Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Norman C. Barber, D.D.S.,	)	DATE: April 3, 1991
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-198
	)	
The Inspector General.	)	Decision N. CR123
	)	

DECISION

On December 13, 1989, the Inspector General (I.G.) notified Petitioner Norman C. Barber, D.D.S. (Petitioner) that he was being excluded pursuant to section 1128(a)(2) of the Social Security Act (Act) from participation in the Medicare and State health care programs for eight years.[1] The I.G. advised Petitioner that he was being excluded as a result of his conviction for a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service.

By letter dated January 5, 1990, Petitioner requested a hearing, and the case was assigned to me. Prior to the hearing, both parties submitted motions for partial summary disposition on the issue of whether the I.G. has the authority to exclude Petitioner under section 1128(a)(2) of the Act. Petitioner also objected to the I.G.'s offering as evidence in this case documents which contain hearsay. On June 13, 1990, I issued a Ruling which denied both parties' motions for summary disposition. I also ruled that hearsay evidence was admissible. However, I stated that I would provide the party against whom hearsay evidence is offered for the

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[1] "State health care program" is defined by section 1128(h) of the Act to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

truth of its contents with the opportunity to cross-examine the declarant of such evidence under oath, if such a request was made. On June 27, 1990, I conducted a hearing in this case in Salt Lake City, Utah.[2]

I have considered the evidence of record, the parties' arguments, and the applicable laws and regulations. I conclude that Petitioner was convicted of a criminal offense relating to abuse of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act. I find that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for eight years is reasonable. Therefore, I sustain the eight-year exclusion which the I.G. imposed and directed against Petitioner.

ISSUES

The issues in this case are:

1. Whether Petitioner was convicted of a criminal offense relating to the neglect or abuse of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act; and

2. If the I.G. has the authority to exclude Petitioner under section 1128(a)(2) of the Act, whether the length of the eight year exclusion imposed and directed by the I.G. is reasonable under the circumstances of this case.

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[2] At the conclusion of the hearing, counsel for Petitioner indicated that due to other work commitments, he would need a generous amount of time to submit his post-hearing brief. Counsel for the I.G. did not object to this request, and I gave the parties 60 days from the date they received a copy of the transcript of the hearing to file their post-hearing briefs. The I.G. subsequently timely filed his post-hearing brief by October 1, 1990. Petitioner requested several extensions of time to file his post-hearing brief, and I received it on January 2, 1991. On February 8, 1991, the I.G. filed a reply.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a dentist who has specialized in pedodontistry. I.G. Ex. 9/6.[3]

2. On February 29, 1988, in a document entitled "Information", Petitioner was charged in the District Court of Davis County, Utah with two counts of aggravated sexual abuse of a child and five counts of forcible sexual abuse. I.G. Ex. 3.

3. Count three of the Information referred to an episode of forcible sexual abuse which allegedly occurred during September or October, 1986. Count four of the Information referred to an episode of sexual abuse which allegedly occurred between December 1986 and February 1987. I.G. Ex. 3.

4. Attached to the Information was a probable cause statement, attested to by a police officer. The probable cause statement asserts that the allegations against Petitioner are based on interviews of two juvenile females, both 16 years old at the time of the interviews. I.G. Ex. 3.

5. The two juveniles who provided the information which formed the basis of the probable cause statement were Petitioner's twin daughters. I.G. Ex. 4; Tr. 83-89.

6. Paragraph four of the probable cause statement alleges that in about September or October of 1986, Petitioner sexually abused the first juvenile after he had anesthetized her in his dentist office, ostensibly in order to perform dental services. Paragraph five of the probable cause statement alleges that in about December 1986, or January or February of 1987, Petitioner sexually abused the first juvenile after he had anesthetized her in his dental office, ostensibly in order to perform dental services. The probable cause statement also alleges that Petitioner sexually abused both juveniles on other occasions. I.G. Ex. 3.

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[3] The exhibits and transcript of the hearing will be referred to as follows:

I.G.'s Exhibits	I.G. Ex. (number)/(page)
Transcript	Tr. (page)

7. Subsequent to the issuing of the Information and the accompanying probable cause statement, the parties entered into a plea agreement in which they agreed that the Information would be amended to charge Petitioner with three counts rather than seven counts, and that these counts would include two second degree felonies and one third degree felony. Tr. 51, 61-62.

8. On May 3, 1988, in a document entitled "Amended Information", Petitioner was charged with three counts of forcible sexual abuse. Counts one and two were second degree felonies and count three was a third degree felony. I.G. Ex. 5.

9. Count one of the Amended Information referred to an episode of forcible sexual abuse which allegedly occurred during September or October 1986. Count two referred to an episode of forcible sexual abuse which allegedly occurred between December 1986 and February 1987. I.G. Ex. 5.

10. The Amended Information was not accompanied by a probable cause statement, and counts one and two of the Amended Information do not identify the females against whom the forcible sexual abuse was perpetrated. I.G. Ex. 5.

11. In drafting the Amended Information, the prosecuting attorney selected counts three and four from the Information and put them in the Amended Information as counts one and two. Count one of the Amended Information was based on Paragraph four of the probable cause statement alleging an episode of sexual abuse perpetrated by Petitioner in his dental office and count two of the Amended Information was based on paragraph five of the probable cause statement alleging sexual abuse perpetrated by Petitioner in his dental office. Tr. 51-53.

12. At an arraignment occurring on May 17, 1988, Petitioner pleaded guilty to counts one and two of the Amended Information. I.G. Ex. 7. Petitioner also admitted in a sworn affidavit that, with respect to both counts, his daughter was the victim of the criminal conduct. I.G. Ex. 6.

13. In pleading guilty to counts one and two of the Amended Information, Petitioner admitted to using anesthesia to perpetrate sexual abuse against a dental patient, as described in paragraphs four and five of the probable cause statement. Findings 2-12.

14. On May 17, 1988, the court found that the facts supported Petitioner's guilty plea, and accepted these pleas on counts one and two of the Amended Information. I.G. Ex. 8.

15. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) and 1128(i) of the Act.

16. Petitioner was convicted of a criminal offense relating to abuse of patients in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

17. Sections 1128(a)(2) and 1128(c)(3)(B) of the Act provide that the minimum mandatory exclusion period is five years for an individual who has been convicted of a criminal offense relating to abuse of patients in connection with the delivery of a health care item or service.

18. The Secretary of the United States Department of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21661 (May 13, 1983).

19. On December 13, 1989, the I.G. excluded Petitioner from participating in the Medicare program, and directed that he be excluded from participating in Medicaid, for eight years, pursuant to section 1128(a)(2) of the Act.

20. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of at least five years as required by the minimum mandatory exclusion provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

21. The remedial purpose of section 1128 of the Act is to protect federally-funded health care programs and their beneficiaries and recipients from providers who have demonstrated by their conduct that they cannot be trusted to handle program funds or to treat beneficiaries and recipients.

22. Felonies are serious criminal violations. Petitioner was convicted of two felonies.

23. The serious nature of Petitioner's offenses is reflected in the sentence fashioned by the court. I.G. Ex. 10.

24. The serious nature of Petitioner's offense is also reflected in the fact that the state licensing board revoked Petitioner's licenses to practice dentistry and to administer controlled substances as a result of his criminal misconduct. I.G. Ex. 20; I.G. Ex. 11.

25. The two felony counts underlying Petitioner's conviction did not occur in isolation. Petitioner sexually molested his twin daughters in the course of providing dental care to them over a two year period. This is a lengthy period of time. In addition, the abuse which occurred in Petitioner's dental office was part of a larger pattern of abuse which had begun two years earlier when his daughters were as young as 12 years of age. I.G. Ex. 21/148.

26. The synergistic effect of administering chloral hydrate and nitrous oxide in combination is an exaggerated degree of sedation. I.G. Ex. 11/8.

27. Petitioner admitted that he administered nitrous oxide and chloral hydrate in combination to his twin daughters on repeated occasions with the intent to induce a deep level of sedation in order to gain sexual access to them without their knowledge and consent. I.G. Ex. 21/190-194.

28. Petitioner's conduct jeopardized the health and well-being of his daughters. I.G. Ex. 21/87.

29. Petitioner has demonstrated that he is capable of using his licenses to practice dentistry and to administer controlled substances to perpetrate criminal sexual assaults on others. Petitioner has repeatedly placed the gratification of his own urges above the welfare of his own children. Findings 25-28.

30. Petitioner continued to sexually assault his twin daughters for approximately a year after his wife and officers of his church became aware of this conduct. I.G. Ex. 21/161, 272. He did not stop the abuse until it was reported to the police, and he did not seek professional psychological help until after criminal charges were formally filed against him. I.G. Ex. 21/180,186; I.G. Ex. 16/1. These actions show that Petitioner possessed a stubborn resistance to stopping his criminal misconduct.

31. The psychological evidence shows that although Petitioner admitted that he had sexual contact with his daughters, he had difficulty perceiving that this conduct was inappropriate and that it was harmful. I.G. Ex. 16.

32. Petitioner cannot be trusted to restrain himself from acting on impulses that would be harmful to the welfare and safety of others, including his patients. Findings 25-31.

33. The opinion of Petitioner's treating psychologists that Petitioner is unlikely to sexually abuse children outside of his family is unreliable because it is based primarily on information provided by Petitioner. I.G. Ex. 16; I.G. Ex. 21/53-60, 216, 240, 256, 264.

34. Petitioner has progressed satisfactorily in his psychological treatment. I.G. Ex. 21/221; Tr. 194.

35. Although they expressed the opinion that Petitioner was unlikely to abuse children outside of his family, Petitioner's treating psychologists were unable to guarantee that he would not assault children outside of his family in the course of his dental practice. I.G. Ex. 16/6; I.G. Ex. 21/56, 221-223.

36. A lengthy exclusion is reasonable in this case to protect program beneficiaries and recipients, even if there is only a slight risk that Petitioner might sexually abuse patients, because such abuse, if it occurred, would greatly endanger the welfare and safety of patients.

37. The eight year exclusion imposed and directed against Petitioner by the I.G. is reasonable. Findings 1-36.

ANALYSIS

I. Petitioner was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

A. Four statutory requirements must be satisfied in order for the I.G. to have authority to impose an exclusion under section 1128(a)(2) of the Act.

The I.G. excluded Petitioner from participating in Medicare and directed that Petitioner be excluded from participating in Medicaid, pursuant to section 1128(a)(2) of the Social Security Act. This section mandates the exclusion from participating in Medicare and Medicaid of individuals who are:

> [C]onvicted, under Federal or State law, of a criminal offense relating to neglect or abuse of

> patients in connection with the delivery of a health care item or service.

The I.G.'s authority to impose and direct an exclusion under 1128(a)(2) is based on fulfillment of the following statutory criteria: (1) conviction of a criminal offense, (2) relating to neglect or abuse, (3) of patients, (4) in connection with the delivery of a health care item or service.

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under section 1128(a)(2) is that Petitioner must be convicted of a criminal offense. I find that the undisputed facts satisfy this criterion.

Neither party to this case disagrees that Petitioner was convicted of a criminal offense within the meaning of section 1128. The undisputed facts establish that Petitioner entered a guilty plea to two counts of forcible sexual abuse in the District Court for the County of Davis, Utah, and the court accepted Petitioner's plea. I.G. Ex. 8. The exclusion law defines the term "convicted of a criminal offense" to include those circumstances in which a plea of guilty by an individual has been accepted by a federal, state, or local court. Act, section 1128(i)(3). I therefore conclude that Petitioner was "convicted of a criminal offense" within the meaning of sections 1128(a)(2) and 1128(i) of the Act.

The second criterion that must be satisfied in order to find that the I.G. had the authority to exclude Petitioner under section 1128(a)(2) is that the criminal offense must relate to neglect or abuse of another individual. The undisputed facts establish that Petitioner was convicted of two felony counts of forcible sexual abuse. I.G. Ex. 8. As I found in my June 13, 1990 Ruling [Ruling] in this case, the criminal offense of forcible sexual abuse on its face constitutes "abuse" within the meaning of section 1128(a)(2) of the Act. The undisputed facts therefore satisfy the requirement that the criminal offense relates to neglect or abuse.

What remains to be determined is whether the abuse of which Petitioner was convicted was abuse of a patient and whether it was abuse in connection with the delivery of a health care item or service.

B. Nothing in Petitioner's plea or in the charges to which he pleaded establishes that the victim of his criminal offense was a patient or that the abuse occurred in connection with the delivery of a health care item or service.

A review of the relevant documents pertaining to the criminal proceeding before the District Court of Davis County, Utah establishes that on February 29, 1988, Petitioner was charged, in a document entitled "Information", with two felony counts of aggravated sexual abuse of a child and five felony counts of forcible sexual abuse. I.G. Ex. 3. Counts three and four of this Information referred to episodes of forcible sexual abuse which allegedly occurred during September or October of 1986 and between December 1986 and February 1987. I.G. Ex. 3.

The Information was accompanied by a probable cause statement, attested to by a police officer. The probable cause statement asserts that the allegations against Petitioner are based on interviews of two female juveniles who were 16 years old at the time of the interviews. I.G. Ex. 3. Transcripts of the interviews which formed the basis for the probable cause statement show that the two juveniles were Petitioner's twin daughters. I.G. Ex. 4; Tr. 83-89. The probable cause statement alleges that on two occasions, in about September or October of 1986, and in about December 1986, or January or February of 1987, Petitioner sexually abused the first juvenile after he had anesthetized her in his dentist office, ostensibly in order to perform dental services. The probable cause statement also alleges that Petitioner sexually abused both juveniles on other occasions. I.G. Ex. 3.

On May 3, 1988, a document entitled "Amended Information" was filed. This Amended Information charged Petitioner with three felony counts of forcible sexual abuse, and it no longer charged Petitioner with aggravated sexual abuse of a child. Count one alleged that Petitioner had committed the crime in September or October 1986. Count two alleged that Petitioner had committed the crime between December 1986, and February 1987. No probable cause statement accompanied the Amended Information. I.G. Ex. 5.

In a sworn affidavit dated April 17, 1989, Petitioner admitted that, with respect to counts one and two of the Amended Information, his daughter was the victim of his criminal conduct. Petitioner also stated that it was his understanding that the State would move to dismiss count

three of the Amended Information in exchange for his pleas of guilty to counts one and two. I.G. Ex. 6. At an arraignment occurring on May 17, 1988, Petitioner pleaded guilty to counts one and two of the Amended Information. I. G. Ex. 7. On May 17, 1988, the court found that the facts supported Petitioner's guilty pleas, and accepted these pleas on counts one and two of the Amended Information. I.G. Ex. 8.

It is apparent from the exhibits submitted by the I.G. that at one time Petitioner was charged with sexually abusing his daughters in the course of providing them with dental treatment. However, the document which contained the charges to which Petitioner actually pled guilty, the Amended Information dated May 3, 1988, does not contain these allegations. In addition, statements made by Petitioner at the time he pleaded guilty do not contain any facts establishing that these criminal offenses related to incidents occurring in Petitioner's dentist office. In my Ruling in this case, I found that nothing in Petitioner's plea or in the charges to which he pleaded establishes that the victim of his criminal abuse was a patient or that the abuse occurred in connection with the delivery of a health care item or service. I therefore concluded that the issue of whether the abuse of which Petitioner was convicted was abuse of a patient in connection with the delivery of a health care item or service was a question which could not be resolved by the facts before me at that time.

C. <u>It is consistent with congressional intent to admit extrinsic evidence concerning the circumstances of a conviction to determine whether the statutory requirements of section 1128(a)(2) have been satisfied</u>.

Petitioner argues that no extrinsic evidence should be considered to decide whether his guilty plea constitutes a conviction within the meaning of section 1128(a)(2). He asserts that if this is not evident from the face of the documents which comprise the conviction (in this case, the Amended Information and Petitioner's plea), then there cannot be a conviction within the meaning of the section.

I disagree. It is consistent with congressional intent to admit limited evidence concerning the facts upon which the conviction was predicated in order to determine whether the statutory criteria of section 1128(a)(2) have been satisfied.

Congress could have conditioned imposition of the exclusion remedy on conviction of criminal offenses consisting of patient neglect or abuse. Had it used the term "of" instead of the term "relating to" in section 1128(a)(2), that intent would have been apparent. Had Congress done so, then, arguably, no extrinsic evidence would be permitted in a given case to explain the relationship between the criminal conviction and the underlying conduct. However, Congress intended that the exclusion authority under section 1128(a)(2) apply to a broader array of circumstances. It mandated that the Secretary exclude providers who are convicted of criminal offenses "relating to" patient neglect or abuse in connection with the delivery of a health care item or service. The question before me is whether the criminal offense which formed the basis for the conviction relates to neglect or abuse of patients, not whether the court convicted Petitioner of an offense called "patient abuse" or "patient neglect".

It is consistent with congressional intent to admit evidence which explains the circumstances of the offense of which a party is convicted. One of my tasks in hearing and deciding this case is to examine all relevant facts to determine if there is a relationship between the Petitioner's criminal offenses and neglect or abuse of patients in connection with the delivery of a health care item or service. In Thomas M. Cook, DAB Civ. Rem. 106 (1989), I found that I could admit extrinsic evidence to establish the identity of the victim and to establish that this victim was a "patient" when it was clear that the conviction was based on these facts.[4]

An exclusion cannot be based on allegations which are not within the ambit of the charge to which Petitioner pleaded.[5] This would be inconsistent with the derivative nature of section 1128(a)(2) exclusions. Just as section 1128(a)(2) does not empower me to question a

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[4] See also H. G. Blankenship, DAB Civ. Rem. 67 (1989) (In construing the language "related to" in the context of the delivery of a program-related item or service under section 1128(a)(1) of the Act, the administrative law judge found that the I.G. could use evidence extrinsic to the final judgment to establish that criminal activities which formed the basis of the conviction were related to the Medicaid program.)

[5] I may consider such alleged criminal actions in determining whether an exclusion in excess of the minimum mandatory period would be extreme or excessive.

conviction when a petitioner denies that he or she committed the underlying criminal offense, similarly, section 1128(a)(2) does not empower me to broaden a conviction beyond the scope of the allegations which are the basis of the charge of which a petitioner is convicted. Extrinsic evidence therefore is not admissible to add elements of a charge in order to bring a conviction within the scope of the exclusion law. However, under Cook, supra and Blankenship, supra, extrinsic evidence is admissible to explain ambiguities in criminal complaints or pleas. It is admissible to explain unstated but necessarily implied elements of the offense to which a party pleads.

In this case, it is apparent from the exhibits offered by the I.G. that the allegations upon which the Amended Information was based, and to which Petitioner pleaded guilty, were broad enough to include allegations that Petitioner sexually abused one of his daughters while she was his patient and in connection with the delivery of a health care item or service. Therefore, it was appropriate to allow the I.G. to offer evidence to establish that such allegations were subsumed in the criminal charges filed against Petitioner. It would not, however, have been appropriate for the I.G. to offer evidence to show that such allegations could have been made or that the criminal charges to which Petitioner pleaded were broadly worded so as to encompass allegations which were not made as a precursor to the issuing of the Amended Information.

In my Ruling, I stated that the I.G. had not established the requisite factual link between the allegations in the probable cause statement attached to the Information and the counts to which Petitioner pleaded guilty in the Amended Information. I stated that there was some ambiguity which must be resolved, since the Amended Information does not incorporate or refer to the probable cause statement. I therefore informed the parties that they would be permitted to present evidence at an in-person hearing on the issue of whether counts one and two of the Amended Information were based on allegations which were made in the probable cause statement.

D. The I.G. brought forward evidence establishing the requisite factual link between the Amended Information and the probable cause statement.

At the hearing held before me, Mr. John Mark Andrus, deputy county attorney, provided extensive testimony regarding the circumstances surrounding the drafting of the Information, the probable cause statement attached to the Information, and the Amended Information in this

case. I find that this testimony establishes the requisite link between the Amended Information and the allegations in the probable cause statement.

Mr. Andrus testified that he drafted the Information, the attached probable cause statement, and the Amended Information. Tr. 48, 50. Mr. Andrus stated that counts three and four of the Information were based on allegations of sexual abuse committed by Petitioner in his dental office. Mr. Andrus stated that count three was based on paragraph four of the probable cause statement and count four was based on paragraph five of the probable cause statement. Tr. 50. Paragraphs four and five of the probable cause statement describe specific instances where Petitioner allegedly anesthetized and sexually assaulted one of his twin daughters in the course of providing dental treatment to her. I.G. Ex. 3.

Mr. Andrus testified that subsequent to the drafting of the Information and the attached probable cause statement, he entered into a plea agreement with Petitioner's attorney in which the parties agreed that the Information would be amended to charge Petitioner with three counts rather than seven counts and that these counts would include two second degree felonies and one third degree felony. Tr. 51, 61-62. Mr. Andrus also testified that in drafting the Amended Information, he was concerned with charging Petitioner with offenses which complied with the statutory requirements for felonies in the second and third degrees pursuant to the parties' plea bargain. He stated that he was not concerned at that time with prosecuting Petitioner with sexual abuse which occurred at his dental office. Mr. Andrus stated that he picked counts three and four from the Information, which were based on the allegations of sexual abuse in the dental office, and put them in the Amended Information as counts one and two because they were second degree felonies. According to Mr. Andrus, it was "an accident or fate" that he prosecuted Petitioner for the specific incidents of sexual abuse that occurred in the dental office. Tr. 56, 77-79. Although Mr. Andrus did not pick counts three and four from the Information because they were related to sexual abuse in the dental office, he stated that these counts, which eventually became counts one and two of the Amended Information, were definitely based on the sexual abuse in the dental office. Tr. 51.

Mr. Andrus also testified that the dates in counts one and two of the Amended Information correlate with the dates of paragraphs four and five of the probable cause statement. He also stated that when these documents are read together, it could be reasonably inferred that counts one and two of the Amended Information were based on the allegations regarding sexual abuse in the dentist office set forth in paragraphs four and five of the probable cause statement. Tr. 52-53.

Mr. Andrus also stated that as part of the plea bargain, the parties agreed that Petitioner would not be formally arrested, but that he would voluntarily appear in court. He explained that he did not attach the relevant portion of the probable cause statement to the Amended Information because it was agreed that Petitioner would not be arrested and this obviated the need to show the basis for an arrest. Tr. 55.

E. Petitioner has failed to bring forward any factual evidence or legal arguments that are persuasive in rebutting the I.G.'s position that section 1128(a)(2) applies to this case.

Mr. Andrus' testimony establishes that the allegations that Petitioner sexually abused his daughter after he had anesthetized her set forth in paragraphs four and five of the probable cause statement formed the basis for counts one and two of the Amended Information. Petitioner has not brought forth any evidence to rebut this finding. Instead, Petitioner responds to this damaging evidence with several unpersuasive arguments.

Petitioner points out that in a hearing before the state licensing board which was held to determine whether his licenses to practice dentistry and to administer controlled substances would be revoked, he admitted that the sexual abuse took place after he performed dental procedures on his daughters. Petitioner therefore contends that his sexual abuse did not occur "in connection with the delivery of a health care item or service" because the sexual abuse did not occur until the dental services had been completed.

This argument is unpersuasive because the admissions made by Petitioner at his license revocation hearing are irrelevant for the purpose of determining the actions which formed the basis for his criminal conviction. In fact, this argument is disingenuous in light of the fact that Petitioner argued in his prehearing brief that the I.G. could not rely on findings made by the licensing board to support a conclusion regarding the underlying

basis for his criminal conviction. As Petitioner correctly pointed out in his prehearing brief, the licensing hearing is an entirely different proceeding from the criminal proceeding. The admissions Petitioner made before the licensing board therefore are not probative on the issue of the underlying basis for the criminal conviction.[6]

Paragraphs four and five of the probable cause statement describe the incidents which form the basis for Petitioner's conviction. Both of these paragraphs indicate that Petitioner's daughter was at the dental office for the purpose of receiving dental treatment, that Petitioner anesthetized her, and that he sexually abused her while she was under the influence of anesthesia. These allegations formed the basis of Petitioner's conviction, and they show that Petitioner used the dentist-patient relationship and his access to anesthesia to perpetrate the sexual abuse. This description of the facts underlying the conviction leads to the conclusion that Petitioner's conviction was related to abuse of a patient in connection with the delivery of a health care item or service.

Petitioner also contends that his conviction did not relate to abuse of a patient in connection with the delivery of a health care item or service because there has been no showing that the dental procedures performed by him were inadequate. Section 1128(a)(2) does not condition imposition of the exclusion on the provision of incompetent or inadequate medical care, but instead contemplates an exclusion where a provider has been convicted of a criminal offense relating to abuse of a patient in connection with the delivery of a health care item or service. Petitioner used anesthesia to perpetrate sexual abuse against a dental patient. The fact that he may have also adequately performed a dental procedure on the victim does not undermine the conclusion that he was convicted for an offense related to abuse of a patient in connection with the delivery of a health care item or service.

Petitioner also elicited testimony from Mr. Andrus which establishes that in the course of the criminal proceedings, Petitioner refused to sign an affidavit which expressly referred to the incidents of sexual abuse in

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[6] Facts developed by the licensing board might be relevant in determining whether an exclusion in excess of the minimum mandatory period would be extreme or excessive.

the dental office. Mr. Andrus subsequently prepared an affidavit which did not contain any explicit reference to sexual abuse in his dental office and this is the document that Petitioner ultimately signed. Tr. 66. At page four of his post-hearing brief, Petitioner admits that sexual abuse took place in the dental office as well as at home during the time period set forth in the Amended Information. Petitioner also points out in his post-hearing brief that the Amended Information does not on its face indicate the location of the abuse. He argues that his refusal to sign a criminal affidavit which explicitly stated that he abused his daughter at his dental office supports the conclusion that he pled guilty to, and was convicted for, the sexual abuse which occurred at home.

I am not persuaded by this argument. The evidence of record establishes that Petitioner pleaded guilty to counts one and two of the Amended Information. The evidence further establishes that these counts are based on incidents of sexual abuse perpetrated by Petitioner in the course of providing dental treatment as set forth in the probable cause statement attached to the Information. In pleading guilty to counts one and two of the Amended Information, Petitioner admitted to using anesthesia to perpetrate sexual abuse of a dental patient as described in paragraphs four and five of the probable cause statement. In accepting this guilty plea, the court convicted Petitioner for these criminal offenses.

These findings are not disturbed by the fact that there is evidence showing that Petitioner did not intend to plead guilty to incidents of sexual abuse occurring in his dental office and that he refused to sign an affidavit which explicitly referred to these incidents of sexual abuse. Similarly, these findings are not disturbed by the fact that the prosecuting attorney did not consciously choose to prosecute these particular offenses for the reason that they occurred in the dental office. The task before me is to determine whether, objectively, the underlying basis of Petitioner's conviction were the incidents of criminal sexual abuse perpetrated by Petitioner in the course of providing dental treatment described in the probable cause statement. I conclude that the testimony of Mr. Andrus regarding the basis for counts one and two of the Amended Information establishes that Petitioner was convicted of criminal offenses which were related to abuse of a patient in connection with the delivery of a health care item.

In view of the foregoing, I find that all four statutory requirements necessary to find that the I.G. has authority to impose and direct an exclusion pursuant to section 1128(a)(2) have been satisfied in this case. The I.G. is therefore required to exclude Petitioner for a minimum of five years under sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

II. An eight year exclusion is appropriate and reasonable in this case.

A. The remedial purpose of section 1128 of the Act is to protect federally-funded health care programs and their beneficiaries and recipients from untrustworthy providers.

The I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for eight years. While the exclusion provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act require that an individual or entity who has been convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service be excluded for a minimum period of five years, there is no mandated maximum period for exclusions imposed pursuant to section 1128. The remaining issue in this case is whether the I.G. is justified in excluding Petitioner for eight years. Since there is no statutory provision which sets the maximum exclusion period for exclusions imposed under the authority of section 1128(a)(2), it is reasonable to conclude that Congress intended that resolution of this issue be based on analysis of the evidence in a particular case in light of the legislative purposes of the exclusion statute. See Frank J. Haney, DAB Civ. Rem. C-156 (1990).

The exclusion law is not a penal statute enacted by Congress for the purpose of imposing punishment. Section 1128 is a civil statute, and Congress intended it to be remedial in application. The remedial purpose of the exclusion law is to enable the Secretary to protect the trust funds of federally-funded health care programs from misconduct. Such misconduct includes fraud or theft against federally-funded health care programs. It also includes neglectful or abusive conduct against program recipients and beneficiaries. See, S. Rep. No. 109, 100th Cong., 1st Sess. 1; reprinted 1987 U.S. Code Cong. and Admin. News 682.

This policy was evident in Congress' original enactment of the exclusion law in 1977. Successive revisions of the law have continued to express this legislative

purpose in progressively stronger terms. In fact, the title of the most recent amendments to the exclusion law, the Medicare and Medicaid Patient and Program Protection Act of 1987, clearly signals that Congress intended the law to protect federally-funded health care programs and the beneficiaries and recipients of those programs. Prior to 1987, the Secretary did not have the authority to exclude persons who had been convicted of criminal offenses which were not related to Medicare or other State health care programs. One of the amendments enacted in 1987 was the provision at issue in this case, section 1128(a)(2). The purpose of this amendment was to "give the Secretary the authority to protect Medicare and the State health care program beneficiaries from individuals or entities that have already been tried and convicted of offenses which the Secretary concludes entailed or resulted in neglect or abuse of other patients and whose continued participation in Medicare and the State health programs would therefore constitute a risk to the health and safety of patients in those programs." S. Rep. No. 109, 100th Cong., 1st Sess. 6; reprinted 1987 U.S. Code Cong. and Admin. News 682, 686.

The key term to keep in mind is "protection", the prevention of harm. See, Webster's II New Riverside University Dictionary 946 (1984). As a means of protecting the Medicare and Medicaid programs and their beneficiaries and recipients, Congress chose to mandate, and in other instances to permit, the exclusion of untrustworthy providers. Through exclusion, individuals who have caused harm, or demonstrated that they may cause harm, to the federally funded health care programs or its beneficiaries or recipients are no longer permitted to receive reimbursement for items or services which they provide to Medicare beneficiaries or Medicaid recipients. Thus, untrustworthy providers are removed from a position which provides a potential avenue for causing harm to the program or to its beneficiaries or recipients. See Charles J. Burks, M.D., DAB Civ. Rem. C-111 (1989).

Federally-funded health care programs are no more obligated to continue to deal with dishonest or untrustworthy providers than any purchaser of goods or services would be obligated to deal with a dishonest or untrustworthy supplier. The exclusion remedy allows the Secretary to suspend his contractual relationship with those providers of items or services who are dishonest or untrustworthy. The remedy therefore enables the Secretary to assure that federally-funded health care programs will not continue to be harmed by dishonest or untrustworthy providers of items or services. The exclusion remedy is therefore closely analogous to the

civil remedy of termination or suspension of a contract to forestall future damages from a continuing breach of that contract. See Hanlester Network, et al., DAB Civ. Rem. 186, et al. (1991).

Congress has not mandated that exclusions from participation in the federally-funded health care programs be permanent. Instead, section 1128(g) provides that an excluded provider may apply for reinstatement into the program at the end of the exclusion period. The Secretary may then terminate the exclusion if there is no basis for a continuation of the exclusion, and there are reasonable assurances that the types of actions which formed the basis for the original exclusion have not recurred and will not recur.[7]

By not mandating that exclusions from participation in federally-funded health care programs be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance". The placement of a limit on the period of exclusion allows an excluded individual or entity the opportunity to demonstrate that he or she can and should be trusted to participate in the federally-funded health care programs as a provider of items and services to beneficiaries and recipients. See Thomas J. Depietro, R. Ph., DAB Civ. Rem. C-282 at 8 (1991).

The ultimate issue to be determined at a hearing pertaining to an exclusion imposed pursuant to section

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[7] This is also the standard that Congress used in making the legislative finding that providers who are convicted of program-related offenses must be excluded for a minimum of five years. In discussing the mandatory minimum five year exclusion for convictions of program-related offenses, the Senate Finance Committee stated in its report that five years is the minimum amount of time necessary to provide the Secretary "with adequate opportunity to determine whether there is a reasonable assurance that the types of offenses for which the individual or entity was excluded have not recurred and are not likely to do so." S. Rep. No. 109, 100th Cong., 1st Sess. 5 (1987), reprinted in 1987 U.S. Code Cong. & Admin. News 682, 686.

1128 of the Act is whether the exclusion is reasonable. 42 C.F.R. 1001.128(a)(3). In adopting this regulation, the Secretary stated that:

> The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive.

48 Fed. Reg. 3744 (January 27, 1983). An exclusion determination will be held to be reasonable where, given the evidence of the case, it is consistent with the legislative purpose of protecting federally-funded health care programs and their beneficiaries and recipients and it is not extreme or excessive as a length of time necessary to establish that the excluded provider no longer poses a risk to covered programs and their beneficiaries and recipients. See Basem F. Kandah, R. Ph., DAB Civ. Rem. C-155 at 5 (1990).

An exclusion may have the ancillary benefit of deterring providers of items or services from engaging in the same or similar misconduct as that engaged in by excluded providers. However, the primary purpose of an exclusion is the remedial purpose of protecting the trust funds and beneficiaries and recipients of those funds. Deterrence cannot be a primary purpose for imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes the civil remedies objectives intended by Congress. Punishment, rather than remedy, becomes the end. As stated by the United States Supreme Court:

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 440 U.S. 435, 448 (1989).

In order to be adjudged reasonable under section 1128, an exclusion must satisfy the remedial objective of protecting federally-funded health care programs and their beneficiaries and recipients from untrustworthy providers of items or services. An exclusion which satisfies this purpose may also have the ancillary benefit of deterring wrongdoing. However, an exclusion fashioned solely to achieve the objective of deterrence is punitive if it does not reasonably serve the Act's

remedial objective. See Hanlester Network, et al., DAB Civ. Rem. C-186, et al. (1991).

B. The fact finder must evaluate the totality of the circumstances of each case in light of the remedial purpose of the exclusion law in order to determine the appropriate length of an exclusion.

There is no precise formula which can be applied to calculate when a provider should be trusted and allowed to reapply for participation in the federally-funded health care programs. Each case has unique facts which must be weighed in determining the appropriate length of an exclusion.

Guidance in determining the appropriate length of an exclusion is found in regulations contained in 42 C.F.R. 1001.125(b). These regulations were adopted by the Secretary prior to the enactment of the 1987 amendments to the Act, and specifically apply only to exclusions for convictions for criminal offenses related to Medicare and Medicaid. While these regulations are not specifically applicable to cases under 1128(a)(2), they are entirely consistent with congressional intent to exclude untrustworthy providers from participation in federally-funded health care programs. Thus, to the extent that they have not been repealed or modified, these regulations are instructive as broad guidelines for determining the appropriate length of exclusions in cases such as this one, which have arisen after the enactment of the 1987 revisions and where the Secretary has authority to exclude individuals for convictions relating to patient abuse.[8]

The regulations enumerate a number of factors which should be considered in deciding how long an exclusion will be reasonable. They include: (1) the number and nature of the offenses, (2) the nature and extent of any adverse impact the violations have had on beneficiaries,

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[8] There are proposed regulations which, if adopted by the Secretary, would establish his policy for exclusions imposed pursuant section 1128. See 55 Fed. Reg. 12205 (April 2, 1990). These proposed regulations have not been adopted. It would not be appropriate for me to consider them as guidelines because they may not be finally adopted in their current form. Additionally, it is not clear that, assuming these proposed regulations are adopted, they would apply retroactively to exclusion cases heard prior to the date of their adoption. See Joyce Faye Hughey, DAB App. 1221 (1991).

(3) the amount of the damages incurred by the Medicare, Medicaid, and social services programs, (4) the existence of mitigating circumstances, (5) the length of sentence imposed by the court, (6) any other facts bearing on the nature and seriousness of the violations, and (7) the previous sanction record of the excluded party. 42 C.F.R. 1001.125(b).

Section 1128 is not a criminal statute and the exclusion remedy is not intended to be a punishment for wrongdoing. The regulations therefore should not be applied as sentencing guidelines to the facts of a case to determine the degree of a provider's culpability with a view to determining the punishment he "deserves". Instead, the regulations provide guidance as to the factors that should be considered in order to make inferences about a provider's trustworthiness and the length of time a provider should be excluded to provide the Secretary adequate opportunity to determine that a provider no longer poses a risk to the covered programs and to their beneficiaries and recipients. For example, in most cases, inferences as to a provider's trustworthiness can be drawn from the conduct that the provider is found to have committed. In most circumstances, where a provider is found to have committed a serious offense, the inference can be drawn that the provider is untrustworthy and that a lengthy exclusion is necessary to show that the provider will not repeat his misconduct.

The regulations do not define what factors may be considered as "mitigating." However, given congressional intent to exclude untrustworthy individuals from participation in federally-funded programs, it is reasonable to conclude that such factors would constitute those factors which would lead to the conclusion that an excluded individual is trustworthy and no longer poses a danger to covered programs and beneficiaries and recipients of program funds. Leonard N. Schwartz, R. Ph., DAB Civ. Rem. C-62 at 14 (1989). Thus, for example, factors pertaining to a provider's rehabilitation efforts should be considered in determining the length of the exclusion.[9]

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[9] I use the term "mitigating" with some trepidation here, because I do not intend that it connote "mitigation" as used in determining a criminal sentence. All of the factors considered in evaluating the reasonableness of an exclusion must relate to the question of trustworthiness, and not to punitive considerations. Evidence which might serve to mitigate

(continued...)

In order to achieve the remedial objectives of the exclusion law, the regulations must not be mechanically applied to the facts of a case. Instead, the totality of the circumstances of each case must be evaluated in order to reach a determination regarding the appropriate length of an exclusion. For example, it is possible to have a case where there is strong evidence that an excluded provider has been rehabilitated. However, the harm which resulted from the offense committed by that provider may have been so serious that even a slight chance for repetition of the offense would justify the imposition of a lengthy exclusion. See Bernard Lerner, M.D., DAB Civ. Rem. C-48 (1989); and Michael D. Reiner, R.M.D., DAB Civ. Rem. C-197 (1990).

This hearing is, by law, de novo. Act, section 205(b). Evidence which is relevant to the reasonableness of an exclusion is admissible in a hearing on an exclusion whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Moreover, evidence which relates to a petitioner's trustworthiness or to the remedial objectives of the exclusion law is admissible at an exclusion hearing, even if that evidence is of conduct other than that which establishes statutory authority to exclude petitioner. The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with the legislative purpose of protecting federally-funded health care programs and their beneficiaries and recipients from untrustworthy providers.

In this case, I received evidence which included investigative reports, documents pertaining to Petitioner's criminal proceedings, documents pertaining to Petitioner's license revocation proceedings before the Utah State licensing board, reports of psychological evaluations of Petitioner, and transcripts of interviews of the victims of Petitioner's crimes, as well as Petitioner's former wife. My purpose in admitting such evidence was to create as full a record as possible about the gravity and effect of Petitioner's offenses, Petitioner's rehabilitation efforts, Petitioner's character and trustworthiness, and other factors related to the issue of whether an eight year exclusion is reasonable.

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[9](...continued)
against imposition of a punishment would not necessarily be relevant to the issue of trustworthiness.

I conclude that the evidence of record establishes that the eight year exclusion imposed and directed against Petitioner is consistent with the exclusion law's remedial purpose. My conclusion is based on the grave and serious misconduct engaged in by Petitioner, the absence of definite assurances that he will not at some time in the near future engage in similar misconduct, and the potential for harm should Petitioner engage in such misconduct. I find that Petitioner's misconduct is so serious and the threat of harm to his patients is so great that even a slight possibility that Petitioner may resume his unlawful conduct justifies imposition of a lengthy exclusion to ensure that program beneficiaries and recipients are protected from exposure to such danger.

C. The nature and gravity of Petitioner's criminal misconduct is serious.

Petitioner pled guilty to, and was convicted of, two felony counts of forcible sexual abuse. I.G. Ex. 8. These are serious criminal violations. Petitioner admitted that the victim of these offenses was his daughter. I.G. Ex. 6. The factual circumstances which formed the basis for these criminal offenses involved incidents in which Petitioner sexually abused his daughter after he had anesthetized her in his dentist office, ostensibly to perform dental services. Petitioner has shown by his actions that he is capable of using his ability to practice dentistry and his access to medication to facilitate criminal sexual assaults on others. Most disturbing, Petitioner's actions demonstrate that he is an individual who can consciously place the gratification of his sexual urges above the health and well-being of his own daughter.

The nature and gravity of these offenses is in some measure reflected in the comprehensive sentence fashioned by the criminal court. The court determined that Petitioner's wrongdoing was serious enough to justify a punishment which included incarceration. The court sentenced Petitioner to 1-15 years in the Utah State Prison and suspended this sentence on the condition that Petitioner serve one year in the Davis County Jail. The court also determined that Petitioner's criminal offenses were grave enough to merit the imposition of a fine in addition to a jail sentence. The court sentenced Petitioner to a $10,000 fine on each count and suspended all but $1,000 of the fine, plus a 25 percent surcharge, on each count. The court also ordered Petitioner to complete sexual dysfunction therapy as part of its sentence, showing a recognition that Petitioner's sexual

offenses were symptoms of an emotional condition which requires psychological therapy. In addition, the court ordered Petitioner to pay the costs of psychological treatment of the victims, acknowledging that Petitioner's criminal offenses were psychologically damaging to the victims.[10] The court also placed Petitioner on probation, showing a recognition that Petitioner required continuing supervision. The court granted Petitioner a work release, but placed restrictions on Petitioner's dental practice. These restrictions show that the court perceived Petitioner to be a threat to his patients. The court required that Petitioner submit to inspection at his place of business without notice, prohibited Petitioner from using nitrous oxide in his dental practice, and required that he treat patients only during business hours when an assistant is present. I.G. Ex. 10.

Following Petitioner's conviction for the criminal offenses of forcible sexual abuse, a hearing was held before the state licensing board regarding his licenses to practice dentistry and to administer controlled substances in Utah. The seriousness of Petitioner's criminal misconduct is also reflected in the fact that the state licensing board determined that Petitioner's licenses to practice dentistry and to administer controlled substances should be revoked. I.G. Ex. 11. This revocation was stayed after Petitioner and the state licensing board entered into an agreement which permits Petitioner to practice dentistry on a restricted basis pending a decision on Petitioner's appeal of the order of revocation. I.G. Ex. 12.

It is evident from Petitioner's admissions of criminal misconduct that he has committed, and is capable of committing, offenses that pose a grave threat to the safety and welfare of others. It is therefore reasonable to infer from Petitioner's admissions that he is an untrustworthy individual with serious psychological problems. The evidence, however, establishes that these admitted offenses did not occur in isolation. Instead, they were part of a pervasive pattern of similar misconduct which occurred over a lengthy period of time. This evidence shows that Petitioner is capable of repeatedly engaging in abusive behavior over a protracted

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[10] The charges to which Petitioner actually pled guilty involve only one of Petitioner's daughters. The court, however, referred to the "victims" of the offenses in its sentence.

period of time, and it provides additional confirmation for a finding that he is untrustworthy.

The record contains a transcript of the hearing before the state licensing board held on June 7, 1989. During the course of that hearing, Petitioner admitted that he sexually molested his twin daughters from the time they reached the age of 12 until they were 16 years old. This is a period of four years, a lengthy period of time. I.G. Ex. 21/148.

During the latter two years of the four year period, the incidents of sexual abuse occurred at Petitioner's dental office as well as at home. The later incidents of abuse in the dental office are particularly chilling because Petitioner used drugs to isolate and gain sexual access to his daughters. These actions were premeditated, and they were calculated to impair the victims' ability to defend themselves against Petitioner's sexual assaults. I.G. Ex. 4, 14, 15, & 16.

The transcript of the Petitioner's hearing before the Utah State licensing board contains extensive testimony by Petitioner in which he describes the incidents of sexual molestation which occurred in his dental office. Petitioner testified that on several occasions when he sexually molested his daughters at his office, he administered chloral hydrate in combination with nitrous oxide. I.G. Ex. 21/169. Petitioner also testified that during the course of his dental training he had been cautioned about the synergistic effects of choral hydrate and nitrous oxide. I.G. Ex. 21/173. Petitioner stated that after administering the anesthesia, he would perform dental procedures on his daughters which were generally from 30 to 60 minutes in duration. Petitioner testified that there were occasions when his daughters were unconscious for 45-60 minutes. On some occasions when the sexual abuse occurred, Petitioner testified that he had been able to dress his daughters before they awoke and they were unaware of what occurred. On other occasions, Petitioner's daughters awoke prematurely, and Petitioner acknowledged that this was an "accident". Petitioner admitted that he administered the anesthesia for the dual purposes of dental treatment and facilitating the sexual assaults of his daughters. I.G. Ex. 21/190-194.

The record contains evidence that an "exaggerated degree of sedation" results when nitrous oxide and chloral hydrate are administered together. I.G. Ex. 11/8. Petitioner, by his own admission, purposely administered these medications in combination with the intent to

induce a deep level of sedation in his daughters in order to obtain sexual access to them. Not only did he obtain sexual access to his daughters without their consent, but he intended to obtain sexual access to them without their knowledge. This conduct leads to the inescapable conclusion that Petitioner is manifestly untrustworthy. Petitioner has shown himself to be capable of violating the fundamental trust inherent in both the relationship between parent and child and the relationship between health care provider and patient.

Petitioner also testified at the hearing before the Utah State licensing board that he had not sexually abused any children other than his twin daughters. I.G. Ex. 21/159. Other evidence rebuts this assertion. Petitioner's former wife testified at the same hearing that she had observed Petitioner engaging in sexual misconduct with another daughter, then aged 18 months. I.G. Ex. 21/270; See also I.G. Ex. 13/4; Tr. 91. This testimony is troubling because it is evidence that Petitioner has unnatural sexual attractions to very young children which he is capable of acting upon.

Petitioner's former wife also testified at the hearing before the Utah State licensing board that two of her younger sisters reported to her that Petitioner had engaged in kissing and other inappropriate sexual activities when they were between the ages of ten and fourteen. I.G. Ex. 21/270-271. This is disturbing testimony because it shows a propensity on Petitioner's part to engage in sexually inappropriate behavior with children who are outside of his nuclear family.

It is also telling that Petitioner did not on his own initiative seek help to end the sexual abuse of his twin daughters. The first time that he received counseling for this problem was in 1986 after his wife and daughters reported the sexual abuse to officials of their church. The record shows that the church officials did not report the abuse to the police at that time, but instead attempted to counsel members of the family. These efforts were unsuccessful because Petitioner admits that he continued the sexual assaults for approximately a year after it came to the attention of the church officials. I.G. Ex. 21/161, 272. This evidence is damaging to Petitioner because it shows that Petitioner possessed an entrenched resistance to stopping his criminal behavior, even in the face of external pressures to do so. This refusal to change his behavior even after he had been "discovered" is indicative of Petitioner's capacity to engage in self-destructive and destructive behavior.

Petitioner did not stop the sexual abuse of his daughters until it was reported to the police by a neighbor who learned about it from one of Petitioner's daughters. I.G. Ex. 21/180, 186. He did not seek professional psychological help until after he was charged with forcible sexual abuse. I.G. Ex. 16/1. Thus, Petitioner sought to correct his criminal behavior only when all the pressures of the criminal justice system came to bear upon him.

D. The psychological evidence of record fails to establish that Petitioner is trustworthy.

The record shows that Petitioner's attorney referred Petitioner to Dr. Doris A. Read, a clinical psychologist, for a psychological evaluation at the time he was charged with his criminal offenses. Dr. Read evaluated Petitioner in March of 1988, and a report of that evaluation is contained in the record. I.G. Ex. 16. This report indicates that, at the time of the March 1988 evaluation, Petitioner evinced a willingness to openly admit that he had sexual contact with his twin daughters, but he had difficulty perceiving that this conduct was inappropriate. Instead, Petitioner perceived his daughters to be "mature ladies, not minors" who were active and willing participants in a sexual relationship with him. He described his relationship with one of his daughters as being "a romance and not a perversion", and had difficulty characterizing his sexual contacts with his daughters as being "forcible." Rather than taking responsibility for his abusive behavior, Petitioner attempted to shift responsibility for his molestations to his daughters. He believed that they wanted a sexual relationship with him, and he reported "falling for it".

This psychological report also indicates that Petitioner had difficulty perceiving that his molestations could result in harm to his daughters. Instead, Petitioner indicated that he believed that one of his daughters was using the abuse as an "excuse for the other problems she is having". According to the report, Petitioner appeared to be greatly concerned about the consequences his abuse would have on his career and his reputation and he showed relatively little concern for the harm his abuse may have on his daughters.

This evidence shows that Petitioner is capable of being profoundly narcissistic and self-centered, and that he is capable of building a dangerously distorted psychological reality that conforms to how he needs the world to be rather than to how it actually is. Petitioner has demonstrated that he is an individual that is capable of

monumental denial of reality and that he is impaired in his ability to perceive the consequences of his actions. Since Petitioner has demonstrated that he is capable of being completely unaware of the impact his actions have on others, it is difficult to trust his ability to restrain himself from acting on impulses that could result in harm to others.

Petitioner continued to be treated by Dr. Read for seven months, until September 1988. Dr. Read subsequently testified at the hearing before the state licensing board that Petitioner claimed that he had no attraction to or sexual experience with non-sexually mature children. In fact, Petitioner expressed repulsion for people who have such an attraction. Based on these statements as well as police reports made available to her, Dr. Read stated that, to her knowledge, Petitioner had not sexually abused any children other than his own daughters as they approached sexual maturity. Dr. Read expressed the opinion that, based on this pattern of sexual abuse, it is unlikely that Petitioner would go outside his family and abuse children in his dental practice. Instead, Dr. Read opined that Petitioner's history of sexual behavior and abuse were consistent with that of a typical incest offender. She pointed out that Petitioner reported that he was unhappy in his marriage, and she theorized that he came to see his daughters as "pseudoadults" who could meet his sexual and emotional needs which were not being met in his marriage. Dr. Read concluded that while Petitioner may pose a threat to other female children in his family as they approach sexual maturity, she did not believe that he would abuse children outside his family. I.G. Ex. 16/6-7; I.G. Ex. 21/53-60.

Dr. Read based her opinion that Petitioner is not a threat to children in his dental practice on Petitioner's own reports of his sexual proclivities. Although Petitioner avers that he is not sexually attracted to young children, it is difficult to rely on these representations in light of his demonstrated ability to delude himself in self-serving ways. Dr. Read herself testified that sexual offenders typically have little insight into their actions, and they distort reality in order to justify their actions. I.G. Ex. 21/138-139. Dr. Read also observed that Petitioner in particular was unable to accurately perceive the nature and seriousness of his behavior. Further doubt is cast on Petitioner's claim that he is repulsed by sexual activity with young children in light of his former wife's testimony that she observed him engaging in sexual misconduct with his 18 month old daughter.

It is also significant that Dr. Read repeatedly stated both in her written report and in the testimony before the Utah State licensing board that it is impossible to state with certainty that Petitioner is not a danger to children in his dental practice. Dr. Read stated that it is "worrisome" that Petitioner used his professional office and anesthesia as part of the sexual abuse pattern. In addition, she stated that a psychological evaluation such as the one she performed on Petitioner "cannot accurately predict whether someone will engage in future abuse, or will regress under emotional strain in the future." She therefore recommended that Petitioner should be allowed to continue to practice dentistry under certain restrictions designed to monitor his behavior. I.G. Ex. 16/6; I.G. Ex. 21/56.

Dr. Read also reported that during the seven months that she treated Petitioner, he had begun to make some progress in what she stated often is for sex offenders a slow process of breaking down patterns of denial. She stated that Petitioner had begun to recognize the impact his actions had on his children. In order to accelerate this therapeutic process, Dr. Read referred Petitioner to the Intermountain Sexual Abuse Treatment Center for more comprehensive treatment which would include group therapy as well as individual counseling sessions. I.G. Ex. 21/138-139.

Dr. Larry Fox, clinical director of the Intermountain Sexual Abuse Treatment Center, subsequently treated Petitioner, and he testified as to his findings and conclusions regarding Petitioner's psychological condition at both the hearing before the Utah State licensing board and the hearing before me. Dr. Fox testified that he possesses a doctorate degree in counseling psychology and that he has several years of experience in treating sex offenders. Tr. 186. Dr. Fox also testified that Petitioner had made satisfactory progress in his treatment, and that at the time of the hearing before me, he was beginning to "phase out" Petitioner's therapy. I.G. Ex. 21/221; Tr. 194.

Dr. Fox also reported on the results of a plethysmograph performed on Petitioner. A plethysmograph is a test designed to determine the sexual arousal patterns of male patients through measuring the degree of penile erection to various sexual stimuli. I.G. Ex. 21/262. Dr. Fox testified that the results of this test showed that Petitioner showed most sexual arousal to appropriate sexual stimuli involving adult women, and that he showed substantial sexual arousal to stimuli involving consenting 12 year old females. I.G. Ex. 21/218.

Dr. Fox expressed the opinion that even though the plethysmograph showed that Petitioner was sexually aroused by 12 year old females, he was of the opinion that Petitioner would not act on that arousal and assault 12 year old females who were not his own children. Dr. Fox agreed with Dr. Read's view that while Petitioner might pose an increased threat to his own female children as they approach the age of sexual maturity, Petitioner was unlikely to sexually abuse children outside of his family who were his dental patients. In view of this, Dr. Fox testified that five years would be an adequate period of time to exclude Petitioner from participation in the federally-funded health care programs. Dr. Fox based this opinion on the fact that Petitioner did not have a history of abusing patients that are not his children, and on his assessment of the dynamics of Petitioner's family life as reported to him by Petitioner. Dr. Fox set forth the theory that Petitioner's marital discord combined with his daughter's nurturing behaviors created a climate which operated to psychologically motivate him to engage in incestuous behavior. I.G. Ex. 21/216, 240, 256, 264; Tr. 194.

Dr. Fox essentially agreed with the opinion expressed by Dr. Read, and his opinion suffers from the same shortcoming of Dr. Read's opinion. His theory explaining why he believed Petitioner was a threat only to his own children was largely based on information reported to him by Petitioner. Since Petitioner's perception of reality is demonstrably unreliable, any conclusions based on those perceptions is unreliable.

Dr. Fox admitted that his explanation for Petitioner's incestuous behavior was only a working hypothesis, and he stated repeatedly that he could provide no guarantees that Petitioner would refrain from abusing children outside of his family in the course of his dental practice. He, like Dr. Read, recommended that certain restrictions be placed on Petitioner's dental practice to provide a margin of safety to Petitioner's patients. I.G. Ex. 21/223-225.

E. <u>An eight year exclusion in this case is not extreme or excessive</u>.

Petitioner contends at page seven of his post-hearing brief that the imposition of an eight year exclusion in this case is "arbitrary and capricious" because " there "was no reason or basis presented . . . as to why the exclusion should be for a longer time than five (5) years". I disagree. I have evaluated the evidence of record before me, and conclude that an eight year

exclusion imposed against Petitioner is reasonably related to the exclusion law's goal to protect federally-funded health care program beneficiaries and recipients from untrustworthy health care providers.

Petitioner was convicted of sexually abusing his daughters in the course of providing them dental care. He perpetrated the criminal offenses which formed the basis of his conviction under the guise of his profession and with the assistance of anesthesia he had access to because of his profession. Petitioner admitted that he sedated his daughters for the dual purposes of performing dental procedures on them and gaining sexual access to them. It is also clear from Petitioner's admissions that he intended to gain sexual access to his daughters without their consent or even their knowledge. Petitioner's sexual abuse of his daughters in his dental office occurred over a two year period, a lengthy period of time. In addition, the abuse in his dental office was part of a larger pattern of sexual abuse which had begun two years earlier when the victims were as young as 12 years old. The record also shows that Petitioner had great difficulty in recognizing that his behavior was abusive and little appreciation for the harmful effects of his actions. He did not, on his own initiative, seek help to overcome his abusive behavior, and he stubbornly persisted in his conduct even after it came to the attention of his wife and officials in his church.

The evidence of record overwhelmingly demonstrates that Petitioner is an individual who has been driven by compulsions and disturbed psychological processes. It is reasonable to infer from the nature of Petitioner's offenses, and from the circumstances under which they occurred, that Petitioner is manifestly untrustworthy. Therefore, a substantial period of time is necessary to establish that Petitioner no longer poses a threat to federally-funded health care programs and their beneficiaries and recipients.

Petitioner's conduct was not only merely unlawful, but it was the type of conduct that has the potential for causing incalculable damage to the well-being and psychological health of others. Petitioner's dental practice is predominantly a pediatric practice. I.G. Ex. 21/146. Petitioner has preyed upon children in the past. It is likely that should Petitioner resume his abusive conduct in the future, the victims of the conduct would be children. Children are a vulnerable segment of the population. Their dependency on adults impairs their ability to defend themselves against abusive behavior. In addition, they are impressionable and are likely to

I am also aware that Petitioner has already suffered extensive financial losses as a result of the related criminal and license revocation proceedings, and that this exclusion may have a severe financial impact on Petitioner. However, the remedial considerations of the exclusion law must take precedence over the financial consequences that an exclusion may have on Petitioner.

The evidence in this case provides strong justification for the exclusion imposed by the I.G. An eight year exclusion is, in this case, consistent with the purpose of protecting federally-funded health care beneficiaries and recipients and it is not extreme or excessive as a length of time necessary to establish that Petitioner is no longer a danger to these beneficiaries and recipients.

CONCLUSION

Based on the evidence in this case and the law, I conclude the I.G. properly excluded Petitioner from federally-funded health care programs pursuant to section 1128(a)(2) of the Act, and that a minimum period of exclusion of five years is mandated by federal law. In addition, I conclude that the I.G.'s determination to exclude Petitioner from participation in federally-funded health care programs for eight years is reasonable. Therefore, I sustain the exclusion imposed against Petitioner, and I enter a decision in favor of the I.G.

/s/

Steven T. Kessel
Aministrative Law Judge