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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

KENNETH P. STOLLER, M.D, Petitioner, v. **MEDICAL BOARD OF CALIFORNIA,** Respondent.	Case No. 34-2021-80003606 **~~[Proposed]~~ JUDGMENT DENYING PETITION FOR WRIT OF ADMINISTRATIVE MANDATE**

BY FAX

This matter came on regularly for a videoconference hearing on the merits on July 23, 2021, at 10:00 a.m., in Department 17 of the Sacramento Superior Court, the Honorable James P. Arguelles, Judge presiding. Petitioner was represented by his attorney Richard Jaffe, Esq., and Respondent Medical Board of California was represented by Rob Bonta, Attorney General of the State of California, by Lawrence Mercer, Deputy Attorney General.

The Court having considered the written and oral argument presented by the parties, and having considered the administrative record, took the matter under submission. On August 30, 2021, the Court issued its Final Ruling denying the writ. A copy of the Final Ruling is attached hereto and incorporated by reference.

IT IS HEREBY ORDERED that:

1. The Petition for Writ of Administrative Mandate is DENIED.

2. Judgment is entered in favor of Respondent Medical Board of California.

3. Pursuant to Government Code section 6103.5, Respondent shall recover from Petitioner and pay to the Clerk of the Court the sum of $435.00, said sum being the amount of fees that would have been paid but for the operation of Government Code section 6103.

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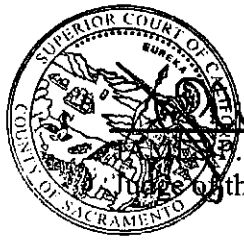

LAWRENCE P. ARGUELLES
Judge of the Superior Court

Approved as to form.

RICHARD JAFFE, ESQ.
Attorney for Petitioner

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

HRG DATE / TIME JUDGE	July 23, 2021 / 10:00 A.M. James P. Arguelles	DEPT. NO. CLERK	17 Slort/Ward
KENNETH P. STOLLER, M.D., Petitioner, v. MEDICAL BOARD OF CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA, Respondent.		Cases No.: 34-2021-80003606	
Nature of Proceedings:	Petition for Writ of Mandate – Final Ruling		

The petition is DENIED.

Petitioner Kenneth P. Stoller, M.D.'s (Dr. Stoller) request for judicial notice of legislative history is GRANTED. Dr. Stoller's further requests for judicial notice of administrative decisions in other matters, and of the number of school children in California, are DENIED as irrelevant.

Background

Until 2015, there were three avenues by which children could avoid immunization requirements governing admission into schools and other child care facilities: the religious exemption, the personal belief exemption and the medical exemption.[1] After a measles outbreak in 2014, the Legislature took up Senate Bill (SB) 277 to eliminate the personal belief exemption and move closer to universal immunization.

While SB 277 was under consideration, persons opposing the bill as well as several legislators expressed concern that the medical exemption should be expanded or clarified so that physicians could write exemptions based on their best professional judgment. When SB 277

[1] Pursuant to Health and Safety Code Section 120335, admission to schools and child care centers requires proof of immunization to the following diseases: Diphtheria, Haemophilus influenza type b, Measles, Mumps, Pertussis (whooping cough), Poliomyelitis, Rubella, Tetanus, Hepatitis B and Varicella B (chicken pox).

was introduced, Health and Safety Code Section 120370(a)[2] authorized medical exemptions as follows:

> If the parent or guardian files with the governing authority a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances **that contraindicate immunization**, that child shall be exempt ... to the extent indicated by the physician's statement. (Emphasis added.)

SB 277 amended this subdivision so that a school or other "governing authority" was required to honor a medical exemption indicating "the medical condition or circumstances, including, but not limited to, family history, for which the physician does not recommend immunization[.]" The word "contraindicate" was deleted.

Dr. Stoller is a former pediatrician who believes that vaccinations present greater risks than are generally acknowledged among physicians, mainstream medical organizations and the pharmaceutical industry. He describes himself as an integrative physician. When SB 277 was enacted into law in 2015, Dr. Stoller had not been a practicing pediatrician for several years. He had discontinued his membership with the American Association of Pediatricians (AAP) largely because of the organization's views about vaccinations. By 2011, Dr. Stoller's main practice was the use of hyperbaric oxygen chambers and nutritional supplements to treat traumatic brain injuries, Lyme disease and autoimmune disorders.

Dr. Stoller was present when SB 277 was debated in the Assembly Health Committee (Committee). He heard the bill's sponsor, Senator (and physician) Richard Pan, assure Committee members that Section 120370(a) did not limit physicians to exemptions based on contraindications issued by the Centers for Disease Control (CDC). He also heard Senator Pan represent that Respondent herein Medical Board of California (Board) had never investigated or disciplined a physician for writing a medical exemption.

After SB 277 became law, Dr. Stoller drafted and posted to his professional website policies and procedures to evaluate adverse risks of immunization. This document identified a number of medical conditions, experienced by a child and/or a child's family members, that Dr. Stoller indicated could qualify for a medical exemption. In practice, a parent seeking such an exemption "got into the door" to his office by identifying one or more such conditions, at which point Dr. Stoller wrote a temporary exemption from all required immunizations. His policies directed parents to bring any pertinent medical records already in their possession, but he did not ask parents to secure other medical records that might substantiate their verbal reporting to him. Instead, he accepted verbal medical histories and did not investigate the accuracy of the reporting. Several of the parents who sought out exemptions from Dr. Stoller traveled considerable distances from their homes to do so.

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[2] Undesignated statutory references shall be to the Health and Safety Code.

When Dr. Stoller wrote temporary medical exemptions, he recommended genetic testing, and the procurement of the child's raw genetic data, through the 23andMe commercial service. Dr. Stoller reviewed the data to determine whether the child had any of 12 genes he had recently concluded were associated with adverse reactions to vaccination. Where he discerned such genes, he wrote permanent exemptions from all immunizations. Dr. Stoller wrote these exemptions fully aware that genetics studies had not identified any allele causally related to an adverse reaction to vaccination. Given his belief that vaccinations were generally dangerous, he determined that any holes in the research warranted a presumption against vaccination, as opposed to one in favor of it. He described this as a "precautionary principle," whereby he presumed vaccination to be unsafe if the child's genetics suggested some unknown level of risk.

Dr. Stoller wrote exemptions for approximately 500 children between 2016 and spring 2019. The Board investigated and ultimately produced an accusation with four charges pertaining to ten of these children. Dr. Stoller was not the treating physician of any of the ten children. He did not communicate directly with their treating physicians before writing the exemptions.

The Board accused Dr. Stoller of gross negligence, repeated negligent acts and incompetence for performing genetic testing to determine whether children should be exempted from required vaccinations. (See Bus. & Prof. Code § 2234(b)-(d).) The Board alleged that the CDC's Advisory Committee on Immunization Practices (ACIP) as well as the AAP set the standard of care and did not recommend such testing. The Board further alleged that no allele accurately predicted vaccine response, and that Dr. Stoller's genetics-based, permanent and global exemptions lacked medical or scientific support.

Next, the Board charged Dr. Stoller with gross negligence, repeated negligent acts and incompetence for obtaining and relying upon unverified patient and family histories:

> The histories obtained by [Dr. Stoller] are typically scant and insufficiently documented as accepted diagnoses. To document an existing or family history of a condition or reaction without specification of the condition, the person who had the condition and their relation to the patient, and the specific vaccine or vaccine component that the condition or reaction related to, is not standard medical charting. In some cases, [Dr. Stoller] recorded a history of potentially very serious events, such as near SIDS, near exsanguination or acute encephalitis, but he did not obtain the pertinent medical records or otherwise investigate. [Dr. Stoller]'s provision of medical exemptions based on conditions not generally accepted as medical precautions or contraindications, his inadequate documentation of patient and family histories and failure to obtain records and/or investigate potentially very serious events fall below the standard of care and constitute grounds for discipline... .

(Pet., ¶ 25.)

Thirdly, the Board charged Dr. Stoller with gross negligence, repeated negligent acts and incompetence for writing exemptions from all vaccines. And finally, it charged him with failing to maintain adequate and accurate records.

Dr. Stoller filed a notice of defense and cited as a "legal issue" an alternative standard based on Business and Professions Code Section 2334.1. That section provides, in relevant part:

> (a) A physician and surgeon shall not be subject to discipline pursuant to subdivision (b), (c), or (d) of Section 2234 solely on the basis that the treatment or advice he or she rendered to a patient is alternative or complementary medicine ... if that treatment or advice meets all of the following requirements:
>
> (1) It is provided after informed consent and a good-faith prior examination of the patient, and medical indication exists for the treatment or advice, or it is provided for health or well-being. [¶¶]
>
> (b) For purposes of this section, "alternative or complementary medicine" means those health care methods of diagnosis, treatment, or healing that are not generally used but that provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk of the health care method.

Dr. Stoller also tendered advice of counsel as a factor mitigating any discipline ultimately imposed.

At the administrative hearing, the Board produced Dean Blumberg, M.D. (Dr. Blumberg), an expert in pediatric infectious diseases. Dr. Blumberg testified that the ACIP Guidelines and the AAP's so-called "Red Book" supply the professional standard of care governing immunization of children. These two publications are virtually identical and generally call for vaccinations on prescribed schedules absent one or more specific "contraindications" or "precautions." A contraindication reflects a patient's condition that increases risk of severe or serious adverse reaction to a specific vaccine. (See 9/21/20 Tr. at 51.) Precautions are "more relative" than contraindications and encompass conditions that might increase risk of adverse reactions or preclude the desired immune response. (See *id.*) Table 4.1 in the ACIP Guidelines enumerates the contraindications and precautions excusing a patient from a given immunization. (See B404-410.)

Dr. Blumberg opined that the exemptions Dr. Stoller wrote constituted extreme departures from the standard of care. Dr. Blumberg impugned Dr. Stoller to the extent he issued exemptions based on reported patient and family histories that he failed to investigate. Dr. Blumberg testified that independent research did not support Dr. Stoller's methods. He dismissed as illogical and medically unsupported Dr. Stoller's consistent reliance on family histories and discrete genetic markers as a basis for exempting children from immunization.

Dr. Stoller testified on his own behalf. He asserted that SB 277, not the ACIP Guidelines or the AAP Red Book, dictated the scope of the medical exemptions a physician was authorized to write.

Dr. Stoller also produced Kelly Sutton, M.D. (Dr. Sutton), who was board-certified in internal medicine. She had no particular credentials in infectious disease, genetics or immunology.[3] Dr. Sutton testified that the exemptions Dr. Stoller wrote were consistent with an alternative standard of care endorsed by a group of physicians, which included herself and Dr. Stoller, known as Physicians for Informed Consent. Formed when SB 277 was enacted, this group sought to take advantage of what they perceived to be new legal authority to exempt children from immunization. The alternative standard that Dr. Sutton described counseled against vaccination for any child whose recovery from a medical condition or prior adverse health event had not been confirmed over time. Although she admitted she was not completely familiar with Dr. Stoller's approach to genetics, she approved his reliance on family histories and genetics to exempt children from all required immunizations.

At the conclusion of the evidentiary hearing, the administrative law judge (ALJ) sustained the charges against Dr. Stoller except the charge of inaccurate and inadequate record-keeping. The sustained charges were predicated on (i) use of "spurious genetic analyses" as a basis for exemptions, (see Pet., Exh. E, p. 29); (ii) "reliance on unverified and medically irrelevant personal and family health histories," (*Id.*); and (iii) issuance of "baseless" lifetime exemptions. (*Id.*)

The ALJ recommended revocation of Dr. Stoller's license notwithstanding that Dr. Stoller had no history of prior discipline. She concluded that Dr. Stoller had shown contempt for medical science and, in exchange for compensation, had taken advantage of medically ignorant and anxious parents. She determined that protection of the public – the Board's highest priority – warranted the penalty of revocation.

The Board adopted the ALJ's decision (Decision) in full. This action followed.

In his petition for administrative writ of mandate (Petition), Dr. Stoller alleges that the revocation of his license was an arbitrary penalty compared with penalties imposed against other physicians charged with wrongly exempting children from vaccinations. He further alleges that, given the statutory law at the time, the Board erred to the extent it disciplined him for failing to comply with the standard of care set forth in the ACIP Guidelines and the AAP Red Book. Dr. Stoller assigns other errors as well.

Standard of Review

The court reviews the Board's decision pursuant to Code of Civil Procedure Section 1094.5. That section affords review of an administrative proceeding in which an evidentiary hearing was

[3] When she testified, Dr. Sutton was also under investigation for exemptions she had written.

required by law. (See Code Civ. Proc. § 1094.5(a).) "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Id.* § 1094.5(b).)

When reviewing the revocation of a medical license, the court applies its independent judgment to the Board's factual findings. (See *id.*, § 1094.5(c); *Pirouzian v. Superior Court* (2016) 1 Cal.App.5th 438, 447.) "Although the 'starting point' for the trial court is a presumption of correctness concerning the Board's decision, the trial court 'is free to substitute its own findings after first giving due respect to the agency's findings.'" (*Id.*, p. 447.) However, even where the independent judgment test applies, the findings of the agency come before the court with a strong presumption of their correctness, and the petitioner bears the burden of demonstrating the findings are contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811-812.)

The Board's construction of statutes, and other legal issues, are reviewed *de novo*. (See *Duncan v. Department of Pers. Admin.* (2000) 77 Cal.App.4th 1166, 1174.)

The particular penalty chosen as discipline will only be set aside if it was a manifest abuse of discretion. (See *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 217-218.)

Discussion

Dr. Stoller and his counsel have repeatedly conceded that the exemptions in question did not comply with the ACIP Guidelines or the AAP Red Book. In his legal briefs, however, Dr. Stoller argues that SB 277's amendments to Section 120370(a) created a statutory standard of care independent of these sources. Pursuant to this statutory standard, he reasons, he was entitled to write each of the exemptions notwithstanding any departure from the ACIP Guidelines and the AAP Red Book. Because the Board did not review his conduct solely by reference to the terms of Section 120370(a), he argues that the Board abused its discretion.

As noted above, the version of Section 120370(a) in effect when Dr. Stoller wrote the exemptions amended a prior version of that subdivision. The prior version required exemptions to identify medical conditions or circumstances *contraindicating* immunization. The amended version deleted the reference to contraindication and instead required exemptions to identify the medical conditions or circumstances, "including, but not limited to, family history," for which immunization was "not recommended." Dr. Stoller argues that the amendment was intended to afford physicians discretion to exempt patients even in the absence of a contraindication or precaution identified in the ACIP Guidelines. The Board counters that Section 120370 is not concerned with the standard of care at all, and instead merely alerts schools and child care centers to the exemptions they must receive before admitting unvaccinated children into their facilities.

Like Dr. Stoller, the court believes that SB 277 was intended to afford physicians leeway to write exemptions without strict reference to the ACIP Guidelines or the AAP Red Book otherwise furnishing the standard of care. True, Section 120370 is located within a chapter of the Health and Safety Code governing immunization requirements, as opposed to professional standards of care. Nonetheless, few if any physicians would write exemptions conforming to Section 120370 if the exemptions conflicted with the standard of care governing malpractice and discipline. Accordingly, the court rejects the view that Section 120370 authorized exemptions that could have resulted in the discipline of the authoring physicians. By amending Section 120370 so as to untether exemptions from contraindications, the Legislature must have intended to enlarge physicians' professional discretion. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451 ["We presume the Legislature intends to change the meaning of a law when it alters the statutory language [citation], as for example when it deletes express provisions of the prior version [citation]"].)

On the other hand, the version of Section 120370 in effect when Dr. Stoller wrote his exemptions did not operate as a stand-alone, statutory standard of care. Before and after it was amended, Section 120370 required exemptions to identify medical conditions or circumstances such that immunization was "not considered safe." The text of Section 120370 has never dictated how these safety determinations should be made. Hence, those determinations must be made by reference to something external. Without some objective measure against which to judge an exemption, physicians would be free to exempt children for purely personal reasons, including baseless antagonism to vaccinations generally. Because SB 277 was intended to eliminate personal belief exemptions, (see Legis. Counsel's Dig., Sen. Bill 277, Stats. 2015, c. 35 (2015-2016 Reg. Sess.), the Legislature could not have intended to authorize physicians to write exemptions based on nothing but unsupported personal beliefs.

The court concludes that Section 120370, as amended by SB 277, contemplated exemptions predicated on medically supported, professional judgment not strictly limited to contraindications or precautions in the ACIP Guidelines or the Red Book.

To the extent Section 120370 was ambiguous, the Legislative history fortifies a view that SB 277 was intended to supplement the professional standard of care. As noted above, SB 277 was introduced to eliminate the personal belief exemption. Opponents of the bill expressed concern that medical exemptions were difficult to obtain, in part because physicians were apprehensive about writing them. In anticipation of a public hearing before the Committee, Committee staff drafted a bill analysis identifying the opponents' concern and suggesting an amendment to accommodate it. The bill analysis described medical exemptions as follows:

> A medical exemption letter can be written by a licensed physician that [sic] believes that vaccination is not safe for the medical conditions of the patient, such as those whose immune systems are compromised, which are allergic to vaccines, are ill at the time of vaccination, or have other medical contraindications to vaccines for that individual patient. Every state allows medical exemptions from school vaccination requirements. This determination is entirely up to the professional clinical judgment

> of the physician. There are no required medical criteria for diagnosing circumstances that contraindicate vaccination. A physician must base that decision on their [sic] professional judgment and the standard of practice for their [sic] field. According to the Medical Board of California, the "standard of care" (or "standard of practice") for general practitioners is defined as that level of skill, knowledge and care of diagnosis and treatment ordinarily possessed and exercised by other reasonably careful and prudent physicians in the same or similar circumstances[.] [...]

(Assem. Com. on Health, Rep. on Sen. Bill No. 277 (2015-2016 Reg. Sess.) as amended May 7, 2015, p. 7.)

Under a heading "SUGGESTED AMENDMENTS," the bill analysis further provided:

> **A physician's professional judgment.** As previously discussed, it is entirely within the professional judgment of a physician if vaccination is not recommended due to the medical history of the patient. Opponents of this bill have raised concerns that current law regarding the letter of medical exemption does not adequately make clear that the letter may be written based on the best medical judgment of the physician. To that end, the author may wish to consider amending this bill [as follows:]
>
> > Section 120370. (a) If the parent or guardian files with the governing authority a written statement by a licensed physician to the fact that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances ~~that contraindicate~~ ***for which the physician does not recommend*** immunization, that child shall be exempt ... .

(*Id.*, pp. 13-14.)

At the hearing before the Committee, several Committee members discussed the scope of the existing medical exemption, as well as the potential need for an amendment, with Senator Pan. For example, the following exchange took place between Senator Pan and the Committee chairman:

> **Chairman Bonta:** Thank you, Dr. Pan. And then finally, we have an amendment regarding the medical exemption in a physician's judgment. And I've heard from a number of constituents and Californians regarding concerns that a medical exemption is difficult to obtain or was difficult to obtain. I believe that current law states that a physician has complete professional discretion over the writing of a medical exemption.
>
> However, I have asked the author to take an amendment to clarify that a medical exemption is entirely within the professional judgment of a physician. And we have agreement on that amendment?

Senator Pan: Yes.

(B551-552, 594-595.) Senator Pan also testified that then-existing law did not prevent a physician from writing an exemption based on professional judgment that a sibling's adverse reaction created a risk to the patient. He also asserted that "we are not aware of any physician who's been disciplined and investigated because they provided a medical exemption. So there's no cloud hanging over them to be able to do this." (B558:8-11; see also B622-623 [offering to reassure physicians who feel pressured not to write medical exemptions due to "external influence other than their professional judgment"].)

Another Committee member questioned Senator Pan about the relationship between statutory exemptions and CDC guidelines. Senator Pan remarked that existing law did not compel compliance with such guidelines, and the amendment in SB 277 was meant to clarify that. He reiterated his belief that the Board had never disciplined a physician for issuing a medical exemption. (See B647-649.)

During the same discussion, however, Senator Pan asserted that any physician's exercise of professional judgment was subject to review by the Medical Board. (See B647.) In an exchange with a third Committee member, Senator Pan repeated that the amendment was intended to clarify that medical exemptions are "at the professional judgment of the physician." (B679; see also B691 ["If a physician feels that there's a genetic association in a sibling, a cousin, some other relative, it's not safe for a vaccine, they can provide a medical exemption for that vaccine. There's no limitation on a physician from doing that other than their own professional judgment, their own knowledge and expertise about what they believe is safe for the patient"].)

The amendment ultimately adopted went further than the one tendered to the Committee and identified "family medical history" as an example of a medical condition or circumstance supporting an exemption. As noted above, Section 120370(a) read during the period in question:

> If the parent or guardian files with the governing authority a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances, including, but not limited to, family medical history, for which the physician does not recommend immunization, that child shall be exempt... .

Like the text of the amendment, the legislative history reflects an intent to authorize medical exemptions based on physicians' professional judgment, but without strict reference to contraindications enumerated in the ACIP Guidelines or the AAP Red Book. As previously explained, the point was not to decouple medical exemptions from medical science. Rather, it was to provide physicians with some leeway to exempt patients for medical reasons other than those supporting the contraindications and precautions in the ACIP Guidelines or the AAP Red Book.

Prior to the merits hearing in this case, the court served counsel with questions reflecting a concern that the Board might have failed to account for the leeway that SB 277 was intended to provide. After discussing this and other concerns with counsel at oral argument, and after reviewing the transcripts of the hearing below, the court concludes that the Board committed no prejudicial abuse of discretion in this regard.

With respect to the charge that Dr. Stoller wrongly predicated exemptions upon genetic testing, the Board credited Dr. Blumberg's testimony that such a practice violated the ACIP Guidelines and the AAP Red Book. Because these medical sources were relevant to the propriety of the exemptions, the Board properly considered them.

But the Board also credited evidence – correctly – that there was no other medical or scientific basis for exempting children from vaccination based upon the alleles that were the focus of Dr. Stoller's testing. Dr. Blumberg credibly testified that no research has yielded a causal connection between particular alleles and reactions to vaccines. Even Dr. Stoller admitted that the genetic "associations" he discerned could not be quantified into any probability of adverse reaction. The weight of the evidence, therefore, clearly supports a finding that the genetic testing on which Dr. Stoller relied was not a medically supported basis for exempting the tested children. Consequently, Section 120370(a) did not authorize the genetic testing that Dr. Stoller employed, and the related administrative charges leveled against him were properly sustained.

The same may be said of the charge about writing global exemptions, i.e., exemptions from all vaccines. The weight of the evidence establishes that the vaccines required for children in California vary in their ingredients. As Dr. Blumberg explained, even if a medical condition made a child sensitive to a particular vaccine, it would not support the wholesale exemptions that Dr. Stoller routinely wrote.

Dr. Stoller and Dr. Sutton attempted to justify global exemptions on the theory that vaccinations are inherently harmful and, therefore, any suggestion of susceptibility in genetics and/or family history made every vaccine more risky than beneficial. The weight of the evidence is to the contrary. Moreover, the court in *Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1142 took judicial notice "'of the safety and effectiveness of vaccinations in preventing the spread of dangerous communicable diseases, a fact that is commonly known and accepted in the scientific community and the general public.'" An assumption that vaccines are generally more harmful than beneficial is not a medical justification for global exemptions.

The final charge that the Board sustained pertains to Dr. Stoller's treatment of patient and family histories. In its Decision, the Board wrote:

> 93. Although [Dr. Stoller] relied most heavily on genetic testing to support the vaccination exemptions he issued to Patients 1 through 10, he did also consider aspects of personal and family health history that the ACIP Guidelines and the AAP Red Book do not identify as relevant... . Neither he nor Dr. Sutton cited any laboratory or clinical research, however, supporting their opinions that these personal and family

health factors increased the likelihood that these patients would experience negative consequences from vaccination.

94. Furthermore ... respondent relied in every case solely on his patients' parents' reports about their children's or their family members' medical histories. Even when those reports were extreme, inconsistent, and facially implausible ... respondent made no effort to investigate them further.

95. With respect to personal and family health history matters that the ACIP Guidelines and AAP Red Book do not identify as contraindications or precautions to vaccination, Dr. Blumberg's opinion ... is that respondent committed extreme departures from the standard of care by relying on those matters to issue medical vaccination exemptions. Even as to personal or family health history matters that the ACIP Guidelines and AAP Red Book identify as potentially relevant to vaccination, however, Dr. Blumberg testified that the standard of care requires a physician to obtain complete, accurate information about those matters before relying on them to make medical decisions. [...]

96. In his interview with Board investigators, respondent explained that he did not seek other medical records about patients who came to him seeking medical immunization exemptions, because he did not need "to verify that this is truth or not truth." Yet in his medical records, his reports to parents, and his hearing testimony, respondent relied repeatedly on his patients' and their family members' reported environmental allergies, auto-immune disorders, neurological problems, and previous vaccine-related health problems to justify the vaccination exemptions he issued. Dr. Blumberg's assessment of respondent's reliance on unverified personal and family health histories in his medical vaccination exemptions for Patients 1 through 10 is persuasive.

(Pet., Exh. E.) The Board concluded that Dr. Stoller's reliance on "unverified and medically irrelevant personal and family health histories" was cause for discipline.

The weight of the evidence supports the Board's findings. Dr. Blumberg explained that Dr. Stoller misdiagnosed and exaggerated patients' conditions. Dr. Blumberg also described Dr. Stoller's exemptions as medically unsupported and illogical. As to the many exemptions that Dr. Stoller wrote based on reported family histories of autoimmune disease, even Dr. Sutton admitted that neither a patient's nor patient's family's history of autoimmune diseases in itself warrants an exemption. (See 9/24/20 Tr. at 14:14-18.) And as previously explained, the genetic analyses that Dr. Stoller performed did not add medical support for the exemptions. The Board did not abuse its discretion by concluding that the patient and family histories on which Dr. Stoller relied were medically irrelevant.

The weight of the evidence likewise supports the finding that Dr. Stoller improperly failed to investigate or otherwise substantiate parents' reporting. Dr. Stoller knew that parents sought

him out from considerable distances after failing to obtain exemptions from treating physicians. In addition, he had posted to his public website a list of conditions that he indicated could warrant an exemption. He should have questioned parents' reporting. Dr. Blumberg testified that the standard of care required verification of reported histories. Dr. Stoller's response was that physicians' medical records of reactions to vaccination are categorically inaccurate. (See 9/23/20 Tr. at 93:4-11.) He also asserted that he felt no need to consult with patients' primary physicians because he did "not need to hear ... over and over and over again" that the physicians were scared of writing exemptions and losing their licenses. (See *id.* at 103:4-10.) These assertions do nothing to undermine Dr. Blumberg's testimony.

Dr. Stoller argues that, even if his reliance on medical histories cannot be justified under "conventional" medical standards, Section 2234.1 should have precluded discipline. As noted above, that section enumerates elements of a safe harbor for physicians practicing alternative or complementary medicine. At some points in his legal briefs, Dr. Stoller faults the Board for failing to negate elements of the safe harbor. At oral argument, however, Dr. Stoller's counsel conceded that Section 2234.1 provides an affirmative defense, not a cause for discipline that the Board must prove. The court accepts this concession and will not grant relief on the theory that the Board failed to meet a burden of proof.

Dr. Stoller challenges the Board's determination that he failed to perform the requisite "good-faith prior examination[s]" of the children in question. (See § 2234.1(a)(1).) In his view, he was only required to perform physical examinations in good faith, as opposed to the good-faith review of medical records that was the Board's focus. However the term "examination" is construed, Dr. Stoller did not act in good faith when examined the children in question. He approached his patients with an anti-immunization agenda and reverse engineered justifications for the exemptions he wrote. Ultimately, though, the court need not trace the contours of the good-faith requirement in Section 2234.1, since Dr. Stoller's methods were not alternative or complementary medicine in the first place.

"Alternative or complementary medicine" denotes "those health care methods of diagnosis, treatment, or healing that are not generally used but that *provide a reasonable potential for therapeutic gain* in a patient's medical condition *that is not outweighed by the risk of the health care method*. (*Id.*, § 2241.1(b).) Dr. Stoller's methods did not provide reasonable potential for therapeutic gain, much less potential for gain equal to or greater than the associated risks. Dr. Stoller exempted children from immunizations that were likely to benefit them (as well as members of public with which they interacted). Because Section 2234.1 only precludes discipline for practicing alternative or complementary medicine, and because Dr. Stoller was not engaged in such a practice when he wrote his exemptions, Section 2234.1 did not provide him with a defense.

Finally, Dr. Stoller argues that the discipline imposed was unduly severe. As noted above, the court's review of discipline that the Board imposes is deferential. (See *Davis v. Physician Assistant Bd.* (2021) 66 Cal.App.5th 227, 284 [only a manifest abuse of discretion justifies disturbing discipline that the Board imposes; if reasonable minds can differ about the

discipline's propriety, the court defers to the Board].) Dr. Stoller argues that his discipline must be set aside because it is disproportionate with discipline imposed on other physicians who engaged in similar conduct. Dr. Stoller does not cite any legal authority requiring the Board to gauge discipline in this way, and there is authority to the contrary. (See *Talmo v. Civil Svc. Com.* (1991) 231 Cal.App.3d 210, 230-231 ["When it comes to a public agency's imposition of punishment, 'there is no requirement that charges similar in nature must result in identical penalties'"].) The court rejects Dr. Stoller's argument.

The court likewise rejects the argument that revocation was too severe a penalty given the absence of evidence that Dr. Stoller's exemptions resulted in physical injuries to anyone. The Board is not required to wait until injuries are sustained before it imposes discipline for professional negligence or incompetence. (See *Hoang v. California State Bd. of Pharmacy* (2014) 230 Cal.App.4th 448, 458; *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772-773.)

Nor will the court grant relief on the theory that the ALJ excluded advice-of-counsel evidence that could have mitigated the penalty. The principal case cited to support this theory, *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, involved a physician who relied on the erroneous advice of counsel and otherwise acted in good faith. Dr. Stoller did not otherwise act in good faith. Consequently, the ALJ did not prejudice his rights by excluding evidence that an attorney may have advised him that his medical exemptions were consistent with legal requirements.

Disposition

The petition is denied.

Pursuant to Cal. R. Ct. 3.1312, the Board's counsel shall lodge for the court's signature a judgment to which this ruling is attached as an exhibit.

Unless otherwise ordered, any administrative record, exhibit, deposition, or other original document offered in evidence or otherwise presented at trial, will be returned at the conclusion of the matter to the custody of the offering party. The custodial party must maintain the administrative record and all exhibits and other materials in the same condition as received from the clerk until 60 days after a final judgment or dismissal of the entire case is entered.

Dated: August 30, 2021

Hon. James A. Arguelles
California Superior Court Judge
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, Certify That I Am Not A Party To This Cause, And On The Date Shown Below I Served **Petition for Writ of Mandate – Final Ruling,** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, 95814 each of which envelopes was addressed respectively to the persons and addresses shown below:

Attorney Richard Jaffe
State Bar No. 289362
770 L. Street, Ste 950
Sacramento, CA 95814

Lawrence Mercer
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3488

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: August 31, 2021

Superior Court of California, County of Sacramento

By: D. Ward,
Deputy Clerk

DECLARATION OF SERVICE BY E-MAIL

Case Name: **Kenneth P. Stoller, M.D. v. Medical Board of California, Department of Consumer Affairs, State of California**

Case No.: **2021-80003606**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of electronic correspondence.

On September 2, 2021, I served the attached **COVER LETTER TO HONORABLE JAMES P. ARGUELLES; [PROPOSED] JUDGMENT DENYING PETITION FOR WRIT OF ADMINISTRATIVE MANDATE** by transmitting a true copy via electronic mail addressed as follows:

Richard A. Jaffe
Attorney at Law
770 L Street, Suite 950
Sacramento, CA 95814
Email: rickjaffeesquire@gmail.com

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 2, 2021, at San Francisco, California.

M Dubonnet
Declarant

Signature

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