Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Bruce Lindberg, D.C.,	DATE: July 22, 1991
Petitioner,	
- v. -	Docket No. C-348
	Decision No. CR145
The Inspector General.	

DECISION

On February 15, 1991, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs.[1] The I.G. advised Petitioner that he was being excluded due to his State court conviction of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. Petitioner was further advised that exclusions based on such convictions were made mandatory pursuant to section 1128(a)(2) of the Social Security Act (Act) and that section 1128(c)(3)(B) of the Act required a minimum period of exclusion of not less than five years.

Petitioner timely requested a hearing and the case was assigned to me. A prehearing conference was held on March 15, 1991 to discuss procedures for hearing and deciding the case. The I.G. indicated that the case could be decided through submission of a motion for summary disposition without the need for an in-person hearing. With the acquiescence of Petitioner, I set a schedule for filing of briefs and supporting

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

documentation. The parties have completed their submissions and the matter is ready for decision.

I have considered the exhibits[2] submitted by the parties, their arguments, and the applicable law and regulations. I conclude that (1) there are no material disputed facts, (2) the exclusion imposed and directed by the I.G. is mandated by section 1128(a)(2) of the Act, and (3) the five-year exclusion is the minimum mandatory period required by section 1128(c)(3)(B) of the Act.

ISSUE

Whether Petitioner was convicted of a criminal offense relating to the neglect or abuse of a patient, within the meaning of section 1128(a)(2) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner, at all times relevant to this case, was a chiropractor with offices in Albia, Centerville, and Ottumwa, Iowa. I.G. Ex. 1.[3]

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[2] The I.G. filed 33 exhibits with his briefs, accompanied by the required declaration. These are admitted into evidence as I.G. Ex. 1 - 33. Petitioner filed seven exhibits with his brief, accompanied by the required declaration. Petitioner submitted his exhibit as "Exhibit A" and then numbered each document 1 - 7. However, I have designated the exhibits as P. Ex. 1 - 7 and these are admitted into evidence.

[3] The parties' exhibits and memoranda will be referred to as follows:

I.G.'s Exhibit	I.G. Ex. (number) at (page)
I.G.'s Brief	I.G. Brief at (page)
I.G.'s Reply Brief	I.G. Reply at (page)
Petitioner's Exhibit	P. Ex. (number) at (page)
Petitioner's Response Brief	P. Response at (page)

2. On June 16, 1989, in a Trial Information[4] filed in the Iowa District Court for Monroe County, Petitioner was charged with five counts of Lascivious Acts with a Child, in violation of section 709.8(1) of the Iowa Criminal Code. I.G. Ex. 15.

3. On January 17, 1990 in a Trial Information filed in court, Petitioner was charged with one count of Indecent Contact with a Child and two counts of Lascivious Acts with a Child, violation of sections 709.12(2) and 709.8 of the Iowa Criminal Code. I.G. Ex. 16.

4. On April 11, 1990, in a Trial Information filed in court, Petitioner was charged with two counts of Indecent Contact with a Child and two counts of Indecent Exposure, violations of sections 709.12(2) and 709.9 of the Iowa Criminal Code. I.G. Ex. 17.

5. On April 11, 1990, Petitioner pled guilty to two counts of Indecent Contact with a Child and two counts of Indecent Exposure, violations of sections 709.12(2) and 709.9 of the Iowa Criminal Code. Sentencing was set for July 20, 1990. I.G. Ex. 17.

6. In a Judgment Entry dated July 20, 1990, the court found Petitioner guilty of two counts of Indecent Contact with a Child and two counts of Indecent Exposure, violations of section 709.12(2) and 709.9 of the Iowa Criminal Code. P. Ex. 6.

7. The record shows that Petitioner included among his patients a number of male children under the age of 18. I.G. Ex. 11 - 12. These children would come to Petitioner seeking treatment for various spinal disorders. I.G. Ex. 30. A number of the children were members of athletic teams at the local high school and sought treatment for problems arising from the physical rigors of team sports. I.G. Ex. 6 at 4. During the course of treatments of such persons, Petitioner would engage in illicitly attempting to touch and touching of the childrens' genitalia. I.G. Ex. 3, 5, 7, 8, 30, 31.

8. The court sentenced Petitioner to six years' probation subject to the following conditions: (1) he was to pay all court costs and make restitution to the eight victims by providing an annuity which would provide each victim with funds to pay for counseling and each

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[4] Although this document is captioned "Information", it is referred to in the text as a "Trial Information."

victim with $5,000 on his 18th birthday; (2) he was to continue receiving counseling on an individual basis throughout probation or until successfully discharged by the counselor with the approval of the probation officer; (3) he was to continue attending 12-step meetings with the majority of them focusing on sexual addiction; and (4) he was to complete 300 hours of community service work. I.G. Ex. 19.

9. Petitioner was convicted of a criminal offense, within the meaning of sections 1128(i) and 1128(a)(2) of the Act.

10. 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.

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

12. 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).

13. On September 20, 1990, Petitioner filed an Amendment to Judgment Entry. Petitioner's amended plan of restitution provided that he was to make restitution to the eight victims of his crime by providing a $5,000 annuity for each of the victims, paying a total amount of $40,000. Each victim was to have any funds from the annuity available to him prior to age 18 to use for counseling services. At age 18, each victim was to receive the remaining balance of his $5,000 annuity, the remaining balance being the sum of $5,000 minus any early withdrawal for counseling. If there is an early withdrawal, Petitioner is to cover the early withdrawal penalty. I.G. Ex. 29.

14. On September 21, 1990, the court sustained Petitioner's application to amend the Judgment Entry. I.G. Ex. 29.

15. On September 28, 1990, the court approved Petitioner's Plan of Restitution. I.G. Ex. 29.

16. On September 28, 1990, Petitioner was notified by the State of Iowa Board of Chiropractors (Iowa Board) that a hearing had been scheduled concerning his license to practice as a chiropractor in the State of Iowa. The hearing was scheduled to determine whether disciplinary action should be taken against Petitioner's license for his alleged violation of Iowa Board regulations. I.G. Ex. 23.

17. The Iowa Board informed Petitioner that the violations arose from these allegations: (1) Petitioner made suggestive, lewd, lascivious, or improper remarks or advances to at least seven minors who were his patients during the time period of approximately 1988-1989; and (2) Petitioner used his position as a chiropractor to allow him to make suggestive, lewd, lascivious, or improper remarks or advances to at least one other minor during the time period of approximately 1988-1989. I.G. Ex. 23.

18. In a letter dated February 15, 1991, Petitioner was notified by the I.G. that he was being excluded from participation in the Medicare program and any State health care program for a period of five years, because of his conviction of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. I.G. Ex. 26.

19. On March 1, 1991, the Iowa Board entered a Stipulation and Order, signed by Petitioner on February 26, 1991, in which Petitioner's chiropractic license was surrendered indefinitely pending compliance with certain conditions. I.G. Ex. 27.

20. The Stipulation provided the following conditions for Petitioner during the period that his license was to be suspended: (1) Petitioner was to continue counseling and any other treatment in which he was then engaged and was to arrange for his counselors to submit monthly progress reports to the Iowa Board; (2) he was to comply with the terms of his court-ordered probation and arrange to have his probation officer submit monthly reports documenting that compliance to the Iowa Board; and (3) at the end of six months, he could submit to the Iowa Board a comprehensive evaluation conducted within the six-month period by a professional therapist approved by the Iowa Board. If the report were to find that Petitioner could resume the practice of chiropractic and he had complied with all the terms of his court-ordered probation, the suspension could be stayed, with a three-year probationary period and other conditions as delineated in the Stipulation. I.G. Ex. 27.

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

22. 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 programs funds or to treat beneficiaries and recipients.

23. In response to the court's inquiry concerning his guilty plea to Counts I and II, Petitioner admitted that he did touch a child, who was under the age of 14, in the groin area for Petitioner's own sexual satisfaction. P. Ex. 7 at 17 - 18.

24. Petitioner has demonstrated that he is capable of using his license to practice chiropractic to perpetrate child molestation against young boys who were his patients. Petitioner has repeatedly placed the gratification of his own urges above the welfare of his young patients. FFCL 7.

25. The five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable. FFCL 1-24.

RATIONALE

1. 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, within the meaning of section 1128(a)(2) of the Act.

Petitioner is a chiropractor with offices in Albia, Centerville, and Ottumwa, Iowa. Based on information developed in a criminal investigation of Petitioner, a Trial Information was filed on June 16, 1989 in the Iowa District Court for Monroe County, charging Petitioner with five counts of Lascivious Acts with a Child, in violation of section 709.8 of the Iowa Criminal Code. FFCL 2. A second Trial Information was filed on January 17, 1990, in the same court, charging Petitioner with one count of Indecent Contact with a Child, in violation of section 709.12(2) of the Iowa Criminal Code and two counts of Lascivious Acts with a Child, in violation of section 709.8 of the Iowa Criminal Code. FFCL 3. On April 11, 1990, Petitioner entered into a plea agreement wherein he voluntarily pled guilty to two counts of the

crime of Indecent Contact with a Child, in violation of section 709.12(2) of the Iowa Criminal Code, and two counts of Indecent Exposure, in violation of section 709.9 of the Iowa Criminal Code. FFCL 5.

Consequently, in a Judgment Entry dated July 20, 1990, the court found Petitioner guilty of violations of the Iowa Criminal Code as set forth in the plea agreement and placed Petitioner on six years' probation conditioned on (1) payment of court costs and full restitution to the victims by providing an annuity which would provide each victim with funds to pay for counseling and with a lump-sum payment of $5,000 on each victim's 18th birthday; (2) continuation of counseling on an individual basis throughout probation or until Petitioner is successfully discharged by the counselor and with the approval of the probation officer; (3) continuation of attendance of 12-step meetings with the majority of them focusing on sexual addiction; and (4) completion of 300 hours of community service work. FFCL 6, 8. On September 21, 1990, the Court sustained Petitioner's application to amend the Judgment Entry regarding the amount of money to be provided the victims. The amended Judgment Entry provided that each victim would receive a $5,000 annuity. Each victim could then request funds from the annuity to pay for counseling. Upon each victim's 18th birthday, he would receive the $5,000 annuity, minus the counseling fees. FFCL 13 - 14.

In order to exclude Petitioner under Section 1128(a)(2) of the Act, it must be shown that he was (1) convicted of a criminal offense and that (2) the offense related to neglect or abuse of patients in connection with the delivery of a health care item or service. Petitioner does not dispute that he was convicted of a criminal offense, but contends that the charges upon which the conviction is based do not involve "child abuse or conduct that endangered a child while [Petitioner] was their doctor." P. Response at 2, 4.

Apparently, the crux of Petitioner's argument is based on procedural grounds in that the specific violations contained in the documents which form the basis of the conviction, indecent contact and indecent exposure with children, occurred outside of the doctor-patient relationship. P. Response at 5. Moreover, Petitioner opines that the I.G. cannot properly rely on extrinsic pleadings, such as "various depositions and other court pleadings and affidavits," other than the conviction itself, to support patient abuse in connection with the delivery of a health care item or service. P. Response at 5. For example, Petitioner takes issue with the

I.G.'s reliance on the victim's restitution plan, which Petitioner admits includes two of his patients. P. Response at 4 - 5. Lastly, Petitioner illustrates his position that the conviction itself did not relate to his patients by pointing to the sentencing transcript's recital of Counts I and II of the Trial Information, which pertains to indecent contact with one "K.L.," a child who is not described as a patient. P. Response at 6; P. Ex. 7 at 9 - 10.

Petitioner's arguments are without merit and contrary to existing case law. The essence of Petitioner's position is that evidence supporting patient abuse in connection with the delivery of a health care item or service is limited to the Judgment Entry and plea transcript. Such a restricted interpretation is not supported by the existing case law. The I.G. properly relies on Norman C. Barber, D.D.S., DAB Civ. Rem. C-198 (1991), to demonstrate that a determination of whether the elements of section 1128(a)(2) were met can be based on extrinsic evidence found in pleadings and other documents supporting the conviction. I.G. Reply at 1 - 2. The rationale for such an interpretation is shown by the following passage from Barber:

> 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 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 . . . is whether the criminal offense which formed the basis for the conviction related to neglect or abuse of patients, not whether the court convicted Petitioner of an offense called

> "patient abuse" or "patient neglect." [E]xtrinsic 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.

Id. at 10 - 12.

The appellate decision in Dewayne Franzen, DAB App. 1165 (1990), is instructive on the issue of the scope of the administrative law judge's (ALJ) examination in determining the nature of a criminal offense under section 1128(a)(1) and (a)(2). The appellate panel, relying on H. Gene Blankenship, DAB Civ. Rem. C-67 (1989), held that:

> [T]he ALJ, the finder of fact, can look beyond the findings of the state court to determine if a conviction was related to Medicaid. Therefore the ALJ's characterization of an offense is not limited to the state court's or the violated statute's precise terms for purposes of determining whether a conviction related to Medicaid. Franzen at 6. See Thomas M. Cook, DAB Civ. Rem. C-106 (1989).

Having the authority to examine the full circumstances surrounding a conviction to determine whether the statutory elements of section 1128(a)(2) are met is particularly appropriate in the context of this case. Here, Petitioner pled guilty to specified criminal offenses pursuant to a plea agreement. He was able to avoid a trial where full details of his criminal activities would have been presented. The Trial Information upon which his conviction was based contains only a skeletal recital of the essential elements of the criminal offenses of which he was charged. See I.G. Ex. 17. There is no description of where, under what circumstances, and who were the recipients of Petitioner's criminal sexual misconduct (other than a generic reference to two individuals). This was obviously done to protect the identity of the children who were the victims of Petitioner's criminal conduct.

Petitioner would have the determination of the extent of his criminal offense for purposes of section 1128(a)(2) be limited to the four corners of the Judgment Entry. But such constraints are even more restrictive than that imposed on the trial judge in his deliberations on whether to accept Petitioner's guilty plea. Although the Trial Information referred only to two children, it is

evident from the discussion in the transcript of Petitioner's guilty plea that Petitioner's conduct involved more than the two children mentioned in the Trial Information. In return for dropping certain charges, Petitioner agreed to set up an annuity in the amount of $5,000 for each of the "eight different children . . . involved in the original two charges." P. Ex. 7 at 12 - 13. The Plan of Restitution clearly reflects that it was for the purpose of compensating these eight children for "pecuniary damages caused by [Petitioner] as a result of criminal activities." I.G. Ex. 29. There is no doubt that all the parties involved in Petitioner's criminal conviction were aware of the details of his criminal activities. That same information can properly be examined for purposes of section 1128(a)(2).

Having disposed of Petitioner's procedural argument, I must next resolve whether the elements of section 1128(a)(2) have been met in this case. This section refers to convictions involving patient neglect or abuse. The terms "neglect or abuse" are not defined in the statute. Absent a statutory definition, the words should be given their common and ordinary meaning. As indicated in Cook:

> "Neglect" is defined in Webster's Third New International Dictionary, 1976 Edition as "1: to give little or no attention or respect to: . . . 2: to carelessly omit doing (something that should be done) either altogether or almost altogether . . . ." "Abuse" is defined as "4: to use or treat so as to injure, hurt or damage; MALTREAT . . . ." I conclude from these common definitions that Congress intended the statutory term "neglect" to include failure by a party to satisfy a duty of care to another person. "Abuse" is intended to include those situations where a party willfully mistreats another person. Id. at 4 - 5. See Summit Health Limited, dba Marina Convalescent Hospital, DAB App. 1173 at 8 (1990).

Neither the I.G. nor Petitioner has submitted for the record the full wording of the two sections of the Iowa Criminal Code -- Indecent Contact with a Child (709.12(2)) and Indecent Exposure (709.9) -- which form the basis for Petitioner's conviction. The trial documents of record do not contain statutory language adequate for me to conclude that violation of the criminal code provisions per se amounts to "neglect or abuse" under section 1128(a)(2) of the Act. Also, I

am unable to conclude from examination of the Trial Information and the Judgment Entry alone that the victims of Petitioner's criminal conduct were his patients and that such conduct occurred in the delivery of a health care item or service.

Even though the criminal statute underlying Petitioner's conviction does not provide evidence of the elements necessary to support an exclusion under section 1128(a)(2), the "relating to" language provides a basis to examine the full circumstance of Petitioner's criminal offenses to establish the I.G.'s authority to exclude. Review of the record supporting Petitioner's criminal conviction amply establishes the elements of section 1128(a)(2). Petitioner, a licensed chiropractor, included among his patients a number of male children under the age of 18. I.G. Ex. 11 - 12. These children came to Petitioner seeking treatment for various spinal disorders. Apparently as an inducement to new patients, Petitioner provided the initial treatments without cost. I.G. Ex. 30 at 28. A number of the children were members of athletic teams at the local high school and sought treatment for problems arising from the physical rigors of team sports. I.G. Ex. 6 at 4. Petitioner encouraged these children to seek him out by providing weight training and other equipment for their use. I.G. Ex. 7 at 12.

During the course of treatments of these children, Petitioner illicitly attempted to touch and touched their genitalia. This would often occur while Petitioner was engaged in chiropractic treatment, such as a massage, or in the course of using electrical vibrators and stimulators. I.G. Ex. 3, at 3; 5 at 3; 13 at 28 - 29; 30 at 9 - 10, 23 - 24; 31 at 8 - 10; 32 at 6 - 8; 7 at 12; 8 at 6 - 9. Moreover, Petitioner frequently exploited the care and trust arising from the doctor-patient relationship by inviting these children to his home or to other locations for recreational activities. I.G. Ex. 30 at 11; 32 at 5. While at his home, Petitioner suggested to the children that they should undergo a chiropractic adjustment or massage. The illicit touching occurred on these occasions as well. I.G. Ex. 7 at 1, 4 - 5, 8 - 9. Petitioner not confine his sexual misconduct with these children only to situations where the illicit touching occurred under the guise of legitimate chiropractic treatments. He often engaged in sexual molestation of children in the sauna at his home, while engaged in water sports, and in his car while driving the children to their homes. I.G. Ex. 7 at 13 - 16; 8 at 10 - 11; 30 at 17; 31 at 11 - 12, 13 - 14; 32 at 5.

Petitioner utilized his doctor-patient relationship to foster the children's confidence and trust and then further exploited this relationship through the provision of gifts, such as money and trips to recreational areas. I.G. Ex. 7 at 6, 8, 10, 19. Such actions by Petitioner was particularly devious since it took advantage of the vulnerability of these children and enabled Petitioner to engage in the illicit sexual misconduct with a minimum of resistance. The following excerpt from the deposition of one of Petitioner's victims illustrates this point:

> Q. So [Petitioner] reached over and touched your chest, and then touched you in your privates while he was driving?
> A. Yes.
>
> Q. And how did you feel about that, or what were you thinking when he was doing that?
> A. I was thinking in my mind that maybe [I] should tell him don't, but if I do maybe he wouldn't like me any more or something.

I.G. Ex. 31 at 22.

Although the record is replete with evidence that Petitioner's criminal conviction related to sexual misconduct involving his patients while in the course of chiropractic treatment or in other circumstances, Petitioner contends that the "charges" did not involve "child abuse" while Petitioner was the children's doctor. P. Response at 2. The only basis for Petitioner's assertions is his reliance on the specific wording of the Trial Information and the admission by Petitioner at his guilty plea. P. Response at 3. The supporting documents establish without doubt that Petitioner engaged in the sexual misconduct either during the course of his chiropractic practice or as a result of the relationships with children that evolved from such practice. If it were not for contacts arising from Petitioner's chiropractic practice, the children identified in the documents supporting the conviction would not be the victims of Petitioner's sexual misconduct.

Petitioner apparently recognizes that his conduct constituted "abuse," but argues that the specifics of the Trial Information did not recite such abuse. P. Response at 3. The shallowness of Petitioner's argument has already been shown and need not be repeated again. Moreover, the record reflects reports from Petitioner's treating analysts which fully describe the extent of his long-standing sexual addictive disorder,

hebephilia.[5] I. G. Ex. 24 at 3. Petitioner did not control his unnatural compulsions toward young males emanating from his mental disorder. The emotional turmoil created by Petitioner's sexual molestation is likely to have had a significant physical and mental impact on his victims. They were dependent upon him as a result of his position as their doctor. Due to their youth and inexperience, they had no reason to question his motives or behavior. Such dependence and lack of sophistication was exploited by Petitioner to satisfy his own sexual fantasies and erotic desires. Recognition of the harm resulting from Petitioner's abusive conduct is reflected by the terms of his restitution plan, in which he agreed to provide each of the recipients of his sexual misconduct with a $5,000 annuity to use for personal counseling.

The Iowa Board also recognized the seriousness of Petitioner's sexual misconduct and the damaging impact such behavior had on his patients. The Iowa Board suspended his license with the resumption conditioned on the successful completion of therapy and a three-year probationary period during which he would not be allowed to treat male children under the age of 18 without the presence of their parents or a staff member. I.G. Ex. 23, 27.

There is overwhelming, uncontroverted, evidence that Petitioner's conviction related to patient abuse in the delivery of a health care item or service. Absent disputed issues of material fact, summary disposition is appropriate in this case. I conclude, therefore, that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act.

2. The exclusion imposed and directed against Petitioner is mandated by law.

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years when such individuals and entities have been

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[5] This condition has been described as the erotic attraction to early and mid-pubescent individuals, in Petitioner's case, an attraction to young males. P. Ex. 2. Petitioner described his own behavior "as inappropriate attention and touch to the boys to attempts to masturbate them, most of his behavior being of a passive, seductive, albeit abusive nature." P. Ex. 2 at 1.

convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. Congressional intent is clear from the express language of section 1128(c)(3)(B):

> In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . .

Where the minimum mandatory exclusion of five years is applicable by virtue of the statutory requirements having been met, the I.G. must seek an exclusion of at least that term of years and I do not have any discretion to alter it. Accordingly, by virtue of the statutory requirements, the I.G.'s imposition of a five-year exclusion of Petitioner is consistent with the Congressional mandate.[6]

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[6] The evidence supports the conclusion that Petitioner suffers from a variant of pedophilia (described in DSM-III-R Code 302.20), a mental illness having significant and damaging consequences on young children who are the subject of his deviant, uncontrolled, sexual fantasies. P. Ex. 2. Petitioner preyed on young males who sought him out for treatment of health-related problems. It was within the trust and vulnerability arising from such relationship that he victimized them. The harm to such individuals cannot be quantified in monetary terms and may take many years of psychological counseling to overcome. Considering that Petitioner's mental illness is of long-standing duration and chances of recidivism are great even with therapeutic counseling, an exclusion of a precise term of years may not adequately protect recipients and beneficiaries of the program. Nor does the record suggest that full recovery will occur within the minimum mandatory exclusion period. Where mental illness is the prime factor leading to the conduct which provided the authority for the exclusion, Petitioner should not be allowed to again become a provider under the Medicare and Medicaid programs until he demonstrates that he is mentally competent to treat patients without risk of resumption of the offending conduct. I do not have authority to impose such a requirement or other conditions on Petitioner as part of his exclusion. See Walter J. Mikolinski, Jr., DAB App. 1156 at 5 - 16 (1990). Fortunately, 42 C.F.R. 1001.132 provides the I.G. with an opportunity to carefully examine any application from Petitioner for reinstatement, to ensure that he no longer poses any risk to program beneficiaries and recipients.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude that the I.G. has the authority to exclude Petitioner from the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

/s/

Edward D. Steinman
Administrative Law Judge