf Hazlehurst