Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Jerry D. Harrison, D.D.S.,	DATE: May 29, 1992
Petitioner,	Docket No. C-281
- v. -	Decision No. CR203
The Inspector General.	

DECISION

This case is governed by section 1128 of the Social Security Act (Act). By letter dated August 1, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs until he obtains a valid license to practice dentistry in the State of Iowa.[1] Petitioner was advised that his exclusion resulted from the surrender of his dental license while a formal disciplinary proceeding was pending before the Iowa Board of Dental Examiners (Iowa Board). Petitioner was further advised that his exclusion was authorized by section 1128(b)(4) of the Act. By letter dated August 10, 1990, Petitioner requested a hearing before an administrative law judge (ALJ), and the case was assigned to me for hearing and decision.

The I.G. subsequently filed a motion for summary disposition, and Petitioner opposed this motion. In the I.G.'s March 29, 1991 reply to Petitioner's opposition to his motion for summary disposition, the I.G. notified this office that, effective March 1, 1991, the California

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[1] "State health care program" is defined by section 1128(h) of the Act, 42 U.S.C. §§ 1320a-7(h), 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.

Board of Dental Examiners (California Board) had revoked Petitioner's dental license and stayed the revocation for five years, based on his compliance with certain restrictions. The I.G. stated that in light of this recent state action, he modified the length of Petitioner's exclusion to be until Petitioner successfully completes his California probation and has his California dental license fully restored.[2]

I deemed this modification of the proposed exclusion by the I.G. as a motion to add a new issue to this proceeding, pursuant to 42 C.F.R. § 498.56, which allows me to give notice of new issues. I further gave the parties the opportunity to brief this issue.

On May 14, 1991, I issued a Ruling in which I granted the I.G.'s motion to modify the proposed exclusion, on the grounds that Petitioner had not demonstrated any substantial prejudice by this modification. I also preliminarily concluded that the I.G. has authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. In addition, I concluded that the I.G. had not demonstrated as a matter of law that Petitioner should be excluded until he obtains full restoration of his license to practice dentistry in the State of California. I found that there were genuine issues of material fact concerning the issue of Petitioner's alleged untrustworthiness.

On October 8, 1991, I conducted an in-person hearing in San Francisco, California.[3] On January 29, 1992, during the period that the post-hearing briefing schedule was in progress, the Secretary of the Department of Health and Human Services (the Secretary) promulgated new regulations containing procedural and substantive provisions affecting exclusion cases. I extended the

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[2] The California Board's decision contemplates that the period of Petitioner's probation will be at least five years. The I.G. therefore determined that Petitioner will be excluded for at least five years.

[3] During the hearing, I indicated that either party would have until October 18, 1991, to submit a copy of a decision issued by the State of Washington Department of Health Dental Disciplinary Board (Washington Board) as an additional exhibit in this case. By letter dated October 17, 1991, the I.G. offered this document as evidence. Petitioner did not object to this exhibit, and I am admitting it into evidence as I.G. Ex. 17.

post-hearing briefing schedule to provide the parties with the opportunity to address the issue of the potential impact of the regulations on this case.

Based on the evidence of record, the parties' arguments, and the applicable law, I conclude that the I.G.'s determination to exclude Petitioner was authorized by section 1128(b)(4)(B) of the Act. I also conclude that the new regulations do not govern my decision regarding the reasonableness of the length of the exclusion. I find that the I.G.'s determination to exclude Petitioner for a minimum period of five years is reasonable. If at the end of that time California has given him an unrestricted dental license, or at any time thereafter that California gives him an unrestricted dental license, he may apply for reinstatement as a Medicare/Medicaid provider. Or, if at the end of the five years another State has given him an unrestricted dental license, or at any time after the five years that a State gives him an unrestricted dental license, and 1) he is practicing there; and 2) prior to giving him an unrestricted dental license, that State had examined all of the legal and factual issues considered by the California Board, then he may apply for reinstatement as a Medicare/Medicaid provider.

ISSUES

The issues are:

a. Whether the I.G. has the authority to impose an exclusion against Petitioner pursuant to section 1128(b)(4) of the Act.

b. If the I.G. has the authority, whether the modified period of exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed to practice dentistry in the State of Iowa on July 1, 1968. I.G. Ex. 1/1.[4]

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[4] Citations to the record in this decision are as follows:

I.G. Exhibits	I.G. Ex. (number/page)
I.G. Posthearing Brief	I.G. Posth. Br. (page)

(continued...)

2. Subsequent to receiving his Iowa dental license, Petitioner received orthodontic training and he began to practice as an orthodontist in Iowa in June 1970. Tr. 149-150.

3. On November 17, 1989, the Iowa Board filed a Statement of Charges alleging Petitioner sexually abused five different children during the period from 1978 to 1984. I.G. Ex. 1/2.

4. In the face of these charges, on April 16, 1990, Petitioner signed a Stipulation and Consent Order (Consent Order) in which he surrendered his Iowa dental license. I.G. Ex. 2/3.

5. In the April 16, 1990 Consent Order, Petitioner admitted to sexually abusing four of the five children during the period from 1978 to 1981, with the understanding that the sexual abuse did not occur while Petitioner was performing dental services to the children. I.G. Ex. 2/2; FFCL 3.

6. 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. 21662, May 13, 1983.

7. Section 1128(b)(4)(B) of the Act authorizes exclusions from the Medicare and Medicaid programs for any individual or entity who surrendered a license while a formal disciplinary proceeding was pending before a State licensing authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

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[4](...continued)

I.G. Posthearing Reply Brief	I.G. Posth. R. Br. (page)
Petitioner Exhibits	P. Ex. (number/page)
Petitioner Posthearing Brief	P. Posth. Br. (page)
Petitioner Posthearing Reply Brief	P. Posth. R. Br. (page)
Findings of Fact and Conclusions of Law	FFCL (number)

8. On August 1, 1990, pursuant to section 1128(b)(4)(B) of the Act, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid until he obtains a valid license to practice medicine in Iowa.

9. On July 30, 1984, Petitioner was issued a license to practice dentistry in the State of California. I.G. Ex. 2/3.

10. On September 21, 1984, Petitioner was issued a license to practice dentistry in the State of Washington. I.G. Ex. 2/3.

11. Effective March 1, 1991, the California Board revoked Petitioner's license and stayed the revocation for five years, based on certain restrictions, including the successful completion of a period of probation to last at least five years. I.G. Ex. 8.

12. On March 29, 1991, the I.G. notified Petitioner that he modified the length of Petitioner's exclusion to be until Petitioner successfully completes the California probation and his California dental license is fully restored. I.G. March 29, 1991 Prehearing Reply Brief.

13. On September 13, 1991, the Washington Board issued a decision revoking Petitioner's dental license, but staying the revocation indefinitely and placing Petitioner on probation with certain conditions, including that he comply with the conditions established by the California Board. I.G. Ex. 17.

14. Petitioner admitted that he surrendered his license to provide health care while a formal disciplinary proceeding was pending before a State licensing authority, within the meaning of section 1128(b)(4)(B) of the Act. January 7, 1991 Prehearing Order.

15. The formal disciplinary proceeding concerned Petitioner's professional competence and his professional performance within the meaning of section 1128(b)(4)(B) of the Act. FFCL 3-5.

16. The I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. FFCL 7, 14-15.

17. Section 1128(b)(4)(B) of the Act does not establish a minimum or a maximum term of exclusion.

18. The Secretary did not intend that the regulations promulgated on January 29, 1992, concerning permissive exclusions under section 1128(b) of the Act, 42 C.F.R. §§ 1001 Subpart C, apply retroactively to appeals of I.G. exclusion determinations that were pending before ALJs at the time the regulations were promulgated.

19. The remedial purpose of section 1128 of the Act is to protect the integrity of federally-funded health care programs and the welfare of beneficiaries and recipients of such programs from individuals and entities who have been shown to be untrustworthy.

20. Petitioner's surrender of his dental license in the face of charges, and where he had the opportunity to defend himself against such charges, creates a presumption that he is as untrustworthy as an individual who loses his or her license after litigating the issue of his or her professional competence or professional performance. S. Rep. No. 109, 100th Cong., 1st Sess. 2-4, 7, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 684, 688.

21. The four boys Petitioner admitted abusing during the period from 1978 to 1981 were 12, 13, or 14 years old. Tr. 195-196.

22. The four boys Petitioner admitted abusing during the period from 1978 to 1981 were children of close friends of Petitioner. Tr. 158, 183, 241-242.

23. Petitioner abused alcohol from 1978 to 1981, and this alcohol abuse was a contributing factor in Petitioner's sexual abuse of the four boys during this period. Tr. 156-157.

24. Petitioner did not stop abusing the children of his close friends until he was confronted by the parents of some of the victims. Tr. 151.

25. Petitioner did not seek professional psychological treatment for his problem until May 1983, when parents of some of the victims decided that it was necessary that he do so. Tr. 151-152.

26. Petitioner's therapist reported Petitioner's sexual misconduct to the Department of Social Services. Tr. 159-160.

27. Petitioner began to exhibit classic signs of a manic episode during the period the Department of Social

Services was investigating his sexual misconduct. I.G. Ex. 11/3; Tr. 163.

28. Petitioner's friends involuntarily committed him to a mental institution in July 1983. I.G. Ex. 11/3; Tr. 162.

29. During the course of his hospitalization, Petitioner was diagnosed as having a manic depressive illness (bipolar disorder). I.G. Ex. 11/3.

30. On the day before he was hospitalized, Petitioner engaged in sexually inappropriate behavior with a 12-year-old boy who lived in his neighborhood. Tr. 203-204.

31. Petitioner was discharged from the mental institution in August 1983, and he returned to work as a dentist. I.G. Ex. 11/3; Tr. 167-169.

32. In February 1984, an adolescent Petitioner met while he was in the hospital accused Petitioner of sexually abusing him. Petitioner has consistently denied these charges, and the record does not contain sufficient evidence to prove that these allegations are true. Tr. 167-169.

33. Petitioner stopped practicing dentistry in 1984, and he did not work again as a dentist until 1988. During the period Petitioner did not work, he received disability payments for his manic depressive illness. I.G. Ex. 2/3; Tr. 171-175.

34. Petitioner has received continuous psychiatric treatment from 1983 until the present. I.G. Exs. 8/4, 11.

35. Petitioner was treated with lithium, an antimanic drug, from 1983 to 1986. I.G. Ex. 11/3.

36. Petitioner was the victim of sexual abuse as a child on repeated occasions. I.G. Ex. 11/4; Tr. 160.

37. Petitioner admits to engaging in repeated incidents of sexual misconduct involving five different boys, aged 12 to 14 years, over a period of five years. FFCL 5, 30.

38. Petitioner's pattern of sexual misconduct during the period from 1978 to 1983 meets the diagnostic criteria for the mental disorder known as pedophilia, established by the American Psychiatric Association, as set forth in the 1987 Diagnostic and Statistical Manual of Mental Disorders. I.G. Ex. 15; Tr. 114.

39. Individuals who were victims of sexual abuse as children are predisposed to suffering from pedophilia when they become older. I.G. Ex. 15.

40. Pedophilia is known to have a high recidivism rate, particularly when the abuse involves children of the same sex. I.G. Ex. 15.

41. There are no allegations that Petitioner has engaged in sexual misconduct since 1984. FFCL 32.

42. There is no evidence that Petitioner is now abusing alcohol. P. Ex. 2/8.

43. Petitioner feels remorse for his sexual offense, and he has expressed concern for his victims' welfare. Tr. 179-180; 213.

44. Petitioner's manic depressive illness is now in remission. I.G. Ex. 11/8.

45. The expert medical opinion evidence establishes that Petitioner is unlikely to have another manic episode in the future. Tr. 139.

46. The expert opinion evidence establishes that Petitioner is unlikely to sexually abuse adolescent boys in the future. Tr. 127; P. Ex. 2/8; I.G. Ex. 11/8-9.

47. The expert opinion evidence establishes that Petitioner should continue to remain under psychiatric care for at least two years. Tr. 144; P. Ex 2/8; I.G. Ex. 11/9.

48. Petitioner's treating therapist is unable to guarantee that Petitioner will not have another manic episode and that he will not sexually abuse children in the future. Tr. 139, 144.

49. Were Petitioner to have another manic episode, there is a good possibility that he will sexually abuse children. Tr. 144.

50. 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 such persons.

51. The remedial purpose of section 1128 of the Act is satisfied by the following exclusion: Petitioner is

excluded for not less than five years. If at the end of that time California has given him an unrestricted dental license, or at any time thereafter that California gives him an unrestricted dental license, he may apply for reinstatement as a Medicare/Medicaid provider. Or, if at the end of the five years another State has given him an unrestricted dental license, or at any time after the five years that a State gives him an unrestricted dental license, and 1) he is practicing there; and 2) prior to giving him an unrestricted dental license, that State had examined all of the legal and factual issues considered by the California Board, then he may apply for reinstatement as a Medicare/Medicaid provider.

RATIONALE

1. Petitioner surrendered his license to provide health care while a formal disciplinary proceeding was pending before a State licensing authority which concerned his professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(4)(B) of the Act.

The I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid pursuant to section 1128(b)(4) of the Act. Subsection (B) of that provision authorizes the Secretary, or his delegate, the I.G., to impose and direct exclusions against any individual or entity who:

> surrendered . . . a license [to provide health care] while a formal disciplinary proceeding was pending before . . . [any State licensing] authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

The I.G.'s authority to impose and direct an exclusion under 1128(b)(4)(B) is based upon fulfillment of the following statutory criteria: (1) surrender of a license to provide health care, (2) while a formal disciplinary proceeding is pending before any State licensing authority, (3) which concerns the individual's or entity's professional competence, professional performance, or financial integrity.

The uncontested facts show that on November 17, 1989 the Iowa Board filed a Statement of Charges based on Petitioner's alleged sexual abuse of, or attempt to sexually abuse, five children who were patients in his dental practice. I.G. Ex. 1. On April 16, 1990,

Petitioner and the Iowa Board agreed to a Consent Order in which Petitioner admitted to sexually abusing four of the five children described in the Statement of Charges, with the understanding that such conduct did not occur while Petitioner was performing dental services. Petitioner stipulated that the alleged conduct occurred from at least 1978 to 1981; that he was involuntarily admitted to Mercy Health Center from July 1983, until August 1983; and that due to his mental condition he did not practice dentistry and received disability insurance payments from February 23, 1984 through March 21, 1988. I.G. Ex. 2.

The Consent Order stated that Petitioner's disciplinary hearing would not be held and that Petitioner agreed to surrender his Iowa dental license, "in order to resolve the pending disciplinary proceeding against him." The Consent Order further noted that the surrender of Petitioner's Iowa dental license constitutes disciplinary action. I.G. Ex. 2/3.

Petitioner does not dispute that the first two statutory criteria set forth in section 1128(b)(4)(B) of the Act are met in this case. He admitted during the December 14, 1990 prehearing conference that: (1) he surrendered his license to provide health care; (2) while a formal disciplinary proceeding was pending before a State licensing authority. January 7, 1991 Prehearing Order. I conclude that the record supports this admission.

However, Petitioner vigorously disputes that the formal disciplinary proceeding concerned his professional competence or performance. According to Petitioner, the evidence presented at the hearing establishes that Petitioner did not meet the children he abused through his dental practice and that he did not rely on his professional contacts for sexual satisfaction. Instead, Petitioner asserts that he had established close ties with the parents of each of the affected children and with the children themselves long before they became his dental patients. Petitioner also asserts that none of the incidents of abuse occurred in Petitioner's dental office or in the course of his delivery of dental treatment to these patients. According to Petitioner, it was "fortuitous" that the victims of his sexual abuse also happened to be his patients. P. Posth. Br. 2. Petitioner avers that the incidents of sexual abuse "had absolutely nothing to do with the fact that, on occasion, these adolescents may have received dental services from [Petitioner]." P. Posth. R. Br. 3. Petitioner argues that the Iowa license disciplinary proceeding did not relate to his professional competence or performance

because the incidents of sexual abuse were not connected with the victims' status as dental patients. P. Posth. Br. 3.

The I.G. does not dispute Petitioner's characterization of the facts regarding how Petitioner met the children he abused and where the abuse occurred. Instead, he argues that these facts are irrelevant to the issue of whether the Iowa disciplinary proceeding related to Petitioner's professional competence or performance. The I.G. argues that sexual misconduct with children who were patients in Petitioner's practice concerned Petitioner's professional competence and performance. According to the I.G., it makes no difference where the abuse occurred or how Petitioner initially met the victims. I.G. Posth. R. Br. 1-4.

I agree with the I.G. that I do not need to find that Petitioner abused children in the course of treating them in his dental office or that he met these children through his dental practice in order to conclude that the Iowa disciplinary proceeding related to Petitioner's professional competence or performance. While the presence of these factors would be additional evidence for concluding that Petitioner's sexual offenses related to his professional competence and performance, they are not determinative.

The medical evidence of record establishes that Petitioner's pattern of sexual offenses fits the diagnostic criteria for the mental disorder known as pedophilia, established by the American Psychiatric Association. I.G. Ex. 15; Tr. 114. The medical evidence also establishes that Petitioner's sexual misconduct was related to a mental condition which resulted in his involuntary commitment to a psychiatric hospital for several weeks in July and August of 1983. Petitioner was disabled from this mental condition and did not practice dentistry during the years from 1984 to 1988. Petitioner was diagnosed as suffering from a manic-depressive illness, otherwise known as a bipolar disorder, at the time of his hospitalization in 1983. I.G. Exs. 2, 11/3.

Stephen C. Hansen, Ph.D., a psychotherapist who evaluated Petitioner in 1989 at the request of the Iowa Board, testified at the October 8, 1991 hearing before me that, in his opinion, Petitioner's sexual misconduct was due to a bipolar disorder. Dr. Hansen opined that during the period that Petitioner engaged in the sexual abuse, he was in a "hypomanic" phase of his illness. According to Dr. Hansen, hypomanic behavior is characterized by impulsive behavior where an individual may engage in

conduct without thinking and take risks that normally would not be taken. Dr. Hansen stated that hypomanic behavior can go on for a period of years without being diagnosed, and he expressed the view that Petitioner's sexual improprieties were a manifestation of this hypomanic behavior. Dr. Hansen also explained that hypomanic behavior can devolve into an "actual manic episode" which usually does not go unnoticed. Tr. 66, 92, 106-107, 115, 122, 127; P. Ex. 4.

I infer from this medical evidence that Petitioner's sexual misconduct during the period of 1978 to 1983 was a manifestation of his underlying manic-depressive illness which resulted in his hospitalization in 1983. It is obvious that a dentist afflicted with this mental disorder would have his ability to practice dentistry significantly adversely affected. There is no question that such a condition could be disabling and cause a dental practitioner to be unable to continue to practice his profession. This happened to Petitioner, as demonstrated by the fact that he did not practice dentistry and received disability payments for a period of four years from 1984 to 1988.

The terms "professional competence" and "professional performance" are not defined in section 1128(b)(4)(B). However, the plain meaning of the terms encompasses the ability to practice a licensed service with reasonable skill and safety. Petitioner's mental illness jeopardizes the well-being and safety of children who are his patients, and it impairs his ability to practice dentistry with reasonable skill and safety. There is a nexus between Petitioner's mental illness, his abuse of minor patients, and his ability to function as dentist. This nexus is evidenced by the fact that the California Board ordered Petitioner to undergo a psychiatric evaluation regarding his judgment and/or ability to function as a dentist in accordance with safety to the public. I.G. Ex. 8. In view of the foregoing, I conclude that Petitioner's "professional competence" and "professional performance" were at issue in the Iowa disciplinary proceeding, within the meaning of section 1128(b)(4)(B) of the Act.[5]

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[5] While it is undisputed that the victims of Petitioner's sexual abuse were patients in Petitioner's dental practice, I would reach this conclusion even if they had not been. Sexual abuse of children by a dentist, even if those children have not been patients, raises the question of whether that dentist can practice

(continued...)

II. The reasonableness of the I.G's exclusion

Having concluded that the I.G. has authority to exclude Petitioner, I must next consider whether the length of the exclusion imposed and directed against Petitioner is reasonable. On January 29, 1992, the Secretary published regulations which, among other things, establish criteria to be employed by the I.G. in determining the length of exclusions to be imposed pursuant to section 1128(b)(4) of the Act. 42 C.F.R. § 1001.501. These regulations also include provisions which govern appeals of such exclusions. 42 C.F.R. Part 1005. In considering the issue of the reasonableness of the length of the exclusion, the threshold question is whether these regulations apply to this case.

A. The new regulations promulgated on January 29, 1992, do not govern the disposition of this case.

The I.G. asserts that the regulations promulgated January 29, 1992 apply to any exercise of ALJ authority on and after that date. The I.G. asserts, therefore, that all cases pending on January 29, 1992 are controlled by the new regulations. The I.G. also cites sections 1005.4(c)(1) and (5) to argue that I have no authority to find the regulations invalid or to review the I.G.'s exercise of discretion to exclude or to review the scope or effect of such exclusion. According to the I.G., the authority of the ALJ is limited to determining whether the I.G. had the legal authority to exclude Petitioner. If it is decided that the I.G. had the legal authority to exclude Petitioner, the regulations prohibit any further inquiry into the length of the exclusion chosen by the I.G. The I.G. avers, therefore, that I must affirm the I.G.'s exclusion in this case and that I do not have the authority to reduce it under the new regulations. I.G. Regulations Brief 3, 5.

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[5](...continued)
his profession without endangering the health, safety, and well-being of the children he treats. Any licensing proceeding concerning allegations of such misconduct by a dentist would therefore relate to the dentist's professional competence and professional performance. While the fact that Petitioner had a dentist-patient relationship with the children he abused serves to strengthen the nexus between Petitioner's misconduct and his professional competence and performance, the existence of this factor is not necessary to reach the conclusion that such a nexus exists.

In opposition, Petitioner contends that the new regulations do not apply to this case because they were not in effect at the time that the I.G. made his exclusion determination. P. Posth. Br. 10.

I find that these regulations are not applicable to cases pending as of the effective date, January 29, 1992. To the extent that the regulations deprive parties of the opportunity for a full hearing as to the reasonableness of their exclusions, those regulations would, if applied to determinations made prior to the regulations' effective date, strip parties of previously vested rights under sections 1128(b) and 205(b)(1) of the Act. There is nothing in the regulations which can be interpreted as a directive to apply them in a way which would produce such a consequence. Such an application would create manifest injustice and would be an unlawful retroactive application of the new regulations, a result not intended by the Secretary. I have previously addressed this issue in depth in my decision in Charles J. Barranco, M.D., DAB CR187 at 16-27 (1992). For purposes of this case, I incorporate the rationale in Barranco that Petitioner's hearing rights would be substantially adversely affected and it would be manifestly unjust to apply the new regulations to this case.

Moreover, the Court of Appeals for the Fourth Circuit held in Varandani v. Bowen, 284 F. 2d 307, 312-313 (4th Cir. 1987), that regulations implementing section 1156 of the Act would not apply retroactively even where the new regulations arguably place the excluded party in a better position to defend against the I.G.'s exclusion. As here, the new regulations at issue in Varandani specified an effective date and were silent on the issue of retroactivity. In such circumstances, the court applied the "usual rule that laws are not retroactive unless they expressly so provide". Id. at 312.

Even assuming arguendo that the new regulations apply to this proceeding, there remains the question of whether Part 1001 is binding on a hearing held under section 205(b)(1) of the Act. As I stated in Barranco, I conclude that the regulations contained in Part 1001 were not intended to provide binding criteria for evaluating the reasonableness of an exclusion at the level of an administrative hearing. The essence of my position is that there is no legislative history or DAB precedent in section 1128(b) permissive exclusion cases to support the application of minimum specified periods of exclusion. While the new regulations arguably reflect the Secretary's intent to have such minimum exclusions apply in permissive cases, the preamble and comments to the new

regulations, as well as the regulations themselves, when considered in relation to the applicable legislative history and DAB precedent, strongly suggest that the Secretary intended that Subpart C, pertaining to permissive exclusions, only applies to the I.G.'s decision to exclude, and did not intend to abrogate any of the hearing rights afforded providers under section 205(b)(1) of the Act. Barranco, DAB CR187 at 24-27.[6] Until an appellate panel interprets these regulations as the I.G. contends, I shall continue to apply them consistent with my obligation under the Act to consider a myriad of facts needed to determine, as in this case, the length of time necessary to establish that Petitioner is not likely to repeat the type of conduct which precipitated his exclusion. Robert Matesic R. Ph. d/b/a Northway Pharmacy, DAB 1327 at 12 (1992).[7]

B. The remedial purpose of section 1128 of the Act is satisfied by the following exclusion: Petitioner is excluded not less than five years. If at the end of that time California has given him an unrestricted dental license, or at any time thereafter that California gives

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[6] There was no appeal in Barranco. However, in a recent decision an appellate panel of the DAB held that application of the 1992 regulations to a case involving an exclusion imposed under section 1128(b)(4)(A) of the Act would not be consistent with past DAB decisions and would represent substantive changes in the law. The appellate panel concluded that absent specific instructions in the Act or the preamble to the 1992 regulations directing that the regulations apply to pending cases, the Secretary did not intend to alter a petitioner's substantive rights in such fundamental ways as suggested by the I.G. Since it concluded that the provisions of the 1992 regulations on which the I.G. relied do not apply retroactively to pending cases, the appellate panel stated that it did not reach the question of the effect of these provisions on future proceedings to which they would apply. Behrooz Bassim, M.D., DAB 1333 at 5-9 (1992).

[7] The appellate panel's decision in Matesic was issued after the effective date of the new regulations. While there is no reference in the decision to the new regulations, it appears that this panel does not believe that the regulations alter the basic responsibility of the ALJ to consider the reasonableness of permissive exclusions in section 1128(b) cases. The panel affirmed the ALJ's three-year exclusion for reasons other than the new regulations.

him an unrestricted dental license, he may apply for reinstatement as a Medicare/Medicaid provider. Or, if at the end of the five years another State has given him an unrestricted dental license, or at any time after the five years that a State gives him an unrestricted dental license, and 1) he is practicing there; and 2) prior to giving him an unrestricted dental license, that State had examined all of the legal and factual issues considered by the California Board, then he may apply for reinstatement as a Medicare and Medicaid provider.

In deciding whether an exclusion under section 1128(b)(4) is reasonable, I must analyze the evidence of record in light of the exclusion law's remedial purpose. Lakshmi N. Murty Achalla, M.D., DAB 1231 (1991).

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 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 beneficiaries and recipients. See, S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S. Code Cong. and Admin. News 682.

When considering the remedial purpose of section 1128, the key term to keep in mind is "protection", the prevention of harm. Through exclusion, individuals who have caused harm, or demonstrated that they may cause harm, to the federally-funded health care programs or their beneficiaries or recipients are no longer permitted to receive reimbursement for items or services which they provide to program beneficiaries or recipients. Thus, untrustworthy providers are removed from positions which provide a potential avenue for causing future harm to the program or to its beneficiaries or recipients.

No statutory minimum mandatory exclusion period exists in cases where the I.G.'s authority arises from section 1128(b)(4)(B). By not mandating that exclusions from participation in the programs be permanent, however, Congress has allowed the I.G. the opportunity to give individuals a "second chance". An excluded individual or entity has the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider. Achalla, DAB 1231.

The hearing is, by reason of section 205(b)(1) of the Act, de novo. Evidence which is relevant to the reasonableness of an exclusion is admissible, whether or

not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Evidence which relates to a provider's trustworthiness or the remedial objectives of the exclusion law is admissible at an exclusion hearing even if that evidence is of conduct other that which establishes statutory authority to exclude a provider.

I do not, however, substitute my judgment for that of the I.G. An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "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." (Emphasis added.) 48 Fed. Reg. 3744.

The determination of when an individual should be trusted and allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs is a difficult issue. It involves consideration of multiple factual circumstances. The appellate panel in Matesic provided a listing of some of these factors, which include:

> the nature of the offenses committed by the provider, the circumstances surrounding the offense, whether and when the provider sought help to correct the behavior which led to the offense, how far the provider has come toward rehabilitation, and any other factors relating to the provider's character and trustworthiness.

Matesic, DAB 1327 at 12.

It is evident that in evaluating these factors I must attempt to balance the seriousness and impact of the offense with existing factors which may demonstrate trustworthiness. The totality of the circumstances of each case must be evaluated in order to reach a determination regarding the appropriate length of an exclusion.

The uncontroverted evidence in this case establishes that on November 17, 1989, the Iowa Board filed a Statement of Charges alleging that Petitioner sexually abused children who were patients in his dental practice. Although Petitioner was entitled to a hearing on these charges before his license could be revoked, he chose not to contest the allegations against him. Instead, he

admitted to sexually abusing four of the five children described in the Statement of Charges. I.G. Exs. 1, 2. Petitioner surrendered his Iowa dental license, and agreed not to reapply for licensure in the State of Iowa. The fact that Petitioner surrendered his dental license in the face of charges of wrongdoing, and in circumstances where he had the opportunity to defend himself, raises a presumption that he cannot be trusted to care for Medicare and Medicaid beneficiaries and recipients. John W. Foderick, M.D., DAB CR43 at 5 (1990).

The nature and gravity of Petitioner's offenses is also reflected in actions taken by licensing authorities in the States of California and Washington. In a decision which became effective on March 1, 1991, the California Board revoked Petitioner's dental license, but stayed the revocation for five years under certain conditions, including the condition that Petitioner successfully comply with the probation program established by the California Board for at least five years. These conditions also include the requirements that Petitioner undergo a psychiatric examination by a psychiatrist approved by the California Board for the purpose of evaluating Petitioner's ability to function as a dentist in accordance with safety to the public and that Petitioner undergo psychiatric treatment if the evaluating psychiatrist determines that this is necessary. These requirements show that, in the eyes of the California Board, Petitioner suffered from a mental condition which needed to be monitored. The California Board also prohibited Petitioner from treating children under eight years of age and required that a third party be present during the treatment of all patients between the ages of eight and eighteen. These requirements show that the California Board perceived Petitioner to be threat to his minor patients. I.G. Ex. 8.

Similarly, on September 13, 1991, the Washington Board issued a decision revoking Petitioner's dental license, but staying the revocation indefinitely and placing Petitioner on probation with certain conditions, including that he comply with the conditions established by the California Board. This decision shows that the Washington Board concurred with the California Board's opinion that Petitioner's offenses were serious and that he requires continuing supervision. I.G. Ex. 17.

Petitioner admits that he sexually abused four children during the period from 1978 to 1981. I.G. Ex. 2. Petitioner also admits that the children he abused were 12, 13, or 14 years old. Tr. 195-196.

According to the American Psychiatric Association's diagnostic criteria for the sexual disorder of pedophilia, the essential feature of this disorder is recurrent, intense, sexual urges and sexually arousing fantasies, of at least six months duration, involving sexual activity with a prepubescent child. The age of the child is generally 13 or younger. The age of the person with pedophilia is set at age 16 years or older and at least five years older that the child. People with pedophilia who are attracted to girls usually prefer eight-to-ten-year old children and those attracted to boys usually prefer slightly older children. The disorder usually begins in adolescence, although some people with pedophilia report that they did not become aroused by children until middle age. 1987 Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised (DSM-III-R) at 284-285. [I.G. Ex. 15.]

It is evident from Petitioner's admissions of sexual misconduct that Petitioner repeatedly engaged in sexual misconduct with four different children aged 12, 13, or 14, over a protracted period of several years. This pattern of behavior meets the 1987 DSM-III-R diagnostic criteria for pedophilia. In addition, the 1987 DSM-III-R states that a predisposing factor for pedophilia is that many people with pedophilia were themselves victims of sexual abuse in childhood. The evidence shows that Petitioner was molested as a child by older children and that he was molested by an adult when he was in the eighth or ninth grade. I.G. Ex. 11/4; Tr. 160.

The fact that Petitioner's conduct meets the diagnostic criteria for pedophilia is disturbing because the course of this disorder is usually chronic, especially in those attracted to the same sex. The DSM-III-R states that the recidivism rate for people with pedophilia involving a preference for the same sex is roughly twice that of those who prefer the opposite sex. I.G. Ex. 15. Based on information contained in the DSM-III-R, Petitioner is at risk for repeating his sexual misconduct because of the chronic nature of pedophilia and the fact that Petitioner's abuse involved children of the same sex.

During the October 8, 1991 hearing, Petitioner testified that the four children he admitted to abusing when he signed the Iowa Consent Order were children of his close friends. Petitioner stated that his friendship with the parents of two of the children went back to his days in graduate school, before the children were born. He knew one of the boys since he was three or four years old, and the other boy he had known for three to four years before the sexual misconduct took place. Petitioner stated that

the children were "like family" and that he was "like an uncle" to them. Tr. 158, 183, 241-242. This is troubling because it shows that Petitioner is capable of taking advantage of the trust a child feels towards a close family friend in order to gain sexual access to that child. Petitioner also violated the trust inherent in the longstanding and close friendship between him and the parents of the children. His conduct shows that he is capable of placing the satisfaction of his sexual desires above the health and safety of the children of his close friends.

Petitioner testified that his consumption of alcohol was a contributing factor in these incidents of abuse. Petitioner stated that during the period these incidents took place between 1978 and 1981, he was a "borderline alcoholic". Tr. 156-157. Petitioner testified that while he has "wine at dinner" and "a Margarita after a round of golf", he no longer engages in the "binge drinking" that he has done in the past. Tr. 242-244. Although there is no evidence that Petitioner abuses alcohol at present, his history of alcohol abuse is disturbing. Given his history of problems with controlling his drinking in the past, Petitioner is at risk for abusing alcohol in the future. Were Petitioner to relapse and again engage in drinking binges, he would also be at risk for repeating his sexual misconduct.

Petitioner did not on his own initiative seek help to end the sexual abuse of his friends' children. Petitioner testified that in December of 1981 he was "confronted" by the parents of some of the victims regarding his sexual encounters with their children. To his credit, Petitioner admitted his behavior to the parents at that time. Tr. 151. For the next year and a half, Petitioner and the families of the victims decided to keep the matter "private". It was not until May of 1983, when one of the families "decided that I needed to seek some professional help with regards to my problem", that Petitioner actually sought professional counseling for his condition. Tr. 152.

The record shows that in May of 1983 Petitioner began receiving psychiatric treatment with a family therapist referred to him by one of the parents involved in the matter. Tr. 151. This therapist then brought the matter to the attention of the Department of Social Services, and an investigation ensued. Tr. 159-160. Petitioner stated that this investigation turned out to be a "God-awful situation" because many of his friends were shocked at learning about his misconduct when the authorities started interviewing them. I.G. Ex. 11/3. During this

period, Petitioner began to exhibit "all the classic signs" of manic episodes. He was not sleeping, had grandiose ideas, and was saying wild things. Tr. 163. As a result, in July 1983, his friends involuntarily committed him to a mental institution, where he was diagnosed as having a manic-depressive illness (bipolar disorder). Tr. 162, I.G. Ex. 11/3.

Petitioner testified that the day before he was committed to the mental institution, there was another incident of sexual misconduct involving a 12-year-old boy who lived in his neighborhood. Petitioner admitted that he asked this boy to pull his swim trunks down, but stated that he did not sexually manipulate him. Tr. 203-204. In describing this incident, Petitioner stated that he "was definitely not in a normal state at that time". Tr. 196-197; 203-204. This occurrence of sexual misconduct is troubling because it happened two and a half years after the incidents involving the four other boys during the period from 1978 to 1981. This incident suggests that Petitioner's sexual misconduct is episodic in nature, and that Petitioner has a propensity to repeat this misconduct even after relatively long periods when he kept his sexual impulses under control. This incident also suggests that Petitioner is particularly at risk for engaging in this type of misconduct in the event that he ever experiences another manic phase of his bipolar disorder.

Petitioner was discharged from the hospital in August 1983, and he returned to his Iowa dental practice. However, in February of 1984, an adolescent he met while he was in the hospital accused him of molesting him. Petitioner vehemently denied the allegation, and the case was never prosecuted. Tr. 167-169. The record does not contain sufficient evidence to prove that Petitioner actually perpetrated this sexual abuse as alleged, and I am not convinced that these allegations are true. Therefore, it is not possible for me to draw meaningful inferences as to Petitioner's trustworthiness from this alleged episode.[8]

Petitioner's partner in his dental practice told Petitioner that he no longer wanted to associate with

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[8] Just because I am not persuaded that the adolescent's allegations are true does not mean that I must find Petitioner's version is true. I am not required to, nor do I find, that Petitioner's claim that he had no sexual involvement with this adolescent is true.

Petitioner professionally after he heard about these allegations in 1984. This prompted Petitioner to sell his practice, and from 1984 to 1988 he was on medical disability for his manic depressive illness. During this period, Petitioner left Iowa, and he obtained his license to practice dentistry in the States of Washington and California. Petitioner eventually settled down in California, and he began practicing as an orthodontist in California in 1988. Tr. 169, 171, 172, 175, 224; I.G. Ex. 2.

The record shows that after Petitioner was released from the hospital in 1983, he continued to receive psychiatric care from a physician named Dr. Plekenbrock. During his hospitalization, Petitioner was treated with lithium, an antimanic drug, and he continued to take this medication from 1983 to 1986. Petitioner testified that, in the fall of 1984, he learned that one of the boys he had abused had been committed to a mental institution. Petitioner stated that he felt responsible for this boy's mental problems, and that this impressed on him the importance of treating his mental condition so that he would not hurt other children. Even after he sold his practice and relocated, Petitioner testified that he continued to return to Iowa every few weeks to receive treatment from Dr. Plekenbrock and he regularly consulted with him by telephone. Petitioner was subsequently evaluated by Stephen C. Hansen, Ph.D., in September 1989, at the request of the Iowa Board, and he began to regularly receive psychotherapy from him up until the present. I.G. Ex. 11/3; P. Ex. 4; Tr. 171, 179-180, 221-223, 230.

These facts show that Petitioner has a history of serious mental illness. His condition was so serious in 1983 that he was involuntarily committed to a mental institution for approximately a month. Subsequent to his hospitalization, Petitioner took lithium for three years to control his condition. He was also disabled from working for four years due to his mental illness, and he has remained under psychiatric care from 1983 to the present.

While Petitioner acknowledges that his sexual misconduct was serious and that it is related to serious psychological problems, he contends that "he has done everything possible to come to terms with what he did and to rehabilitate himself." P. Posth. Br. 4. Petitioner argues that the incidents of sexual abuse were the result of an unusual set of circumstances, which included a difficult breakup of a relationship that he had with a woman for three years, alcohol abuse, and psychological

problems. Petitioner contends that he has addressed these problems and that the exclusion imposed by the I.G. is excessive in view of the fact that there have been no recurrences of sexual incidents with minors since Petitioner's hospitalization in 1983. In addition, Petitioner contends that the psychological evidence establishes that he is not now a danger to the patients he treats. P. Posth. Br. 1-2, 10.

Dr. Hansen, Petitioner's treating psychologist, testified at the hearing that while Petitioner's sexual misconduct technically falls within the 1987 DSM-III-R diagnostic criteria for pedophilia, there are factors which would militate against defining Petitioner as a "true" pedophile. According to Dr. Hansen, pedophiles typically do not express remorse for their actions, and they do not feel concern for their victims. In addition, pedophiles typically exhibit pedophilia in adolescence and this is a pattern of behavior that continues throughout adulthood. Dr. Hansen also stated that the primary sexual preference for a pedophile is prepubescent children. Tr. 68-69, 108, 114, 121-123.

Dr. Hansen opined that Petitioner did not fit this profile because he has expressed guilt for his misconduct and concern for the victims' welfare. Dr. Hansen also stated that there is no evidence that Petitioner engaged in sexual misconduct before he reached middle age and that this misconduct was not a long term pattern that continued throughout Petitioner's lifetime. Dr. Hansen characterized Petitioner's misconduct as being "episodic" in nature, and he expressed the view that the primary cause of Petitioner's sexual misconduct was his manic depressive illness. Tr. 68-69, 109, 117, 127. Dr. Hansen stated that he does not believe that Petitioner has a sexual interest in boys at this time. He testified that since Petitioner's manic depressive illness has been in remission for several years, he does not believe that it is likely that there will be a recurrence of Petitioner's sexual misconduct with boys. Tr. 127.

John E. Hannon, Ph.D., administered psychological tests on Petitioner in conjunction with Dr. Hansen's initial evaluation of Petitioner in 1989. In a report dated November 7, 1989, Dr. Hannon agreed with Dr. Hansen's assessment that there is no longer a "significant risk" that Petitioner will molest children. P. Ex. 2/8.

Dr. Bruce T. Kaldor, a board-certified psychiatrist, evaluated Petitioner in 1991, at the request of the California Board. In a report dated April 3, 1991, Dr. Kaldor agreed with Dr. Hansen that Petitioner

suffered from a manic depressive illness which is now in remission. Dr. Kaldor concluded that Petitioner is not now suffering from a mental disorder which would impair his ability to practice dentistry safely. He stated that Petitioner has insight into his sexual deviance, "which had multiple determinants of which many are no longer present." I.G. Ex. 11/8-9.

The expert medical opinion in this case is consistent in stating that Petitioner has suffered from serious mental illness, but that he has benefitted from psychiatric treatment. The medical evidence is also consistent in stating that Petitioner has been rehabilitated to the degree that he is now unlikely to molest boys under his care. However, Drs. Hansen, Hannon, and Kaldor all qualify this assertion by recommending that Petitioner continue to remain under psychiatric care. Dr. Hansen recommended that Petitioner continue to receive psychiatric treatment for "a minimum" of two years. Tr. 144. Dr. Hannon stated that it was important for Petitioner "to enter into a longstanding psychotherapy experience". P. Ex. 2/8. Dr. Kaldor recommended that Petitioner receive psychotherapy "over the next two years" to "reduce the unlikely risk of emotional regression accompanied by inappropriate sexual behavior." I.G. Ex. 11/9.

Implicit in these repeated recommendations that Petitioner continue to receive psychiatric care is a tacit admission that Petitioner has not been completely cured of his mental problem. I infer from this that while the risk that Petitioner will molest children in the future may be low, there is still some risk that this behavior will recur in the future. In fact, Dr. Hansen testified that he could not guarantee that Petitioner would not sexually abuse children again. He stated that there is still a "good possibility" that Petitioner will again sexually abuse children if he has another manic episode. While Dr. Hansen stated that it is unlikely that Petitioner will have another manic episode, he could not guarantee that this would be the case. Tr. 139, 144.

I have evaluated the evidence before me and I conclude that an exclusion for at least five years is reasonably related to the exclusion law's goal to protect federally-funded health care beneficiaries and recipients from untrustworthy providers.

Petitioner was the victim of sexual abuse as a child on repeated occasions. Childhood victims of sexual abuse are predisposed to perpetrate sexual abuse on other children when they reach adulthood. In fact, Petitioner

admitted that he repeatedly sexually abused four 12 to 14 year old boys who were children of close friends. This abuse occurred over a lengthy period spanning from 1978 to 1981. During this period, Petitioner also admitted that he abused alcohol. Petitioner did not stop the abuse until the parents of the victims intervened and confronted him. While there appears to be a cessation of Petitioner's sexual misconduct for a period after the latter part of 1981, Petitioner admitted that he again engaged in sexually inappropriate behavior with a neighborhood child in July of 1983. Thus, Petitioner has admitted to engaging in repeated incidents of sexual misconduct involving five different 12 to 14 year old boys over a five year period.

As I noted earlier in my Rationale, this pattern of behavior meets the diagnostic criteria for pedophilia established by the American Psychiatric Association. According to the American Psychiatric Association, pedophilia is usually a chronic condition and the recidivism rate is particularly high for individuals who have perpetrated abuse against the same sex. It is reasonable to infer from the nature of Petitioner's offenses, and from the circumstances under which they occurred, that Petitioner is untrustworthy. In reaching this conclusion, I am mindful that Dr. Hansen, Petitioner's treating physician, presented extensive testimony articulating why he believes that Petitioner does not fit the profile of a "true" pedophile. However, even Dr. Hansen conceded that Petitioner's conduct fits the diagnostic criteria for pedophilia established by the American Psychiatric Association. In view of the fact that this condition is known to have a high recidivism rate, a substantial period of time is necessary to establish that Petitioner no longer poses a threat to federally-funded health care programs.

Petitioner's conduct is the type of conduct that has the potential for causing devastating harm to the psychological health of others. The majority of Petitioner's patients are minors. Approximately 20 to 25 percent of his patients are aged 11 to 13. Tr. 230. Petitioner has molested boys in this age group in the past. Should Petitioner resume his sexual misconduct, the victims of his abuse would also probably be in this age group. The psyches of children are fragile, and they can suffer severe psychological damage throughout their lives if they are victims of sexual abuse. Tr. 143. In view of the incalculable damage Petitioner could cause were he to engage in similar offenses against his minor patients in the future, it is appropriate to build a

margin of safety into any exclusion imposed on Petitioner.

I recognize that the evidence shows that, since 1983, Petitioner has recognized the need for psychiatric treatment to stabilize his mental condition and that he has been cooperative in this treatment. There is no evidence that Petitioner is now abusing alcohol and, by all accounts, his manic depressive illness is now in remission. The expert medical opinion evidence also consistently states that Petitioner is now unlikely to molest adolescent boys. I am also cognizant that the record is devoid of any allegation that Petitioner engaged in sexual misconduct since 1984. I have also considered the character evidence from Petitioner's coworkers, presented by Petitioner in support of his contention that he no longer poses a threat to Medicare and Medicaid beneficiaries and recipients. These factors all militate in favor of a finding that Petitioner is at low risk for repeating his sexual misconduct in the future. If any of these factors were not present, the absence of that factor might have been a reason to increase the period of exclusion.

While I accept that there is a low likelihood that Petitioner will sexually abuse patients under his care, I find that the evidence establishes that there is still some chance that this could occur. The medical opinion evidence consistently states that Petitioner continues to need psychiatric care. This suggests that Petitioner still has psychological problems which must be addressed. In addition, Dr. Hansen stated that the nature of manic depressive illness is episodic and that there is some risk that Petitioner could have a recurrence of a manic episode in the future, particularly if he is under stress. If such a recurrence occurs, then, according to Dr. Hansen, there is a "good possibility" that Petitioner's sexual misconduct will recur. Tr. 144. In view of the serious damage which can result from sexual abuse, I find that a lengthy exclusion is reasonable even if there is a slight possibility that Petitioner will engage in this conduct. See Norman C. Barber, D.D.S., DAB CR123 (1991).

Petitioner practices dentistry in the State of California. The State of California therefore has a substantial interest in protecting its citizenry from untrustworthy health care providers. The evidence shows that the California Board made a thorough inquiry into the facts of this case, and I find the conclusions reached by the licensing authorities to be persuasive.

The California Board revoked Petitioner's dental license, but stayed the revocation for a period of five years. The stayed revocation was subject to certain conditions, including that Petitioner successfully comply with the probation program established by the California Board. While the California Board contemplates that the period of probation will be at least five years, it may extend the probation period under certain circumstances, such as the filing of an accusation against Petitioner's license. The California Board also contemplates that Petitioner's dental license will be fully restored upon successful completion of the probation period. I.G. Ex. 8.

The I.G. seeks to exclude Petitioner until such time as Petitioner has satisfied the State of California that he has successfully completed his probation and has his license to practice dentistry in California fully restored. Since the California Board contemplates that Petitioner's probation will be for at least five years, the I.G. seeks to exclude Petitioner for a minimum of five years. The evidence in this case provides strong justification for an exclusion for a period of at least five years. I find that a minimum exclusion of five years is, in this case, consistent with the purpose of protecting federally-financed 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 those beneficiaries and recipients.

However, the California Board may also extend the probation period for an indefinite period beyond five years in the event that it deems this to be necessary to protect the citizens of California. In past cases under section 1128(b)(4), the I.G. has sought and been upheld by appellate panels of the DAB in obtaining exclusions of an indefinite duration based on relicensure in the State where the original license was revoked, suspended or surrendered. See, Leonard R. Friedman, M.D., DAB 1281 (1991) and John W. Foderick, M.D., DAB 1125 (1990). As the appellate panel concluded in Friedman, such a remedy is reasonable since that State, in exercising its decision on relicensure, would act in a careful and prudent manner in the best interest of its citizens. Friedman at 7. In such circumstances, it is appropriate for the Secretary, in discharging his responsibilities to the Medicare and Medicaid programs, to defer to such State in determining that a health care provider has demonstrated sufficient trustworthiness to justify seeking application for admission into the program.

Here, Petitioner's original license was revoked in Iowa. The State of Iowa has no further interest in Petitioner

because he does not intend to practice there, and the citizens of Iowa are not presently patients of his medical practice. Recognizing this, the I.G. modified his original exclusion, which was coterminous with Petitioner's relicensure in Iowa, to be coterminous with Petitioner's relicensure in California, where he now lives and works. Assuming that Petitioner continues to live and work in California upon the expiration of the five years which I have found to be the minimum length of time necessary to establish his trustworthiness, an indefinite exclusion until Petitioner's California license is fully restored is reasonable. This is particularly evident since it is conceivable that the State of California could conclude, based on evidence that Petitioner's mental illness is not completely resolved, to continue his probationary status and restrictions beyond the original five year period. Alternatively, if Petitioner practices in another State before his license in California is fully restored, then Petitioner's exclusion will last until the minimum five year period expires and until the new State licensing agency grants Petitioner a license without restriction after conducting a full review of all the legal and factual issues which were before the State of California.[9]

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[9] I note that the need to retain the minimum five year exclusion even when Petitioner relocates to another state and seeks licensure to practice dentistry is a departure from the exclusion I imposed in Barranco. In that case, I deferred to the action of the licensing agency of any new State where it considered the facts and legal issues which resulted in Petitioner's original license revocation. I set no minimum period of exclusion. However, the case at bar presents considerations, not present in Barranco, that warrant a different result. Here, the cause of Petitioner's misconduct which led to his license revocation was based on mental illness, for which he still receives treatment and which may reoccur in the future. Moreover, the potential future victims of Petitioner's sexual misconduct, in the event his mental illness leads to such conduct, would be minor male children who are in need of special protection due to their vulnerability and capacity for significant harm from Petitioner's actions. I am unwilling, considering such a threat to the Medicare and Medicaid programs, to leave to the determination of another State the question of when the exclusion should end, at least until a minimum five year period has expired, during which time Petitioner can demonstrate he

(continued...)

CONCLUSION

Based on the material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs was authorized by section 1128(b)(4)(B) of the Act. In addition, I conclude that the remedial purpose of section 1128 is satisfied by the following exclusion: Petitioner is excluded not less than five years. If at the end of that time California has given him an unrestricted dental license, or at any time thereafter that California gives him an unrestricted dental license, he may apply for reinstatement as a Medicare/Medicaid provider. Or, if at the end of the five years another State has given him an unrestricted dental license, or at any time after the five years that a State gives him an unrestricted dental license, and 1) he is practicing there; and 2) prior to giving him an unrestricted dental license, that State had examined all of the legal and factual issues considered by the California Board, then he may apply for reinstatement as a Medicare/Medicaid provider.

/s/

Edward D. Steinman
Administrative Law Judge

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[9](...continued)
is trustworthy to resume his participation as a provider.