Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of: David A. Barrett, Petitioner, - v. - The Inspector General.	DATE: October 14, 1993 Docket No. C-93-113 Decision No. CR288

DECISION

This matter is before me on the request for hearing filed by David A. Barrett (Petitioner) on August 25, 1993, to contest his exclusion from participating in Medicare and State health care programs.[1] Petitioner was informed by the Inspector General (I.G.) of the Department of Health and Human Services that the exclusion was being imposed under section 1128(a)(2) of the Social Security Act (Act) because Petitioner had been convicted in Cerro Gordo County, Iowa, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. The exclusion is for a period of five years.

During the prehearing conference held on September 3, 1993, the parties agreed that there is no material fact in dispute and that this case should be decided on cross motions for summary disposition. In addition, the parties jointly moved for an expedited briefing schedule. During the conference, I granted their motion to expedite proceedings.

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act, 42 U.S.C. § 1320a-7(h), to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Social Security Act. Unless the context indicates otherwise, I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Shortly after the conclusion of the prehearing conference, I received and considered Petitioner's motion to stay the exclusion pending resolution of this administrative hearing. Petitioner cited 5 U.S.C. § 705 for support of his contention that, when an agency finds that justice so requires, it may postpone the effective date of an action taken by it, pending judicial review. I ruled that the Secretary has not delegated to administrative law judges the authority to stay exclusions. I therefore denied Petitioner's motion for me to stay the exclusion. September 8, 1993 Prehearing Order and Schedule for Filing Motions for Summary Disposition, pp. 2 - 3.

Having considered the parties' cross-motions for summary disposition, the materials submitted in support thereof,[2]

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[2] Each party has submitted a memorandum in support of summary disposition and a reply memorandum, together with various exhibits. In this decision, I refer to Petitioner's supporting memorandum and reply memorandum as "P. Mem." and "P. Rep.," respectively, and to the I.G.'s supporting memorandum and reply memorandum as "I.G. Mem." and "I.G. Rep.," respectively. In citing the exhibits filed by the parties, I refer to "P. Ex." or "I.G. Ex.," followed by the numerical designation of the exhibit and the page number.

Petitioner's exhibits are:

> P. Ex. 1: The affidavit Petitioner prepared for this case (pp. 1 - 4) with documents in support of his assertions (pp. 5 - 12).
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> P. Ex. 2: The affidavit prepared by Gary Mrosko for this case (pp. 1 - 2).
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> P. Ex. 3: A copy of Petitioner's Motion to Amend Pleading filed before the Iowa District Court (p. 1); a copy of Petitioner's Amended and Restated Application for Postconviction Relief (pp. 2 - 8) with supporting documents (pp. 9 - 18); a copy of Petitioner's Application for Postconviction Relief (pp. 19 - 24) with supporting documents (pp.25 - 32).

Petitioner's Exhibit 3 contains numerous duplicate pages because he used many of the same documents as attachments in support of his postconviction relief motion and amended postconviction relief motion.

(continued...)

the parties' joint stipulations, and the applicable law, I grant the I.G.'s motion for summary disposition. For the reasons that follow, I conclude that the I.G. has the authority to exclude Petitioner pursuant to section 1128(a)(2) of the Act and that the five-year exclusion imposed by the I.G. is mandated by law.

ISSUES

The issue is whether Petitioner is subject to the minimum mandatory five-year exclusion provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act. Under this issue, I must resolve the following questions:

1. Whether Petitioner was "convicted" of a criminal offense within the meaning of section 1128(a)(2) and section 1128(i) of the Act;

2. Whether the criminal offense of which Petitioner was convicted was "in connection with the delivery of a health care item or service;" and

3. Whether Petitioner was convicted of a criminal offense relating either to the "neglect of patients" or the "abuse of patients."

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[2](...continued)

The I.G.'s two exhibits are:

I.G. Ex. 1: A copy of the Complaint filed against Petitioner in Iowa District Court on March 5, 1993 (p. 1), and a copy of the court summons (p. 2).

(I.G.'s exhibit 1 duplicates P. Ex. 1, pp. 5 - 6, and P. Ex. 3, pp. 15 - 16, 25 - 26.)

I.G. Ex. 2: A copy of the docket sheet of Petitioner's proceedings before the magistrate in Cerro Gordo County, Iowa (p. 1).

Neither party has objected to the foregoing exhibits, and I have admitted all of them into the record for the purpose of considering the merits of the parties' positions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)

A. Findings of Fact and Conclusions of Law by Agreement of the Parties

1. Petitioner is the Director of Residential Services for Handicap Village, a residential and vocational center which provides services for mentally and physically disabled individuals. Joint Stipulations, p. 1.[3]

2. In February of 1992, Petitioner was informed by a female staff member that a Handicap Village resident had complained of being sexually abused by a certain male staff member. Joint Stipulations, p. 1.

3. Petitioner completed an investigation of the resident's allegation and ultimately determined that the resident's charge was unsubstantiated. Although Petitioner was a mandatory reporter under Iowa Code § 235B, Petitioner also determined that the resident's allegation should not be reported to the Iowa Department of Human Services for reasons which included the following:

> a) there were no witnesses to the alleged sexual abuse other than the resident;
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> b) the accused male staff member neither admitted nor denied the allegations;
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> c) the accused male staff member resigned, therefore insulating the resident from any further abuse; and
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> d) the resident's family did not want the allegation reported since the resident had a history of sexual deviancy.

Joint Stipulations, pp. 1 - 2.

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[3] As summarized in my September 8, 1993 Prehearing Order and Schedule for Filing Motions for Summary Disposition, the parties have stipulated to facts numbered 1 - 3 and 6 - 14 found in a document marked as Joint Stipulations. While I have adopted the Joint Stipulations without substantive changes, I have changed their numbering where appropriate, I have conformed the style with the style I use in other parts of the Decision, and I have made other noncontroversial changes for the sake of clarity.

4. After another individual notified the Iowa Department of Human Services of the allegation of sexual abuse at Handicap Village, Roxanne Neary, an investigator from the Iowa Department of Inspections and Appeals, investigated the alleged sexual abuse. During the course of her investigation, Petitioner discussed what he knew about the incident. At the end of her investigation, Ms. Neary informed Petitioner that he might be facing possible criminal charge for failure to report suspicion of adult abuse. Ms. Neary also informed Petitioner that she was forwarding her investigative file to the Cerro Gordo County Attorney. Joint Stipulations, p. 3; P. Ex. 1, p. 2.

5. On March 5, 1993, the Cerro Gordo County Attorney charged Petitioner with failure to report a suspected case of adult abuse, a violation of Iowa Code §§ 235B.1(1)(a)(4), 235B.1(7)(a), and 235B.1(11). Joint Stipulations, p. 3.

6. Petitioner then contacted Ms. Neary, who informed him that the charge was a mere formality and that he would probably only have to pay a $50 fine. When asked if the charge would affect his employment, Ms. Neary stated that his continued employment at Handicap Village was a matter between him and Handicap Village. Joint Stipulations, p. 3.

7. On March 18, 1993, Petitioner pled guilty to failure to report a suspected case of adult abuse, a violation of Iowa Code §§ 235B.1(1)(a)(4), 235B.1(7)(a), and 235B.1(11). Petitioner was not represented by counsel. The magistrate who took Petitioner's plea fined Petitioner $50 and assessed Petitioner a $15 surcharge and $25 in costs. Petitioner paid his fine that day. Joint Stipulations, pp. 3 - 4.

8. By letter dated August 13, 1993, the I.G. notified Petitioner that, effective 20 days from the date of the letter, the Secretary of Health and Human Services was excluding him from participation in the Medicare program and from any State health care program which receives federal funding, pursuant to section 1128(a)(2) of the Act. This action was based on Petitioner's conviction in the Iowa District Court for Cerro Gordo County for his failure to report a suspected case of adult abuse. Since there were no aggravating circumstances, Petitioner's exclusion was for the minimum five-year period mandated by section 1128(c)(3) of the Act. Joint Stipulations, p. 4.

9. Handicap Village receives approximately 50 percent of its funding from Medicare and other federal programs. Thus, unless Handicap Village can pay Petitioner's salary from a source that does not include federal funds, the effect of the exclusion directed by the I.G. was to prohibit Petitioner from working at Handicap Village after September 2, 1993 (i.e., 20 days from the date of the I.G.'s notice letter). The Executive Director of Handicap Village has testified in a different proceeding that Handicap Village might be able to fund a chaplin or minister position with strictly private funds. Thus, there remains a possibility that Petitioner could continue working at Handicap Village, albeit in a different role. Joint Stipulations, p. 4.

10. On August 24, 1993, Petitioner filed a post-conviction relief petition, asserting that his conviction should be set aside. That matter is still pending in State court. Joint Stipulations, p. 5.

11. On August 25, 1993, Petitioner filed a timely request for hearing before a federal administrative law judge to contest the exclusion imposed and directed by the I.G.. The case was assigned to me for hearing and the issuance of a decision. Joint Stipulations, p. 5.

12. On August 27, 1993, Petitioner filed an action in federal district court seeking to enjoin the Secretary of Health and Human Services from excluding him pending the exhaustion of his administrative remedies. By order dated September 1, 1993, the court denied Petitioner's Motion for Temporary Restraining Order and Preliminary Injunction and Request for Evidentiary Hearing. Joint Stipulations, p. 5; Barrett v. Shalala, No. C93-3058 (N.D. Iowa Sept. 1, 1993).

13. Petitioner's conviction is not related to the abuse of patients. I.G. Rep., p. 1; P. Mem., p. 6.

B. Other Findings of Fact and Conclusions of Law

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

15. Petitioner may not utilize this administrative proceeding to collaterally attack his criminal conviction.

16. The elements of Petitioner's conviction establish that Petitioner was "convicted" of a criminal offense relating to a patient, within the meaning of section 1128(a)(2) of the Act.

17. The elements of Petitioner's conviction establish that Petitioner was convicted of a criminal offense which was "in connection with the delivery of a health care item or service," within the meaning of section 1128(a)(2) of the Act.

18. The elements of Petitioner's conviction establish that Petitioner was convicted of a criminal offense relating to "neglect" of patients, within the meaning of section 1128(a)(2) of the Act.

19. The Secretary of Health and Human Services has 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).

20. The five-year exclusion imposed and directed against Petitioner by the I.G. is for the minimum period required for exclusions imposed and directed pursuant to section 1128(a)(2) of the Act. Section 1128(c)(3)(B) of the Act.

21. The exclusion imposed and directed by the I.G. against Petitioner is in accordance with the mandates of the Act.

22. Neither the I.G. nor the administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

ANALYSIS

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

The facts and stipulations of record establish that Petitioner had pled guilty to a misdemeanor offense in State court and the presiding magistrate had accepted his plea. FFCL # 7; I.G. Ex. 1 and 2. These facts establish the existence of a conviction within the meaning of sections 1128(a)(2) and 1128(i) of the Act.

Nevertheless, Petitioner asserts that he was not convicted within the meaning of the Act. P. Mem., pp. 3, 5. He argues that the criminal complaint against him was technically defective; that he should not have been charged under a superseded statute and after the statute of limitations had expired; that the description of the acts constituting the offense are inaccurate; that he was not informed that an exclusion from the Medicare and

Medicaid programs would ensue from his guilty plea; and that the presiding magistrate erred in having accepted a guilty plea that was not intelligently or knowingly made by Petitioner. P. Mem., pp. 5 - 6; P. Ex. 3. Petitioner has instituted postconviction relief proceedings in Cerro Gordo County Court in order to set aside the conviction he believes to be contrary to law. P. Mem., p. 5; FFCL #10.

In challenging his exclusion before me, Petitioner has confused the existence of his conviction with his opinion of its validity. His arguments make clear that he regrets having pled guilty to the State's charge and believes he should not have been convicted. However, on the undisputed facts of this case, the laws and regulations applicable to these proceedings prohibit Petitioner from denying the existence of his conviction.

Section 1128(i) of the Act defines "conviction" as, inter alia, "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending . . . ." and "when a plea of guilty . . . by the individual or entity has been accepted by a . . . State, or local court . . . ." Sections 1128(i)(1) and 1128(i)(3) of the Act. The pendency of Petitioner's postconviction relief motion and its bases do not negate the existence of Petitioner's conviction in this or any other forum.

In addition, the regulations that control the scope of these exclusion proceedings expressly prohibit Petitioner from collaterally attacking his conviction in the present forum. 42 C.F.R. § 1001.2007(d)(1992). I am without authority to adopt the rationale articulated by Petitioner in his postconviction relief motion, no matter how sympathetically he has portrayed himself. Where, as here, a petitioner to the federal exclusion proceedings believes that his underlying State conviction is invalid, he must test the merits of his belief in State court, where the prosecution has a right also to set forth its position and where the presiding officials will have the benefit of a full record pertaining to the conviction when they consider whether to grant Petitioner relief. Petitioner may not use the federal exclusion hearing procedures to prove his grievances against the State.

For the same reasons, I give no effect to Petitioner's assertion that he "had been told by a state employee who is employed by the very office responsible for reporting the conviction to the Inspector General that the conviction would not have an impact on his job."

P. Mem., p. 5. Petitioner is using the words he attributes to the State employee for the impermissible purpose of collaterally attacking the validity of his conviction in these proceedings. However, because Petitioner's attribution also preserves an estoppel argument against the I.G., I find it appropriate to address the matter as a separate but related issue under section 1128(i) of the Act.

First, Petitioner has stated under oath:

> I met with an investigator, Roxanne Neary, and . . . she indicated to me that . . . she would be talking to the county attorney for Cerro Gordo, Iowa, about charging me with failure to report a suspected case of dependent adult abuse. I questioned her about what this would mean, and she indicated that the crime was a simple misdemeanor and that a conviction would not have an impact on my job unless my employer so chose.

P. Ex. 1, p. 2 (emphasis added). This conversation should have put Petitioner on notice that his job might be affected by the conviction.

I further note that Petitioner's reference is to an employee of the State of Iowa. There is no fact of record establishing that this State employee spoke to Petitioner as a representative of the I.G.. There is no fact of record suggesting that the I.G. has authorized the State employee to give advice to Petitioner on the I.G.'s behalf. Nor is there any fact of record suggesting that the I.G. had induced Petitioner to seek or rely on a State employee's opinion concerning the legal ramifications of any guilty plea Petitioner may enter. In sum, nothing said between a State employee and Petitioner can be construed as having estopped the I.G. from acting on the existence of Petitioner's conviction under section 1128(a)(2) of the Act.

Moreover, section 1128 of the Act is a federal statute which was designed to advance the federal interest in protecting federally-funded health care programs from health care providers who cannot be trusted to handle program funds. There is nothing in section 1128 which suggests that Congress intended that the authority to impose and direct exclusions be subject to limitations imposed by employees of State governments. I conclude that a State employee does not have the authority to make a decision on behalf of the Secretary of Health and Human Services that would frustrate the strong federal interest

in protecting the integrity of federally-funded health care programs. Anthony Accaputo, Jr., DAB CR249 (1993), aff'd, DAB 1416 (1993).

I find that Petitioner was convicted within the meaning of the Act.

B. The elements of Petitioner's conviction establish that Petitioner was convicted of a criminal offense relating to a "patient" and that the criminal offense was "in connection with the delivery of a health care item or service."

Petitioner admits that, during February of 1992, he was informed by a female staff member of Handicap Village that a resident of Handicap Village had complained of having been sexually abused by a certain male staff member of Handicap Village. FFCL # 2. Petitioner admits also that, at the time he learned of the complaint, he was the facility's Director of Residential Services, and Handicap Village was a residential and vocational center which provides services for mentally and physically disabled individuals, using funds from federal and State health care programs. FFCL # 1 and # 9; see also P. Ex. 2, p. 1. He was convicted after pleading guilty to the following charges:

> that on or about the 19th day of February, 1992, . . . said defendant did unlawfully, knowingly and willfully fail to report a case of suspected dependent adult abuse, as a mandatory reporter in charge of an institution or facility for the care of dependent adults, to-wit: did fail to report to the Department of Human Services a suspected case of dependent adult abuse involving deprivation of supervision, contrary to Sections 235B.1(1)(a)(4), 235B.1(7)(a), and 235B.1(11), of the 1991 Code of Iowa, a simple misdemeanor.

P. Ex. 1, p. 5.

The I.G. contends that, on the foregoing facts, Petitioner can interpose no meritorious challenge to the I.G.'s conclusion that the conviction was "in connection with the delivery of a health care item or service," as required by section 1128(a)(2) of the Act. I.G. Mem., p. 4.

However, Petitioner asserts in his reply brief that the I.G. is not entitled to summary disposition on this issue because the I.G. has not presented any evidence that the

resident who had complained of sexual abuse was at Handicap Village for medical treatment.[4] In essence, Petitioner's argument is that section 1128(a)(2) requires a "patient" to have been neglected in connection with the delivery of health care, and there is no evidence in this case that the alleged victim of neglect or abuse was a patient at Handicap Village.

I agree with Petitioner that, under section 1128(a)(2) of the Act, at least one patient has to have been neglected in relation to the criminal offense underlying Petitioner's conviction. In the context of Petitioner's case, the statutory elements underlying Petitioner's conviction adequately establish that the resident of Handicap Village who had complained of sexual abuse was a patient at Handicap Village during the relevant time period. In reaching this conclusion, I do not imply that, in all cases involving patient neglect under section 1128(a)(2), the patient neglected must be those of the excluded individual's institution. See discussion of Carolyn Westin, DAB 1381 (1993) below.

Petitioner has misplaced reliance on the decision in Wilhelmina K. Rote, R.N., DAB CR242 (1992) to support his argument that the I.G. must submit additional evidence proving that the resident who complained of sexual abuse was at Handicap Village for medical reasons. Rote is inapposite. The petitioner in Rote had been convicted of assault under a statute that did not, by its clear terms, establish that petitioner's offense related to a patient in a treatment setting. In this case, given the statutory elements of the offense for which Petitioner was convicted, the individual who allegedly suffered from sexual abuse was without doubt a "patient" at Handicap Village during the time period and in the events relevant to Petitioner's offense, and the circumstances that gave rise to Petitioner's conviction were connected with the delivery of a health care item or service to that individual.

As discussed earlier, Petitioner is bound by the fact of his conviction and he is not entitled to collaterally attack the elements to which he had already pleaded guilty in contesting the I.G.'s authority to exclude him. Petitioner was convicted under section 235B.1(1)(a)(4) of

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[4] According to Petitioner, "There is no evidence that the resident was there for medical treatment[;]" and "[t]here is no evidence that the resident at issue here is at that facility for medical reasons." P. Rep., p. 5.

the 1991 Code of Iowa, which defined "dependent adult abuse" as:

> The deprivation of the minimum food, shelter, clothing, supervision, physical and mental health care, and other care necessary to maintain a dependent adult's life or health.

"Dependent adult," as defined by section 235B.1(3) of the 1991 Code of Iowa, meant:

> a person eighteen years of age or older who is unable to protect the person's own interests or unable to adequately perform or obtain services necessary to meet essential human needs, as a result of a physical or mental condition which requires assistance from another, or as defined by departmental rule.

Section 235B.1(7)(a) of the 1991 Code of Iowa, under which Petitioner was convicted as well, imposed a reporting duty on health practitioners, the heads of hospitals or similar institutions and their designated agents, as follows:

> A health practitioner, . . . who examines, attends, or treats a dependent adult and who reasonably believes the dependent adult has suffered dependent adult abuse, shall report the suspected abuse to the department of human services. If the health practitioner examines, attends, or treats the dependent adult as a member of the staff of a hospital or similar institution, the health practitioner shall immediately notify the person in charge of the institution or the person's designated agent, and the person in charge or the designated agent shall make the report.

Petitioner's guilty plea and conviction for failure to report "dependent adult abuse" establish that the resident who complained of sexual abuse was so severely handicapped that he was unable to protect his own interests or adequately care for his own essential human needs without help from others. See sections 235B.1(1)(a)(4) and 235B.1(3) of the 1991 Code of Iowa; FFCL # 2. The fact that this individual resides at Handicap Village (Petitioner has consistently referred to him as a "resident") in such an utterly dependent state readily implies that even the routine services provided by Handicap Village to maintain his survival should have included health care services. See Dawn Potts, DAB CR120,

at 7 (1992). The elements of Petitioner's conviction contradict Petitioner's theory that during the period of time and in the events relevant to Petitioner's conviction, the purported victim of abuse might have been receiving only nonmedically related "residential or vocational care" at Handicap Village. P. Rep., p. 5.

In addition, the elements of Petitioner's conviction specifically establish that the purported victim of dependent adult abuse was examined, attended, or treated by a health care practitioner who was on the staff of Handicap Village. See section 235B.1(7)(a) of the 1991 Code of Iowa. While attending to, examining, or treating the dependent adult resident in question, the health care practitioner on Handicap Village's staff formed a reasonable belief that said resident had been the victim of suspected dependent adult abuse involving the deprivation of supervision necessary for maintaining his life or health.[5] See id. and section 235B.1(1)(a)(4) of the 1991 Code of Iowa. Only because Handicap Village is a hospital or like institution, the health care practitioner on its staff reported her beliefs of dependent adult abuse to Petitioner in his capacity as the designated agent for Handicap Village. See section 235B.1(7)(a) of the 1991 Code of Iowa.

Petitioner could not have been convicted absent a complaint by a dependent adult resident whose survival necessitated the delivery of health care services for his

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[5] Petitioner takes issue with the allegation in the State's complaint that the abuse Petitioner failed to report involved a failure to supervise. P. Mem., p. 5. Petitioner contends that "[t]here was never any allegations of failure to supervise involved in the case." Id. Petitioner's contention lacks merit. The State's allegation of failure to supervise in this case had been lodged in its complaint, and Petitioner had pled guilty to having violated section 235B.1(1)(a)(4) of the 1991 Iowa Code, which lists as an offense the "deprivation of . . . supervision . . . necessary to maintain a dependent adult's life or health." I.G. Ex. 1 and 2. As noted earlier, Petitioner is not entitled to collaterally attack his conviction in this proceeding. In addition, proceeding as I must from the parties' stipulations that the material facts underlying Petitioner's conviction relate only to his failure to report suspected sexual abuse, I can reasonably read the State's complaint as averring that the suspected sexual abuse at Handicap Village, if it took place as alleged, involved a failure of supervision at the facility.

maintenance. Absent the involvement of a health care practitioner on Handicap Village's staff who examined, attended, or treated the alleged victim of abuse during her delivery of a health care item or service to him, Petitioner would not have been convicted. Petitioner's failure to report could not have resulted in his conviction had Handicap Village not been an institution like a hospital. Petitioner's conviction was therefore "in connection with the delivery of a health care item or service" and relating to a "patient" within the meaning of the Act.

C. Petitioner's offense is related to the "neglect" of patients.

The I.G.'s argument that Petitioner's conviction is related to the neglect of patients is supported by the appellate panel's decision in Carolyn Westin, DAB 1381 (1993) and the administrative law judge's decision in Vicky L. Tennant, R.N., DAB CR134 (1991), both of which involved criminal convictions for the failure to file medical incident reports with the State. The I.G.'s position in this case is also consistent with the holdings in cases that have involved criminal convictions for the failure to report suspected patient abuse to the State.

In Dawn Potts, DAB CR120 (1991), the convicted individual was a house manager at a facility that provided health care to mentally handicapped persons. In the course of her duties as house manager, she was informed that an individual she supervised had struck a mentally handicapped resident who was receiving health care at the institution. Because she failed to report the incident of suspected abuse to the State authorities as required by law, she was convicted of a criminal offense under Florida's reporting statute.

The administrative law judge held that the conviction was related to patient neglect within the meaning of section 1128(a)(2) of the Act. He reasoned that the convicted individual had a duty to provide care by virtue of her position as a house manager, and the care she was under a duty to provide included following the directives of State law to report those incidents which might place patients in jeopardy of their health and safety. By failing to make the report of suspected abuse, she breached her duty as a health care provider to the patient who was allegedly abused. Her conviction therefore resulted from her neglect of that patient.

Recently, I decided a case which involved facts very similar to Petitioner's and a conviction for the same offense as the one committed by Petitioner. Section 235B.1(7)(a) of the 1991 Code of Iowa; Glen E. Bandel, DAB CR261 (1993). Mr. Bandel was the head of a nursing home in Iowa, and, as such, was required by Iowa law to report incidents of suspected dependent adult abuse. After having conducted his own investigation of the alleged patient abuse that was reported to him by a member of his staff, he concluded that there was no reasonable basis for reporting the incident to the State. The State later convicted him in Cerro Gordo County, Iowa, upon his pleading guilty to section 235B.1(7)(a) of the 1991 Code of Iowa, for his failure to report the suspected abuse. I concluded in the Bandel case that the conviction under section 235B.1(7)(a) of the 1991 Code of Iowa related to the neglect of patients within the meaning of section 1128(a)(2) of the Act.

I reached that conclusion in Bandel on the basis of the duty that the Iowa legislature had placed on Mr. Bandel to use the statutorily specified means for protecting the health, safety, and well-being of those dependent adult patients in his charge. I noted that each State has the right to protect its own dependent adult citizens and regulate the health care services that are delivered to them. By statute, the State of Iowa had determined that, in the course of delivering health care to dependent adult patients, persons in Mr. Bandel's position must care for the dependent adults in their charge by referring to the State all incidents of suspected patient abuse. In failing to comply with the mandatory reporting requirements of the Iowa law, Mr. Bandel neglected a dependent adult patient's right to certain specific aspects of care especially recognized and required by Iowa law.

Petitioner takes issue with the neglect analysis in Bandel and Potts on several grounds. First, Petitioner asserts that Congress intended to reach only those persons who "directly abuse or neglect patients." P. Mem., p. 7. Petitioner next argues that he cannot be excluded because the statute under which he was convicted does not set forth the criminal elements of a patient neglect offense; other Iowa statutes define patient neglect offenses. P. Mem., pp. 8 - 9. Petitioner contends also that it is not the State law that controls; rather, the underlying facts supporting the conviction should be considered in determining whether the conviction relates to patient neglect. P. Mem., pp. 9 - 11. Petitioner contends that the facts that underlie his conviction show that he should not be excluded from the

Medicare and Medicaid programs. P. Mem., pp. 9 - 12; P. Rep., pp. 2 - 4.

1. Those who directly abuse or neglect patients are not the only ones who may be excluded under section 1128(a)(1) of the Act.

I am not persuaded by Petitioner's argument that, in enacting section 1128(a)(2) of the Act, Congress intended to reach only those persons who have directly abused or neglected patients. Since applying the reasoning I used in Bandel to the facts of this case leads to the conclusion that Petitioner had directly neglected the care of the patient who complained of abuse, I assume what Petitioner means by his legal argument is that persons who perform administrative or supervisory responsibilities in the health care delivery chain are not subject to section 1128(a)(2) of the Act.

The language and history of the statute do not support the theory that, to be excluded under section 1128(a)(2), the convicted individual must have had direct interaction with patients. Congress' use of "relating to" to describe patient neglect or abuse indicates that the exclusion provision at issue must be read as covering more than those who have inflicted direct harm on patients through abuse or neglect. The regulation at 42 C.F.R. § 1001.101(b) interprets an offense related to the neglect or abuse of a patient as "including any offense that the OIG concludes entailed, or resulted in, neglect or abuse of patients." The preamble to said regulation contains an example of an embezzlement offense in a nursing home that may be related to patient neglect or abuse. 57 Fed. Reg. 3303 (1992). Even the legislative report quoted by Petitioner states that the exclusion shall apply to those individuals who were convicted of offenses that "entailed or resulted in neglect or abuse of other patients." P. Mem., p. 7.

In sum, the statute can reach others in the health care delivery chain, such as heads of medical institutions and supervisors of direct care personnel, who may have had no direct contact with any patient but whose conviction was for an offense that related to, resulted in, or entailed the abuse or neglect of patients.

2. Patient neglect need not be an element in the conviction as asserted by Petitioner.

I reject also Petitioner's arguments that section 1128(a)(2) of the Act is inapplicable to his situation because the Iowa statute used to convict him did not contain patient neglect as an element and he was not convicted under any of the State's patient neglect laws.

Section 1128(a)(2) of the Act does not require a conviction for patient abuse or neglect; rather it requires a conviction for an offense that is related to, entailed, or resulted in the abuse or neglect of a patient. Section 1128(a)(2) of the Act; 42 C.F.R. § 1001.101(b). The relatedness determination is for the I.G., and now me, to make. 42 C.F.R. § 1001.101(b); section 205(b)(1) of the Act. In promulgating regulations to implement the statute, the Secretary of Health and Human Services has especially noted, "Further, the offense that is the basis for the exclusion need not be couched in terms of patient abuse or neglect;" the illustrative example given is of a conviction for embezzlement of nursing home funds that resulted in the neglect of patients. 57 Fed. Reg. 3303 (1992). An appellate panel of the Departmental Appeals Board (Board) also has held that "it does not matter that the term 'neglect' was not specifically mentioned during the criminal process." Carolyn Westin, DAB 1381, at 12 (1993). Under a proper reading of the law, there is no conceivable merit to Petitioner's contention that patient neglect must be an element of the offense for which he was convicted.

According to Petitioner, a statement I made in Bandel supports his contention that he cannot be excluded unless he has been convicted of an offense having patient neglect as an element. P. Mem., p. 8. My statement, "However, Iowa law controls here in determining what is related to the neglect of patients within its own boundaries" (Bandel at 10) does not alter the plain language of the federal statute or the agency's implementing regulations. In Bandel, I made that statement in the course of noting that, in a jurisdiction which did not have a reporting statute similar to Iowa's, the same omissions by Mr. Bandel might not result in a conviction that I would find to be related to patient neglect. In the context of addressing Mr. Bandel's arguments, I was simply pointing out that, even though all States do not require the same type of care for their dependent adult patients, I could not decide the "related to patient neglect" issue in Mr. Bandel's case by using

other States' laws. My statement does not support Petitioner's incorrect legal theory.

3. Petitioner has failed to establish that section 1128(a)(2) is inapplicable to him because he believes he has caused no harm and poses no risk to the programs' beneficiaries and participants.

I next turn to Petitioner's affirmative arguments that he should not be excluded on the basis of patient neglect because, in his view, the facts that underlie his conviction show that he has caused no harm by his failure to report the suspected patient abuse; that he constitutes no risk to the health and safety of his patients and, absent such serious risk, he is beyond the exclusion mandates of the Act; that he was acting within his discretion as a supervisor when he failed to report the suspected abuse; that he was convicted even though the law allowed him to exercise his discretion on whether to report the offense; and that he has actually helped prevent abuse of dependent patients by investigating the allegations of patient abuse and accepting the resignation of the staff member under investigation. While acknowledging that his failure to report the suspected patient abuse for a State investigation may have impacted negatively on the State's effort to keep records on patient abusers and keep them from taking positions where they could inflict their abuse again, Petitioner says he has not neglected any patient. P. Mem., pp. 9 - 12; P. Rep., pp. 3 - 4.

It should be apparent from my earlier rejection of Petitioner's related arguments on "direct" patient neglect that I do not view actual harm to a patient as a prerequisite to Petitioner's exclusion. In Westin and Tennant, the appellate panel and the administrative law judge, respectively, upheld the exclusions imposed under section 1128(a)(2) in the absence of any proof of actual harm to patients. The underlying offenses in those cases were the individuals' failure to file medical incident reports with the State concerning certain patient deaths that were not caused by the individuals. In those cases, relatedness to patient neglect was established by the offense's potential for harming patients.

Petitioner has cited no authority showing that an individual may not be excluded unless he had caused actual harm to a patient by neglect. Petitioner's reading of the preamble to the regulations is not in accord with its plain meaning or its context. See P. Mem., pp. 10 - 11. The preamble's reference to the

I.G.'s authority to impose an exclusion "irrespective of whether the individual intended to harm patients" means what it says; furthermore, this explanation was given to explain the example where a conviction for an offense without a patient neglect element (such as embezzlement) may be related to patient neglect. 57 Fed. Reg. 3303 (1992).

Even the dictionary definition of "neglect" quoted by Petitioner, i.e., "to fail to care for or attend to properly" (P. Rep., p. 2) makes no reference to harm caused by such failure. The facts underlying Petitioner's conviction shows that he had in fact neglected patients under the dictionary definition he used. As to the resident who complained of sexual abuse, Petitioner had "fail[ed] to care for or attend to [him] properly" in the manner directed by the State of Iowa during the course of delivering health care to him. Bandel, at pp. 9 - 10; Potts, at pp. 6 - 7.

Even if actual harm to patients were material to this case, Petitioner has not proven as facts his affirmative arguments that his omission under the Iowa statute has no adverse effect on patients. Because Petitioner did not file the required report with the State when he learned of the abuse allegations, Petitioner's conclusions that the alleged victim has not been harmed by sexual abuse or by his personal investigation of the matter are speculative. Petitioner's decision not to report the matter to the State has foreclosed comparing the results from his investigation for Handicap Village with those of a contemporaneous and independent investigation conducted by the State. Valuable information or physical evidence in support of the abuse allegations and successful prosecution of the offender may have been lost by the time the State learned of the incident. Even if Petitioner had been well versed in the requisite investigative techniques relevant to sexual abuse alleged by severely handicapped individuals, Petitioner was not a disinterested investigator, and he was not empowered to compel the production of information from those reluctant to provide it to him. Every patient in Iowa who believed that he or she had been sexually abused by an institution's employee had the right to make his or her complaint known and have the head of the institution, or a designate, safeguard that patient's health and safety by referring the complaint to the State for an independent evaluation by professionals who should have no stake in its outcome.

Even though the accused staff member had voluntarily resigned during Petitioner's investigation (FFCL # 3(c)),

Handicap Village has no legal reason for not rehiring him in the future -- especially after Petitioner has found no basis for suspecting that sexual abuse had occurred. P. Ex. 1, p. 2. Thus, contrary to Petitioner's arguments, the resignation of the accused provided no real protection to the alleged victim or other patients at Handicap Village.

I reject Petitioner's contentions that he neglected no patient because his decision not to report the allegation of abuse was within his managerial prerogatives and that the Iowa statute used to convict him had allowed him to exercise his judgment to determine whether a report of suspected abuse should be filed. Petitioner's contentions reflect his inaccurate reading of the Iowa statute. The Iowa statute did not permit him to exercise his managerial discretion in the manner he did, and the Iowa statute did not permit him to decide whether he agreed with the others' suspicions of dependent adult abuse. Once others (e.g., the staff member who treated, attended, or examined the alleged victim) had determined that their suspicions of the abuse were reasonable and referred their suspicions to Petitioner, his only recourse was to report the others' reasonable suspicions to the State. Section 235B.1(7)(a) of the 1991 Code of Iowa. Moreover, Petitioner's reliance on his misreading of the Iowa law amounts to another collateral attack on the validity of his conviction, which is beyond the purview of this case.

On Petitioner's arguments that he poses no risk to Medicare beneficiaries and Medicaid recipients, and therefore should be exempted from the exclusion, I note that Congress has already determined that persons who have been convicted of offenses related to patient neglect pose very great risks to program beneficiaries and recipients. The facts that underlie Petitioner's conviction cannot be used to alter that legislative determination. In addition, even if he were entitled to prove that he poses no risk despite his conviction, I do not find his arguments persuasive.

Petitioner put many patients at risk with his decision not to report the allegations of sexual abuse to the State. He unreasonably characterizes his offense as the dereliction of a statutory duty he owed only to the State -- not to patients. He fails to recognize that the State uses the reports of suspected adult abuse to make investigations, keep records, and provide services for the protection and benefits of patients. His conviction was for the dereliction of a statutory duty he owed to patients.

Petitioner's denial posture appears especially inappropriate in the face of his acknowledgment that his failure to make the report to initiate a State investigation may have negatively impacted on the State's efforts to track patient abusers and keep them from taking jobs that may put other patients in danger. P. Rep., p. 3.[6] As earlier noted, an appellate panel of the Board has upheld a finding of patient neglect in an analogous fact situation where an individual's failure to file a required report also deprived the State of the vital information it was tracking. There, the patient whose condition should have been reported had passed away before the commission of the offense, but patients elsewhere were put at risk by the absence of the required report. The Board upheld the finding that the offense had a direct relationship to the health and safety of patients and therefore constituted patient neglect. In reaching this conclusion, the appellate panel stated:

> Since failure to file the required report denied the state important information about the circumstances of the patient's death, the offense had a direct relationship to the health and safety of patients and therefore constituted patient neglect.

Westin, at 12 (citing Tennant, at 10 - 11). So in this case, too, Petitioner's offense must be found to be related to the neglect of patients in and out of his employing institution.

> 4. Petitioner's offense was related to patient neglect within the meaning of the law.

I have not been persuaded that the analysis in Potts and Bandel are erroneous. Thus, using the rationale already discussed in full in those two decisions as well as in the foregoing sections of the present decision, I find that Petitioner's conviction for his failure to report

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[6] The evidence placed before the United States District Court for Iowa (see FFCL # 12) led the judge to find that the accused staff member who resigned from Handicap Village did later secure employment to care for the mentally retarded in another facility, and at the second facility the accused admitted to having had "close contact" with the Handicap Village resident who complained of sexual abuse. Barrett v. Shalala, No. C93-3058, (N.D. Iowa Sept. 1, 1993). I have not made these same findings only because Petitioner has not stipulated to them in moving for summary disposition.

suspected abuse of a patient is a conviction for an offense related to his neglect of that patient.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from Medicare, and to direct that Petitioner be excluded from participation in Medicaid, for five years, was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusion imposed and directed against Petitioner is sustained.

/s/

Mimi Hwang Leahy
Administrative Law Judge