

**BEFORE THE NEW MEXICO MEDICAL BOARD**

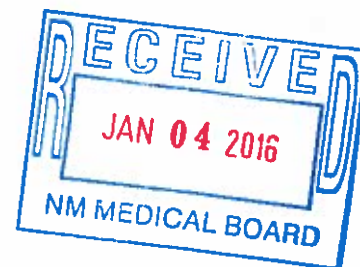
**IN THE MATTER OF:**

**KENNETH STOLLER, M.D**

**License No. 97-382**

**Respondent**

**No. 2014-031**



**AMENDED STIPULATED SETTLEMENT AGREEMENT**

**THE PARTIES STIPULATE AND AGREE AS FOLLOWS:**

1. **Jurisdiction.** The New Mexico Medical Board ("Board") has jurisdiction over Respondent and the subject matter pursuant to the Medical Practice Act, NMSA 1978, §§ 61-6-1 *et seq.*

2. **Waiver of Rights.** Respondent knowingly, intentionally and voluntarily waives his right to a hearing and the right to judicial appeal.

3. **Resolution.** As full and final resolution of matter # 2014-031, Respondent and the Board agree to the following:

(i) The Board agrees that Respondent has not engaged in conduct which violates the Medical Practice Act.

(ii) The Order of the Board dated August 13, 2015, is hereby set aside.

(iii) The Board agrees to replace its Order of the Board signed August 13, 2015 with an advisory letter. The advisory letter does not constitute discipline.

(iv) The Board agrees to withdraw its Report to the National Practitioners Data Bank within 10 days of execution of this agreement.

(v) Respondent agrees to pay costs in the amount of \$3,496.76 (Three thousand four hundred and ninety six dollars and seventy six cents). Costs will be paid within 30 (thirty) days of execution of this agreement.

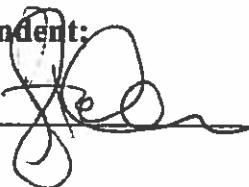
(vi) Respondent agrees to dismiss his appeal filed in D-101-CV-2015-02047, within 10 days of execution of this agreement.

4. **Public Records.** Respondent understands that this Settlement Agreement and other documents related to these proceedings are matters of public record under the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12.

9. **Full and Complete Settlement.** This Settlement Agreement constitutes a full and complete resolution of all claims and defenses that either party did raise or could have raised with respect to these proceedings and execution of this Settlement constitutes full and final resolution of Medical Board Action #2014-031, In the Matter of Kenneth Stoller, M.D.

**IT IS SO STIPULATED AND AGREED:**


**Respondent:**

  
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12/30/15  
\_\_\_\_\_  
Date

**AND**

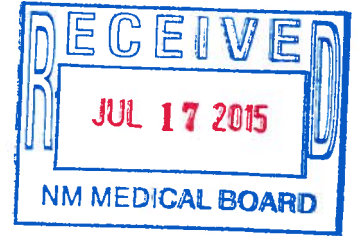
**THE NEW MEXICO MEDICAL BOARD**

  
\_\_\_\_\_  
By: Steven Jenkusky M.D.  
Chair

1/4/16  
\_\_\_\_\_  
Date

BEFORE THE NEW MEXICO MEDICAL BOARD

IN THE MATTER OF  
KENNETH STOLLER, M.D.



License No. 97-382

No. 2014-031

Respondent.

**REPORT AND RECOMMENDATIONS OF HEARING OFFICER**

Pursuant to Section 16.10.5.16 NMAC, the parties conducted a hearing on May 27, 2014 concerning the New Mexico Medical Board's August 14, 2014 Notice of Contemplated Action. The New Mexico Medical Board was represented by Prosecutor Scott Fuqua, and Kenneth Stoller, MD was represented by Kate Ferlic.

The parties presented the following witnesses and exhibits, which have been relied upon by the Hearing Officer to varying degrees:

Witnesses:

1. Leslie Strickler, MD
2. Jaqueline Krohn, MD
3. Penny Davies, MD
4. Giuseppina Feingold, MD
5. Kenneth Stoller, MD

Exhibits: Please see the exhibits submitted by the parties on June 22, 2015 and appended to this report as Attachment A.

Findings of Fact

1. Kenneth Stoller, MD is and, at all times relevant to this proceeding was, a licensee of the New Mexico Medical Board.
2. Dr. Stoller was trained as a pediatrician. (Tr. at p. 268: 9-17). In 2001 Dr. Stoller opened a hyperbaric medical center, at which Dr. Stoller's practice was less focused on

pediatrics. (Tr. at p. 268: 22-24). Dr. Stoller considers himself to be an expert in the area of hyperbarics. (Tr. at p. 269: 19-22).

3. Dr. Stoller treated a minor patient, LW, with hyperbaric oxygen treatments starting in February of 2009, and those treatments continued through the balance of 2009. (Tr. at p. 271: 18; 276: 5-11). The hyperbaric oxygen treatments were sought by LW's mother, VW, upon a referral from LW's pediatrician, Dr. Krohn. (Tr. at p. 271; 273-274).
4. Dr. Krohn continuously served as LW's primary care physician from 2006 to December of 2010. (Tr. at p. 179:5-21). Dr. Krohn describes LW as a medically fragile child, and she testified that she had concerns about the child's various developmental delays and apparent immunosuppression. (Tr. at p. 180:14-16; 179:20-21; 189:18-23). Dr. Krohn testified that she saw LW frequently but that Dr. Krohn felt that the frequency of the visits was appropriate in light of LW's medical issues. (Tr. at p. 184: 15-185:2). Dr. Krohn never felt the need to try to de-escalate LW's care." *Id.*
5. LW was born at full term, but medical records regarding her birth document that she was born with "major issues." (Tr. at p. 71-72).
6. Dr. Stoller was treating LW for developmental delays and colitis. (Tr. at p. 276: 23 – 277: 3).
7. Between February of 2009 and December of 2009, Dr. Stoller treated LW with three rounds of hyperbaric oxygen therapy, ordered one blood test, two liver function tests and a stool sample test, and prescribed four medications, including leucovorin which can be obtained over the counter. (Ex. 1).
8. In mid-2009, because LW presented with chronic diarrhea, Dr. Stoller tested for the presence of pathogens / infection and discovered *Rhodotorula* fungus and blastocystis

- hominis, which he treated with Diflucan, fluconazole and ketoconazole (although not at the same time). (Tr. at p. 278:2-19).
9. According to Dr. Feingold, Ketoconazole and Diflucan are anti-fungals and based on LW's stool samples, appropriate to prescribe for identified fungal infection or presence. (Tr. at p. 243:21-245:10).
  10. According to Dr. Feingold, Leucovorin is folinic acid and commonly-prescribed; it's a vitamin and you can get it anywhere in a health food store. It is not dangerous. (Tr. at p. 241:16-24; 242:20-243:1).
  11. LW's condition appears to have improved during the period in which Dr. Stoller was treating LW. (Tr. at p. 182:17-21).
  12. Dr. Feingold, who was offered as an expert in hyperbarics, testified that Dr. Stoller's treatment of LW was consistent with the accepted standard of care in the area of hyperbarics, both with respect to the conditions that were being addressed and with respect to the frequency and duration of the treatments. (Tr. at p. 235:11-236:17; 245:11-21; 255:24-256-19). Pursuant to stipulation by the Prosecutor, neither the use of hyperbaric oxygen treatment to treat LW nor the duration of or frequency of hyperbaric treatment is at issue in this case. (Tr. at p. 114:14-115: 5).
  13. After Dr. Stoller had ceased providing LW with hyperbaric treatments, Dr. Stoller continued to provide medical consultation to LW's mother, VW, through 2012. (Ex. 1; Tr. at 295:15-296:13). During this time, he sent test results that he had ordered and that other physicians had ordered to treating physicians at their request to assist with diagnosis. (Ex. 1; Tr. at p. 295:15-296:13). From 2010 through 2012, Dr. Stoller prescribed a new nebulizer for LW on one occasion. (Ex. 1; Stoller 0092-0095).

14. Dr. Stoller's uncontroverted testimony is that in July of 2012, he made an effort to convince VW to enlarge LW's very restrictive diet because he believed that the restrictions in LW's diet were too limiting. (Tr. at p. 284:3-285:12). The evidence also reflects that Dr. Stoller refused to provide additional hyperbaric oxygen treatments to LW after December of 2009, despite VW's requests for additional treatments, because Dr. Stoller did not believe that LW would benefit from additional treatments. (Tr. at p. 294:22 – 295:3).
15. The complaining witness in this case is Dr. Leslie Strickler. Dr. Strickler's first contact with LW was in February of 2012 when LW was admitted to the hospital for an acute illness. (Tr. at 21: 4-5). Dr. Strickler treated LW over the course of a weekend in during the February 2012 hospital admission. (Tr. at p. 21: 1-12).
16. In February of 2013, Dr. Strickler was consulted about LW in her role as a physician member of the Child Abuse Response Team, or "CART." (Tr. at p. 21:23 - 22:12). The referral to CART was made because one of LW's providers had concerns that LW was being medically abused by her mother. (Tr. at p. 22:4-12).
17. During Dr. Strickler's interactions with VW during February of 2013, Dr. Stoller and Dr. Strickler had a strained telephone call, in VW's presence. (Tr. at p. 309:1-5).
18. In an effort to investigate the reported suspicion of medical child abuse, Dr. Strickler sought the records of LW's treating physicians. (Tr. at p. 24: 5-14).
19. Dr. Strickler testified that the only one of LW's medical providers who failed to respond to Dr. Strickler's request for medical records was Dr. Stoller. (Tr. at p. 24: 18-23).

20. Dr. Strickler testified that she has requested medical records under similar circumstances approximately 700 to 800 times and that she has never previously had a medical provider refuse to provide her with existing medical records. (Tr. at p. 25:7 – 26:11).
21. Dr. Stoller acknowledges that he understood that Dr. Strickler was seeking medical records in response to a concern about the possibility that VW was medically abusing LW. (Tr. at p. 308:15-20).
22. Dr. Stoller refused to provide his medical records to Dr. Strickler and CART because VW, LW's mother, asked Dr. Stoller not to cooperate with Dr. Strickler's request. (Tr. at p. 308: 7-20; 313:13-16).
23. Dr. Stoller testified that his obligation was to advocate on behalf of LW. (Tr. at p. 309: 1-5). Dr. Stoller further testified that "[He] would have burned [his] medical license before [he] would have said VW was abusing her child." (Tr. at p. 310: 4-5). Dr. Stoller feared that Dr. Strickler would misuse Dr. Stoller's records to substantiate false accusations against VW. (Tr. at p. 310: 1-24).
24. Dr. Stoller clearly doubted Dr. Strickler's motives, and further had a very hostile and negative reaction to Dr. Strickler upon the very first interaction between Dr. Stoller and Dr. Strickler. (Tr. at p. 310: 4 – 313:5).
25. Dr. Strickler did not provide a signed HIPAA release from VW or an agent of the state which had custody of LW when Dr. Strickler requested records from Dr. Stoller. (Tr. at p. 91:5-13; 291:12-17).
26. Dr. Stoller never received a subpoena from a court or an attorney for LW's records. (Tr. at p. 91:5-13; 291:20-292:2). Similarly, there was no written court order requiring Dr. Stoller to produce his medical records to Dr. Strickler, but Dr. Strickler testified that a

judge verbally ordered such an order, albeit not in Dr. Stoller's presence. (Tr. at p. 292:3-6; 79:10-22).

27. Dr. Strickler testified that she believes that there is no obligation on the part of a responding physician to produce medical records in the absence of a court order or subpoena when a patient objects to the production. (Tr. at p. 91:19-24).

28. Dr. Stoller testified that he believed that he was constrained from responding to Dr. Strickler's request for medical records because he believed that it would be a violation of the Health Insurance Portability and Accountability Act (HIPAA) to produce LW's records without the permission of VW. (Tr. at p. 314:3 – 315:2).

29. Dr. Strickler acknowledged that there was nothing of which she was aware that would have required Dr. Stoller to share his medical records with her. (Tr. at p. 91:19-24). However, Dr. Strickler and the Prosecutor offered the opinion that Dr. Stoller's proffered excuse regarding the absence of a HIPAA authorization from VW was baseless. *Id.*

30. Even in the absence of Dr. Stoller's records, Dr. Strickler made a determination that LW was the victim of medical abuse, which resulted in Dr. Strickler testifying against LW's parents in related hearings. (Tr. at p. 87:22 – 88:3).<sup>1</sup>

31. Dr. Strickler testified that “[I]n retrospect, most of the physicians who participated in the treatment of the child have ultimately provided unnecessary care.” (Tr. at p. 37:15-23).

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<sup>1</sup> Dr. Stoller's counsel elicited testimony about the records that Dr. Strickler had a various different points in the child custody proceeding, and tried to establish, to varying degrees of success, that Dr. Strickler did not have complete responses from all of LW's medical providers at the time Dr. Strickler authored her report concluding that LW was a victim of medical child abuse and at the time the Dr. Strickler testified. This testimony is documented in the transcript at pages 77-90. This testimony does not appear to be entirely relevant to the issues before the Board, except insofar as Dr. Stoller is claiming that Dr. Strickler may have held him to a different standard than that applied to the other responding physicians. Dr. Stoller offered testimony that the motive for this perceived differential treatment was the fact that Dr. Stoller testified in support of VW during the child abuse hearings, and was critical of Dr. Strickler in his testimony. (Tr. at 283:1-13). These facts are not included in the findings of fact section because Dr. Stoller admits that he intentionally did not respond to the request for records, and there are no similar admissions from other physicians on the record. As a result, the testimony regarding the state of compliance of other physicians at various times does not appear relevant.



32. Dr. Strickler's concern regarding Dr. Stoller's interaction with VW in the course of providing medical care for LW was that Dr. Stoller failed to intervene or otherwise de-escalate a pattern of unnecessary medical treatment that VW was pursuing for LW. *Id.*

33. Dr. Strickler further admitted that she did not see anything in the records that suggested that Dr. Stoller's treatment of LW was unnecessary or deficient. (Tr. at p. 145:9-146:2).

34. The April 28, 2015 Amended Notice of Contemplated Action identifies four bases for the summary suspension, including:

- a. At various times from 2009-12, [Dr. Stoller has] repeatedly, unnecessarily, and injudiciously provided medical treatments to a minor child for medical conditions that did not exist, and that [he] should have known did not exist. Such treatments included, but were not limited to "hyperbaric oxygen therapy" and the injudicious prescribing of numerous dangerous drugs, including baclofen, diflucan, ketoconazole, and leucovorin.
- b. The mother of [LW] was subsequently found by the State of New Mexico to have abused and/or neglected her child by fabricating medical conditions for the child, providing inadequate nutrition to the child, other otherwise engaged in "medical child abuse." Such medical child abuse occurred during the entire time that [Dr. Stoller] provided the medical treatment described in A, above.<sup>2</sup>
- c. [Dr. Stoller's] medical treatment described in A, above, perpetuated the medical child abuse described in B, above, placed the child at unnecessary risk of harm, and furthermore, reflects [Dr. Stoller's] grossly negligent failure to recognize and

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<sup>2</sup> It was determined at the hearing that paragraph (b) as stated herein does not constitute an actionable basis for relief. (Tr. at p. 166:9 – 167:21).

address the medical threats facing the minor child while entrusted to [Dr. Stoller's] care.

- d. [Dr. Stoller] failed to maintain or keep adequate, legible, accurate or complete medical records reflecting [his] treatment of the minor child. [Dr. Stoller] also failed to timely transmit what medical records [he] did have to a requesting physician investigating potential abuse of the child by her mother.

(April 28, 2015 Amended NCA).

#### Conclusions of Law

1. The New Mexico Medical Board is authorized to conduct this hearing. See NMAC 16.10.6.3 (promulgated pursuant to and in accordance with the Medical Practice Act and the Uniform Licensing Act).
2. The standard of proof to be applied by the Board is by a preponderance of the evidence. NMSA. 1978 § 61-1-13; *Foster v. Board of Dentistry of State of N.M.*, 103 N.M. 776, 777-78, 714 P.2d 580, 581-82 (1986).
3. Proving a fact by a preponderance of the evidence “means to establish that something is more likely true than not true.” UJI 13–304 NMRA 2001.
4. A professional license is a constitutionally protected property right, and professional licensees facing license revocation or suspension must be afforded due process. *Mills v. New Mexico State Bd. of Psychologist Exam'rs*, 1997 NMSC 28, P14, 123 N.M. 421, 426, 941 P.2d 502, 507.
5. The Health Insurance Portability and Accountability Act, Pub. L. 104-191, 110 US Stat. 1936 (codified in various titles of the United States Code) (“HIPAA”) permits, but does not require, a treating physician to share his or her records with another treating

physician. The applicable portion of the provision states: “[A] covered entity may disclose protected health information for treatment activities of a health care provider.”  
45 CFR §164.506(c)(2).

6. The Prosecutor met his burden of establishing the following allegations from April 28, 2015 NCA by the preponderance of the evidence:

a. [Dr. Stoller] also failed to timely transmit what medical records you did have to a requesting physician investigating potential abuse of the child by her mother.

7. The Prosecutor did not meet his burden of establishing the following allegations from the April 28, 2015 Amended NCA by the preponderance of the evidence:

a. [Dr. Stoller] failed to maintain or keep adequate, legible, accurate or complete medical records reflecting [his] treatment of the minor child.

b. At various times from 2009 to 2012 [Dr. Stoller] repeatedly, unnecessarily, and injudiciously provided medical treatment to a minor child for medical conditions that did not exist and that [he] should have known did not exist. Such treatments included, but were not limited to, hyperbaric oxygen therapy and injudicious prescribing of numerous potentially dangerous medications, including baclofen, diflucan, ketoconazole, and leucovorin.

c. The medical treatment that [Dr. Stoller] provided to the child perpetuated the mother’s medical child abuse and placed the child at unnecessary risk of harm. It furthermore reflects [his] grossly negligent failure to recognize and address the medical threats facing the minor child while she was [his] patient.

### Opinion and Recommendation

The purpose of the May 27, 2015 hearing was to adjudicate the issues presented in the April 28, 2015 Amended Notice of Contemplated Action (Amended NCA). This opinion and recommendation pertains to the issues presented by the Amended NCA, and is intended as a final opinion and recommendation.

This matter is one that appears to have been spawned by a negative and unnecessarily hostile interaction between two physicians, one of whom is the complaining witness in this case and the other who is the Respondent. At the outset, it is important to note that notwithstanding the volumes of testimony and evidence regarding whether hyperbaric oxygen treatment is an effective method of treatment, the Prosecutor conceded that the effectiveness of hyperbaric oxygen therapy is not at issue in this case. Instead, the issues litigated in the hearing<sup>3</sup> consist of: 1) whether Dr. Stoller placed the child at issue in harm's way by continuing to treat the child in the face of evidence that the child's mother was potentially medically abusing her child, and 2) whether Dr. Stoller wrongly refused to provide his medical records to Dr. Strickler when Dr. Strickler was investigating possible medical child abuse.<sup>4</sup>

### Background

Dr. Stoller is a physician who is formally trained as a pediatrician but who has focused his practice on hyperbarics since 2001. Dr. Stoller treated minor patient LW from February of

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<sup>3</sup> To the extent the narrative description varies in any significant respect from the April 28, 2015 Amended NCA, the content of the April 28, 2015 Amended NCA control.

<sup>4</sup> There was no testimony presented on the issue of whether Dr. Stoller failed to keep adequate medical records regarding his treatment of LW with the exception of a very brief excerpt from Dr. Strickler's testimony ("I think notes would be a stretch. They were – they were limited to just a few words. Like for example, a diagnosis – one I recall is blastocystis hominis. And I don't even know that the term recommendation was in there, but the indication that the mother was told to look at a website called badbugs.com, and that was it.") (Tr. at p. 75:21-25.). Furthermore, that issue was not addressed by the Prosecutor in opening, closing or in the closing brief. As a result, the evidence presented on this issue is deemed insufficient.

2009 through December of 2012. Dr. Stoller's treatment of LW was most intense and frequent from February of 2009 through December of 2009, at which time Dr. Stoller was treating LW with hyperbaric oxygen treatments. During that time, Dr. Stoller also prescribed medications to treat various ailments. After December of 2009, Dr. Stoller rarely prescribed medications for the child, and appears to have seen her on four occasions in approximately three years.

By all accounts, LW's mother, VW, was actively involved in her daughter's care. Dr. Krohn and Dr. Stoller both testified about the fact that LW had significant medical issues, and Dr. Krohn acknowledged that she saw LW frequently but that Dr. Krohn felt that the frequency of the visits were appropriate in light of LW's medical issues. The period of time during which Dr. Krohn treated LW overlapped with the period of time during which Dr. Stoller treated LW, and Dr. Krohn testified that she never felt the need to de-escalate LW's medical care for any reason, despite the fact that Dr. Strickler testified that she detected efforts to de-escalate in Dr. Krohn's medical records.

There are two fundamental obstacles to reaching a solid conclusion in this case. First, the record is replete with various opinions by different practitioners about the types and severity of medical conditions that LW experienced during the operative time period and the appropriate course of treatment for those issues. The fact that practitioners disagree on these subjects should come as no surprise – the practice of seeking second opinions from physicians is a time-honored tradition. But the degree of disagreement between and among the various physicians who testified is unsettling. Second, Dr. Strickler and Dr. Stoller have an oddly adversarial relationship that not only contributed to the development of the circumstances leading up to the licensure action but that also colors their testimony and affects their credibility to varying degrees.

### Unnecessary Medical Treatment

The evidence on the question of whether Dr. Stoller provided unnecessary medical treatment is a muddled mess, despite the fact that it is the cornerstone of the Amended NCA. It is worth noting that Dr. Stoller's efforts to immunize himself from the allegations of the NCA by arguing that he was not treating the child after December of 2009 are not well-taken. While the record supports his position that his treatment of LW was more intense and frequent during 2009, the evidence shows that Dr. Stoller continued to have a treatment relationship with LW and her mother after 2009. Indeed, the fact that Dr. Stoller was talking to VW on the phone in February of 2013 when Dr. Strickler was confronting VW with her concerns about medical abuse strongly suggests that there was an ongoing treatment relationship between LW and Dr. Stoller after December of 2009.

On the issue of the existence of conditions and the appropriateness of the treatment that Dr. Stoller provided, I have to resolve that issue in favor of Dr. Stoller on the record before me. Dr. Krohn testified that she believes that the conditions that Dr. Stoller endeavored to treat were real conditions; Dr. Krohn actually referred LW to Dr. Stoller for treatment. The record reflects some evidence that the child actually showed signs of improvement during the period of time during which the child was being treated by Dr. Stoller with hyperbaric oxygen. The prosecutor candidly admits that the question of whether Dr. Stoller's treatment of the child was warranted turns on the issue of whether LW had medical conditions that required treatment. Setting aside Dr. Stoller's own testimony, Dr. Stoller presented testimony from Dr. Krohn and from a non-treating expert, Dr. Feingold. Both Dr. Krohn and Dr. Feingold testified that Dr. Stoller's treatment of LW was appropriate. Notably, the Prosecutor relied on a single witness, Dr.

Strickler, to prove the allegations of the Amended NCA, and even Dr. Strickler denied under oath that Dr. Stoller had unnecessarily treated the patient.<sup>5</sup>

The content of the Amended NCA notwithstanding, Dr. Strickler's concern about Dr. Stoller's treatment of LW is not really predicated on the fact that she believes that Dr. Stoller misdiagnosed or unnecessarily treated LW. Instead, Dr. Strickler mainly criticizes Dr. Stoller for allegedly failing to de-escalate LW's mother's pursuit of medical care for her daughter. The record certainly establishes that different physicians had differing opinions regarding the propriety of VW's efforts to obtain care for her daughter. However, the record is also full of evidence concerning the fact that many other physicians, none of whom reported concerns about medical abuse of LW (including Dr. Strickler herself), were providing care to LW over the same period of time as was Dr. Stoller. Moreover, the record supports the notion that Dr. Stoller did make at least one effort to de-escalate the situation by counseling VW to enlarge LW's severely medically restricted diet. Additionally, the evidence shows that Dr. Stoller declined to treat LW with additional hyperbaric oxygen treatments after December of 2009, despite VW's request for additional treatments, because Dr. Stoller did not believe LW would benefit from additional treatments.

Given this evidence of de-escalation, Dr. Strickler's concern that Dr. Stoller failed to respond to VW's apparently insatiable need to subject her child to medical treatment falls flat. It is also difficult to imagine why Dr. Stoller is at fault for failing to recognize signs of medical abuse in 2009 when none of the other practitioners who were treating LW during that time

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<sup>5</sup> Perhaps the most frustrating aspect of this case is that there are some extreme contradictions in Dr. Strickler's testimony. Dr. Strickler accuses Dr. Stoller of unnecessarily treating the child, but then she admits under oath that he had not unnecessarily treated the child. Dr. Strickler complains that she has never seen Dr. Stoller's medical records, but then she opines that Dr. Stoller misdiagnosed the type and severity of the conditions that he was treating, as though she has reviewed the records.

recognized the problem. As a result, I conclude that the Prosecutor has failed to carry his burden of proving items 1 and 3 in the Amended NCA.

#### Provision of Medical Records

The evidence presented during the hearing conclusively establishes that Dr. Stoller did not provide his records to Dr. Strickler, who was investigating LW's mother, VW, on issues of medical child abuse. The question of whether Dr. Stoller's failure to comply with Dr. Strickler's request for his medical records is actionable turns on whether there was any obligation for Dr. Stoller to comply with Dr. Strickler's request.

The parties appear to agree that there was no subpoena and no written court order that would have dictated compliance by Dr. Stoller. Although Dr. Strickler reported that a judge said something during a hearing in the child abuse proceedings against LW's parents that led Dr. Strickler to believe that Dr. Stoller had been judicially compelled to produce his records, the evidence is clear that Dr. Stoller was not present when the judge's comments were made, and there is no written order in evidence.

The parties also agree that VW, as LW's parent and legal guardian, did not sign any kind of HIPAA compliant authorization directing Dr. Stoller to release medical records to Dr. Strickler. Indeed, the record reflects that VW specifically directed Dr. Stoller to not provide the medical records to Dr. Strickler. Dr. Stoller self-righteously testified that under those circumstances, he was precluded from providing his medical records to Dr. Strickler.

The Prosecutor correctly opines that HIPAA permits medical providers to share medical records for the purpose of providing medical treatment, even in the absence of a HIPAA authorization. In an effort to circumvent this obvious and frequently used exception to the



restrictions set forth in HIPAA, Dr. Stoller argues that Dr. Strickler was an “investigator” for CART rather than a physician engaged in the provision of medical services, and concludes that providing Dr. Strickler with the requested records would have constituted a HIPAA violation. Dr. Stoller’s attempted characterization of Dr. Strickler as an “investigator” constitutes a perversion of the facts – the evidence shows that Dr. Strickler was a treating physician for purposes of the exceptions set forth in HIPAA. It is clear that Dr. Strickler was providing medical care to LW when she was consulted in her capacity as a physician with CART. As a result, Dr. Stoller was free to share his medical records with Dr. Strickler without concern of violating HIPAA.

However, the applicable provision of HIPAA vests discretion in Dr. Stoller regarding whether or not to share his medical records under the circumstances presented by this case. The provision specifically uses the permissive “may” rather than the mandatory “shall” when describing the situations in which medical records can be shared. 45 CFR §164.506(c)(2). (“[A] covered entity may disclose protected health information for treatment activities of a health care provider.”). Accordingly, there was no legal requirement for Dr. Stoller to provide his medical records to Dr. Strickler. Indeed, even Dr. Strickler acknowledged under oath that there was no real legal requirement that obligated Dr. Stoller to share his medical records with her.

That said, it is apparent from the evidence that Dr. Stoller’s refusal to provide his medical records to Dr. Strickler was improperly motivated and constituted a threat to LW’s well-being. Dr. Stoller candidly admitted that he was determined to not turn over his medical records to Dr. Strickler from the moment he first spoke to Dr. Strickler because he questioned her motivations. Despite the fact that Dr. Stoller clearly understood that Dr. Strickler was reviewing records in an effort to ascertain whether LW had been neglected or abused by her mother, Dr. Stoller

acquiesced to the demand of VW to withhold the medical records from Dr. Strickler. The strength of Dr. Stoller's desire to advocate on behalf of his patient is laudable, but in this instance Dr. Stoller's actions rose to the level of blind devotion to VW and actually jeopardized LW's well-being. Indeed, it would seem that Dr. Stoller's determination to withhold LW's medical records was initiated by a desire to protect VW rather than to protect his actual patient: LW. One has to wonder why Dr. Stoller did not believe that he was serving the interests of LW in permitting his records to be reviewed by Dr. Strickler and CART, particularly if he was confident of VW's innocence.

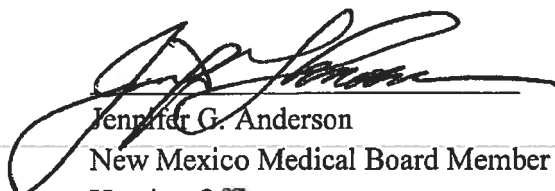
Moreover, it is worth noting that there is an inescapable contradiction in Dr. Stoller's explanations. On one hand, Dr. Stoller argues that he only infrequently interacted with LW and her mother after December of 2009 such that he disclaims the actual existence of a treatment relationship with LW after December of 2009. On the other hand, Dr. Stoller believed that he had such a good grasp on the situation in February of 2013 (more than 3 years after his regular visits with LW ceased) that he could conclude, based on a very short conversation with Dr. Strickler, that there was no basis for concern regarding the suspected medical abuse of LW. In fact, he testified that he was so opposed to the notion that VW was neglecting or abusing her child that he "would have burned [his] medical license before [he] would have said VW was abusing her child."

The Medical Practices Act proscribes "unprofessional or dishonorable conduct" by a licensed physician. Included in the scope of "unprofessional or dishonorable conduct" is "conduct likely to . . . harm the public." Dr. Stoller's frankly rash and unprofessional lack of cooperation with the investigation by Dr. Strickler and CART is troubling. While there was no legal compulsion for Dr. Stoller to cooperate with Dr. Strickler, the reach of the Medical Practice

Act is not limited to those situations where a licensee has neglected a legal obligation. The Act is designed to give the Board discretion to examine troubling circumstances and ascertain whether the conduct of a licensee is compliant with the high standards of practice the Board expects from its licensees. Dr. Stoller's refusal to cooperate with the CART investigation, despite his professed lack of familiarity with the contemporaneous condition of LW, was capricious and fell short of the applicable standard of practice.

Perhaps more so than in any other situation, where there is a suspicion of child abuse, the Board's licensees should be prepared to set aside any differences between them and work together to share information in an effort to aid in a determination regarding the safety and well-being of the suspected victim. Dr. Stoller allowed his disdain for Dr. Strickler to rule the day when he started manufacturing excuses for his unwillingness to cooperate in an investigative process that was designed to protect LW, his patient. Consequently, I find that the Prosecutor met his burden of proving the second half of item 4 in the April 28, 2015 Amended NCA, and satisfactorily established a violation of the Medical Practice Act.

Respectfully Submitted,

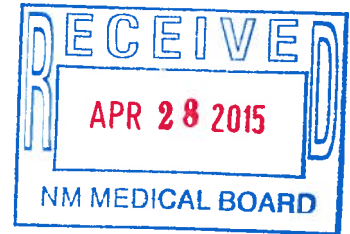


Jennifer G. Anderson  
New Mexico Medical Board Member  
Hearing Officer

July 17, 2015

**BEFORE THE NEW MEXICO MEDICAL BOARD**

**IN THE MATTER OF  
KENNETH STOLLER, M.D.**



**License No. 97-382,**

**Case No. 2014-031**

**Respondent.**

**AMENDED NOTICE OF CONTEMPLATED ACTION**

YOU ARE HEREBY NOTIFIED that pursuant to provisions of the Uniform Licensing Act ("ULA"), NMSA 1978, §§ 61-1-1, *et seq.*, the New Mexico Medical Board ("the Board") has before it sufficient evidence that, if not rebutted or explained, will justify the Board in imposing sanctions that could include restricting, revoking, or suspending your license to practice medicine in the State of New Mexico.

**Nature of the Allegations Against You**

This Notice of Contemplated Action is based on the following allegations:

1. At various times from 2009 to 2012 you have repeatedly, unnecessarily, and injudiciously provided medical treatment to a minor child for medical conditions that did not exist, and that you should have known did not exist. Such treatments included, but were not limited to, hyperbaric oxygen therapy and the injudicious prescribing of numerous potentially dangerous medications, including baclofen, diflucan, ketoconazole, and leucovorin.

2. The mother of the minor child referenced in Paragraph 1 above was subsequently found by the State of New Mexico to have abused or neglected her child by fabricating medical conditions allegedly afflicting the child, and to have otherwise engaged in medical child abuse. Such medical child abuse occurred during the time that you provided the medical treatment described in Paragraph 1.

3. The medical treatment that you provided to the child perpetuated the mother's medical child abuse and placed the child at unnecessary risk of harm. It furthermore reflects your grossly negligent failure to recognize and address the medical threats facing the minor child while she was your patient.

4. You failed to maintain or keep adequate, legible, accurate, or complete medical records reflecting your treatment of the minor child. You also failed to timely transmit what medical records you did have to a requesting physician investigating potential abuse of the child by her mother.

#### **Applicable Law**

5. The above allegations, if proven, would constitute a violation of the following sections of the Medical Practice Act, NMSA 1978, §§ 61-6-1, *et seq.*:

- a. Section 61-6-15(D)(18), conduct likely to harm the public;
- b. Section 61-6-15(D)(12), gross negligence in the practice of a licensee;

c. Section 61-6-15(D)(33), improper management of medical records, including the failure to maintain timely, accurate, legible, and complete medical records; and

d. Section 61-6-15(D)(26), injudicious prescribing, administering, or dispensing of a drug or medicine.

### **Your Rights**

6. Pursuant to NMSA 1978, § 61-1-4, you have a right to a hearing before the Board concerning these allegations. To exercise that right, you must make a written request to the Board, mailed via certified mail, return receipt requested. You must make that written request within twenty days after your receipt of this Notice of Contemplated Action. If you do not request a hearing within that twenty day period, the Board will take the contemplated action against your license, specifically the imposition of sanctions that could include the revocation or suspension of your license to practice medicine in the State of New Mexico. Action taken by the Board under such circumstances is not subject to judicial review.

7. Pursuant to NMSA 1978, § 61-1-8(A) you have the right to be represented in this proceeding by legal counsel, by a licensed member of your profession, or both. You have the right to present all relevant evidence by means of witnesses, books, papers, documents, and other evidence. You also have the right to examine all opposing

witnesses who may appear on any matter relevant to the issues and have subpoenas duces tecum issued prior to the commencement of the hearing in order to compel the attendance of witnesses or the production of relevant books, papers, documents, and other evidence. The issuance of such subpoenas after commencement of the hearing rests with the discretion of the Board of its Hearing Officer.

8. Pursuant to NMSA 1978, § 61-1-8(B), you have the right to obtain from the Board the names and addresses of any witnesses who may be called to testify at a hearing and to inspect and copy any documents or items that the Board will or may introduce as evidence at a hearing.

9. The issuance of this Notice of Contemplated Action is not a disciplinary event reportable to any data bank, but it is a public document open to public inspection.

10. In the event the Board takes against you or your license a final action as described in NMSA 1978, § 61-1-3, you shall bear all costs of the disciplinary proceeding pursuant to NMSA 1978, § 61-1-4(G) unless excused by the Board from such obligation.

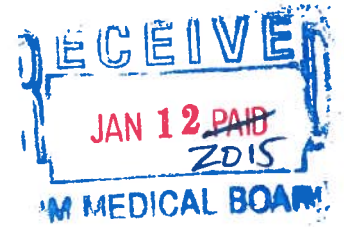
Dated April 28, 2015.

NEW MEXICO MEDICAL BOARD



Debbie Dieterich, Executive Director  
2055 South Pacheco, #400  
Santa Fe, NM 87505  
(505)476-7220

BEFORE THE NEW MEXICO MEDICAL BOARD



IN THE MATTER OF )  
KENNETH STOLLER, M.D. )

License No. 97-382 )

No. 2014-031

Respondent. )

AMENDED NOTICE OF CONTEMPLATED ACTION

YOU ARE HEREBY NOTIFIED that pursuant to provisions of Section 61-1-4 NMSA 1978 of the Uniform Licensing Act (“ULA”), the New Mexico Medical Board ("Board") has before it sufficient evidence that, if not rebutted or explained, will justify the Medical Board imposing sanctions that could include restricting, revoking or suspending your license to practice medicine in the State of New Mexico.

1. You are subject to action by the Board pursuant to Sections 61-1-1 et seq. NMSA 1978 of the Uniform Licensing Act and Sections 61-6-1 et seq., NMSA 1978 of the Medical Practice Act.

2. This contemplated action is based on the following allegations:

A. At various times from 2009-12, you have repeatedly, unnecessarily, and injudiciously provided medical treatments to a minor child for medical conditions that did not exist, and that you should have known did not exist. Such treatments included, but were not limited to “hyperbaric oxygen therapy” and the injudicious prescribing of numerous dangerous drugs, including baclofen, diflucan, ketoconazole, and leucovorin.

B. The mother of above minor child was subsequently found by the State of New Mexico to have abused and/or neglected her child by fabricating medical conditions for the child, providing inadequate nutrition to the child, and otherwise engaged in “medical child abuse.” Such medical child abuse occurred during the entire time that you provided the medical treatment described in A, above.



C. Your medical treatment described in A, above, perpetuated the medical child abuse described in B, above, placed the child at unnecessary risk of harm, and furthermore, reflects your grossly negligent failure to recognize and address the medical threats facing the minor child while entrusted to your care.

D. During the practices described in A, above, you failed to maintain or keep adequate, legible, accurate or complete medical records, indeed, practically any medical records of the child's care.

E. You have publically claimed, through a website, to be a diplomat of the American Board of Pediatrics despite a lack of current certification in that specialized field.

F. In your testimony before the State of New Mexico regarding your role in the medical child abuse of the minor, you made several false statements regarding your professional qualifications.

3. The above allegations, if proven, would constitute a violation of the following sections of the Medical Practice Act, Section 61-6-1 et seq.:

- a. Section 61-6-15(D)(18), conduct likely to harm the public;
- b. Section 61-6-15(D)(12), gross negligence in the practice of a licensee,
- c. Section 61-6-15(D)(15), the use of a false, fraudulent, or deceptive statement in a document connected with the practice of a license,
- d. Section 61-6-15(D)(33), improper management of medical records, including failure to maintain timely, accurate, legible and complete medical records;
- e. Section 61-6-15(D)(26), injudicious prescribing, administering or dispensing of a drug or medicine; and,
- f. making false or misleading statements regarding the efficacy or value of the medicine, treatment or remedy prescribed or administered by the licensee or at the direction

of the licensee in the treatment of a disease or other condition of the human body or mind.

4. Please take notice that pursuant to Section 61-1-4, you may secure a hearing before the Board by depositing in the mail within twenty (20) days after service of this notice a certified return receipt requested letter addressed to the Board and containing a request for a hearing. If you do not request a hearing within twenty (20) days after service of this notice as described above, the Board will take the contemplated action, i.e., imposing sanctions that could include the revocation or suspension of your license to practice medicine in the State of New Mexico, and there will be no judicial review of their decision.

5. Pursuant to Section 61-1-8 NMSA 1978, you have the right to be represented by counsel or by a licensed member of your profession or both, and to present all relevant evidence by means of witnesses, books, papers, documents and other evidence; to examine all opposing witnesses who may appear on any matter relevant to the issues and have subpoenas duces tecum issued as of right prior to the commencement of the hearing, to compel the attendance of witnesses and the production of relevant books, papers, documents and other evidence upon making a written request therefore to the Board. The issuance of such subpoenas after commencement of the hearing rests with the discretion of the Board or Hearing Officer.

6. The issuance of this Notice of Contemplated Action is not a disciplinary event reportable to any data bank but is a public document open to public inspection.

7. In the event that the Board takes a final action against you as specified in Section 61-1-3 of the ULA, you shall bear all costs of disciplinary proceedings pursuant to Section 61-1-4(G) of the ULA unless excused by the Board.

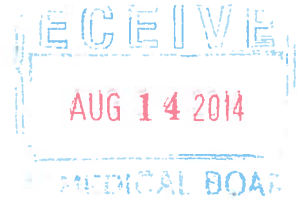
Dated this 12<sup>th</sup> day of January, 2014.

NEW MEXICO MEDICAL BOARD



Debbie Dieterich, Acting Director  
NM Medical Board  
2055 S. Pacheco, #400  
Santa Fe, New Mexico 87505  
(505) 476-7220

**BEFORE THE NEW MEXICO MEDICAL BOARD**



**IN THE MATTER OF** )  
**KENNETH STOLLER, M.D.** )  
 )  
**License No. 97-382** )  
 )  
**Respondent.** )

**No. 2014-031**

**NOTICE OF CONTEMPLATED ACTION**

YOU ARE HEREBY NOTIFIED that pursuant to provisions of Section 61-1-4 NMSA 1978 of the Uniform Licensing Act (“ULA”), the New Mexico Medical Board ("Board") has before it sufficient evidence that, if not rebutted or explained, will justify the Medical Board imposing sanctions that could include restricting, revoking or suspending your license to practice medicine in the State of New Mexico.

1. You are subject to action by the Board pursuant to Sections 61-1-1 et seq. NMSA 1978 of the Uniform Licensing Act and Sections 61-6-1 et seq., NMSA 1978 of the Medical Practice Act.

2. This contemplated action is based on the following allegations:

A. At various times from 2009-12, you have repeatedly, unnecessarily, and injudiciously provided medical treatments to a minor child for medical conditions that did not exist, and that you should have known did not exist. Such treatments included, but were not limited to “hyperbaric oxygen therapy” and the injudicious prescribing of numerous dangerous drugs, including baclofen, diflucan, ketoconazole, and leucovorin.

B. The mother of above minor child was subsequently found by the State of New Mexico to have abused and/or neglected her child by fabricating medical conditions for the child, providing inadequate nutrition to the child, and otherwise engaged in “medical child abuse.” Such medical child abuse occurred during the entire time that you provided the medical treatment described in A, above.

C. Your medical treatment described in A, above, perpetuated the medical child abuse described in B, above, placed the child at unnecessary risk of harm, and furthermore, reflects your grossly negligent failure to recognize and address the medical threats facing the minor child while entrusted to your care.

D. During the practices described in A, above, you failed to maintain or keep adequate, legible, accurate or complete medical records, indeed, practically any medical records of the child's care.

E. You have publically claimed, through a website, to be a diplomat of the American Board of Pediatrics despite a lack of current certification in that specialized field.

F. In your testimony before the State of New Mexico regarding your role in the medical child abuse of the minor, you made several false statements regarding your professional qualifications.

3. The above allegations, if proven, would constitute a violation of the following sections of the Medical Practice Act, Section 61-6-1 et seq.:

- a. Section 61-6-15(D)(18), conduct likely to harm the public;
- b. Section 61-6-15(D)(12), gross negligence in the practice of a licensee,
- c. Section 61-6-15(D)(15), the use of a false, fraudulent, or deceptive statement in a document connected with the practice of a license,
- d. Section 61-6-15(D)(33), improper management of medical records, including failure to maintain timely, accurate, legible and complete medical records; and
- e. Section 61-6-15(D)(26), injudicious prescribing, administering or dispensing of a drug or medicine.

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return receipt requested letter addressed to the Board and containing a request for a hearing. If you do not request a hearing within twenty (20) days after service of this notice as described above, the Board will take the contemplated action, i.e., imposing sanctions that could include the revocation or suspension of your license to practice medicine in the State of New Mexico, and there will be no judicial review of their decision.

5. Pursuant to Section 61-1-8 NMSA 1978, you have the right to be represented by counsel or by a licensed member of your profession or both, and to present all relevant evidence by means of witnesses, books, papers, documents and other evidence; to examine all opposing witnesses who may appear on any matter relevant to the issues and have subpoenas duces tecum issued as of right prior to the commencement of the hearing, to compel the attendance of witnesses and the production of relevant books, papers, documents and other evidence upon making a written request therefore to the Board. The issuance of such subpoenas after commencement of the hearing rests with the discretion of the Board or Hearing Officer.

6. The issuance of this Notice of Contemplated Action is not a disciplinary event reportable to any data bank but is a public document open to public inspection.

7. In the event that the Board takes a final action against you as specified in Section 61-1-3 of the ULA, you shall bear all costs of disciplinary proceedings pursuant to Section 61-1-4(G) of the ULA unless excused by the Board.

Dated this 14<sup>th</sup> day of August, 2014.

NEW MEXICO MEDICAL BOARD



Lynn Hart, Executive Director  
NM Medical Board  
2055 S. Pacheco, #400  
Santa Fe, New Mexico 87505  
(505) 476-7220