Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	DATE: August 6, 1993
Alan R. Bonebrake, D.C.,	
Petitioner,	Docket No. C-92-003 Decision No. CR279
- v. -	
The Inspector General.	

DECISION

On July 22, 1991, the Inspector General (I.G.) notified Alan R. Bonebrake, D.C., (Petitioner), that he was being excluded from participation in the Medicare program and certain federally assisted State health care programs as defined in section 1128(h) of the Social Security Act (Act).[1]

The I.G. alleged that this action was being taken because Petitioner's license to provide health care in Kansas was surrendered during formal disciplinary proceedings before the Kansas State Board of Healing Arts (KSBHA). Petitioner was informed that he was being excluded under the authority of section 1128(b)(4) of the Act for an indefinite time, until he obtained a valid license to practice chiropractic in Kansas. In a letter dated September 28, 1991, Petitioner challenged the exclusion and requested a hearing before an administrative law judge (ALJ).

I have considered the evidence of record, the parties' arguments, and the applicable laws and regulations. I

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

conclude that the I.G. was authorized to impose and direct an exclusion against Petitioner by section 1128(b)(4) of the Act. I conclude also that the regulations at 42 C.F.R. Part 1001, published and effective on January 29, 1992, and as clarified on January 22, 1993, do not apply retroactively to establish a standard for adjudicating the length of the exclusion in this case. In addition, I conclude that the three-year exclusion imposed by the I.G. is excessive. I conclude that the remedial purpose of section 1128 of the Act will be served in this case by excluding Petitioner for two years. Alternatively, Petitioner's exclusion may be for less than two years if another State licensing authority, after Petitioner has fully and accurately disclosed to it the circumstances surrounding his license surrender in Kansas, grants Petitioner a new license or takes no significant adverse action as to a currently held license. See Tajammul H. Bhatti, M.D., DAB 1415, at 12 (1993).

PROCEDURAL BACKGROUND

I convened a prehearing conference with the parties on November 15, 1991. During the prehearing conference, the parties jointly requested that the proceedings be stayed so that they could pursue settlement negotiations. Subsequently, the parties informed this tribunal that their attempts to settle the case had been unsuccessful, and I held a prehearing conference on February 13, 1992.

At the February 13th prehearing conference, Petitioner contended that his indefinite exclusion from the Medicare program was unreasonable but conceded the I.G.'s authority to exclude him. The I.G. informed Petitioner that in light of information which Petitioner had supplied to the I.G., the indefinite exclusion was being modified to a term of three years. The I.G. modified the term of the exclusion based on the fact that Petitioner was licensed to practice chiropractic in Texas and Oklahoma. The I.G. then moved for summary disposition and Petitioner agreed to respond. The parties timely filed their motions and briefs on the issue of whether the I.G. was entitled to summary disposition.

On July 24, 1992, I issued a Ruling in which I granted in part and denied in part the I.G.'s motion for summary disposition. I concluded that, based on the undisputed material facts and the law, the I.G. had the authority to exclude Petitioner pursuant to section 1128(b)(4) of the Act. I concluded also that the new regulations published on January 29, 1992 did not govern my decision regarding

the reasonableness of the exclusion. See 57 Fed. Reg. 3298 - 3358 (1992). I decided that there remained disputed material facts as to the reasonableness of the three-year exclusion imposed and directed against Petitioner by the I.G. I then scheduled an in-person hearing on this issue. On November 5, 1992, I held an in-person hearing in St. Louis, Missouri.

On January 22, 1993, the Secretary of the Department of Health and Human Services published a final rule clarifying the scope and purpose of the final regulations published on January 29, 1992. The parties submitted briefs regarding the effect, if any, the clarifying regulations have on this case. As stated more fully hereinafter, I concluded that such regulations did not have the effect of substantially revising the retroactive application of the January 29, 1992 regulations to this case.

On February 13, 1993, Petitioner filed a motion to supplement the record, and proffered a letter from an individual that he contended demonstrated the lack of credibility of an affiant relied on by the I.G. to show Petitioner did not utilize proper chiropractic techniques. The I.G. filed an objection to Petitioner's motion. On March 4, 1993, I issued a Ruling in which I denied Petitioner's motion to supplement the record. In denying Petitioner's motion, I concluded that Petitioner had a full opportunity to present his case, and, given the extensive and voluminous evidence he had already presented to show that he comported with valid chiropractic techniques, there would be potential prejudice to the I.G. if I were to allow Petitioner's untimely and cumulative evidence into the record.

On April 9, 1993, I held a posthearing telephone conference with the parties. The parties were given a final opportunity to submit additional evidence relevant to the standards established by 42 C.F.R. § 1001.505(c)(1) and (2), so that the record would be complete if I decided that this case is governed by the new regulations and the clarifying regulations. During the conference, counsel for the I.G. stated that she would offer no further evidence in the event that I decided this case under the new regulations and the clarifying regulations. Petitioner stated that he would offer no further evidence pursuant to 42 C.F.R. § 1001.501(c)(1). However, with regard to 42 C.F.R. § 1001.501(c)(2), Petitioner wanted the opportunity to submit additional documents. Petitioner filed an additional exhibit and brief. I marked the exhibit as

Petitioner's Exhibit (P. Ex.) III/7.[2] The I.G. filed a response.

ISSUES

The issues in this case are:

1. Whether regulations published by the Secretary on January 29, 1992 and the clarifying regulations published on January 22, 1993 are applicable to this case.

2. Whether the three-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background of case

1. Petitioner, Alan R. Bonebrake, D.C., was licensed to practice chiropractic in Kansas, having been issued License No. 3524. Tr. at 179; I.G. Ex. 3 at 2.[3]

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[2] Petitioner submitted his exhibits in three separate volumes. The volume number of Petitioner's exhibits will be referred to by the use of Roman numerals (I, II, or III). Accordingly, I received into evidence P. Exs. I/1 - 12; II/1 - 10; III/1 - 7. When no page number is used in reference to an exhibit, for example, P. Ex. I/1, the reference is to the entire exhibit. I admitted into evidence P. Exs. I, II, and III. I admitted also into evidence I.G. Exs. 1 - 20.

[3] Citations to the record in this case are as follows:

I.G.'s Exhibits	I.G. Ex. (number at page)
I.G.'s Motion and Brief for Summary Disposition	I.G. Brief (page)
I.G.'s Reply	I.G. Reply (page)
I.G.'s Posthearing brief and Motion for Reconsideration	I.G. Posthearing Br. (page)
I.G.'s Posthearing Reply	I.G. Posthearing Reply (page)
Petitioner's Exhibits	P. Ex. (volume/number at page)
Petitioner's Motion and Brief for Summary Disposition	P. Brief (page)

such examinations constituted unprofessional conduct. I.G. Ex. 3.

7. In his Answer, Petitioner admitted to making additions to the records of patient D, but denied that the conduct was false, fraudulent, or deceptive, or that it constituted unprofessional conduct. I.G. Ex. 3 at 12 - 14.

8. In his Answer, Petitioner admitted advertising, but denied that the advertising was misleading or constituted unprofessional conduct. I.G. Ex. 3 at 12 - 14.

9. In a letter to KSBHA dated August 5, 1990, Petitioner voluntarily surrendered his license to practice chiropractic in Kansas. Petitioner stated also that he planned to participate in the Kansas Chiropractic Association's impaired-physicians program for two years. I.G. Ex. 5.

10. On October 13, 1990, a Final Order was entered before KSBHA. KSBHA considered Petitioner's voluntary surrender of his license to practice chiropractic as (1) a "plea of no contest" and as a "suspension" of his license; and (2) a disciplinary sanction for reporting purposes to any State or national medical federation or clearing house for disciplinary sanctions of health care providers and licensees. I.G. Ex. 3 at 16 - 22.

11. Petitioner approved and signed the Final Order of KSBHA. I.G. Ex. 3 at 21.

12. On July 15, 1991, Petitioner removed himself from the Kansas Chiropractic Association's impaired-physicians program without completing the program. I.G. Ex. 8.

13. Prior to withdrawing from the impaired-physicians program, Petitioner was referred to a psychologist for an evaluation and treatment. The psychologist found no significant psychopathology but recommended ongoing therapy to assist Petitioner in dealing with his feelings and to relate more appropriately to people, particularly female patients. Petitioner stated that the psychologist advised him that he had no chance of regaining his license unless he admitted his guilt. I.G. Ex. 8.

14. Petitioner's premature removal from the impaired physicians program when (1) he had no psychopathology and (2) he would have to admit that he engaged in sexual misconduct with his patients, an allegation that was never proven, is not in itself a indication that

2. On April 21, 1990, KSBHA found probable cause to suspect Petitioner had committed acts of unprofessional or dishonorable conduct, was professionally incompetent, or had committed other acts which were violations of the Kansas Healing Arts Act, K.S.A. § 65-2801 et seq. (1989 Supp.), and requested the disciplinary counsel to prosecute an action against Petitioner. I.G. Ex. 3 at 2.

3. On May 17, 1990, a petition on behalf of KSBHA was filed against Petitioner, case no. 90-DC-0198, which is incorporated as if fully set out herein. I.G. Ex. 3.

4. The petition filed by KSBHA alleged that Petitioner had committed acts of unprofessional conduct in violation of K.S.A. § 65-1836(b), to wit: over a period of years, Petitioner had engaged in unprofessional conduct; conduct likely to harm the public; sexual abuse, misconduct, or exploitation related to his professional practice and serving no legitimate medical purpose, including breast examinations and other inappropriate touching; and that Petitioner had repeatedly failed to practice the healing arts with that level of care, skill, and treatment which is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances. I.G. Ex. 3 at 3 - 8.

5. The petition on behalf of KSBHA found probable cause that Petitioner had altered the medical records of one patient in that he used false, fraudulent, or deceptive statements in such patient's record, and as to this patient he also failed to keep written medical records describing services, including pertinent findings and examination results, such conduct being unprofessional conduct as defined in K.S.A. § 65-2837(b)(17) and (25); and that Petitioner used newspaper and radio advertising, which KSBHA concluded were acts of unprofessional conduct in violation of K.S.A. §§ 65-2836(b), 65-2837(b)(7), (b)(8), 65-2885. I.G. Exs. 3 at 7 - 8; 4 at 23 - 24.

6. Petitioner filed an Answer to KSBHA's petition. He admitted to performing breast examinations on four female patients -- namely, A, B, C, and D -- but he denied that

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Petitioner's Reply Brief	P. Reply (page)
Petitioner's Posthearing Reply Brief	P. Posthearing Reply (page)
Transcript	Tr. (page)
Findings of Fact and Conclusions of Law	FFCL

Petitioner is untrustworthy to be a program provider. FFCL 12 - 13, 17.

15. The charges filed against Petitioner by KSBHA constituted a formal disciplinary proceeding by a State licensing authority concerning Petitioner's professional competence or performance. FFCL 4 - 5; Social Security Act, section 1128(b)(4)(B).

16. Petitioner surrendered his Kansas license to practice chiropractic while a formal disciplinary proceeding was pending before the State licensing authority and the proceeding concerned his professional competence or professional performance. FFCL 1 - 15; Social Security Act, section 1128(b)(4)(B).

17. Since Petitioner did not contest the charges against him in Kansas, no licensing authority or court has evaluated the evidence against him and determined his guilt or innocence.

Alteration of a patient's medical record

18. As a matter of standard conduct of practice, chiropractors like other health care providers, are required to keep complete and accurate records of their examination and treatment of patients. K.S.A. § 65-2837(b)(25); I.G. Ex. 19 at 4.

19. Petitioner admitted to altering the record of patient D by putting in supplemental information, but contends that such alteration was an act of inadvertence and not a falsification of the record. Tr. 139.

20. Petitioner admitted that he failed to put into patient D's record that "when I walked in the room she was slouched forward and that I did a chest/breast exam." He further admitted this addition to the patient record occurred approximately five to six months after the examination and after the patient's father accused him of "kissing his daughter on the neck after a breast exam . . ." Tr. 140 - 143.

21. Although Petitioner denies that the alteration of patient D's record was self-serving, it is apparent that the alteration of the patient record provided petitioner with a purported medical basis in response to the accusation of sexual misconduct. Tr. 144; FFCL 20.

22. Petitioner's failure to create a complete and accurate record of his examination and treatment of

patient D was not in accord with standard professional chiropractic practice. FFCL 18.

23. Petitioner's failure to adhere to professional chiropractic practice relating to patient records and his belated modification of patient D's record to provide a purported medical basis in response to an accusation of sexual misconduct are indications of his lack of trustworthiness to be a program provider. FFCL 21 - 22.

24. The record is devoid of any evidence that (1) Petitioner's failure to maintain accurate and complete records of his examination and treatment of patients and (2) his belated alteration of patient D's record in response to an accusation of sexual misconduct were part of a pattern; rather it appears to have been an isolated transaction, with no other incidents having been reported since 1989.

25. Petitioner's threat to the program arising from circumstances described in FFCL 20 - 23 has been minimized by the absence of any evidence in the record establishing a continuing pattern or practice of such conduct. Moreover, the exclusion imposed in this case has provided sufficient time for Petitioner to demonstrate whether any propensity to alter records poses a danger or threat to program beneficiaries and recipients.

Newspaper and radio advertisements

26. Petitioner placed an advertisement in a Wichita, Kansas newspaper on June 22, 1989, which was construed to advertise professional superiority or the performance of professional services in a superior manner or to guarantee a professional service contrary to K.S.A. § 65-2837(b)(7), and (8). I.G. Ex. 4 at 29 - 30.

27. The advertisement was placed by the National Institute of Clinical Acupuncture (Institute); the address and phone number given for the Institute was the same as Petitioner's; he was the only member of the Institute; the advertisement did not mention Petitioner's name or the branch of the healing arts in which he was licensed. I.G. Ex. 4 at 30; see also, I.G. Ex. 4 at 66 - 74.

28. On August 24, 1989, KSBHA received an audiotape recording of a radio advertisement placed by Petitioner, which did not identify him as a doctor of chiropractic using the words chiropractor, chiropractic physician, or

D.C. Such failure was construed as a violation of K.S.A. § 65-2885. I.G. Ex. 4 at 30.

29. On April 10, 1990, Petitioner signed a "Stipulation" with KSBHA regarding the aforementioned advertising matters, and, in return for proceedings not being brought against him, he agreed among other things: (1) not to publish in any medium any advertising which may constitute false, misleading, deceptive, or unlawful advertising; (2) to identify himself in all advertisements as a Doctor of Chiropractic; (3) for a period of two years from the date of the Stipulation, any advertisement which he published would be submitted before publication to KSBHA's representatives, for the purpose of advice and comment on the form and content; and (4) a violation of the Stipulation would be prima facie evidence that a violation of the Healing Arts Act had occurred for which KSBHA could suspend, revoke, or limit the license of Petitioner. I.G. Ex. 4 at 31 - 34.

30. The petition filed by KSBHA on May 17, 1990, alleged that Petitioner used newspaper and radio advertising in such a manner as to constitute unprofessional conduct, and appears to contain the same charges as set forth in the Stipulation. FFCL 5.

31. The record contains no indication that Petitioner engaged in such improper advertising after 1989 or that he has violated the Stipulation. While such advertising is an indicia of a lack of trustworthiness by Petitioner, his threat to the program resulting from such advertising is minimal. Moreover, any such untrustworthiness will be fully resolved with the passage of the two-year exclusion imposed by my decision.

General chiropractic practice[4]

32. Dr. Bonebrake, Petitioner, is an acupuncturist, a certified receptor-tonus instructor, chiropractic orthopedist, and has a degree in biology, emphasizing human nutrition. Tr. 135.

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[4] At the in-person hearing held on November 5, 1992, Petitioner and three witnesses for Petitioner testified -- Michael Joseph Fiscella, D.C. (Tr. 22 - 48); Lawrence E. Jaggers, D.C. (Tr. 49 - 104); John C. Lowe, D.C. (Tr. 107 - 133); and Petitioner (Tr. 134 - 187). The I.G. offered no evidence of chiropractic practice other than the affidavit of Dr. John H. Hill, II, a generalist not having the extensive background and training possessed by Petitioner. See I.G. Ex. 17.

33. Dr. Fiscella is a doctor of chiropractic and a Board Certified Chiropractic Orthopedist and his practice is limited to myofascial (muscle and connective tissues) trigger-point therapy; he is a qualified expert in chiropractic. Tr. 22 - 24.

34. Dr. Lowe is a chiropractor with degrees in psychology and biology and an expert in the diagnosis and treatment of myofascial problems; he is a qualified expert in chiropractic. Tr. 108 - 109.

35. Dr. Hill was the Kansas Chiropractic Association's 1992 doctor of the year. He has (1) served on KSBHA's Chiropractic Review Committee for three years and on the Board of the Governor's Healthcare Stabilization Fund for Kansas for seven years, (2) been past president of the Kansas Chiropractic Association, and (3) practiced chiropractic in Kansas for twelve years. Dr. Hill is a qualified expert in chiropractic. I.G. Exs. 17 - 18.

36. Dr. Jaggers specializes in orthopedics, neurology, acupuncture, chiropractic, and stress management. He is a qualified expert in chiropractic and acupuncture.[5] Tr. 53 - 54; P. Ex. III/6.

37. In Kansas, the following persons shall be deemed to be engaged in the practice of chiropractic:

> (a) Persons who examine, analyze and diagnose the human living body, and its diseases by the use of any physical, thermal or manual method and use the X-ray diagnosis and analysis taught in any accredited chiropractic school or college and (b) persons who adjust any misplaced tissue of any kind or nature, manipulate or treat the human body by manual, mechanical, electrical or natural methods or by the use of physical means, physiotherapy (including light, heat, water or exercise), or by the use of foods, food concentrates, or food extract, or who apply first aid and hygiene but chiropractors are expressly prohibited from prescribing or administering to any person medicine or drugs in materia medica, or from performing any surgery, as hereinabove stated, or from practicing obstetrics. K.S.A. § 65-2871.

P. Ex. II/3 at 2.

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[5] Dr. Jaggers' curriculum vitae is set out in P. Ex. III/6.

38. Chiropractors in Kansas may perform general physical examinations, which could include a breast examination, pelvic examination, and rectal examination. Such examinations are a part of the training received by students studying chiropractic medicine. I.G. Ex. 17 at 1; P. Ex. II/2 at 6 - 8.

39. Chiropractors may also perform blood tests, hair analysis, urinalysis, and saliva tests in the office. Tr. 87 - 88.

40. Chiropractic students in Kansas are instructed in the professional and proper manner in which to perform breast examinations on male and female patients. I.G. Ex. 17.

41. Chiropractors who include myofascial work in their practice could perform breast examinations more often than chiropractors who do not include myofascial work. Tr. 130.

42. Dr. Fiscella performed breast examinations on less than one percent of his patients. Tr. 40.

43. Dr. Jaggers does not always examine a patient's breasts; breast examinations are done based on the patient's complaints and other circumstances that might be involved. Tr. 67, 100.

44. The evidence in the record does establish that other chiropractors having similar background and experience as Petitioner do not engage in breast examinations to the same extent as Petitioner. FFCL 42 - 43.

45. The expert opinion establishes that a chiropractor who performs a breast examination or treats the pelvic or anal areas of female patients should (1) inform the patient that the practitioner is going to perform a breast examination or treat the pelvic or anal areas and the purpose for such examination or treatment; (2) ask the patient if she consents to such an examination or treatment; and (3) ask the patient if she wants a third person to be present during such procedures. Tr. 42 - 44, 102 - 104, 130 - 131; I.G. Ex. 17.

Sexual misconduct: (a) breast examinations

46. Patient A had sought treatment from Petitioner in February 1988 for lower back pain and did not return after that visit. She had been to one other chiropractor for lower back pain. I.G. Ex. 14 at 3 - 4.

47. Patient B had sought treatment from Petitioner in September 1988 for back problems; during the three-month period that he treated her, she saw him approximately 20 times. Her back problems had existed for about four years. I.G. Ex. 15 at 4 - 5.

48. Patient C had sought treatment from Petitioner for a slipped or herniated disc; she had approximately 14 or 15 visits. She was treated by a number of different doctors and chiropractors before seeing Petitioner. I.G. Ex. 16 at 11, 35 - 36, 38, 42.

49. Patient D was Petitioner's patient from 1986 until mid-1989; she had sought treatment because of tendinitis in her hands and neck problems. She was treated by a neurologist and chiropractor prior to being treated by Petitioner. I.G. Ex. 4 at 40.

50. The allegations against Petitioner included accusations that he (1) looked for "knots" in a patient's breasts; (2) massaged or kneaded a patient's breasts; (3) while patient was lying on her side, he examined her breast against the examining table; (4) examined "cupped" another patient's breasts; and (5) pinched a patient's nipple and asked if it hurt. I.G. Exs. 4, 14 - 16.

51. Patient B alleged that before she could respond to Petitioner's statement that he was going to do a breast examination, he pulled down the paper gown that she had on and examined her breasts. I.G. Ex. 15 at 5.

52. Most female patients who seek examination and treatment from chiropractors do so without an expectation that they will undergo a breast examination. I.G. Exs. 4, 14 - 16.

53. Dr. Hill, a member of KSBHA's Chiropractic Review Committee, opined that squeezing a patient's breast or nipple and asking "does that hurt" did not constitute a professional or a proper complete breast examination.[6] I.G. Ex. 17.

54. Chiropractic expert opinion establishes that if a chiropractor pinched a patient's breast and asked "does that hurt" without further examination, that "could very

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[6] At the request of the I.G., John H. Hill, II, D.C., submitted an affidavit after reviewing the statement by patient D concerning Petitioner's treatment of her. I.G. Ex. 17.

well be good enough" to constitute a complete examination or part of an examination. Tr. 35, 97.

55. Dr. Lowe testified that he would customarily perform a breast examination if the pectoralis muscle was involved and he would examine the two pectoralis muscles. He would "use pincer palpation to lift and palpate the fatty tissue of the breast and would manipulate the nipple briefly." Tr. 130.

56. Petitioner testified that he had cupped a patient's breasts as part of a breast examination and that "[t]here are several things that are part of a normal medical breast exam and part of a myofascial breast exam." Tr. 163.

57. Expert chiropractic opinion establishes that cupping a patient's breasts is a legitimate procedure used by chiropractors. Tr. 42 - 43; I.G. Ex. 16.

58. The breast examinations performed by Petitioner on patients A, B, C, and D had a legitimate medical purpose and reflect a level of care, skill and treatment in accord with recognized standards of chiropractic care. FFCL 50.

59. Petitioner has treated over 4,000 patients in ten years with upper body complaints and he has performed about 3,000 breast examinations on both female and male patients during that period. Tr. 156.

60. Compared to the number of breast examinations that Petitioner has performed, he has had relatively few complaints. I.G. Ex. 3 at 2 - 7; I.G. Ex. 4 at 74 - 77.

61. Some of the examinations that Petitioner performed were done in connection with acupuncture treatment and his advanced training in other areas; he used adjustment techniques based on this training -- sitting on the table behind patient with his leg up and patient leaning into his leg -- which less well-trained chiropractors would not use. Tr. 53; I.G. Ex. 17 at 2.

62. By letter dated April 28, 1988, KSBHA informed Petitioner that the charges of unprofessional conduct while treating patient C were thoroughly investigated and presented to the Chiropractic Review Committee, which recommended that the case be closed. P. Ex. I/7 at 8.

63. Petitioner was informed that complaints involving breast examinations, which were previously closed, could

be reopened if additional complaints were received against Petitioner. Tr. 173 - 174.

64. The Chiropractic Review Committee recommended also that, in the future, Petitioner should have a female assistant present when giving examinations to female patients. P. Ex. I/7 at 8.

65. Prior to April 1988, generally, there was no nurse or other third party present when Petitioner examined his female patients. I.G. Exs. 4, 14 - 16.

66. Petitioner admitted that in 1988 he first put signs up in his office advising female patients that a third party could be present during examinations. Tr. 174.

67. Petitioner engaged in breast examinations of patients after KSBHA had conducted earlier investigations regarding Petitioner's treatment of his patients, which included complaints regarding breast examinations. I.G. Ex. 4 at 73 - 77.

68. Petitioner was on notice by KSBHA that any additional complaints could reopen the earlier records which were closed. FFCL 63.

69. Most of Petitioner's patients had been treated by other chiropractors or doctors before coming to him and their chiropractic problems had not been resolved by those other practitioners. I.G. Exs. 4 at 40 - 41; 14 at 4; 16 at 35 - 36, 42.

70. Petitioner testified that he always gives a patient an explanation of what he is going to do before he does it; if the patient does not understand, he explains the procedure again or gives the patient the opportunity to accept or reject the procedure.[7] This testimony is contradicted by the statements made by the patients. Tr. 136, 153; I.G. Exs. 4, 14, 16.

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[7] As to other points contained in Petitioner's testimony, I have no evidence of record to dispute the veracity of his statements. I have considered Petitioner's conduct with regard to failing to disclose pertinent information to his patients and his contradictory testimony on this issue. The two-year exclusion imposed shall provide sufficient time for him to no longer pose a danger or threat to program recipients or beneficiaries.

71. Petitioner treated patient D approximately 42 times, performing two breast examinations during that period, despite his alleged misconduct during the first breast examination. An allegation of misconduct in such circumstances is suspect, considering the continuation of extensive treatment after the initial alleged misconduct arose. Tr. 153 - 154.

72. Petitioner filed a lawsuit against a patient D because she failed to pay her bill, and the patient in turn filed a counter lawsuit against Petitioner alleging that he made sexual advances toward her. Tr. 170.

73. The reliability of patient D's allegations that Petitioner committed sexual misconduct is questionable, considering the pending litigation and the continuation of treatment after the initial breast examination. The I.G. did not produce this patient at the in-person hearing where her credibility and demeanor could be evaluated.

74. Petitioner violated his duty of care as a chiropractor, especially since his practice specializes in acupuncture and myofascial treatments, by not properly (1) advising female patients of an impending breast examination and its purpose; (2) advising such persons that they had the right to accept or reject such examination or treatment; and (3) informing them that a third person could be present during the procedure. FFCL 45.

75. In performing breast examinations on female patients who were not given an adequate opportunity to refuse such treatment or to have a third person present, Petitioner's conduct established that he is untrustworthy to provide health care to program recipients or beneficiaries.

76. There is nothing in the record to show that Petitioner performed breast examinations for his own sexual gratification. Such examinations were conducted in accordance with Petitioner's past training and experience and in an attempt to provide relief to patient's complaints of pain and discomfort. FFCL 54, 56 - 61.

Sexual misconduct: (b) other physical contact with patients

77. Patient A indicated that Petitioner's examination was rough and that he "hit every pressure point on my body," including her thighs, and that "my arms and legs were all bruises." I.G. Ex. 14 at 5 - 6.

78. Petitioner massaged patient C's Caesarean scar and massaged in the area of her anus and the patient was afraid to complain because she did not want to seem naive, childish, or insulting. I.G. Ex. 16.

79. For three weeks, three times a week, Petitioner performed deep muscle massages on patient D's outer and inner thighs and buttocks, sometimes getting close to the pubic bone, but the patient never complained about his treatment. I.G. Ex. 4 at 44.

80. Expert chiropractic opinion establishes that acupuncturists may use massage therapy to break up adhesions around surgery scars. Tr. 53 - 54; FFCL 78.

81. The expert chiropractic opinion establishes that whether a person bruises easily depends on the type of examination being done as well as on the nutritional tolerances of the patient. A patient deficient in vitamin B-12, iron, vitamin C, and other nutrients will have a tendency to bruise easily. Females bruise more easily than males. Tr. 86; FFCL 77.

82. Receptor-tonus practitioners, such as Petitioner, locate trigger points or myofascial areas by examination or palpitation of the soft tissues of the body. Tr. 24; FFCL 77 - 80; P. Ex. I/7 at 24 - 29, 41 - 57, 66 - 69.

83. After identifying an area of hypertonicity, receptor-tonus practitioners may apply deliberate pressure on that region in order to eliminate sensitivity and ultimately to relax the area. This technique should always be done at a level that the patient can tolerate. Tr. 25; FFCL 77 - 79.

84. Expert chiropractic opinion establishes that, if a patient came to a practitioner's office complaining of tendinitis of both wrists, neck pain, and had a history of menstrual cramping and recurrent yeast infections, it would be proper for the practitioner to examine the patient's inner thigh area, the pubic bone, the coccyx area, and the breast area. Tr. 73 - 74; FFCL 79.

85. Petitioner's use of myofascial and trigger point therapy on the patients alleging sexual misconduct was done in a manner consistent with appropriate and professional chiropractic care administered by chiropractors having his experience and training. FFCL 80 - 84; Tr. 176.

86. Most female patients who seek treatment from chiropractors do so without an expectation that such

treatment may involve massage or trigger point therapy of the pelvic or anal areas. I.G. Exs. 4, 4 - 16.

87. Petitioner's performance of pelvic or anal trigger point or myofascial examinations or treatment on female patients without (1) informing them that he was going to treat or examine the pelvic or anal areas and the purpose for actions; (2) asking them if they consent to such procedures; and (3) inquiring whether they want a third person to be present is inconsistent with accepted professional chiropractic practice. FFCL 45.

88. In performing such pelvic or anal examinations or treatment on female patients who were not given an adequate explanation or opportunity to refuse such procedures or to have a third person present, Petitioner's conduct established that he is untrustworthy to provide health care to program recipients and beneficiaries.

89. Petitioner admitted that he had hugged patient D and kissed her on the cheek to congratulate her on her engagement. Tr. 142.

90. Patient B complained that Petitioner's behavior was a little strange, in that every time he would come into the treating room, he would put his arm around her from behind, squeeze her, and ask her how she was doing. I.G. Ex. 15 at 7.

91. Petitioner has provided an adequate explanation for his behavior. While he may have been somewhat exuberant in his socialization with patients, the record does not support he acted in this manner for sexual gratification or as a result of any mental disorder. Tr. 136 - 182.

92. Petitioner now recognizes that his past effusive socialization and mannerisms could interfere with his professional relationships with patients. He has indicated that he will be more restrained in his future dealings with his patients. P. Posthearing Br. at 6.

93. Petitioner's socialization and mannerisms with his patients do not pose a threat or danger to program beneficiaries or recipients and do not warrant his exclusion as a program provider.

Petitioner's other chiropractic licenses

94. Petitioner has the burden of proof in establishing the factual elements of 42 C.F.R. § 1001.501 (c)(2) of the regulations. 42 C.F.R. § 1005.15(c).

95. Petitioner is currently licensed to practice chiropractic in Texas and was issued a license there on August 18, 1989. I.G. Ex. 9.

96. On October 8, 1991, the Texas Board of Chiropractic Examiners (Texas Board) wrote Petitioner that its Enforcement Committee "received and reviewed all information available on the complaint filed against you. After extensive investigation, the Enforcement Committee has determined that this does not constitute a violation of the Chiropractic Act of Texas. Therefore, this complaint is dismissed." I.G. Ex. 9 at 4.

97. Petitioner submitted a letter dated April 16, 1993 from the Texas Board which states that Petitioner assisted the Enforcement Committee of the Texas Board during an investigation of allegations against his license in Kansas. Petitioner "presented a volume of documents on our request, that included but was not limited to committee reports and transcripts from [KSBHA], patient files, advertising documents, etc,[.] etc. After this Committee's investigation the Texas Board of Chiropractic Examiners did not discipline Dr. Bonebrake[r]." P. Ex. III/7.

98. The I.G. did not rebut the information contained in the April 16th letter, but instead noted that this letter was in conflict with earlier correspondence from the Texas Board. I.G. Response to Petitioner's Additional Posthearing Br. at 2 - 3.

99. Petitioner submitted extensive information, both orally in writing, to the Texas Board. P. Ex. III/7; I.G. Ex. 9 at 11.

100. Petitioner fully and accurately disclosed to the Texas Board the circumstances surrounding his license surrender in Kansas and, based on such information, including information received from KSBHA, the Texas Board took no significant adverse action against Petitioner's license. FFCL 96 - 99.

101. Petitioner is currently licensed to practice chiropractic in Oklahoma and has been since June 4, 1980. Tr. at 179; I.G. Exs. 11 - 12; P. Ex. I/7 at 97.

102. In a letter dated February 4, 1992 to the I.G., the Oklahoma Board of Chiropractic Examiners (Oklahoma Board) stated that it "took no action against Dr. Bonebrake in regards to his surrendered Kansas license due to the fact there appeared to be no violations of Oklahoma Statute. He was merely required to provide proof of continuing

education taken during 1991 and the renewal fee in order to receive his 1992 license. The Board did in fact investigate this issue and was satisfied that there were no violations." I.G. Ex. 12.

103. The February 4, 1992 letter from the Oklahoma Board is ambiguous as to extent of information it received from Petitioner or KSBHA concerning Petitioner's license surrender in Kansas. FFCL 102.

104. Petitioner failed to meet his burden of proof with regard to the action by the Oklahoma Board because the documents he submitted do not reveal the extent of the disclosure made by Petitioner concerning his license surrender in Kansas and whether the Oklahoma Board was fully apprised of the circumstances surrounding such surrender when it decided to take no action against Petitioner's license. FFCL 102 - 103.

105. Petitioner is also currently licensed to practice chiropractic in Colorado. Tr. at 179.

106. In a letter dated October 19, 1992, the State Board of Chiropractic Examiners in Colorado (Colorado Board) wrote to KSBHA indicating that, based on the information provided, the Colorado Board voted to dismiss KSBHA's complaint against Petitioner. The file on this matter was closed. P. Ex. III/6 at 5.

107. In a report dated August 18, 1992, the Complaints and Investigations unit of the Department of Regulatory Agencies in Colorado conducted an investigation based on the complaint filed with KSBHA. Petitioner provided information which included a written documents which support his examination of the breast (pectoral area) for diagnosis and treatment of referred pain from myofascial and non-myofascial trigger points. Id. at 8.

108. The report of investigation specifically requested from KSBHA: a certified copy of the Final Agency Order; a copy of the investigative report detailing the allegations, findings, and other matters in the case; and confirmation of Petitioner's compliance with such sanctions. Id.

109. Petitioner fully and accurately disclosed to the Colorado Board the circumstances surrounding his license surrender in Kansas and based on such information, including information received from KSBHA, the Board took no significant adverse action against Petitioner's license. FFCL 106 - 108.

110. On March 12, 1992, the Indiana Board of Chiropractic Examiners (Indiana Board) denied Petitioner's application for a license to practice chiropractic because (1) he did not pass an examination in orthopedic testing, neurological testing, and chiropractic technique with a score of 75; and (2) his license was disciplined in Kansas for a violation which bears on his ability to practice competently in Indiana. P. Ex. III/3 at 11.

111. On June 4, 1992, the Indiana Board issued findings of fact and an order pursuant to Petitioner's petition for review of the Indiana Board's denial of his application for licensure. The order stated that Petitioner's application for license was denied because of his failure to pass an oral/practical examination. The Indiana Board overruled its prior determination that Petitioner's Kansas chiropractic license was disciplined for a violation which would have a direct bearing on Petitioner's ability to practice competently in Indiana. P. Exs. III/6 at 1 - 4; III/3 at 11.

112. Based on information provided to the Indiana Board by Petitioner concerning his license surrender in Kansas, the Indiana Board determined that such surrender would not be a basis to deny him a license in Indiana but chose not to grant him a chiropractic license due to his failure to pass an oral/practical examination. FFCL 111.

113. Since Petitioner was not granted a license, the factual predicate of 42 C.F.R. § 1001.501(c)(2) is not met. FFCL 112.

114. The recent actions by the licensing boards of Texas, Oklahoma, Colorado, and Indiana to either take no adverse action against Petitioner's existing chiropractic licenses or to conclude that his license surrender in Kansas would not provide a basis to deny him a new license further demonstrates that a two-year exclusion is an adequate time period to ensure that Petitioner is trustworthy to provide items or services to beneficiaries and recipients of the Medicare and Medicaid programs. FFCL 95 - 112.

Other Findings of Fact and Conclusions of Law

115. The charges upon which Petitioner's license surrender are based are very serious, directly relating to Petitioner's ability to adequately care for beneficiaries and recipients of the Medicare and Medicaid programs.

116. 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 agency and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

117. 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. 21,662 (1983).

118. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4)(B) of the Act. FFCL 2 - 11, 120.

119. On July 22, 1991, pursuant to section 1128(b)(4)(B) of the Act, the I.G. notified Petitioner that he was being excluded from participating in the Medicare program and directed that he be excluded from participating in Medicaid until he obtained a valid license to practice medicine in Kansas.

120. On November 4, 1991, Petitioner conceded that the I.G. had authority under section 1128(b)(4)(B) of the Act to exclude him from the Medicare and Medicaid programs. Confirmation of Stay of Proceedings dated November 15, 1991.

121. Subsequently, the I.G. modified the exclusion to three years. Prehearing Order and Schedule for Filing Submissions for Summary Disposition dated February 26, 1992.

122. 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.

123. The regulations published on January 29, 1992 establish criteria to be used by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act. 58 Fed. Reg. 3298 (1992); 42 C.F.R. Part 1001 (1992).

124. On January 22, 1993, the Secretary published a clarifying regulation which directs that the criteria to be used by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act are binding also on administrative law judges, appellate panels of the Departmental Appeals Board, and

federal courts in reviewing the imposition of exclusions by the I.G. 58 Fed. Reg. 5618 (1993) (to be codified at 42 C.F.R. § 1001.1(b)).

125. The regulations published on January 29, 1992 and the clarifying regulations published on January 22, 1993 do not apply retroactively to establish a standard for adjudicating the reasonableness of the exclusion in this case. Behrooz Bassim, M.D., DAB 1333 (1992).

126. My adjudication of the length of the exclusion in this case is not governed by the criteria contained in 42 C.F.R. § 1001.501(b).

127. The three-year exclusion which the I.G. imposed and directed against Petitioner is excessive.

128. To achieve the Act's remedial purpose, it is sufficient in this case to exclude Petitioner for a period of two years. Alternatively, Petitioner's exclusion may be for less than two years if another State licensing authority, after Petitioner has fully and accurately disclosed to it the circumstances surrounding his license surrender in Kansas, grants Petitioner a new license or takes no significant adverse action as to a currently held license.

RATIONALE

Petitioner represented himself in this proceeding, and the record contains numerous submissions by Petitioner in which he sets forth his position. In many instances, Petitioner's contentions were repetitive and overlapping, and I have attempted to paraphrase and summarize Petitioner's position in this discussion. Even if not expressly mentioned, I have considered each and every one of the arguments made in the briefs and attachments and other documents submitted by Petitioner.

Petitioner surrendered his license in response to KSBHA's petition, which stated that he had committed acts of unprofessional conduct with regard to four different female patients by inappropriately touching and performing breast examinations on them for no legitimate medical purpose. I.G. Exs. 3, 4. KSBHA alleged that Petitioner's conduct was likely to harm the public, served no legitimate medical purpose, and constituted acts of sexual abuse, misconduct, or exploitation relating to his professional practice of chiropractic. I.G. Ex. 3 at 3 - 9. KSBHA alleged that Petitioner had repeatedly failed to practice the healing arts with that

level of care, skill, and treatment which is recognized by a reasonably prudent similarly situated practitioner as being acceptable under similar conditions and circumstances. Id. KSBHA found probable cause that Petitioner had altered a patient's record and that he used false, fraudulent, or deceptive statements in the patient's record; he failed also to keep written medical records describing services for this patient, including pertinent findings and examination results. Id. KSBHA found that Petitioner had placed in a newspaper an advertisement which could be construed to advertise professional superiority or the performance of professional services in a superior manner and/or to guarantee a professional service. Id. KSBHA alleged also that in a radio advertisement, Petitioner was not identified as a doctor of chiropractic.

When Petitioner filed his Answer to KSBHA's petition, he denied the allegations relating to breast examinations, to the extent that it was alleged that such examinations constituted unprofessional conduct. I.G. Ex. 3 at 13. Petitioner asserted that the breast examinations of patients A, B, C, and D served a legitimate medical purpose; did not harm any members of the public; did not constitute an act of sexual abuse, misconduct, or exploitation. Petitioner asserted that, at all times, he practiced the healing arts with that level of care, skill, and treatment required under the Kansas Healing Arts Act. I.G. Ex. 3 at 13. Petitioner admitted that he placed an advertisement in a newspaper but denied that such conduct constituted unprofessional conduct. I.G. Ex. 3 at 14. He admitted also that the radio advertisement did not specifically identify him as a doctor of chiropractic. However, Petitioner denied that the radio advertisement was misleading to the public so as to constitute a violation of the law. I.G. Ex. 3 at 14.

On August 5, 1990, Petitioner wrote a letter to KSBHA and offered to voluntarily surrender his license to practice chiropractic in Kansas while a formal disciplinary hearing was pending. Petitioner said that he planned to cooperate with the Kansas Chiropractic Association's impaired-physicians program for two years. I.G. Ex. 5 at 2. On October 18, 1990, a Final Order was entered before KSBHA. Petitioner's voluntary surrender of his license to practice chiropractic in Kansas was treated as a "plea of no contest" and as a "suspension" of his license. It was reported as such to any state or national medical federation or clearing house for disciplinary sanctions of health care providers and licensees. Petitioner

approved and signed the Final Order. I.G. Ex. 3 at 16 - 22.

On February 19, 1991, the I.G. advised Petitioner that he was being considered for exclusion from participation in the Medicare and Medicaid programs, based on the surrender of his license to practice chiropractic in Kansas while a formal disciplinary proceeding was pending before KSBHA concerning his professional competence, professional performance, or financial integrity. This letter provided Petitioner with an opportunity to present mitigating factors that he believed should be relevant in determining the period of his exclusion. On April 10, 1991, Petitioner submitted mitigating information to the I.G. Petitioner asserted that he was "stressed out by finances and divorce and the unfairness of the [licensing] Board," and he had surrendered his license because he "felt [he] would lose even if [he] won[.]" I.G. Ex. 7. On July 15, 1991, Petitioner removed himself from the Kansas Chiropractic Association's impaired-physicians program without completing it. I.G. Ex. 8 at 2, 6.

On July 22, 1991, pursuant to section 1128(b)(4)(B) of the Act, the I.G. excluded Petitioner from participation in the Medicare and Medicaid programs indefinitely. Petitioner timely requested a hearing on his exclusion from the Medicare and Medicaid programs.[8] Subsequently, the I.G. modified the length of the exclusion to a three-year period. Petitioner does not dispute that the I.G. had authority to impose and direct an exclusion against him pursuant to section 1128(b)(4)(B) of the Act. He disagrees as to the reasonableness of the length of the exclusion imposed and directed by the I.G.

I. A two-year exclusion is reasonable in this case.

A. The Part 1001 regulations do not establish criteria which govern review of the reasonableness of exclusions.

On January 29, 1992, the Secretary published regulations (42 C.F.R. Parts 1001 - 1007) pertaining to the authority

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[8] Petitioner authorized KSBHA and the Kansas Chiropractic Association to release to the I.G. any and all documents, records, or other information reflecting upon his professional competence and performance and the bases for the suspension of his Kansas license, including but not limited to such information pertaining to case no. 90-DC-0198. I.G. Posthearing Br. at 16.

under the Medicare and Medicaid Patient and Program Protection Act (MMPPPA), Public Law 100-93, to exclude individuals and entities from reimbursement for services rendered in connection with the Medicare and Medicaid programs.[9] These new regulations also included amendments to the civil money penalty authority of the Secretary under the MMPPPA. For purposes of this proceeding, the specific regulatory provisions relating to permissive exclusions under section 1128(b)(4) of the Act (42 C.F.R. § 1001.501) and appeals of such exclusions (42 C.F.R. Part 1005) must be considered in terms of their applicability to this case.

Prior to the January 29, 1992 regulations, when determining whether the length of an exclusion imposed and directed against a party by the I.G. was reasonable, ALJs usually evaluated an excluded party's "trustworthiness" in order to gauge the risk that party might pose in terms of the harm Congress sought to prevent. Appellate panels of the DAB have concurred in the appropriateness of using the term "trustworthiness" as a shorthand term for those cumulative factors which govern the assessment of whether a period of exclusion imposed by the I.G. is reasonable. See Hanlester Network, et al., DAB 1347, at 45 - 46 (1992); Behrooz Bassim, M.D., DAB 1333 (1992).

The January 29, 1992 regulations effect procedural and substantive changes with respect to the imposition of exclusions. For example, under the criteria contained in 42 C.F.R. § 1001.501(b), with the exception of circumstances enumerated in 42 C.F.R. § 1001.501(c), an exclusion will never be for a period of time less than the period during which an individual's or entity's license is revoked, suspended, or otherwise not in effect as a result of, or in connection with, a State licensing action. In addition, the new regulations provide that exclusions imposed pursuant to section 1128(b)(4) are subject to being lengthened based on the specific "aggravating" factors enumerated in 42 C.F.R. § 1001.501(b)(2). Only if one or more of the aggravating factors listed in 42 C.F.R. § 1001.501(b)(2) justifies a longer exclusion can the specific mitigating factors listed in 42 C.F.R. § 1001.501(b)(3) be considered. It is undisputed that the new regulations alter the substantive rights of Petitioner, because they limit the mitigating factors that can be considered in Petitioner's favor and would bar Petitioner from presenting evidence

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[9] These regulations can be found at 42 C.F.R. § 1001 - 1007; 57 Fed. Reg. 3298 - 3358.

which is relevant to his trustworthiness to provide care.[10]

Administrative law judges have held consistently that the January 29, 1992 regulations were not intended by the Secretary to strip parties retroactively of rights vested prior to January 29, 1992 and, therefore, the regulations do not apply to any cases arising from exclusion determinations made prior to that date. Bruce G. Livingston, D.O., DAB CR202 (1992); Charles J. Barranco, M.D., DAB CR187 (1992); Syed Hussaini, DAB CR193 (1992); Steven Herlich, DAB CR197 (1992); Stephen J. Willig, DAB CR192 (1992); Sukumar Roy, M.D., DAB CR205 (1992); Aloysius Murcko, D.M.D., DAB CR189 (1992); Narinder Saini, M.D., DAB CR217 (1992); Tajammul H. Bhatti, M.D., DAB CR245 (1992); Anthony Accaputo, Jr., DAB CR249 (1993), aff'd, DAB 1416 (1993). In addition, an appellate panel of the DAB addressed the applicability of the new regulations to an exclusion effected prior to January 29, 1992, under section 1128(b)(4) of the Act. The panel held that the January 29, 1992 regulations do not apply retroactively in cases involving exclusion determinations made prior to the regulations' publication date. Bassim at 5 - 9. This view was recently reaffirmed by an appellate panel of the DAB in Bhatti at 12.

The appellate panel in Bassim noted the distinction between the effective date of a new regulation and the permissible effect of a regulation. Bassim at 6. It held that the January 29, 1992 regulations were inconsistent with prior DAB decisions on the scope of review and the length of an exclusion, and that the January 29, 1992 regulations represented substantive changes in the law. Id. at 6 - 7. The panel determined that the Secretary did not intend to alter the substantive rights of petitioners with the January 29, 1992 regulations. Id. at 8 - 9.

The panel cited several rationales to support its determination that the new regulations were not to be applied retroactively to cases where a petitioner had been excluded prior to January 29, 1992. The panel noted that the concept of retroactivity is not favored in law

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[10] Moreover, 42 C.F.R. § 1001.501 limits my consideration of aggravating factors to those specifically mentioned therein, and so could, under the appropriate scenario, impair the I.G.'s ability to demonstrate that a petitioner is deserving of a lengthy exclusion.

and that an agency's authority to promulgate rules having a retroactive effect must be expressly granted by Congress. Id. at 6. Moreover, the panel noted also that, even with such a statutory grant of authority, an agency's rules will not be applied retroactively unless its language clearly requires this result. Id. at 6.

Congress did not authorize the Secretary to promulgate rules having a retroactive effect, and there was no statement by the Secretary that the new regulations were intended to apply retroactively to achieve substantive changes. In the panel's view, if the Secretary had intended to effect substantive changes in pending cases, this intent would have been expressly stated given the resultant administrative complications in the appeals process as well as the potential prejudice to petitioners. Id. at 7. The panel held that parts of the new regulations which affect substantive changes may be applied only to cases in which the I.G.'s Notice of Intent to Exclude, Notice of Exclusion, or Notice of Proposal to Exclude is dated on or after January 29, 1992. Id. at 9.

I conclude that it was not the Secretary's intent to apply the new regulations retroactively to unlawfully strip parties, including Petitioner, of previously vested rights. Therefore, the new Part 1001 regulations were not intended to apply to cases pending as of the date of their publication. I have previously addressed this issue in depth in my decisions in Barranco at 16 - 27 and Livingston at 8 - 10. Administrative Law Judge Steven T. Kessel has addressed this issue in depth in his decision in Saini at 11 - 19. For purposes of this case, I incorporate the rationale in Barranco, Livingston, and Saini that Petitioner's de novo hearing rights would be substantially adversely affected and it would be manifestly unjust to apply the January 29, 1992 regulations.

On January 22, 1993, the Secretary published a clarification of the January 29, 1992 regulations (hereafter referred to as clarification) that purported to make the regulations of Part 1001:

> applicable and binding on the Office of Inspector General (OIG) in imposing and proposing exclusions, as well as to Administrative Law Judges (ALJs), the Departmental Appeals Board (DAB), and federal courts in reviewing the imposition of exclusions by the OIG (and, where applicable, in imposing exclusions proposed by the OIG).

42 C.F.R. § 1001.1; 58 Fed. Reg. 5618 (1993).

This clarification was to be applied to "all pending and future cases under this authority." 58 Fed. Reg. 5618. The Secretary waived the proposed notice and public comment period specified by the Administrative Procedure Act pursuant to the exception for "interpretive rules, general statements of policy or rules of agency organization, procedure or practice" at 5 U.S.C. 553(b)(A). Id. Moreover, the Secretary stated that this clarification "does not promulgate any substantive changes to the scope of the January 29, 1992 final rule, but rather seeks only to clarify the text of that rulemaking to better achieve our original intent". Id.

At the time he signed the clarification on December 18, 1992, Secretary Sullivan, or those to whom he entrusted the drafting of the clarification, must be assumed to have been aware of the DAB appellate panel's decision in Bassim, which was issued on May 28, 1992. More importantly, the DAB is delegated authority to make final interpretations of law on behalf of the Secretary upon review of ALJs' decisions. Gideon M. Kioko, M.D., DAB CR256 (1993). Thus, the DAB appellate panel was in effect speaking for the Secretary when it concluded that the January 29, 1992 regulations were not to apply retroactively to cases pending prior to promulgation of the new regulations.

The appellate panel in Bassim went on to say:

> In sum, absent specific instructions in the Act or the preamble to the 1992 Regulations directing that they apply to pending cases, we conclude that the Secretary did not intend to alter a petitioner's substantive rights in such fundamental ways as suggested by the I.G. We also conclude that portions of the 1992 Regulations which change substantive law may permissibly be applied only to cases in which the I.G.'s Notice of Intent to Exclude, Notice of Exclusion, or Notice of Proposal to Exclude is dated on or after January 29, 1992.

Id. at 8 - 9.

In this clarification, the Secretary did not expressly state his intent or provide specific instructions directing that the new regulations apply retroactively to cases pending prior to January 29, 1992. Rather, the Secretary emphasized that such regulation did not make "any substantive changes" to the "scope" of the new regulations. 58 Fed. Reg. 5618. No other conclusion can

be reached but that, in publishing the January 22, 1993 clarification, the Secretary did not modify the appellate panel decision in Bassim, which held that the January 29, 1992 regulations do not apply to cases pending prior to January 29, 1992. This case was pending as of that date.

The January 22, 1993 clarification was published during the period that the posthearing briefing schedule was in progress in this case. I specifically invited the parties to address the applicability and impact of the new regulations. I deemed this especially necessary since the parties had prepared for this hearing under the assumption that the case would be heard and decided under the trustworthiness standard. It was not until several months after the November 5, 1992 hearing that the January 22, 1993 clarification was published. Also, I convened a posthearing conference in which I specifically asked the parties whether they wished to submit additional evidence in light of the clarification. Both parties addressed the issues of the impact of the new regulations and the clarifying regulations on this case.

The I.G. argues that, pursuant to the clarifying regulations, the reasonableness of the length of the exclusion must be adjudicated in accordance with 42 C.F.R. § 1001.501(b). The I.G. notes that the I.G. reduced the exclusion to three years from its original indefinite term and that, as a matter of law, the indefinite exclusion originally imposed was reasonable. The I.G. avers that there is no legal or factual basis for consideration of the administrative hearing testimony, since no aggravating circumstances were considered in imposing Petitioner's exclusion, under the new regulations no mitigating circumstances may be considered. 42 C.F.R. § 1001.501(b). Moreover, the I.G. argues that, although it may have been appropriate under DAB precedent for ALJs and the I.G. to inquire into a petitioner's culpability and trustworthiness prior to the Secretary's enactment of the new regulations, this inquiry is no longer appropriate for establishing the reasonableness of the length of an exclusion pursuant to Part 1001. The I.G. contends that 42 C.F.R. § 501(b) is controlling, since the subsequent clarifying regulation indicates that the new regulations apply to all pending and future cases. I.G. Posthearing Br. 2, 5 - 11, 20.

Petitioner argues that the application of the new regulations is a retroactive application and would be unfair to him and that any period of exclusion would be extreme or excessive. P. Posthearing Br. at 104.

Since the January 29, 1992 regulations lacked retroactive effect, for the reasons stated in Bassim, they could not have acquired such effect with subsequent textual clarifications that do not purport to modify the scope of the January 29, 1992 regulations and which have been published without satisfying the procedures necessary under the Administrative Procedure Act for effecting substantive changes. Accordingly, neither the January 29, 1992 regulations nor the subsequent January 22, 1993 clarification is controlling upon my determination of the length of the exclusion in this case, where the notice of exclusion was issued on July 22, 1991, well in advance of the publication of the new regulations on January 29, 1992 or the clarification on January 22, 1993. Instead, Petitioner's trustworthiness is the applicable standard for evaluating the reasonableness of the length of the exclusion in this case.

II. Trustworthiness is the applicable standard for evaluating the reasonableness of the exclusion in this case.

The DAB and its ALJs long have held that section 1128 is a remedial statute. Exclusions imposed under section 1128(b) cannot be imposed for other than remedial reasons. See United States v. Halper, 490 U.S. 435, 448 (1990). The Halper case decided the question of whether a punitive sanction imposed under the False Claims Act in addition to a criminal punishment for the same offense constituted a "second punishment" which violated the Double Jeopardy Clause of the United States Constitution. The Supreme Court's decision subsumes the broader questions of what constitutes a civil remedy and what constitutes a punishment. The Supreme Court observed in Halper that the aims of retribution and deterrence are not legitimate nonpunitive government objectives. It concluded that:

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

490 U.S. at 448.

Civil remedy statutes cannot be applied constitutionally to produce punitive results in the absence of traditional constitutional guarantees, such as the right to counsel, the right to a trial by jury, or the right against self-incrimination. Kennedy v. Mendoza-Martinez, 372 U.S.

144, 168 - 169 (1963). Labelling a statute as a "civil remedies" statute will not serve to insulate acts taken pursuant to that statute from analysis as to whether they are remedial or punitive. Id.

The legitimate remedial purpose for any exclusion imposed pursuant to section 1128(b) of the Act is to protect federally funded health care programs and their beneficiaries and recipients from parties who are not trustworthy to provide care. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992); Stephen J. Willig, M.D., DAB CR192 (1992); Hanlester Network, et al., DAB CR181, at 37 - 38 (1992), aff'd in part and rev'd in part, DAB 1347 (1992), aff'd, no. CV92-4552-LHM (C.D. Cal. 1993); see H.R. Rep. No. 393, Part II, 95th Cong., 1st Sess. 69 (1977), reprinted in 1977 U.S.C.C.A.N. 3072.

Section 205(b) of the Act guarantees parties who are excluded pursuant to section 1128(b), and who request hearings, full administrative review of the reasonableness of the length of the exclusions imposed against them, measured by the remedial criteria implicit in section 1128(b). Bernardo G. Bilang, M.D., DAB 1295, at 9 (1992); Eric Kranz, M.D., DAB 1286, at 7 - 8 (1991); Hanlester, DAB CR181, at 39 - 43.

Section 1128(b) does not require the I.G. to impose an exclusion in every case in which he finds that an individual has engaged in conduct that would authorize an exclusion. Bilang at 8; Kranz at 9; Hanlester, DAB CR181, at 36 - 37. Such an interpretation was made clear when an appellate panel Bilang held that:

> The scheme Congress established in section 1128 permits the Secretary to conserve program resources by relying where possible on other federal or state court or administrative findings. However, Congress did not require imposition of an exclusion [under section 1128(b)(4)] on all providers who surrendered their licenses, nor mandate any particular period of exclusion in such circumstances. This grant of discretion to the Secretary is inconsistent with the I.G.'s apparent position that the surrender of a license creates a presumption of culpability which cannot be rebutted for any purpose.

Bilang at 8. The appellate panel held further that "[i]f Congress had intended the state action to be determinative for federal purposes, Congress would not have made the exclusion permissive, nor have provided for de novo review." Id. at 9.

Thus, whether or not an exclusion should be imposed in a particular case depends on the facts of that case in light of the Act's remedial purpose. Moreover, in circumstances where section 1128(b) authorizes the I.G. to impose an exclusion and where an exclusion is determined remedially to be necessary, section 1128(b) does not set a minimum length of exclusion. As with the question of whether to impose a permissive exclusion at all, the issue of the length of any exclusion that is imposed turns on the remedial basis for the exclusion and the evidence which is unique to each case.

Section 205(b) of the Act guarantees an excluded party the right to a de novo hearing as to the reasonableness of the length of an exclusion imposed under section 1128(b). Bilang at 9; Kranz at 7 - 8; Hanlester, DAB CR181, at 39 - 43. The de novo hearing granted by section 205(b) contemplates a full administrative review of whether an exclusion comports with the Act's remedial purpose. As the appellate panels affirmed in Bilang and Kranz, an administrative law judge who conducts a hearing as to the reasonableness of an exclusion may consider all evidence which is relevant to the issue of reasonableness. Kranz at 8; see Joel Davids, DAB 1283, at 7 (1991); Vincent Baratta, M.D., DAB 1172, at 11 (1990).

Where the petitioner surrenders his license in response to a disciplinary proceeding covered by section 1128(b)(4)(B) of the Act, as was the case herein, such surrender can be used by the I.G. to establish the authority to exclude and to raise a presumption of the Petitioner's culpability for the actions alleged in the disciplinary proceeding. However, this presumption may be rebutted by an excluded party, at a hearing before an ALJ. Bilang at 7 - 9, 12; see also Christino Enriquez, M.D., DAB CR119 (1991). The legislative history of section 1128(b)(4) of the Act supports the creation of the presumption of untrustworthiness when there is a license surrender. See S. Rep. No. 109, 10th Cong., 1st Sess. 3 (1987), reprinted in 1987 U.S.C.C.A.N. 682, 688.

III. I deny the I.G.'s motion for reconsideration of ruling granting in part and denying in part the I.G.'s motion for summary disposition.

The I.G.'s posthearing brief contained also a "Motion for Reconsideration of Ruling Granting in Part and Denying in Part the Inspector General's Motion for Summary Disposition." The I.G. argued that the three-year exclusion was not only reasonable but that there is no

legal or factual basis for consideration of the testimony taken during the administrative hearing. I.G. Posthearing Br. at 10. To the extent that the I.G. is attempting to reargue his position regarding the new regulations, I have already ruled that such regulations are not applicable to this case. Therefore, I deny the I.G.'s motion for reconsideration.

IV. Petitioner's chiropractic practices were the subject of the disciplinary proceeding brought by KSBHA.

A. Petitioner's alteration of a patient's medical record is an indication that he is untrustworthy.

KSBHA's petition against Petitioner concluded that there was probable cause that Petitioner had altered the medical record of patient D, and that such conduct was unprofessional. The petition found that (1) he used false, fraudulent, or deceptive statements in the patient's record and (2) he failed to keep written medical records describing services rendered to this patient. FFCL 5. Although the petition stated that Petitioner altered the records of patient D, no description was given of what entries were considered false, fraudulent, or deceptive, nor did the petition describe the medical services omitted from the patient's record. The I.G. offered no affirmative evidence on these allegations other than relying on the petition itself. In fact, in response to my question of the I.G.'s counsel at the hearing regarding this issue, counsel for the I.G. stated "I'm not prepared to state what the Inspector General's position is on altering a record." Tr. 145. Counsel for the I.G. merely recited that KSBHA had probable cause to make such findings in the petition. Id. Such reliance on KSBHA's petition alone is insufficient to prove a lack of trustworthiness of Petitioner, especially where he offers evidence here to rebut the findings.

The record was clarified through testimony supplied by Petitioner. He admitted that he altered the record by adding supplemental information, contending that it was lawful to supplement a medical record. Tr. 139. He testified that patient D was slouched over when he came into the room and his treatment included a breast/chest examination. Petitioner explained that he "inadvertently left off" this information from the patient's record. Id. He admitted that five to six months after the examination he inserted in the patient's record a notation that he had conducted a breast examination,

after an accusation of sexual misconduct by the patient's father. FFCL 19 -20.

Such conduct makes Petitioner less trustworthy. First, it is accepted professional practice by chiropractors and other health care providers to keep complete and accurate records of their examination and treatment of patients. FFCL 18. Second, not only does Petitioner's conduct fail to adhere to such professional practice, it can be construed also as a self-serving attempt to justify his actions with patient D in response to an accusation of sexual misconduct. FFCL 21. Petitioner's claim to the contrary is inconsistent with his own description of the circumstances of altering patient D's records.

Beneficiaries and recipients of the program should be able to expect that health care providers who treat them will maintain full and accurate records of such treatment in compliance with normal professional standards of conduct. Nor should they receive treatment from providers who alter or modify patient records when accused of professional misconduct as a means of responding to such accusation.

Petitioner's contention at the hearing that the addition to the patient record was not in his best interest misses the point. Tr. 144. Even assuming that the inserted information could have been used against Petitioner, this does not excuse him from the responsibility to maintain complete and accurate treatment records of his patients. The fact that he still may not realize the significance of his actions also makes him less trustworthy. However to his credit, the evidence on this issue came directly from Petitioner without hesitation or obfuscation. He readily admitted his actions, although he contended they were lawful.

The I.G. has not offered any evidence to show that Petitioner has repeated this conduct since 1989. It appears to be an isolated event, rather than a pattern or practice. Moreover, the two-year exclusion imposed against Petitioner is a sufficient period of time for him to demonstrate whether any propensity to alter records poses a danger or threat to the program.

B. Petitioner's newspaper and radio advertisements are an indication of his untrustworthiness.

Petitioner allegedly placed an advertisement in a Wichita, Kansas, newspaper on June 22, 1989, which KSBHA construed as an attempt to advertise professional superiority or the performance of professional services

in a superior manner and/or to guarantee a professional service contrary to K.S.A. 65-2837(b)(7), and (8). I.G. Ex. 3 at 7 - 8. This advertisement allegedly was placed by the National Institute of Clinical Acupuncture (Institute); the address and phone number given for the Institute is the same as Petitioner's; Petitioner is the only member of the Institute; and the advertisement does not mention Petitioner's name or the branch of the healing arts in which he is licensed. I.G. Ex. 4 at 30; see also I.G. Ex. 4 at 66 - 74. On August 24, 1989, KSBHA received an audiotape recording of a radio advertisement placed by Petitioner, which did not identify him as a doctor of chiropractic using the words chiropractor, chiropractic physician, or D.C.

On April 10, 1990, Petitioner signed a "Stipulation" with KSBHA, and, in return for proceedings not being brought against him, he agreed among other things: (1) not to publish in any medium any advertising which may constitute false, misleading, deceptive, or unlawful advertising; (2) to identify himself in all advertisements as a Doctor of Chiropractic; (3) for a period of two years from the date of the Stipulation, any advertisement which he published would be submitted before publication to KSBHA's representatives, for the purpose of advice and comment on the form and content; and (4) a violation of the Stipulation would be prima facie evidence that a violation of the Healing Arts Act had occurred for which KSBHA could suspend, revoke, or limit the license of Petitioner. I.G. Ex. 4 at 28 - 34.

The I.G. offered no affirmative proof on this issue, relying instead on the investigative record from KSBHA. The petition filed by KSBHA appears to contain the same findings as set forth in the Stipulation. FFCL 5, 30. The record contains no indication that Petitioner engaged in improper advertising after 1989 or that he has violated the Stipulation. This is especially significant since Petitioner was required to submit to KSBHA for review prior to publication all of his advertising during a two-year period. While such past advertising arguably is indicative of untrustworthiness by Petitioner, I am impressed that KSBHA was willing to resolve the matter by stipulation without formal disciplinary proceeding. I give no particular weight to the fact that KSBHA chose to incorporate the same charges in its subsequent petition that led to Petitioner's surrender of his license. It is evident at the time the petition was written that KSBHA included all past and pending investigative matters that it believed supported revocation of Petitioner's chiropractic license. Whatever indicia of a lack of trustworthiness which arises from such advertising has

been dissipated with the passage of time since Petitioner was excluded by the I.G. Consequently, I conclude that based on such advertising Petitioner no longer presents a danger or threat to the program.

C. Breast examinations performed on Petitioner's chiropractic patients served a legitimate medical purpose.

Petitioner testified at the hearing that he was an acupuncturist, a certified receptor-tonus instructor, a chiropractic orthopedist, and that he had a degree in biology, emphasizing human nutrition. FFCL 32. He has performed about 3,000 breast examinations on both female and male patients in the past ten years. FFCL 59. Petitioner stated that some of the examinations that he performed which were questioned by KSBHA were done in connection with acupuncture treatment.[11] FFCL 61.

The allegations against Petitioner included accusations that he (1) looked for "knots" in a patient's breasts; (2) massaged or kneaded a patient's breasts; (3) while a patient was lying on her side, he examined her breast against the examining table; (4) "cupped" another patient's breasts; and (5) pinched a patient's nipple and asked if it hurt. FFCL 50. These patients also contended that Petitioner did not mention that a nurse or other third party could be present during an examination and there was no sign in his office indicating this information. FFCL 64 - 66.

Patient D reported that she had neither asked Petitioner to perform a breast examination nor had she consented to a breast examination. I.G. Ex. 4 at 35 - 65. Patient A alleged that Petitioner did not tell her that he was going to do a breast examination. I.G. Ex. 14 at 11 - 12. Patient D contended that although Petitioner advised her that he going to do a breast examination, before she could respond he pulled down her gown and examined her breasts. I.G. Ex. 15 at 5 - 7.

Generally, most female patients who seek chiropractic treatment do so without an expectation that such

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[11] Petitioner testified that at least two complaints lodged against him had been closed by KSBHA and that he had never had an opportunity to respond to the complaint by patient B. Tr. 137 -138. He had been advised that various complaints which were filed against him and that were previously closed could be reopened if additional complaints were received. Tr. 173 - 174.

treatment might include breast examinations. FFCL 52. Chiropractors in Kansas are given a wide latitude to perform general physical examinations, which may include breast, pelvic, and rectal examinations. FFCL 38. They are expressly prohibited from administering medicine or drugs, performing surgery or practicing obstetrics. FFCL 37. Chiropractors who engage in myofascial or trigger point therapy are likely to perform more breast examinations than general chiropractors. FFCL 41. Petitioner admitted that he has performed about 3,000 breast examinations on both female and male patients out of 4,000 patients during the past ten years. FFCL 59. This is in contrast to other chiropractors having similar background and experience as Petitioner who do not perform breast examinations with the same frequency. For example, Dr. Fiscella performed breast examinations on less than one percent of his patients and Dr. Jaggers does not perform them on a routine basis. FFCL 42 - 43.

Petitioner's practice of conducting breast examinations on most of his patients as part of his general examination of them prior to administering treatment, while clearly being more extensive than other chiropractors, is not in itself indicative of an improper chiropractic practice. Such examinations do not violate any Kansas chiropractic regulations. In fact, they are part of the training received by students studying chiropractic medicine. FFCL 40.

The I.G. relied on KSBHA's petition, the interviews or depositions of patients A through D, and the affidavit of Dr. John H. Hill, II, to support the contention that Petitioner improperly performed breast examinations. Dr. Hill confirms in his affidavit that chiropractic students in Kansas are trained to conduct breast examinations on male and female patients. I.G. Ex. 17 at 1. He and the I.G. challenge the manner in which such examinations were conducted and the absence of a third person in the room. Id. Particularly, Dr. Hill opines that "[s]queezing a patient's breast or nipple and asking 'does that hurt' does not describe a professional or proper complete examination." Id.

Such opinion was contradicted by Petitioner's experts. Dr. Fiscella testified that when a physician "is examining the breast tissue itself, a pinching, a pressing on, an observation, a touching thereof, is a normal procedure." Tr. 34 - 35. Dr. Fiscella stated that a pinching of the breast and saying "does that hurt" would be part of a breast examination. Tr. 35. Dr. Jaggers stated that if a chiropractor pinched a patient's breast and asked "does that hurt" without further

examination, that "could very well be good enough" to constitute a complete examination. Tr. 97. Dr. Lowe testified that he would customarily perform a breast examination if the pectoralis muscle was involved and he would "use pincer palpation to lift and palpate the fatty tissue of the breast and would manipulate the nipple briefly." Tr. 130. These experts must be given more weight than the single expert relied on by the I.G. They were subject to cross-examination. Dr. Hill did not testify and the I.G. chose not to rebut Petitioner's experts' testimony. Also, some of the breast examinations or manipulation techniques performed by Petitioner were done based on his advanced training; training that most general chiropractors do not receive.[12] Tr. 102 - 104.

While it is clear that Petitioner may in fact have conducted breast examinations more extensively than other chiropractors, the I.G. has failed to prove that such examinations were done for his sexual gratification and not for medical purposes. Petitioner, if anything, aggressively used his advanced training and techniques to resolve the medical problems of his patients. Many patients came to Petitioner after they had been treated unsuccessfully by other chiropractors. When considering the number of breast examinations that Petitioner has performed, he has had relatively few complaints.[13] Moreover, the credibility of patient D, whose description of Petitioner's conduct is relied on heavily by the KSBHA to establish its case, has been placed in doubt by her continuation of extensive treatment after the initial

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[12] While the curriculum vitae of Dr. Hill is not part of this record, I do note that he indicated that he was not familiar with Petitioner's technique of applying treatment by placing himself on the examination table behind the patient. I.G. Ex. 17 at 2. Testimony from Petitioner's experts on this procedure demonstrates that it has a legitimate medical purpose. Tr. 102 - 104.

[13] He admits to performing approximately 3,000 breast examinations on male and female patients over a ten-year period. FFCL 59. Based on the record before me, he has had less than 10 complaints. Several of those complaints were previously closed by KSBHA based on Petitioner's agreement to provide a third party in the examination room. FFCL 62 - 64.

breast examination and her litigation against Petitioner.[14] Therefore, based on the record before me, I am unable to conclude that Petitioner's breast examinations of patients A - D served no legitimate medical purpose or were below the recognized level of care for chiropractors. This conclusion is supported further by KSBHA's prior review of Petitioner's breast examination of patients, including that of patient C, who was included in the petition, and the closure of such cases without formal action being taken. FFCL 62 - 63.

Although Petitioner's conduct of breast examinations served a legitimate medical purpose, the "cupping" of a female's breast is an unusual act for a chiropractor. It is apparent that many of his female patients were surprised by the examination since they did not anticipate that such examination would be performed by a chiropractor. Nor did Petitioner provide them with an adequate explanation of the procedure or its purpose.[15] Thus, Petitioner owes a higher duty of care to a patient who must undergo such treatment and should fully explain the procedure and why the procedure is necessary. It is ultimately the patient who must decide whether or not to undergo such treatment. All of Petitioner's experts agreed that a chiropractor should inform a patient prior to a breast examination that he intends to do such an examination, make sure the patient consents, and have a third party present, especially if the patient is new to the chiropractic practice. FFCL 45. KSBHA advised Petitioner in April 1988 to notify his female patients

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[14] The evidence in the record indicates that patient D had filed a lawsuit against Petitioner because she felt that he had taken advantage of her physically and because of how he handled the financial matters related to her account. She contended that Petitioner "intentionally made sexual advances" during office visits. I.G. Ex. 16 at 11. Petitioner stated that he filed a lawsuit against the patient because she had failed to pay her bill and that the patient in turn filed a counter lawsuit against him alleging the sexual advance. Tr. 170.

[15] In response to an inquiry from his patient who was undergoing a breast examination, Petitioner merely said "he's the doctor, he knows what he's doing." I.G. Ex. 14 at 4. No third party was present when the examination was conducted. Id. at 4 - 5. Nor was there a sign informing patients that they could have a third party present. Id. at 5.

that a third person could be present if the patient so desired. FFCL 64. It is evident that Petitioner did not always provide such an opportunity to his patients subsequent to the admonition of KSBHA in April 1988.[16] FFCL 65. He contended that he did follow KSBHA's advice, but this is not borne out by the information provided to KSBHA concerning his patient care. Id.

The evidence demonstrates that Petitioner's extensive use of breast examinations was not characteristic of what most chiropractors generally do and was contrary to the reasonable expectation of most of his female patients. In such circumstances, he had a duty to inform his patients of the specifics regarding his methodology. Petitioner should have explained why he needed to do the breast examinations, what he hoped to accomplish, inquired whether the patients agreed to his undertaking such examinations, and whether the patients wanted a third person present. Petitioner is less trustworthy because he did not routinely follow such procedures with his patients, especially considering his past difficulties with KSBHA and the admonitions he received from this licensing board regarding his use of breast examinations in his practice. Failure to undertake such measures with his patients on a uniform basis is contrary to accepted chiropractic standards of conduct, even for persons having similar training and experience as Petitioner.

The I.G. has concluded that a three-year exclusion is appropriate, but I find it excessive. A two-year exclusion is of sufficient length for Petitioner to demonstrate that he no longer poses a threat or danger to the program from his failure to fully inform his female patients of (1) the nature and purpose of his breast examinations and (2) the opportunity to refuse such examinations or have a third person present.

D. Petitioner's other physical contact with patients is not a basis for an exclusion.

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[16] Patient B indicated that Petitioner performed a breast examination on the initial visit while she was wearing a "green cover-up" after "explaining some things" and before she "could say anything, the top [of the gown] was down," and he did the breast examination. I.G. Ex. 15 at 5. Petitioner did not explain that she had the option to have a third person present, but the patient admitted that there was a sign explaining the availability of this option. Id. at 21 - 22.

Petitioner's patients alleged that he was rough when he examined them and that his treatments were painful and often left bruises on their body. FFCL 77 - 79. Patient C, who received massage treatment on her Caesarean scar and in the area of her anus, felt uncomfortable about complaining because she might be considered naive, childish, or insulting. FFCL 78. Even though Petitioner, for three weeks, three times a week, performed deep muscle massage on patient D's outer and inner thighs and buttocks, sometimes getting close to the pubic bone, she never indicated that he was too rough or that she felt that he was getting too close to her pubic bone at times. FFCL 79. Dr. Fiscella testified that once the trigger points at the pubic bone are found, the chiropractor can brush back and forth across that until the trigger point is released. Tr. 26 - 27.

The I.G. and Dr. Hill contested Petitioner's use of deep massage or breast examination as not normally being indicated when a patient presents symptoms of tendinitis of the hands and wrists. I.G. Ex. 17 at 2. Such procedures were validated by the opinion of the chiropractic experts who testified on behalf of Petitioner. FFCL 82 - 84. Apparently, the support for use of these chiropractic measures was based on the advance training Petitioner received in myofascial and trigger point therapy. FFCL 80 - 85. The I.G. did not challenge the legitimacy of the therapy, only the manner in which it was performed by Petitioner. Tr. 71. However, based on the record before me, I have no evidence that Petitioner applied these techniques incorrectly. As he did when conducting the breast examinations, Petitioner failed to inform his female patients prior to performing myofascial or trigger point therapy in the pelvic or anal areas that (1) he was going to conduct such examinations or therapy and the purpose for it, (2) they had the right to refuse such procedures, and (3) they could have a third person present. FFCL 87. Such conduct was contrary to accepted standards of chiropractic practice and is an indication of Petitioner's lack of trustworthiness to be a program provider. FFCL 86 - 89. The I.G.'s only expert -- Dr. Hill -- merely said he was "not familiar" with a particular manipulation or adjustment technique used by Petitioner. FFCL 61; I.G. Ex. 17 at 2. Such evidence is overcome by the opinion of Petitioner's experts, who apparently had more extensive training than Dr. Hill in advanced chiropractic techniques and procedures.

Petitioner studied the receptor-tonus method of chiropractic under Dr. Fiscella.[17] The receptor-tonus practitioner locates trigger points or myofascial areas by examination or palpitation of the soft tissues of the body. Tr. 24. After identifying an area of hypertonicity, the practitioner may apply a deliberate pressure on that region in order to eliminate sensitivity and ultimately to relax the area. Tr. 25. This technique should always be done at a level that the patient can tolerate. Tr. 25. Whether or not a person bruises easily depends on the type of examination being done as well as on the nutritional tolerances of the patient. A patient deficient in vitamin B-12, iron, vitamin C, and other nutrients will have a tendency to bruise easily. Females bruise more easily than males. Tr. 86. Acupuncturists may use massage therapy to break up adhesions around surgery scars. Tr. 53 - 54.

I conclude that Petitioner provided legitimate acupuncture or myofascial trigger point therapy when using massage therapy on his patients. As one of the experts pointed out, females tend to bruise more easily than males. Additionally, it appears that females might be more sensitive to so called "rough" treatment -- i.e., the amount of pressure that the chiropractor applies during a treatment. Unfortunately, Petitioner's techniques resulted in his application of deep massage which resulted in some discomfort to some of his female patients. Such discomfort in such circumstances does not support an allegation of improper chiropractic practice.

It is undisputed that Petitioner is a highly intelligent individual. It is also undisputed that Petitioner has a propensity to give his patients the best care he can and his goal is to make them better than they were before they sought treatment with him. The evidence in this record shows that Petitioner is not a typical chiropractor. FFCL 58, 61. Petitioner's practice seems to go beyond the typical examinations, analyses, diagnoses, and adjustments practiced by most chiropractors. Petitioner is not only a chiropractic orthopedist, he also has a degree in biology, which emphasizes human nutrition, and he is an acupuncturist,

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[17] This method is also known as the "Nimmo Technique," after its developer, Dr. Raymond L. Nimmo. Certification as an instructor of the technique is granted after attendance at four classes by a certified instructor, work as a teaching assistant during three seminars, and favorable recommendations by three different instructors. See P. Ex. I/7 at 2.

as well as a certified receptor-tonus instructor. FFCL 32. Petitioner's patient population seems to be composed of people who are in extreme need of a practitioner who is willing to use methods beyond that of a typical chiropractor. FFCL 69. Patients A, C, and D indicated that they had gone to other chiropractors for treatment, but were not satisfied that the treatment improved or alleviated their conditions. Patients B, C, and D had a significant number of treatments with Petitioner, which seems to indicate that the expertise and level of care that these patients obtained from Petitioner was worth continuing even though they filed complaints against him. For example, patient D had approximately 42 visits with Petitioner over three and one half years, although Petitioner's alleged misconduct occurred during the first and last visits, in which he conducted breast examinations.

I disagree with the I.G.'s contention that Petitioner's experts' testimony about particular chiropractic, acupuncture, or myofascial therapy techniques was not relevant to the issue of Petitioner's trustworthiness. I.G. Posthearing Br. 42. The I.G. did not rebut Petitioner's experts' testimony. The only evidence that the I.G. put in regarding an expert's opinion was the affidavit of Dr. Hill. The remainder of the I.G.'s case consisted of exhibits which were admitted at the hearing. This evidence, especially the testimony of Petitioner's expert witnesses, shows that Petitioner's chiropractic techniques incorporated not only the traditional chiropractic methodology, but also included acupuncture and myofascial therapy techniques. Petitioner prided himself on being able to treat complicated conditions that had not been successfully treated by other chiropractors or doctors.

Patient B complained that Petitioner's behavior was a little strange, in that every time he would come into the treating room, he would put his arm around her from behind, squeeze her, and ask her how she was doing. I.G. Ex. 15 at 7. On another occasion, and allegedly without warning, Petitioner felt around patient D's breast area and kissed her on the neck. I.G. Ex. 4 at 41 - 42. Patient D contended also that Petitioner was always a friendly type of person and he would come into the room and "give you a big squeeze . . . and often say, oh, you smell good, or, hi beautiful, hi gorgeous . . .." Id. at 43.

Patient C reported that Petitioner invited her to a soccer game, told her where he would be sitting, and said that he would be alone. I.G. Ex. 16 at 23. Another time

he told her, "don't be surprised if I call you up and ask you to the movie." Id. at 24. Petitioner admitted that he had invited patient C to sit with him and his son at an indoor soccer game and that he had offered to work out with her, but he denied that either constituted a sexual advance or was intended to be a date. Tr. 162 - 170.

As to these allegations of unprofessional conduct, Petitioner testified that "this is his normal demeanor, and that he [Petitioner] comes from an affectionate family where hugging and kissing is a matter of course." Tr. 179. Petitioner contends that as a normal social gesture, he has received "good marks for this type of conduct before" and never thought that his behavior was offensive to anyone. However, he claims that "he realizes now that not everyone appreciates this mannerism, and he will discontinue it with future patients, as it may offend some, and it isn't worth a misunderstanding." P. Posthearing Br. at 6. He claims that several of his patients stated their support for this type of affection. See P. Ex. I/12 at 2; id. at 8; I.G. Ex. 15 at 7; P. Ex. II/7 at 5; P. Ex. II/7 at 6.

Certainly, the records supports the conclusion that some of his patients found his overt socialization offensive, while others were supportive of his conduct. Considering the record before me, I find that Petitioner provided an adequate explanation for his behavior. I cannot conclude that his conduct with patient C concerning his invitations to a movie and a soccer game provide a basis to impose his exclusion from the Medicare and Medicaid programs. The record does not support that these invitations ever led to an improper social relationship with this patient. It is evident, that he should have maintained a more distant relationship with his patients to ensure proper mutual respect and contact, but the record does not support that he acted in this manner for sexual gratification or as a result of any mental disorder. FFCL 76. Petitioner now recognizes that his past effusive socialization and mannerisms could be misconstrued and interfere with his professional relationship with his patients and he has indicated that he will be more restrained in the future dealings with patients. Consequently, the record does not support the need for any remedial action based on this type of conduct engaged in by Petitioner.

V. Petitioner possesses chiropractic licenses in other States, which considered the circumstances of his license surrender in Kansas.

In the event that a subsequent appellate body may determine that 42 C.F.R. § 1001.501 is binding on this case and to give Petitioner every opportunity to establish his trustworthiness, I gave Petitioner the opportunity to present evidence on the status of his chiropractic licenses in other states. The I.G. has already modified the exclusion to three years, from an indefinite exclusion until Petitioner could regain his license in Kansas. This length of exclusion is based on the three-year floor that exists in other section 1128(b) exclusions under the new regulations. See 42 C.F.R. §§ 1001.301, 401, 601 - 701. The change was motivated by Petitioner's then existing licenses in Texas, Oklahoma, and Colorado. I.G. Posthearing Br. at 10 - 11, 18.

With regard to the issue of mitigation of the three-year exclusion, the I.G. never argued that any of the aggravating factors set forth in 42 C.F.R. § 1001.501(b)(2) are applicable to this case and, absent such aggravating factors, Petitioner is given no opportunity to offer proof of mitigating factors. 42 C.F.R. § 1001.501(b)(3). The only issue that arguably remains is whether the factual predicate for the exception under 42 C.F.R. § 1001.501(c)(2) of the new regulations is applicable to this case based on any of the recent State licensing actions involving Petitioner.

I have already concluded that 42 C.F.R. § 1001.501 does not apply to this proceeding since, the date of Petitioner's notice of exclusion was prior to the effective date of the new regulations on January 29, 1992. This determination was predicated on the fact that I found that application of 42 C.F.R. § 1001.501(b)(3) would deprive Petitioner of substantive rights. Under existing DAB precedent, Petitioner would have the opportunity to establish his trustworthiness relying any factors relevant to that issue, whereas 42 C.F.R. § 1001.501(b)(3) would limit him to proving the factors specifically enumerated. See section I at 24 - 27. In contrast, 42 C.F.R. § 1001.501(c)(2) provides Petitioner with a substantive right that did not exist prior to the effective date of the new regulations. Also, section 1001.501(c)(2) applies prospectively to the issue of consideration of early reinstatement in the program and does not involve criteria that the I.G. used in determining the original length of Petitioner's exclusion. Thus, there is no concern of unlawful retroactive application depriving Petitioner of existing substantive rights. Even if section 1001.501(c)(2) is construed as a procedural right rather than substantive, ALJs have regularly applied the procedural portions of the new regulations -- 42 C.F.R. §§ 1005.1 - 1001.23 --

to cases pending prior to the effective date of the new regulations. See 58 Fed. Reg. 3350 - 3354. Accordingly, I hold that 42 C.F.R. § 1001.501(c)(2) is applicable to this case and is not governed by the appellate decision in Bassim.[18]

The I.G. argues that I have no authority to consider the exception set forth in 42 C.F.R. § 1001.501(c)(2). I.G. Posthearing Br. at 10 - 11; I.G.'s Response to Petitioner's Additional Posthearing Br. at 4 - 5. I disagree. I am only making findings on whether, based on the record before me, Petitioner has satisfied the predicate contained in this exception to warrant consideration by the I.G. of a request for early reinstatement pursuant to 42 C.F.R. § 1001.3001. Whether such reinstatement is granted is governed by 42 C.F.R. § 1001.3002 and I have no authority to intervene in that process. 42 C.F.R. § 1001.3002(f). Similarly, when I reduce an exclusion, as done here from three to two years, absent an appeal, Petitioner is in the same position of seeking reinstatement under 42 C.F.R. § 1001.3001. Since I have authority in the latter instance to require consideration of early reinstatement, the same authority applies to the exception granted pursuant to 42 C.F.R. § 1001.501(c)(2).

Dicta in the recent decision of Douglas J. Pousma, M.D., DAB CR276, at 9 (1993), arguably suggests an opposite result. That case is distinguishable. The ALJ had no evidence of the existence of any State license other than the license revocation which was the basis for the I.G.'s derivative exclusion. Thus, there were no factual circumstances under 42 C.F.R. § 1001.501(c)(2) to consider. In essence, the petitioner in Pousma was seeking an advisory opinion from the ALJ on a speculated future State licensing event. The ALJ correctly declined to give such an advisory opinion.

If the circumstances warranting early consideration of reinstatement exist in the record before the ALJ, namely Petitioner can establish that he has fully and accurately disclosed the circumstances surrounding his license revocation or surrender to another licensing authority

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[18] I am cognizant of an appellate panel's recent decision in Bhatti at pages 11 - 12, where concern was raised about the applicability of this exception to a case pending prior to the effective date of the new regulations. As that panel did, I have incorporated the exception as part of my modification of Petitioner's exclusion from three to two years.

and that authority has taken no significant adverse action as to his currently held license or grants a new license, then the exception would mandate early consideration of reinstatement by the I.G.[19] This regulatory provision directs that such a determination by a State licensing authority provides a basis for the conclusion that (1) Petitioner is now apparently trustworthy to be a program provider, (2) consideration should be given to ending his exclusion, and (3) the I.G. must consider his reinstatement into the program. It mandates only that the I.G. give consideration to reinstatement, not that Petitioner be reinstated. As I indicated earlier, the same situation arises when the ALJ reduces the Petitioner's period of exclusion and that time period has lapsed. In short, this regulatory provision defines for the purpose of 42 C.F.R. § 1001.501 exclusions what is a reasonable period of exclusion and any period of exclusion beyond the licensing authority's recent action would arguably then be excessive or unreasonable.[20] My authority to decide the reasonableness of Petitioner's exclusion is found in the Act and its implementing regulations. See Section 205(b) of the Act; 42 C.F.R. §§ 1001.2007(a)(1)(ii) and 1005.20(b) of the regulations.

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[19] The language of 42 C.F.R. § 1001.501(c)(2), assuming the factual predicate is met, is clear: "the OIG will consider a request for early reinstatement" (emphasis added), and is mandatory. If the requirement was to be permissive, then the drafter of this provision would have used the word "may" or a similar word. Even though early reconsideration is mandatory where the factual predicate is established, the program is protected, since in evaluating a Petitioner's reinstatement application, the I.G. is given full opportunity to determine his trustworthiness after an extensive review of his past and current activities. See 42 C.F.R. § 1001.3002(b).

[20] It is clear from the preamble to 42 C.F.R. § 1001.501 that the I.G. considers its authority to exclude pursuant to this section to be based on actions of "derivative agencies," agencies other than the Department of Health and Human Services. 57 Fed. Reg. 3304. Also, it is clear that by relying on subsequent actions of these "derivative agencies" in granting or not taking significant adverse action as to a current license, the I.G. treats the State agency's action as a surrogate determination that the Petitioner no longer poses a threat to the program. Id. at 3304 - 3305.

In this case, Petitioner has offered proof that he qualifies for the exception contained 42 C.F.R. § 1001.501(c)(2). Three states -- Texas, Oklahoma, and Colorado -- investigated the circumstances surrounding Petitioner's voluntary surrender of his license in Kansas and decided to reinstate Petitioner's license. A fourth state, Indiana, investigated his license surrender in Kansas and will grant him a new license once he successfully completes a qualifying test. Indiana specifically found that the circumstances surrounding his license surrender in Kansas did not create a bar to his obtaining a license once he passes the examination.

In deciding whether, in each of these State actions, the requirements of 42 C.F.R. § 1001.501(c)(2) have been met, a number of preliminary considerations must be addressed. First, Petitioner, as the moving party seeking application of this exception, has the burden of proof in showing that the circumstances envisioned in the exception have been met. Such a showing is similar to the burden of proof required when a Petitioner is arguing the applicability of one the mitigating factors in order to justify the reduction of an exclusion. James H. Holmes, M.D., DAB CR270 (1993); Jose Ramon Castro, M.D., DAB CR259 (1993); 42 C.F.R. § 1005.15(c). Second, a determination must be made as to whether the factual predicate for applying 42 C.F.R. § 1001.501(c)(2) is present in Petitioner's case. There is no existing case precedent interpreting this section. Consequently, I must rely on the plain meaning of the language of the provision. The exception turns on what information the excluded individual or entity provides to the State licensing authority. There must be a full and accurate disclosure of the circumstances surrounding the prior license surrender, revocation, or loss to the new licensing authority.

Thus, I must examine the record and determine what information Petitioner supplied to each of the States that considered the prior action of KSBHA in determining whether to take action against Petitioner's existing license or grant him a new license. I further conclude that where the Petitioner has made a good faith attempt to supply such States with all of the information in his possession concerning the prior licensing disciplinary action of KSBHA, such as the petition and the order accepting the surrender of his license, and where he responds to all reasonable requests from the new State licensing authority for information about his surrender, the requirements of this section have been met.

I have considered the preamble to this regulatory exception. There, the commentators couched the test not on what information the Petitioner supplies to the State licensing authority, but whether such authority is "fully apprised of the circumstances surrounding the loss of the license." 57 Fed. Reg. 3305 - 3306. This is a subtle but significant difference from the regulation itself. Even where there is full and accurate disclosure by Petitioner, the State licensing authority still may not be "fully apprised," especially where such State does not want to expend the time or funds to follow up on the information supplied by Petitioner or the original State chooses to not be responsive to requests for information about its investigation. Again applying the reasonable, fair, and plain meaning of the regulatory exception, if Petitioner has supplied to the new State licensing authorities sufficient information that, with reasonable diligence and effort such States can be fully apprised of the circumstances surrounding his license surrender in Kansas, then he has met the requirement of the exception. Depending on the nature of the circumstances surrounding the loss of license, each State licensing authority will decide how much additional information it needs to adequately protect its citizens from a potentially untrustworthy medical practitioner. The I.G., by relying on these derivative agencies to trigger early consideration of reinstatement, has given latitude to them in the scope of the investigation of a practitioner whose license was previously lost, surrendered, or revoked. Now, under the guidelines set forth above, I will examine each of the actions taken by the states who have reviewed Petitioner's license surrender in Kansas.

A. Petitioner is licensed to practice chiropractic in Texas after Texas reviewed his license surrender in Kansas.

Petitioner was first issued a license in Texas on August 18, 1989. I.G. Ex. 10 at 2. In letters dated January 19, 1991 and December 19, 1990, the Texas Board of Chiropractic Examiners (Texas Board) wrote to Petitioner indicating that they were enclosing a copy of an Answer, Petition, and Final Order from KSBHA. I.G. Ex. 9 at 14, 16. Petitioner was given an opportunity to respond, in writing, to the alleged complaint and offer any evidence that he believed the Texas Board should consider in evaluating the complaint. In a letter dated April 5, 1991, the Texas Board again wrote to Petitioner seeking information about the complaint filed against him in Kansas and the complaint was enclosed. I.G. Ex. 9 at 13. Petitioner responded to the letters on April 10, 1991 and requested an opportunity to present his defense. I.G.

Ex. 9 at 12. By letter faxed on July 8, 1991, Petitioner wrote the Texas Board and wanted more information pertaining to the patient files they requested. By letter dated July 31, 1991, the Texas Board wrote to KSBHA requesting information concerning licensure in that State and KSBHA responded in a letter dated October 1, 1991.

By letter dated October 8, 1991, the Texas Board wrote Petitioner, stating that its Enforcement Committee "received and reviewed all information available on the complaint filed against you. After extensive investigation, the Enforcement Committee has determined that this does not constitute a violation of the Chiropractic Act of Texas. Therefore, this complaint is dismissed." I.G. Ex. 9 at 4. By letter dated February 3, 1992, which was in response to the I.G.'s letter concerning Petitioner, the Texas Board stated that it had received information from KSBHA, which showed that Petitioner had voluntarily surrendered his license during the pendency of a disciplinary proceeding. The Texas Board made numerous attempts to obtain additional information on Petitioner's case, and the information was not provided; without the additional information -- such as numbers of complaints, copies of complaints, patient records -- the Texas Board could not take disciplinary action. I.G. Ex. 9 at 2. In a note to the file, counsel for the I.G. observed that the letter Petitioner received, indicating that the Texas Board had made an "extensive investigation" of the KSBHA complaint, was a form letter. I.G. Ex. 10. The note also said: "Texas only looked at Kansas public records and talked with Dr. Bonebrake." Id.

Petitioner submitted a letter dated April 16, 1993 from the Texas Board which states that Petitioner assisted the Enforcement Committee of the Texas Board during an investigation of allegations against his license in Kansas. Petitioner "presented a volume of documents on our request, that included but was not limited to committee reports and transcripts from [KSBHA], patient files, advertising documents, etc,[.] etc. After this Committee's investigation the Texas Board of Chiropractic Examiners did not discipline Dr. Bonebrake[r]." P. Ex. III/7. The I.G. made no effort to rebut the information contained in the April 16th letter, choosing instead to point out that this latest letter from the Texas Board conflicted with earlier correspondence. I.G.'s Response to Petitioner's Additional Posthearing Br. at 2 - 3.

Review of the record demonstrates that Petitioner submitted extensive information, both orally in writing,

to the Texas Board. The Texas Board made attempts to secure additional information from KSBHA, with questionable results. I am satisfied that Petitioner fully and accurately disclosed to the Texas Board the circumstances surrounding his license surrender in Kansas. Moreover, based on the latest letter from the Texas Board, which was not rebutted by the I.G., the Texas Board was fully apprised of such circumstances and took no significant adverse action against Petitioner's Texas chiropractic license. Consequently, I conclude the record supports a finding that the factual predicate of 42 C.F.R. § 1001.501(c)(2) has been met with regard to Petitioner's Texas license.

B. Although Petitioner is licensed to practice in Oklahoma, I am unable to conclude what information this State looked at regarding Petitioner's license surrender in Kansas.

Petitioner has been licensed in Oklahoma since June 4, 1980. Tr. 179; I.G. Exs. 11 - 12; P. Ex. I/7 at 97. In a letter dated February 4, 1992, from the Oklahoma Board of Chiropractic Examiners (Oklahoma Board) to counsel for the I.G., Oklahoma did not take any action against Petitioner's license to practice chiropractic because there were no violations of Oklahoma's statute. In order to receive his 1992 license in Oklahoma, Petitioner was required to provide proof of continuing education and pay his renewal fee. I.G. Ex. 12 at 1. The letter stated that "[t]he Board did in fact investigate this issue [the surrendered Kansas license] and was satisfied that there were no violations [of Oklahoma statute]." I.G. Ex. 12.

Contrary to the Oklahoma's Board's letter, the I.G. contends that Oklahoma did not investigate the underlying complaints by Kansas patients. See I.G. Ex. 11. Petitioner stated that he authorized the Oklahoma Board to receive the same documents that the I.G. was authorized to receive, thereby fulfilling the requirements of taking "no significant action as to a currently held license," and "fully and accurately disclosing the circumstances surrounding this action to a licensing authority for a different State . . . " P. Motion for Relief at 4.

The February 4, 1992 letter from the Oklahoma Board is ambiguous as to extent of information it received from Petitioner or KSBHA concerning Petitioner's license surrender in Kansas. The parties make opposite contentions regarding this issue. I am unable to determine from the record the extent of the disclosure made by Petitioner to the Oklahoma Board concerning his

license surrender in Kansas and whether the Oklahoma Board was fully apprised of the circumstances surrounding such surrender when it decided to take no action against Petitioner's license. The Petitioner has the burden of proof to establish that he met the factual predicate in § 1001.501(c)(2) and he has failed to do so.

Consequently, the factual predicate of 42 C.F.R. § 1001.501(c)(2) has not been met with regard to Petitioner's Oklahoma license.

C. Petitioner is licensed to practice in Colorado after this State reviewed his license surrender in Kansas.

Petitioner is also currently licensed to practice chiropractic in Colorado. In a letter dated October 19, 1992, the State Board of Chiropractic Examiners in Colorado (Colorado Board) wrote to KSBHA indicating that, based on the information provided, the Colorado Board voted to dismiss KSBHA's complaint against Petitioner. "The facts presented in this case do not appear to be a violation of the Chiropractic Statutes that would warrant disciplinary action." P. Ex. III/6 at 5. The file on this matter was closed.

In a report dated August 18, 1992, the Complaints and Investigations unit of the Department of Regulatory Agencies in Colorado conducted an investigation based on the complaint filed with KSBHA. Petitioner provided information which included a written document which "supports his examination of the breast (pectoral area) for diagnosis and treatment of referred pain from myofascial and non-myofascial trigger points." Id. at 8. The report of investigation specifically requested from KSBHA: a certified copy of the Final Agency Order; a copy of the investigative report detailing the allegations, findings, and other matters in the case; and, confirmation of Petitioner's compliance with such sanctions. The general counsel for KSBHA responded to the investigator's request in a letter dated June 2, 1992. The report of investigation stated that Petitioner submitted a copy of a letter written by Dr. Paul Mullin, D.C., Chairman of the Department of Diagnosis, Palmer College of Chiropractic and in that letter Dr. Mullin indicated that Petitioner was taught "'breast exam' skills relative to trigger point therapy, while a chiropractic student." Dr. Mullin points out also "that such 'breast examination' skills differ from the traditional 'breast exam' females receive from practitioners such as OB/GYN's." Id. at 9.

The Colorado Board received extensive information, both orally in writing, concerning the allegations against Petitioner, including but not limited to, a copy of KSBHA's final order, petition, and findings. Here, Petitioner made extensive efforts to provide the Colorado Board with information of the circumstances surrounding his surrender of his Kansas license and it appears from the record that the Board was fully apprised of such circumstances. Therefore, I am satisfied that Petitioner fully and accurately disclosed to the Colorado Board the circumstances surrounding his license surrender in Kansas and, based on such information, including information received from KSBHA, the Board took no significant adverse action against Petitioner's license.

Consequently, I conclude the record supports a finding that the factual predicate of 42 C.F.R. § 1001.501(c)(2) has been met with regard to Petitioner's Colorado license.

D. Petitioner is not licensed to practice chiropractic in Indiana but this State reviewed his license surrender in Kansas and found no violation of Indiana's laws.

On March 12, 1992, the Indiana Board of Chiropractic Examiners (Indiana Board) denied Petitioner's license to practice chiropractic because (1) he did not pass an examination in orthopedic testing, neurological testing, and chiropractic technique with a score of 75; and (2) because his license was disciplined in Kansas for a violation which bears on his ability to practice competently in Indiana. P. Ex. III/3 at 11. On June 4, 1992, the Indiana Board issued Findings of Fact and Order pursuant to Petitioner's petition for review of the Indiana Board's denial of his application for licensure. Petitioner's application for license was denied because of his failure to pass an oral/practical examination. The Indiana Board concluded that its "prior determination that Petitioner's Kansas chiropractic license was disciplined for a violation which would have a direct bearing on Petitioner's ability to practice competently in Indiana is hereby OVERRULED." P. Exs. III/6 at 1 - 4; III/3 at 11.

Petitioner retook his Oklahoma chiropractic examination and scored a 97 percent. He indicates that he will be applying again for a chiropractic license in Indiana based on reciprocity in Oklahoma. P. Ex. III/6 at 8.

Based on information provided to the Indiana Board by Petitioner concerning his license surrender in Kansas, the Board determined that such surrender would not be a

basis to deny him a license in Indiana but chose not to grant him a chiropractic license due to his failure to pass the required oral/practical examination. Since Indiana decided that the complaint against Petitioner in Kansas would not have a direct bearing on his ability to practice in Indiana, I am satisfied from the evidence of record that Petitioner has fully and accurately disclosed to the Indiana Board the circumstances surrounding his license surrender in Kansas. However, since Petitioner was not granted a license the factual predicate of 42 C.F.R. § 1001.501(c)(2) is not met.

VI. Petitioner is trustworthy.

Through his expert witnesses, Petitioner has satisfactorily rebutted, in part, the presumption of untrustworthiness which arose from his surrender of his license in Kansas under circumstances meeting the statutory requirements of section 1128(b)(4)(B) of the Act. Specifically, the record does not support a finding that he performed breast examinations or myofasical and trigger point treatments in a manner inconsistent with accepted chiropractic practice for individuals having similar training and experience as Petitioner. See FFCL 50. The record also does not support the conclusion that Petitioner employed such examinations for his own sexual gratification rather than for appropriate and legitimate chiropractic purposes in response to the medical needs of his patients. FFCL 76. Also, I conclude from the record that while at times Petitioner may have been overly effusive in his socialization with his patients, such conduct occurred in the past, there is no evidence of its continuation, and Petitioner recognizes that his conduct can be misconstrued by some of his patients and has indicated that he will alter such behavior in the future. P. Posthearing Br. at 6. Thus, as to these matters, the record does not support the need for an exclusion of Petitioner as a program provider. The I.G. argues that Petitioner's premature withdrawal from the Kansas Chiropractic Association's impaired-physicians program is an indication of his lack of trustworthiness to be a program provider. I.G. Posthearing Br. at 41 - 42. I do not draw such an inference. Petitioner left the program before its completion, but only after he was told that he had no psychological impairment. Moreover, in adjusting his behavior with female patients, he had to admit that he previously engaged in sexual improprieties with such patients. Considering that Petitioner never admitted to the allegations contained in KSBHA's petition, his withdrawal from the impaired-physicians program under the above circumstances does not reflect his

untrustworthiness to be a program provider. See FFCL 13 - 14.

Petitioner did not successfully rebut other elements of KSBHA's petition, creating the presumption of untrustworthiness. KSBHA was concerned about his performing breast examinations and therapies in the pelvic and anal areas on his female patients without full disclosure beforehand of the purpose of such therapy and without inquiring whether such patients wanted a third person present in the examination room. FFCL 57. Even Petitioner's own chiropractic experts confirmed that appropriate practice and procedure would warrant such disclosures to female patients prior to performing breast examinations or therapies involving the pelvic or anal areas. FFCL 45, 74. Contrary to accepted standards of chiropractic practice and being aware of such admonition of the Kansas licensing board, Petitioner continued to perform such examinations or therapies without providing to each of his female patients the required disclosures. FFCL 65 - 68. In addition, Petitioner failed to rebut the presumption of untrustworthiness arising from KSBHA's allegation that he altered a patient's treating record. FFCL 5. Petitioner readily admitted supplementing the record of patient D five to six months after the patient's treatment and, more importantly, after an accusation of sexual misconduct involving this patient. FFCL 21. Such alteration was not in accord with standard professional chiropractic conduct in that it showed that Petitioner failed to complete accurate treatment records for his patients. FFCL 18. Moreover, such alteration in the context of an accusation of sexual misconduct would suggest that Petitioner was supplementing the record to provide a medical basis for his conduct with patient D which was, in part, the subject of the accusation. FFCL 22. From each of these practices of Petitioner, I conclude that Petitioner poses a risk or threat to program beneficiaries and recipients.

The I.G. has imposed a three-year exclusion. Petitioner argues that none is warranted. From my review of the record, I conclude that the three-year exclusion is excessive and a two-year exclusion will satisfactorily comport with the remedial requirements of the Act. Petitioner has no mental impairment, nor did he engage in the challenged conduct for purposes of sexual gratification. Thus this case differs from my decisions in Jerry D. Harrison, D.D.S., DAB CR203 (1992), aff'd, DAB 1365 (1992) and Thieu Lenh Nghiem, M.D., DAB CR248 (1992). Nor does this appear to be the type of case where Petitioner took advantage of the trust inherent in the physician/patient relationship in order to gain

sexual access to his patient. See Bruce Lindberg, D.C., DAB CR233 (1992).

The evidence in this case shows that Petitioner poses a less serious threat to the safety of program beneficiaries and recipients than the excluded providers in Harrison and Nghiem, justifying an exclusion that is substantially shorter than the five-year or nine-year minimum period, respectively, that I determined was reasonable in those cases. This case is similar to my decision in Charles J. Barranco, M.D., DAB CR187 (1992). Dr. Barranco had surrendered his license in New York in response to a disciplinary proceeding and the I.G. imposed an exclusion until he regained his license in New York. I reduced the exclusion to three years, or, in the alternative, until a State licensing agency reviewed the factual and legal issues involved in the New York proceeding and neither took significant adverse action against an existing license nor refused to grant a new one. Id. at 38 - 39. I reduced the exclusion based on Dr. Barranco's successful rebuttal of some of the elements of untrustworthiness arising from his license surrender in New York. Id. at 31 - 36. As here, I considered the passage of time since the occurrence the practices challenged by the licensing board and that Dr. Barranco made efforts to correct such conduct in the future. Id. at 35. A factor in Barranco not present in this case is that the I.G. presented current evidence that Dr. Barranco's medical office was billing the program after he was excluded and he misstated his qualifications on an application for staff privileges at a local hospital. Id. This record contains no such recent misdeeds of Petitioner which might warrant a three-year exclusion.

The record reflects that Dr. Bonebrake is a highly skilled chiropractor who treats patients who have complicated and lingering chiropractic disorders. He thrives on learning and performing all the latest techniques related not only to the chiropractic field but also as it relates to acupuncture and myofascial treatment. Petitioner is very aggressive in his attempt to provide patients with the benefit of his advanced training and experience by his utilization of such techniques and procedures in their treatment. At times, he forgets that his chiropractic practice is not typical and that some of his female patients would not expect such examinations or treatment procedures from a chiropractor. Clearly, such factors coupled with (1) Petitioner's failure to fully apprise his female patients of the nature and extent of his treatment and (2)

effusive socialization with some of his patients has led to the accusations of sexual misconduct.

KSBHA was of the belief that his performance of breast examinations and use of myofascial or trigger point techniques in treating pelvic and anal areas were contrary to professional chiropractic standards. This clearly was the major element of the licensing board's case against Petitioner. The I.G. relied on this in supporting its three-year exclusion. Petitioner never challenged the case when the disciplinary proceeding was pending. He apparently had his reasons. He did offer expert evidence in this proceeding to contest KSBHA's allegations and the I.G. has failed to rebut his experts. Moreover, two states -- Texas and Colorado -- have reviewed the allegations surrounding his surrender of his license in Kansas and have not taken any adverse action against his chiropractic licenses. A third state, Oklahoma, has indicated that it took no adverse action against Petitioner's license. However, Petitioner was unable to meet his burden of proof demonstrating that he fully and accurately disclosed to the Oklahoma Board the circumstances surrounding the surrender of his license in Kansas. A fourth state, Indiana, has refused to grant him a new license until he successfully completes an examination, but specifically concluded that his surrender of his license in Kansas would not be a bar to his obtaining a new license. Such circumstances render a three-year exclusion in this case to be excessive. It is these circumstances that warrant the reduction of his exclusion to two years.

CONCLUSION

I conclude that the I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4)(B) of the Act. In addition, I conclude that ta three-year exclusion would be excessive and that the remedial purpose of the Act will be satisfied by a two-year exclusion, or, alternatively, until another State licensing authority, after Petitioner has fully and accurately disclosed to it the circumstances surrounding his license surrender in

Kansas, grants Petitioner a new license or takes no significant adverse action as to a currently held license.

/s/

Edward D. Steinman
Administrative Law Judge