Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Bruce Lindberg, D.C.,	DATE: September 30, 1992
Petitioner,	Docket No. C-92-020
- v. -	Decision No. CR233
The Inspector General.	

DECISION ON REMAND

Petitioner requested a hearing on a February 15, 1991 determination by the Inspector General (I.G.) to exclude him from participation in the Medicare and State health care programs[1] for five years pursuant to section 1128(a)(2) of the Social Security Act (Act). On July 22, 1991, I issued a decision in which I sustained the determination of the I.G. to exclude Petitioner for five years. Bruce Lindberg, D.C., DAB CR145 (1991). I found that the I.G. had the authority to exclude Petitioner under section 1128(a)(2) of the Act because the undisputed material facts established that he was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. I further found that Petitioner is subject to the federal minimum mandatory provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act, and that Petitioner's exclusion for five years is the minimum period mandated by federal law.

Petitioner appealed my decision to an appellate panel of the Departmental Appeals Board (DAB). My July 22, 1991 decision contained 25 Findings of Fact and Conclusions of

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

Law (FFCLs). Petitioner filed exception to my FFCL 10 in which I found that the offenses which formed the basis of Petitioner's conviction were related to abuse of patients in connection with the delivery of a health care item or service. Petitioner did not challenge my other FFCLs.

On November 15, 1991, the appellate panel issued its decision. The appellate panel affirmed and adopted without further discussion the FFCLs which Petitioner did not dispute: FFCLs 1 - 9 and FFCLs 11 - 25. In addition, the appellate panel concluded that I did not err in considering evidence other than court documents pertaining to Petitioner's conviction to determine whether the statutory requirements of section 1128(a)(2) have been satisfied.

With regard to the statutory requirements of section 1128(a)(2), the appellate panel concluded that I did not err in finding that the criminal offenses of which Petitioner was convicted related to "abuse" within the meaning of section 1128(a)(2). However, the appellate panel determined that my finding that such abuse was of a "patient" was not supported by substantial evidence in the record. The appellate panel determined also that my finding that such abuse was "in connection with the delivery of a health care item or service" was not supported by substantial evidence of record. The appellate panel therefore vacated FFCL 10 and remanded the case to me for reconsideration of this FFCL. The appellate panel directed me to make new findings "concerning whether the children referred to in the counts of which Petitioner was convicted were patients of Petitioner and whether the conduct which gave rise to the counts occurred in connection with the delivery of a health care service by Petitioner." Appellate Panel Decision at 11.

On November 21, 1991, I issued an Order on Remand in which I invited the parties to file statements of their positions on certain specified questions. On January 13, 1992, I held a prehearing conference by telephone. Counsel for Petitioner asserted at that time that there were factual issues remaining to be resolved, and he requested an in-person evidentiary hearing. I granted this request.

Petitioner subsequently submitted six proposed exhibits for admittance into evidence at the hearing. The I.G. submitted 11 proposed exhibits. By letter dated February 7, 1992, I informed the parties that my review of the proposed exhibits revealed that, except for the I.G.'s proposed exhibits numbered 2, 3, and 5, all of the other

proposed exhibits submitted by both the I.G. and Petitioner had previously been admitted into the record when I issued my July 22, 1991 decision. Bruce Lindberg, D.C., DAB CR145 at 2 (1991). I stated that documents already admitted into evidence did not have to be received into evidence again on remand.

On February 19, 1992, I conducted a hearing in this case. During the hearing, I noted that the last I.G. exhibit of record was numbered 32.[2] I therefore redesignated the newly proposed I.G. exhibit numbered 2 to be I.G Ex. 33.[3] I identified this document as a letter from James Kivi to Mary Dey Purcell dated December 13, 1991, and admitted it into evidence. I also noted that the newly proposed I.G. exhibit numbered 3 included a document which was already part of the record at I.G. Ex. 17. The only newly submitted material in this proposed exhibit was a document entitled Minutes of Evidence, accompanied by a calendar sheet. I redesignated the Minutes of Evidence and accompanying calendar sheet to be I.G. Ex. 17 and I added this material to the April 11, 1990 Trial Information and Presentence Investigation which had already been admitted into evidence as I.G. Ex. 17. I admitted the Minutes of Evidence and the accompanying calendar sheet into evidence as supplemental pages to I.G. Ex. 17. In addition, I redesignated the newly proposed I.G. exhibit numbered 5 to be I.G. Ex. 34. I identified this document as a receipt of items taken from Petitioner's office in May 1989 by Officer Larry Jones, and I admitted it into evidence. Tr. 11-13.

The parties submitted posthearing briefs and reply briefs. By letter dated June 26, 1992, I invited them to submit supplemental briefs on the issue of how the canons of ethics and other codes of professional conduct for health care professionals define "patient" and the scope

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[2] Due to a typographical error, footnote 2 of my July 22, 1991 decision incorrectly states that I admitted 33 exhibits offered by the I.G. when, in fact, only 32 exhibits were admitted into evidence.

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

I.G.'s Exhibits	I.G. Ex. (number)/(page)
Petitioner's Exhibits	P. Ex. (number)/(page)
Transcript of Hearing	Tr. (page)

of the doctor-patient relationship.[4] The parties briefed this issue.[5]

I base this decision on remand on the applicable law, the documentary evidence, those FFCLs which I issued in my July 22, 1991 decision, and which were accepted and affirmed by the appellate panel, the analysis in the appellate panel's decision, the evidence adduced at the February 19, 1992 hearing, and the parties' arguments. I find that Petitioner was convicted of a criminal offense relating to abuse of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act. I conclude that Petitioner is subject to the minimum mandatory provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act, and that the I.G. is required to exclude Petitioner for a minimum of five years. Therefore, I sustain the five-year exclusion imposed and directed against Petitioner.

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[4] The regulations allow me to apply the Federal Rules of Evidence "where appropriate." 42 C.F.R. § 1005.17(b). The Federal Rules of Evidence provide that a court may take judicial notice of adjudicative facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). The codes of professional conduct for health care professionals meet this requirement. As required by Rule 201(e), I notified the parties that I was considering how the codes of professional conduct for health care professionals affected the issues before me in this case, and I provided an opportunity for the parties to comment on this. I take judicial notice of the codes of professional conduct quoted in this decision, pursuant to Rule 201 of the Federal Rules of Evidence.

[5] Petitioner filed a supplemental brief on this issue, and the I.G. filed a response to Petitioner's supplemental brief. I afforded Petitioner an opportunity to file a reply brief, but he did not take advantage of this opportunity. By letter dated September 10, 1992, I notified the parties that I had closed the record in this case.

ISSUES

The issues to be decided on remand are:

1. Whether the children referred to in the counts of which Petitioner was convicted were "patients" of Petitioner, within the meaning of section 1128(a)(2) of the Act.

2. Whether the conduct which gave rise to the counts of which Petitioner was convicted occurred "in connection with the delivery of a health care item or service" by Petitioner, within the meaning of section 1128(a)(2) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The appellate panel vacated FFCL 10 and remanded the case to me for reconsideration of this FFCL. Based on my evaluation of the evidence submitted on remand, I am reinstating FFCL 10, in which I find:

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

Based on the newly submitted evidence, I make the following additional FFCLs on remand:

26. Petitioner was convicted of sexually abusing children identified as I.J. and K.L.. I.G. Ex. 17.

27. There is no evidence that I.J. was a patient of Petitioner.

28. It was at McDonald's after a school sporting event in 1987 that Petitioner and K.L. first discussed the possibility that Petitioner would provide chiropractic services to K.L.. I.G. Ex. 30/5.

29. Prior to the discussion at McDonald's, Petitioner and K.L. had no more than a passing acquaintance. Tr. 66 - 67; I.G. Ex. 30/5.

30. During the discussion at McDonald's, Petitioner offered to give K.L. three chiropractic treatments free of charge, as an inducement for K.L. to become his patient. I.G. Ex. 30/5.

31. Petitioner used his status as a chiropractor to initiate a relationship with K.L.. FFCLs 28 - 30.

32. K.L.'s first medical appointment with K.L. occurred in the latter part of 1987, when K.L. was in eighth grade. I.G. Ex. 30/6.

33. Petitioner provided appropriate chiropractic services during K.L.'s first three appointments which occurred over a three-week period. I.G. Ex. 30/6 - 8.

34. K.L.'s mother or grandmother brought him to some of his appointments at Petitioner's office. I.G. Ex. 30/6, 8, 28.

35. Petitioner took some time to establish a relationship of trust between K.L. and him. FFCLs 32 - 34.

36. During the course of an appointment which occurred some time after the third appointment, Petitioner treated K.L.'s back complaint by rubbing an electrical instrument on K.L.'s legs and buttocks instead of using it on his back. I.G. Ex. 30/9.

37. K.L. had at least ten to fifteen appointments with Petitioner, occurring over at least a six-month period. Tr. 74 - 75.

38. K.L.'s case file was seized from Petitioner's office by law enforcement officials in May 1989. I.G. Exs. 6, 11, 34.

39. Petitioner continued to provide chiropractic services to K.L. in non-clinical settings, such as Petitioner's home and car, after he stopped treating K.L. at his office. Petitioner did not charge K.L. for these services. I.G. Ex. 30/10, 14, 16, 25 - 28.

40. Petitioner repeatedly engaged in conduct which blurred the distinctions between a professional relationship and a social relationship. FFCL 39.

41. The established medical community recognizes that sexual activity between physicians and patients is unprofessional and unethical because it exploits the trust and dependency of patients. In particular, the American Chiropractic Association (ACA) has stated that chiropractors should avoid "dual relationships" which could lead to the exploitation of a patient. ACA, CODE OF ETHICS at 17 (1991-1992). See American Medical Association, CODE OF MEDICAL ETHICS at 40 (1992);

American Psychiatric Association, OPINIONS OF THE ETHICS COMMITTEE ON THE PRINCIPLES OF MEDICAL ETHICS at 9 (1989).

42. In the course of providing chiropractic services to K.L., Petitioner sometimes attempted to illicitly touch K.L. by trying to get his hands under K.L.'s pants. I.G. Ex. 30/23.

43. The incident which was the basis of Petitioner's conviction occurred prior to May 1989 in Petitioner's car while Petitioner was driving K.L. home after K.L. visited Petitioner at his house. Petitioner began by rubbing K.L.'s neck and then gradually worked his way down to rub K.L.'s genitals over his clothes. I.G. Ex. 30/10, 14 - 16, 24.

44. Prior to the incident which was the basis of Petitioner's conviction, Petitioner did not notify K.L. that he was terminating the chiropractor/patient relationship and he did not transfer copies of his records to either K.L. or to another chiropractor. FFCLs 38, 39.

45. Petitioner's professional relationship with K.L. had not ended at the time the abuse of which Petitioner was convicted occurred. FFCLs 38, 39, 43, 44.

46. The rubbing of K.L 's neck at the time of the incident which was the basis of Petitioner's conviction was similar to physical contact Petitioner had with K.L. during the course of chiropractic treatment in his office. I.G. Ex. 30/7, 9.

47. Petitioner's massage of K.L.'s neck in the car at the time the abuse occurred constitutes the delivery of a health care service within the meaning of section 1128(a)(2).

48. Petitioner used the chiropractic adjustment with which he had treated K.L. in the past as a prelude to perpetrating the abuse of which he was convicted. FFCLs 46 - 47.

49. Petitioner's treatment of K.L. in his office over a period of at least six months beginning in 1987 constitutes the delivery of a health care service within the meaning of section 1128(a)(2).

50. Petitioner exploited the therapeutic relationship he developed with K.L. in the course of providing

chiropractic treatments to him for the purpose of perpetrating the sexual abuse of which he was convicted.

RATIONALE

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

> [C]onvicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

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

Neither party to this case disagrees that Petitioner was convicted of a criminal offense within the meaning of the Act, and the undisputed facts satisfy this criterion. The second criterion that must be satisfied in order to find that the I.G. had the authority to exclude Petitioner under section 1128(a)(2) is that the criminal offense must relate to neglect or abuse of another individual. In my July 22, 1991 decision, I found that Petitioner was convicted of a criminal offense related to abuse, and the appellate panel upheld this determination. What remains to be determined is whether such abuse was of a patient and whether it was in connection with the delivery of a health care item or service.

1. Petitioner was convicted of a criminal offense relating to a "patient," within the meaning of section 1128(a)(2) of the Act.

On June 16, 1989, Petitioner, a chiropractor, was charged with five counts of Lascivious Acts with a Child, in violation of section 709.8(1) of the Iowa Criminal Code, in a Trial Information filed in the Iowa District Court for Monroe County. FFCLs 1, 2. These five counts involved three children referred to as A.B., C.D., and

E.F.. I.G. Ex. 15.[6] A second Trial Information was filed on January 17, 1990, in the same court, charging Petitioner with one count of Indecent Contact with a Child, in violation of section 709.12(2) of the Iowa Criminal Code, and two counts of Lascivious Acts with a Child, in violation of section 709.8(1) of the Iowa Criminal Code. FFCL 3. The Indecent Contact with a Child involved a child referred to as K.L., and the two Lascivious Acts with a Child counts involved two children referred to as M.N. and O.P.. I.G. Ex. 16.

On April 11, 1990, Petitioner entered into a plea agreement in which he pled guilty to two counts of Indecent Contact with a Child and two counts of Indecent Exposure, violations of sections 709.12(2) and 709.9 of the Iowa Criminal Code, respectively. FFCL 5. The two counts of Indecent Contact with a Child both involved one child referred to as K.L., and the two counts of Indecent Exposure both involved one child referred to as I.J.. I.G. Ex. 17. In a Judgment Entry dated July 20, 1990, Petitioner was convicted of all four counts. FFCL 6. Petitioner was sentenced to six years' probation, subject to several conditions, including that he finance an annuity for eight children who had allegedly been victims of Petitioner's abuse. FFCL 8, 13 - 15.

Petitioner was convicted of the four counts to which he pled guilty, involving two different individuals referred to as K.L. and I.J. The appellate panel stated that I improperly concluded that section 1128(a)(2) applied to this case because there was no basis in the record before me at the time that I issued my July 22, 1991 decision that supported a finding that either K.L. or I.J. was a "patient." Appellate Panel Decision at 7.

The appellate panel pointed out that the record contained some limited information about the individual referred to as K.L. According to the appellate panel, the record established that K.L. was one of the children who was to receive an annuity.[7] The appellate panel also pointed

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[6] As I noted at page 9 of my July 22, 1991 decision, the Trial Information referred to the alleged victims of the criminal conduct by letter designations, rather than by name, presumably to protect the identities of these children.

[7] The appellate panel based this conclusion on the undisputed evidence showing that the annuities covered the children referred to in the original two

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out that the record contained a letter from the insurance company with which the annuities were established which names the recipients of the annuities. In addition, the record contained a log of Petitioner's patients aged 16 and under which was prepared by the local police. The appellate panel noted that six of the eight recipients of the annuities were identified as being patients of Petitioner on the patient list compiled by the local police. While the record showed that K.L. was one of the eight recipients of the annuities, the appellate panel stated that "there is nothing in the record which links K.L. to one of the six children who were identified as patients." Appellate Panel Decision at 8. The appellate panel concluded that there was no basis in the record for finding that K.L. was a patient.

The appellate panel pointed out that the record contained even less information about the individual referred to as I.J. According to the appellate panel, there was no evidence of record that I.J. was one of the recipients of the annuities, since the first two Trial Informations do not include any count involving a child referred to as I.J. Appellate Panel Decision at 8. The appellate panel concluded that there was no basis in the record for finding that I.J. was a patient.

Moreover, the appellate panel stated that the record was devoid of evidence showing the basis on which the counts to which Petitioner pled guilty were selected. According to the appellate panel, it was within the realm of reasonable possibility that the four counts which formed the basis of Petitioner's conviction were selected because the two children involved were <u>not</u> patients. Appellate Panel Decision at 8. Since there was nothing in the record before me which shed light on the question of whether or not either K.L. or I.J. was a patient of Petitioner, the appellate panel concluded that the issue of whether the abuse of which Petitioner was convicted was abuse of a patient was an issue which could not be resolved by the facts before me at the time I made my July 22, 1991 decision. The appellate panel remanded the case for further development of the record on this issue, and suggested that this question might be resolved by the

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[7](...continued)
Trial Informations prepared by the State. Since the second Trial Information included a count of Indecent Contact with a Child who was referred to as K.L., the appellate panel reasoned that the record supports a finding that K.L. was one of the children who was to receive an annuity.

submission of documentary evidence showing "how the letters K.L. and I.J. used in the counts against Petitioner related to particular children." Appellate Panel Decision at 10.

On remand, the I.G. submitted a document entitled "Minutes of Evidence" which identifies the names of the children referred to as K.L. and I.J. in the counts to which Petitioner pled guilty.[8] This document also provides a summary of what K.L.'s and I.J.'s testimony would have been in the event that the criminal proceeding went to trial. With regards to K.L.'s potential testimony, the Minutes of Evidence states that K.L.:

> will testify that he has known [Petitioner] for approximately two years. He will testify that he has been a patient of [Petitioner's] a number of times at [Petitioner's] clinic in Albia and that he has been a visitor at [Petitioner's] house in Albia. He will testify that during 1989 he was at [Petitioner's] house with a friend and [Petitioner] offered to drive them home and that while in [Petitioner's] car [Petitioner] placed his hands on the witness[']s genitals over his clothes.

I.G. Ex. 17.

The I.G. pointed out that during Petitioner's April 11, 1990 plea hearing, Petitioner admitted that the information contained in the Minutes of Evidence was accurate. P. Ex. 7/7. The I.G. contended that by admitting to the accuracy of the Minutes of Evidence at the plea hearing, Petitioner admitted that K.L. was a patient of his at the time the abuse of which he was convicted occurred. Tr. 20, 77.

Petitioner does not dispute that the Minutes of Evidence were accurate. However, he does dispute the I.G.'s interpretation of the Minutes of Evidence. Petitioner argues that the Minutes of Evidence merely state that K.L. was a patient of Petitioner's at one point in time. While Petitioner admits that a chiropractor/patient relationship had existed between Petitioner and K.L., he contends that this document does not establish that K.L. was Petitioner's patient at the time the abuse of which Petitioner was convicted occurred. Petitioner contends

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[8] In order to protect the confidentiality of the children who were the victims of the criminal offenses of which Petitioner was convicted, in this decision I will continue to refer to them as K.L. and I.J..

that K.L. is a "patient" within the meaning of section 1128(a)(2) only if it can be established the he was a patient at the time the abuse occurred. Petitioner's Posthearing Brief at 5 - 7. The parties do not dispute, and I find, that the Minutes of Evidence definitively establish that K.L., one of the two victims of the abuse of which Petitioner was convicted, had been a patient of Petitioner.[9]

While it is undisputed that the Minutes of Evidence establish that K.L. had been Petitioner's patient, Petitioner contends that this is not sufficient to show that K.L. was a "patient" within the meaning of the Act. According to Petitioner, the statutory requirement that the criminal offense relates to abuse of patients encompasses only patients who are under active treatment by a health care provider at the time that the abuse occurs. Petitioner asserts that while K.L. had been a patient of his, he was no longer an "active" patient at the time the abuse occurred. Petitioner reasons that since K.L. was not an "active" patient of his at the time the abuse occurred, then I must find that K.L. was not a patient within the meaning of section 1128(a)(2).

Petitioner's argument is unpersuasive. He admits that a "patient" relationship existed with K.L., but contends it was no longer "active" at the time the abusive conduct occurred. Apparently, Petitioner limits the "patient" relationship to the period that K.L. received ongoing chiropractic treatment in Petitioner's office. Petitioner ignores the record evidence that K.L. received chiropractic services from Petitioner in other settings, including his home and car. FFCL 39. In fact, at the time of the abusive conduct which was the basis for Petitioner's conviction, Petitioner began touching K.L. in a manner which mimicked a chiropractic massage or manipulation. FFCL 43, 46 - 48.

The term "patient" is not defined in the Act.[10] The common sense definition of being under the care of a

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[9] The parties do not contend, and I do not find, that I.J., the other victim of the abuse which formed the basis of the conviction, was a patient of Petitioner.

[10] The general dictionary definition of "patient" is someone "under medical treatment." AMERICAN HERITAGE DICTIONARY 910 (2d College ed. 1982). Such definition is not limited by requiring that the person be under active treatment. Moreover, review of the Canons of Ethics for Chiropractors and other medical practitioners demonstrates that the practitioner/patient relationship with regard to the responsibilities imposed on practitioners to protect their patients goes beyond "active" medical treatment.

medical practitioner is a reasonable interpretation of the term "patient" for purposes of section 1128(a)(2) of the Act. Petitioner admits that K.L. was his patient. I do not accept his assertion that K.L. was no longer an "active" patient. The record does not support such a finding. It is undisputed that K.L.'s medical records were still maintained by Petitioner in his office during the time period in which the abuse occurred. FFCL 38, 43. Moreover, the record is devoid of any indication that Petitioner advised K.L. that he was terminating the chiropractor/patient relationship with K.L. FFCL 44. The Code of Ethics for Chiropractors in effect at the time Petitioner committed the offense of which he was convicted mandates specified actions when a chiropractor seeks to terminate the chiropractor/patient relationship, including notification of termination and providing the patient with the right to have his or her records transferred to another doctor.[11] There is no evidence that Petitioner either gave K.L. notice that he was withdrawing his services or transferred copies of his records to either K.L. or another chiropractor. FFCL 44.

Thus, contrary to Petitioner's assertion that K.L. was no longer an "active" patient, the record supports a finding that Petitioner purposely blurred the chiropractor/patient relationship by providing chiropractic treatment in both office and social settings. FFCLs 39 - 40. To satisfy his own sexual urges, Petitioner purposefully extended the chiropractor/patient relationship beyond the traditional boundaries. FFCLs 39 - 40, 46 - 50. He exploited the trust and confidence arising from such relationship to more easily induce K.L. into accepting illicit sexual contacts. FFCL 50.

In sum, the "patient" requirement of section 1128(a)(2) is met here because: (1) K.L. was a patient of Petitioner

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[11] Section A(3) of the Code of Ethics published by the ACA states that:

> Doctors of chiropractic should not terminate their professional services to patients without taking reasonable steps to protect such patients, including due notice to them allowing a reasonable time for obtaining professional services of others, delivering to their patients all papers and documents in compliance with A(5) of this Code of Ethics.

ACA, CODE OF ETHICS at 3 (June 22, 1988).

and Petitioner never expressly ended such relationship prior to the occurrence of the unlawful abuse of K.L.; (2) Petitioner continued to provide chiropractic treatment to K.L. in social settings after he completed a course of treatment in Petitioner's medical office and was applying such treatment immediately prior to engaging in the unlawful abusive conduct; and (3) Petitioner established a pattern of practice where he purposefully expanded the boundaries of the chiropractor/patient relationship and exploited such relationship to satisfy his sexual needs.

Even if I were to accept Petitioner's argument that K.L. was not an "active" patient at the time the criminal offense which gave rise to the conviction occurred, this would not result in my finding that K.L. was not a "patient" for purposes of the Act. The language of section 1128(a)(2) refers to abuse of patients and it does not distinguish between "current" patients and "former" patients or "active" patients and "inactive" patients, as Petitioner asserts. The evidence must show only that K.L. had been Petitioner's patient in order to support a finding that he is a "patient" within the meaning of the statute.

For reasons discussed below, I do not agree with Petitioner that the occurrence of abuse after the termination of the health care provider-patient relationship necessarily precludes finding that the abuse involved a patient.[12] Perpetration of abuse against former patients does not insulate a health care provider from the reach of section 1128(a)(2). It is undisputed that Petitioner was convicted of sexually abusing K.L. and that a chiropractor/patient relationship between Petitioner and K.L. existed at some point in time. Where it can be established that the abusive conduct arose from such relationship and Petitioner used that relationship to achieve such conduct, a finding that K.L. was a patient at the time Petitioner abused him is not a necessary prerequisite for concluding that K.L. was a "patient" within the meaning of section 1128(a)(2). It is necessary to find only that K.L., the victim of the abuse which was the basis for Petitioner's conviction, had been a patient of Petitioner, a fact that is undisputed.

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[12] I want to make it clear that I am not concluding that the abuse of K.L. occurred after the doctor/patient relationship had ended. To the contrary, I made the opposite finding.

Thus, for the reasons set forth above, I conclude that Petitioner was convicted of a criminal offense relating to a patient, within the meaning of section 1128(a)(2).

2. Petitioner was convicted of a criminal offense which occurred in connection with the delivery of a health care service, within the meaning of section 1128(a)(2) of the Act.

Having concluded that the first three criteria for finding that section 1128(a)(2) applies to this case are satisfied, I must determine whether the fourth criterion is satisfied.

Section 1128(a)(2) specifically requires that, as a basis for an exclusion, a health care provider must be convicted of a criminal offense relating to patient abuse or neglect in connection with the delivery of a health care item or service. In order for me to find that the I.G. has the authority to exclude Petitioner under section 1128(a)(2), there must be some nexus between the criminal offense and the delivery of a health care item or service. As stated in Peter J. Edmonson, DAB CR163 at 7 (1991), the phrase "in connection with" is very broad language and "suggests that Congress required only a minimal nexus between the offense and the delivery of a health care item or service as a prerequisite to meeting the statutory test." I find that the requisite nexus is satisfied where the delivery of a health care item or service is an element in the chain of events giving rise to the criminal offense.[13]

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[13] In reaching this conclusion, I am guided by cases arising under section 1128(a)(1) of the Act. For example, in the case Larry W. Dabbs, R.Ph., et al., DAB CR151 at 6 (1991), the ALJ stated that "a criminal offense is an offense which is related to the delivery of an item or service under Medicare or Medicaid where the delivery of a Medicare or Medicaid item or service is an element in the chain of events giving rise to the offense." The relevant language of section 1128(a)(1) mandates the exclusion of individuals or entities convicted of criminal offenses "related to" the delivery of an item or service under Medicare or Medicaid. Section 1128(a)(2), the applicable provision to this case, mandates the exclusion of individuals or entities convicted of criminal offenses relating to abuse of patients "in connection with" the delivery of a health care item or service. I recognize that the operative language of the two provisions is not identical.

(continued...)

Petitioner argues that in order to establish the requisite nexus between the criminal offense and the delivery of a health care item or service, it must be established that abuse occurred in the course of active treatment of a patient in a clinical setting. According to Petitioner, the statutory requirement that the criminal offense is in connection with the delivery of a health care item or service encompasses only those situations where a health care provider abuses a patient while he is actively treating him in a clinical setting. Petitioner admits that K.L. had been a patient of his and that he had repeatedly provided chiropractic treatment to him in a clinical setting. However, he points out that the Minutes of Evidence indicate that the incident which formed the basis of his conviction occurred in a car while he was driving K.L. home after a social visit. Petitioner argues that he was not convicted for abuse "in connection with the delivery of a health care item or service" pursuant to section 1128(a)(2) because the abuse did not occur at a time that he was providing chiropractic services to K.L. in a clinical setting. Petitioner's Posthearing Brief at 8 - 10.

I am not persuaded by Petitioner's argument. The purpose of section 1128(a)(2) is to "give the Secretary the authority to protect Medicare and the State health care program beneficiaries from individuals or entities that have already been tried and convicted of offenses which the Secretary concludes entailed or resulted in neglect or abuse of other patients and whose continued participation in Medicare and State health care programs would therefore constitute a risk to the health and safety of patients in those programs." S. Rep. No. 109, 100th Cong., 1st Sess. 6; reprinted in 1987 U.S.C.C.A.N. 682, 686 - 687. It is true that health care providers who have been convicted of abusing their patients while they are treating them in a clinical setting are a risk to the health and safety of other patients, and Congress intended to protect program beneficiaries and recipients by excluding abusive providers. However, this is not to suggest that the only criminal offenses which fall into the ambit of section 1128(a)(2) are criminal offenses

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[13](...continued)
However, the ordinary meaning of "related to" and "in connection with" is sufficiently similar to be accorded a similar interpretation. See Chander Kachoria, R.Ph., DAB CR220 (1992). Cf. Peter J. Edmonson, DAB CR163 at 7 (1991) where the ALJ stated that the phrase "related to" in section 1128(a)(1) "may suggest a somewhat narrower meaning" than the phrase "in connection with."

which occurred in the course of the provision of medical treatment in a clinical setting. There are other situations which are covered by section 1128(a)(2). For example, health care providers who abuse patients in the course of delivering health care items or services outside a medical office pose a risk to program beneficiaries and recipients. In addition, health care providers who exploit the relationships they develop with patients in the course of treating them in a clinical setting for the purpose of abusing them at a later date in a non-clinical setting also pose a risk to program beneficiaries and recipients.

The statutory test for finding that the criminal offense is in connection with the delivery of a health care item or service is satisfied as long as it can be shown that a provider used his treatment of a patient to perpetrate the criminal offense at some point in the chain of events leading to the abuse. If it can be shown that a provider abused his patient at the time that he was providing treatment in a clinical setting, then this would likely result in a finding that the abuse occurred in connection with the delivery of a health care item or service. However, it is possible to find that the abuse occurred in connection with the delivery of a health care item or service even if it occurred in the course of social activities after the professional relationship ended. While factors such as the victim's status as a patient at the time the abuse occurred and the location of the abuse are relevant in an analysis of whether the abuse occurred in connection with the delivery of an item or service, these factors are not always dispositive of this issue.

Support for this analysis is found in various codes of professional behavior for health care professionals. The medical community recognizes that the relationship between health care providers and patients is inherently a dependency relationship. Typically, health care providers are respected authority figures, and patients are vulnerable because they are in need of professional advice and treatment in areas pertaining to their health. The relationship induces the patient to place great faith in the health care provider and to believe that the health care provider is the patient's ally who is committed to act in his best interests. As reflected in the codes of ethics of the mental health professions, sexual contact between health care providers and patients is a betrayal of the patient's trust and is a breach of the fiduciary relationship between health care provider and patient. The Council on Ethical and Judicial Affairs of the American Medical Association looks with disfavor on sexual activity between physicians and patients,

regardless of whether the patients are patients at the time the sexual contact occurs or are former patients at the time the sexual contact occurred. The Code of Medical Ethics authored by the council states the following:

> Sexual contact that occurs concurrent with the physician-patient relationship constitutes sexual misconduct. Sexual or romantic interactions between physicians and patients detract from the goals of the physician-patient relationship, may exploit the vulnerability of the patient, may obscure the physician's objective judgment concerning the patient's health care, and ultimately may be detrimental to the patient's well-being.
>
> * * *
>
> Sexual or romantic relationships between a physician and a <u>former</u> patient may be unduly influenced by the previous physician-patient relationship. Sexual or romantic relationships with <u>former</u> patients are unethical if the physician uses or exploits trust, knowledge, emotions or influence derived from the previous professional relationship.

American Medical Association, CODE OF MEDICAL ETHICS at 40 (1992) (emphasis added).

Similarly, the American Psychiatric Association has stated:

> Sexual activity with a patient is unethical. Sexual involvement with one's <u>former</u> patients generally <u>exploits emotions deriving from treatment</u> and therefore almost always is unethical.

American Psychiatric Association, OPINIONS OF THE ETHICS COMMITTEE ON THE PRINCIPLES OF MEDICAL ETHICS at 9 (1989) (emphasis added).

More directly applicable to Petitioner, the ACA has expressed its view regarding sexual intimacies with patients:

> This advisory opinion is intended to resolve any misunderstanding and to state that it is the opinion of the Committee that sexual intimacies with a patient is unprofessional and unethical based on the existing ethical provisions in the ACA Code of Ethics: A(6), A(7), A(10) and C(2).

> The physician-patient relationship requires the doctor of chiropractic to exercise utmost care that he or she will do nothing to 'exploit the trust and dependency of the patient.' Doctors of chiropractic should make every effort to avoid dual relationships that could impair their professional judgement or risk the possibility of exploiting the confidence placed in them by the patient.[14]

ACA, CODE OF ETHICS at 17 (1991-1992) (emphasis added).

Thus, the established medical community, including chiropractors, recognizes that sexual contact with patients is likely to be exploitative of them, and it holds this view even when the sexual contact takes place outside the clinical setting and with former patients.[15]

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[14] Petitioner attempts to use the ACA Code of Ethics to support his position that his contacts with K.L. outside the clinical settings were social and not part of the chiropractor/patient relationship. Petitioner Supplemental Brief at 2. While the ACA imposes separate responsibilities on chiropractors regarding patients, the public, and the profession, there is nothing in the Code of Ethics to support Petitioner's conclusion that the ACA separates the patient relationship from the social relationship. In fact, the ACA specifically recognizes that a "dual relationship," like the one Petitioner established purposely with K.L., could lead to the type of exploitation of a patient that is present in this case.

[15] Courts have long relied on the codes of ethics of the medical community to hold that health care providers are responsible for sexual activity arising out of the professional relationship with patients. See L.L. v. Medical Protective Co., 362 N.W. 2d 174 (Wis. App. 1984), where the court held that such conduct may be the basis of a malpractice suit. While the Codes of Ethics of health care professional groups such as the American Psychiatric Association have a long history of articulating the view that sexual contact between clinicians and patients is unethical, the ACA did not explicitly state this until 1991 when the above-quoted addendum on sexual intimacies with a patient was adopted. As the addendum itself states, the view that sexual activity with patients is unethical could be inferred from the ACA's ethical provisions already in existence in 1991, and this addendum served to merely reaffirm the view already held by the ACA Ethics Committee.

In this case, the appellate panel found that the evidence did not establish that the offenses of which Petitioner was convicted occurred in connection with the delivery of a health care item or service. The I.G. had submitted sworn statements of several children whose complaints formed the basis of the criminal charges against Petitioner which asserted that the abuse which Petitioner allegedly committed were committed in connection with the delivery of a health care item or service. However, since the record did not identify either K.L. or I.J. at the time that I issued my July 22, 1991 decision, the appellate panel found that it was possible that neither K.L. nor I.J. were one of the children who made these sworn statements. Since it was possible that neither K.L. or I.J. were one of the children who made the sworn statements, the appellate panel found that the evidence did not establish that the offenses to which Petitioner pled guilty necessarily consisted of the offenses which were asserted as having been committed in connection with the delivery of a health care item or service. Appellate Panel Decision at 8 - 9. The fact that such could have been the case was not sufficient to establish the requisite nexus under the Act.

An examination of the Minutes of Evidence submitted by the I.G. on remand contains skeletal information on its face regarding the circumstances underlying the abuse of which Petitioner was convicted. The Minutes of Evidence states that Petitioner had provided chiropractic treatment at his clinic "a number of times," but it does not state how long or over what period of time K.L. was a patient of Petitioner. The Minutes of Evidence also indicate that the abuse of which Petitioner was convicted occurred in a car while Petitioner was driving K.L. home after K.L. had visited Petitioner at his house.[16] There is nothing in this document which links Petitioner's and K.L.'s therapeutic relationship with the sexual abuse which took place in the car after K.L. visited Petitioner at his house. The description of the circumstances underlying the criminal offense contained in the Minutes of Evidence is therefore not sufficient to support a finding that Petitioner was convicted of criminal abuse which occurred in connection with the delivery of a health care service.

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[16] While Petitioner was convicted of two counts of Indecent Contact with a Child involving K.L., only one instance of abuse is described in the Minutes of Evidence.

Since the Minutes of Evidence identify K.L. by name, it is possible to determine whether K.L. made any of the sworn statements contained in the record. A review of the evidence establishes that K.L. made one of the sworn statements in the record. In order to gain additional information about the circumstances underlying the criminal offense, I must look to K.L.'s sworn statement, as well as other evidence of record.

Petitioner argues that a sworn statement made by K.L. in the course of the investigation which led to Petitioner's conviction cannot be relied on to determine whether the abuse of which Petitioner was convicted was related to the delivery of a health care item or service. According to Petitioner, he did not admit all of the allegations in K.L.'s sworn statement when he pled guilty to counts arising out of these statements. Petitioner states that he pled guilty to the charges in the April 11, 1990 Trial Information based on the facts contained in the Minutes of Evidence. Since he admitted only the allegations contained in the Minutes of Evidence when he entered his guilty plea, Petitioner contends that I may examine only the Minutes of Evidence to determine the factual basis for the guilty plea. Petitioner's Posthearing Brief at 5 - 6.

The fact that Petitioner did not plead guilty to all of the allegations in K.L.'s sworn statement does not mean that I am prohibited from considering the evidence contained in K.L.'s sworn statement. The appellate panel has already found in its decision that extrinsic evidence is admissible for the purpose of determining whether section 1128(a)(2) applies. Appellate Panel Decision at 3 - 4.

In evaluating the probative value of K.L.'s sworn statement, I recognize that Petitioner has not admitted to all of the allegations contained in it. Notwithstanding this, I find that K.L.'s statement is reliable evidence which provides useful information about the factual basis of the abuse of which Petitioner was convicted. This statement was taken under oath and K.L. had little motivation to lie to authorities about these events. Moreover, Petitioner has never objected to the veracity of K.L.'s sworn statement, although he has had the opportunity to do so. I conducted an in-person

hearing in which Petitioner had the opportunity to confront K.L., and he chose not to do so.[17]

Based on my review of the entire record, including K.L.'s sworn statement, I find that Petitioner was convicted of a criminal offense which occurred in connection with the delivery of a health care item or service.

The record shows that Albia, Iowa, the town where the parties lived at the time the criminal offense occurred, is a small community with a population of approximately 4,000 inhabitants. Tr. 74. There is no evidence that, prior to the time that Petitioner began treating K.L., the parties had any more than a passing acquaintance. Petitioner testified that, prior to treating K.L., he knew K.L. by name because K.L.'s sister used to date Petitioner's younger brother. He also stated that while he was not sure that K.L. had visited his house prior to the time that he began treating him, it was possible. Tr. 66 - 67. In any event, the contact between the parties prior to the time that Petitioner began treating K.L. appears to be minimal, and there is no evidence that there was any significant personal or social relationship between the parties at this time.

K.L. stated that the first time he recalled that he actually met Petitioner was when he was in seventh grade, approximately two years before he gave his May 18, 1989 sworn statement. This meeting occurred at McDonald's after a track meet. K.L. stated that he talked to Petitioner about his back because it was "all messed up." Petitioner encouraged K.L. to come to his office for chiropractic treatment, and he offered to provide the first three treatments free of charge. I.G. Ex. 30/5.

K.L.'s first medical appointment with Petitioner occurred approximately two and a half months later, in the fall of the year K.L. was in eighth grade. I.G. Ex. 30/6. Petitioner's grandmother brought him to that and other appointments. Sometimes his mother brought him to Petitioner's office. I.G. Ex. 30/6, 8, 28. Nothing inappropriate happened at that appointment or at the second or third appointments, which occurred over the course of the following three weeks. I.G. Ex. 30/6 - 8.

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[17] See Richardson v. Perales, 402 U.S. 389 (1971), which holds that in an administrative proceeding written statements of persons in lieu of live testimony may be substantial evidence supportive of a finding adverse to a party when the party fails to exercise its right to subpoena the witness.

In another appointment which occurred some time after that, K.L. stated that Petitioner rubbed an electrical instrument on his legs and buttocks instead of using it to rub his back. K.L. indicated that at the time that this happened, he wondered whether this was appropriate treatment for his back complaint. I.G. Ex. 30/9.

I infer from this evidence that Petitioner used his status as a chiropractor to initiate a relationship with K.L.. He strongly encouraged K.L. to come to his office for chiropractic treatment, even to the point of offering the first three treatments without cost, as an inducement to have K.L. begin treatment with him. By providing appropriate chiropractic treatment during K.L.'s initial appointments, Petitioner took some time to establish a relationship of trust between him and K.L.. The fact that K.L. was brought to these appointments by a close family member also served to provide an aura of legitimacy to the relationship. Typically, health care providers, such as chiropractors, are respected authority figures in a community, and it is evident that Petitioner used his status as a chiropractor to encourage K.L. to place his confidence in him. It was only after K.L. became comfortable with him that Petitioner attempted to provide unusual or unexpected treatment.

The I.G. submitted documents showing that K.L.'s case file was seized from Petitioner's office by law enforcement officials on May 8, 1989. I.G. Exs. 6, 11, 34. From this, the I.G. argued that the chiropractor/patient relationship between Petitioner and K.L. lasted from 1987 to 1989, far longer than the six-month period that Petitioner claimed. I.G. Posthearing Brief at 8.

K.L.'s statement does not indicate how long the chiropractic treatments at Petitioner's office continued. At the hearing, Petitioner testified that he could not recall the number of appointments K.L. had with him. However, to the best of his recollection, he estimated that there were ten to fifteen appointments which occurred over a six-month period. Tr. 74 - 75. Petitioner also testified that he kept all of his patients' files together, regardless of whether the patients are actively receiving chiropractic services or not. Tr. 76 - 77. Petitioner argued that the seizure of K.L.'s file in 1989 by law enforcement officials does not mean that K.L. was still receiving chiropractic treatments in his office at that time. Petitioner's Posthearing Brief at 7.

There is no evidence that Petitioner and K.L. formally terminated their professional relationship prior to the seizure of K.L.'s records in 1989. Thus, even if I were to accept Petitioner's estimate that he actively stopped providing chiropractic treatment at his office six months after these treatments began in the latter part of 1987, this does not mean that the professional relationship between the parties ceased at that time. Even if K.L. no longer was an active patient of Petitioner's in 1989 in the sense that he was receiving ongoing chiropractic treatment at Petitioner's medical office, it is still reasonable to infer that K.L. continued to consider Petitioner to be his chiropractor in the event that he needed additional treatment. Petitioner did not give K.L. notice that he was withdrawing his services and he did not transfer copies of his records to either K.L. or another chiropractor.

This conclusion is supported by the evidence showing that even if K.L. was not receiving chiropractic services in a formal clinical setting, Petitioner continued to provide chiropractic services to K.L. in social and other non-office settings. According to K.L.'s sworn statement, K.L. and Petitioner took a sauna together at Petitioner's residence on more than one occasion in 1989. On one of these occasions, Petitioner gave K.L. a free chiropractic adjustment after they took a sauna bath together. I.G. Ex. 30/10 -13, 25, 28. Petitioner also allowed K.L. to use his weight equipment at his fitness center, and he gave K.L. free chiropractic adjustments after K.L. lifted weights at his fitness center. I.G. Ex. 30/27 - 28. Petitioner also went skating with K.L., and Petitioner massaged K.L.'s shoulder during these outings. I.G. Ex. 30/26.

By providing chiropractic massage and adjustment outside the clinical setting, Petitioner, through his conduct, expanded the boundaries of the chiropractor/patient relationship with K.L. to non-clinical settings. The picture that emerges from the record is that throughout the history of his relationship with K.L., Petitioner consistently engaged in conduct which blurred the traditional distinctions between a professional relationship and a social relationship. He initially spoke to K.L. about commencing a professional relationship at a fast food restaurant. This shows that he actively used his professional status to initiate a relationship with K.L.. Once he entered into a professional relationship with K.L., he used this relationship to induce K.L. to trust his motives and conduct. As the trust developed, he exploited it to continue the relationship to extend to non-clinical

settings. Then, in the non-clinical settings, he continued to provide chiropractic services to build on the dependency and trust inherent in the chiropractor/patient relationship. It is noteworthy that the street address for Petitioner's office, house, and fitness center were all 909 S. Clinton in Albia, Iowa. Tr. 64, 66; I.G. Ex. 6. K.L. repeatedly saw Petitioner in all three settings, and the geographical proximity of Petitioner's office, residence, and fitness center made it more likely that K.L. would perceive his professional relationship with Petitioner as being inseparable from his social relationship with him.[18]

K.L. stated that sometimes in the course of giving him a chiropractic adjustment, Petitioner would try to get his hands under K.L.'s pants. On these occasions, K.L. would say something which would cause Petitioner to move his hands away from his pants. I.G. Ex. 30/23. K.L. did not specify whether these attempts to touch him illicitly occurred during the course of chiropractic treatment in a clinical or a non-clinical setting or both. The setting where these attempts to illicitly touch K.L. occurred is of little significance. What is significant is that this evidence shows that once Petitioner had gained the trust of K.L., he tried to use the chiropractic adjustment with which he had treated K.L. in the past as a prelude to satisfy his own sexual needs.

K.L. stated that, on one occasion approximately two months before he made his May 18, 1989 statement, Petitioner drove him home after K.L. had visited Petitioner at his house. While they were in the car, Petitioner started to rub the back of K.L.'s neck. K.L. stated that he "didn't think nothing of it." Petitioner then started gradually to work his massaging motions downward. He rubbed K.L.'s back, and then, working his way down, he began to rub K.L.'s genitals with his hand over K.L.'s pants. I.G. Ex. 30/10, 14 - 16. K.L. stated that the only time that Petitioner touched his genitals

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[18] As I stated in my July 22, 1991 decision, Petitioner's blurring of the distinctions between the professional relationship and the social relationship with K.L. and other patients was particularly treacherous because it took advantage of the vulnerability of these children. This is illustrated by another victim of Petitioner who was abused also in an automobile. That child stated that when Petitioner reached over and touched his genitals, he was thinking that "maybe [I] should tell him don't, but if I do maybe he wouldn't like me any more or something." I.G. Ex. 31/22.

over his clothes was this occasion in the car in 1989. I.G. Ex. 30/16, 24.

The abbreviated description in the Minutes of Evidence of the incident of illicit touching which occurred in a car, which was the basis for Petitioner's conviction, closely resembles the more detailed description of this incident contained in K.L.'s sworn statement. Since K.L. stated that this was the only time that Petitioner placed his hands on his genitals over his clothes, it is reasonable to infer that Petitioner's conviction emanated from this incident.

The sexual abuse of which Petitioner was convicted involved the touching and rubbing of K.L.'s genitals. Rubbing and massage of a patient's body parts is what chiropractors do in the course of providing chiropractic treatment. In fact, the illicit touching in this instance was preceded by the massage of K.L.'s neck and back, something Petitioner had repeatedly done to K.L. in the past, in the course of providing legitimate chiropractic services for K.L.'s benefit. When Petitioner began to massage K.L.'s neck in the car, K.L. offered no resistance because he thought that Petitioner was doing it for his benefit.

At the time of the abuse, K.L. was young, impressionable, and probably sexually inexperienced. Due to his youth and lack of sophistication, K.L. had little reason to question Petitioner's behavior. K.L. trusted Petitioner because of the therapeutic relationship he had with Petitioner. Petitioner took advantage of K.L.'s trust and inexperience to gratify his own sexual urges with a minimum of resistance.

Petitioner now tries to hide behind the fact that the abuse of which he was convicted occurred in a car, rather than a clinical setting, to support his contention that it was not in connection with the delivery of a health care item or service. In evaluating the totality of the circumstances of this case, I am not persuaded by this argument. The record is replete with examples of Petitioner's efforts to extend his professional relationship with K.L. outside the usual treatment parameters. The incident of which Petitioner was convicted is one example where Petitioner touched and massaged K.L. under the guise of providing a legitimate chiropractic service in a non-clinical setting. Petitioner massaged K.L.'s neck in the car for the purpose of perpetrating sexual abuse with a minimum of resistance from K.L.. In this specific instance, the sexual abuse was inseparably related to Petitioner's

provision of chiropractic treatment. Petitioner engaged in conduct in which he extended the boundaries of his therapeutic relationship to a non-clinical setting, and he must be held accountable for this conduct. Under these circumstances, his argument that the abuse of which he was convicted was unrelated to the delivery of a health care service because it occurred in a car rather than a medical office is without merit.

As I discussed in my July 22, 1991 decision, the record contains substantial evidence showing that the criminal offenses to which Petitioner pled guilty did not occur in isolation. Instead, these criminal offenses were but a small part of a larger, more pervasive, pattern of sexually abusing children. On appeal, Petitioner took exception only to my FFCL 10, in which I found that he was convicted of a criminal offense within the meaning of section 1128(a)(2), and he did not challenge my other findings. Petitioner did not dispute my findings that he exploited his professional relationships with several different children for the purpose of gaining sexual access to them. Petitioner did not dispute that in some of these instances, he illicitly touched the victims' genitalia in the course of providing chiropractic treatment in a clinical setting. I recognize that Petitioner was not convicted of these offenses. Nevertheless, the fact that there is substantial undisputed evidence showing that Petitioner repeatedly exploited his therapeutic relationships with children other than K.L. to perpetrate sexual abuse is additional support for my finding that he exploited his therapeutic relationship with K.L. for the purpose of perpetrating the abuse which occurred in the car. In a very calculated fashion, Petitioner repeatedly used his status as a chiropractor and his chiropractic practice as a vehicle for abusing young male children. I find that the sexual abuse of K.L. which occurred in Petitioner's car in 1989, which was the basis for Petitioner's conviction, is another example of this.

Based on the circumstances of this case, I find that the evidence overwhelmingly establishes that the abuse of which Petitioner was convicted occurred "in connection with the delivery of a health care item or service," even though the location of the abuse was a car rather than a clinical setting. I reach this conclusion for two reasons. First, the illicit touching in Petitioner's car which formed the basis of Petitioner's conviction was preceded by the massage of K.L.'s neck and back. Petitioner had repeatedly massaged K.L. in this manner in the past in the course of providing legitimate chiropractic services to K.L. K.L. did not think that

Petitioner's massage of his neck and back on this occasion was inappropriate. At the time the abuse occurred, Petitioner was performing a chiropractic massage on K.L. which K.L. perceived to be for his benefit. Based on this, I find that the massage of K.L.'s neck and back in Petitioner's car constitutes the delivery of a health care service within the meaning of the Act. Since Petitioner initiated the massage for the purpose of lowering K.L.'s resistance to the sexual abuse which followed, I find that the abuse occurred "in connection with" the delivery of a health care service.

In addition, even if I concluded that the neck and back massage at the time of the abuse did not constitute the delivery of a health care service, I would still find that the abuse occurred in connection with the delivery of a health care service, for a different reason. It is undisputed that, prior to the time the abuse occurred, Petitioner delivered chiropractic services to K.L. in a clinical setting. I find that these services constitute the delivery of a health care service within the meaning of the Act. The evidence establishes that in a premeditated manner, Petitioner schemed to exploit the professional relationship he developed with K.L. in the course of delivering these health care services for the purpose of perpetrating the abuse at a later date outside of the clinical setting. These facts more than satisfy the minimal nexus required by the "in connection with" language in section 1128(a)(2). The abuse of which Petitioner was convicted arose from Petitioner's provision of chiropractic services to K.L. in his office, and it occurred "in connection with" the delivery of a health care service.

For the reasons set forth above, I conclude that Petitioner was convicted of a criminal offense which occurred in connection with the delivery of health care service, within the meaning of section 1128(a)(2).

CONCLUSION

On remand, the I.G. provided documentary evidence establishing the identity of K.L.. Based on my evaluation of this evidence, in conjunction with the other evidence of record, I conclude that Petitioner was convicted of abuse relating to a patient and that the conduct which gave rise to his conviction occurred in connection with the delivery of a health care item or service. The I.G. therefore had the authority to exclude Petitioner under section 1128(a)(2) of the Act, and Petitioner's exclusion for five years is the minimum

period mandated by federal law under sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

/s/

Edward D. Steinman
Administrative Law Judge