DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
	)	
Arthur B. Stone, D.P.M.,	)	DATE: MAY 5, 1989
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-52
	)	
The Inspector General.	)	DECISION CR 26
	)	

DECISION AND ORDER

The Petitioner requested a hearing to contest the Inspector General's (I.G.'s) determination to exclude him from participation in Medicare and to direct that the Petitioner be excluded from participation in State health care programs (e.g., Medicaid), for a period of five years. This Decision and Order resolves this case on the basis of written briefs and a stipulated record. I hereby deny the Petitioner's motion to dismiss and I conclude that the I.G. was required under federal law to exclude the Petitioner for five years from Medicare and Medicaid.1/

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

This case is governed by section 1128 of the Social Security Act (Act), codified at 42 U.S.C. 1320a-7 (West U.S.C.A. Supp., 1988). Section 1128(a) of the Act, headed "Mandatory Exclusion," provides for the exclusion from Medicare, and a directive to the State to exclude from State health care programs, any individual who is "convicted of a criminal offense related to the delivery of an item or service" under the Medicare or Medicaid

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1/ For the sake of brevity, I hereafter refer only to Medicaid as constituting "State health care programs" under section 1128 of the Social Security Act.

programs. Section 1128(c)(3)(B) provides that the period of such exclusion shall be for a minimum period of five years.2/

The term "convicted" is defined in section 1128(i) to include "when a judgment of conviction has been entered against the physician or individual by a Federal, State, or local court," or when a plea of guilty or nolo contendere has been "accepted by a Federal, State, or local court." (Emphasis added.)

While section 1128(a) of the Act provides for a minimum five-year mandatory exclusion for (1) convictions of program-related crimes and (2) convictions relating to patient abuse, section 1128(b) of the Act provides for the permissive exclusion of "individuals and entities" for twelve types of other convictions, infractions, or undesirable behavior, such as convictions relating to fraud, license revocation, or failure to supply payment information. The Act does not prescribe a minimum period of exclusion in the case of a permissive exclusion.

II. The Federal Regulations.

The governing federal regulations (Regulations) are found in 42 C.F.R. Parts 498, 1001, and 1002 (1987). Part 498 governs the procedural aspects of this exclusion case and Parts 1001 and 1002 govern the substantive aspects.

In accordance with section 498.5(i), a practitioner, provider, or supplier who has been excluded from program coverage is "entitled to a hearing before an ALJ (Administrative Law Judge)." Pursuant to section 1001.128, an individual who has been excluded from participation has a right to request a hearing before an ALJ on the issues of whether: (1) he or she was, in fact, convicted; (2) the conviction was related to the delivery of an item or service under Medicare or Medicaid; and (3) the length of the exclusion is reasonable.

Section 1001.123(a) requires the I.G. to send written notice of his determination to exclude an individual or entity when he has "conclusive information" that the individual or entity has been convicted of a crime related

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2/ The current version of section 1128 of the Act was enacted in August 1987. Before August 1987, the Act did not prescribe a minimum period of exclusion.

to the delivery of an item or service under Medicare or Medicaid.3/

BACKGROUND

By letter dated July 19, 1988 (Notice), the I.G. notified the Petitioner that, as a result of his conviction of a criminal offense related to the delivery of an item or service under Medicaid, he would be excluded from participation in Medicare and Medicaid for a mandatory five year period, commencing 20 days from the date of the Notice. The I.G.'s stated basis for the exclusion was the Petitioner's nolo contendere plea and conviction in the County Court of Westmoreland County, Pennsylvania of a criminal offense related to the delivery of an item or service under Medicaid.

On September 14, 1988, the Petitioner timely requested a hearing on the I.G.'s determination. I held a prehearing telephone conference call on November 16, 1988, at which I determined that the issues raised by the Petitioner's hearing request were legal issues, which could be further developed by the parties in written briefing, and that there was no dispute as to any material fact. As reflected in the November 21, 1988 Prehearing Order and Notice of Hearing Schedule, I stated that, if it was determined later that an evidentiary hearing was needed, I would contact the parties to schedule such a proceeding.

EVIDENCE

The material facts in this case are stipulated to and evidenced by exhibits concerning the underlying State court documents pertaining to the Petitioner's plea of nolo contendere, such as the criminal complaint (I.G. Ex. 1), and the transcript of the Petitioner's plea and

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3/ Section 1001.123 of the Regulations provides that the period of exclusion is to begin 15 days from the date on the notice; however, the I.G. allowed 5 days for mailing in this case.

sentencing (P. Ex. A-4).4/ See also Tape (containing the stipulation by the parties as to the authenticity of all exhibits). In addition, the Petitioner acknowledges that he pleaded nolo contendere in State court to three counts of submitting false Medicaid invoices. P. Br. 1.

ISSUES 5/

1. Whether the Petitioner is subject to the minimum mandatory five year exclusion provisions of section 1128(c)(3)(B) of the Act.

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

3. Whether the Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

4. Whether the I.G. failed to comply with the federal Administrative Procedure Act, by (1) not publishing regulations to implement the distinction between the mandatory and permissive exclusion authorities, and (2) relying upon unpublished guidelines/directives in implementing the Act.

4/ The citations to the record in this Decision and Order are noted as follows:

Petitioner's Request	P. Req. (page)
Petitioner's Statement of Facts to be Established	P. Statement (page)
Petitioner's Brief	P. Br. (page)
Petitioner's Reply Brief	P. Rep. Br. (page)
Petitioner's Exhibit	P. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)
Tape of March 10, 1989 oral argument (by telephone conference)	Tape

5/ The Petitioner's 56 pages of briefing were highly repetitive, and contained numerous variations of the issues outlined here. Some arguments he made are not directly addressed in this Decision and Order because I found them to be either repetitive or irrelevant under the Act and Regulations.

5. Whether the I.G. was prohibited by provisions of federal law (regarding program operating responsibilities) from excluding the Petitioner.

6. Whether there is a need for an evidentiary hearing in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW 6/

Having considered the entire record, the arguments and submissions of the parties, and being fully advised herein, I make the following Findings of Fact and Conclusions of Law:

1. The Petitioner is a resident of the Commonwealth of Pennsylvania, and has been licensed in Pennsylvania as a doctor of podiatric medicine since 1966. P. Ex. A-4/9.

2. On November 16, 1987, the Petitioner was charged with 151 counts of fraud and abuse against the Medicaid program. I.G. Ex. 1; P. Ex. A-4/4.

3. On November 16, 1987, the Petitioner pleaded nolo contendere in the Court of Common Pleas of Westmoreland County, Pennsylvania, Criminal Division (State Criminal Court) to three counts of fraud and abuse against the Medicaid program. P. Ex. A-4.

4. The State Criminal Court sentenced the Petitioner to a total of five years probation, and the Petitioner was ordered to pay restitution in the amount of $5,734.64, a fine of $5,000, and $632.02 for the costs of prosecution. P. Ex. A-4/20-21.

5. The Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

6. The Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

6/ Any other part of this Decision and Order which is obviously a finding of fact or conclusion of law is incorporated herein.

7. In accordance with section 1128 of Act, the I.G. properly excluded the Petitioner from participation in Medicare, and directed his exclusion from Medicaid, for a period of five years.

8. The I.G. did not violate the federal Administrative Procedure Act, 5 U.S.C. 551 et seq., by not promulgating regulations to distinguish the exclusion authorities in section 1128(a)(1) and 1128(b)1) of the Act.

9. The I.G. did not rely upon an "unpublished guidance/directive" in classifying the Petitioner as subject to the mandatory exclusion authority of section 1128(a)(1) of the Act.

10. The material and relevant facts in this case are not contested.

11. The classification of the Petitioner's conviction of a criminal offense as subject to the authority of 1128(a)(1) is a legal issue.

12. There is no need for an evidentiary hearing in this case.

13. The I.G. is not prohibited by federal law or regulations from participation in the exclusion process.

14. The I.G. is entitled to summary disposition in this proceeding.

DISCUSSION

I. A Minimum Mandatory Five Year Exclusion Was Required In This Case.

Section 1128(a)(1) of the Act clearly requires the I.G. to exclude individuals and entities from the Medicare program, and direct their exclusion from the Medicaid program, for a minimum period of five years, when such individuals and entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs within the meaning of section 1128(a)(1) of the Act. Congressional intent on this matter is clear:

> A minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. . . . Moreover, a mandatory five-year exclusion should

> provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. Code Cong. and Ad. News 682, 686.

Since the Petitioner was "convicted" of a criminal offense and it was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Act, the I.G. was required to exclude the Petitioner for a minimum of five years.7/

II. The Petitioner Was "Convicted" Of A Criminal Offense As A Matter Of Federal Law.

I find and conclude that the Petitioner was "convicted" within the meaning of sections 1128(a)(1) and (i)(3) of the Act because he pleaded nolo contendere to the charges against him and the State Criminal Court "accepted" his plea.8/ Section 1128(i)(3) provides that "convicted" includes a plea of nolo contendere "accepted by a Federal, State, or local court."

The term "accepted" in section 1128(i)(3) is defined by Webster's Third New International Dictionary, 1976 Unabridged Edition, as the past tense of "to receive with consent." The term "accepted" is the opposite of the term rejected. The State Criminal Court did not reject the Petitioner's plea. Quite the contrary, the State Criminal Court "accepted" the Petitioner's plea within the meaning of section 1128(i)(3). Once that happened,

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7/ Since I have found and concluded that the mandatory exclusion provisions of section 1128(a)(1) apply in this case, I need not address the issue raised by the Petitioner of whether I should make a de novo determination to reclassify the Petitioner's criminal offense as subject to the permissive authority under section 1128(b) of the Act.

8/ It is axiomatic that the interpretation of a federal statute or regulation is a question of federal, not state, law, so any interpretation by the Commonwealth of Pennsylvania as to whether the Petitioner was "convicted" would not be directly relevant to this case. United States v. Allegheny Co., 322 U.S. 174, 183 (1944); United States v. Anderson Co., Tenn., 705 F.2d 184, 187 (6th Cir., 1983), cert. denied, 464 U.S. 1017 (1984).

the provisions of subsection 1128(i)(3) were triggered, and what happened after that is of no consequence to the determination that the Petitioner was "convicted," as a matter of federal law.

III. The Petitioner's Conviction Is "Related To The Delivery Of An Item Or Service" Under Medicaid.

Section 1128(a)(1) requires the I.G. to exclude from participation any individual who is convicted of a criminal offense "related to the delivery of an item or service" under Medicaid (emphasis added). The Petitioner was convicted under Pennsylvania law of submitting claims to the Medicaid program which "misrepresent[ed] the services actually rendered." P. Ex. A-4/10.

The Petitioner argues that the I.G.'s "classification" of this case under section 1128(a), and this requiring the five year period of exclusion, is erroneous and that the exclusion should be subject to the permissive authority of 1128(b). The Petitioner maintains that the I.G. improperly interpreted Congressional intent in distinguishing the mandatory and permissive authorities and that the offense to which he pleaded nolo contendere was related to the "reimbursement" function, rather than the "delivery" function. The Petitioner argues that this offense "related to fraud . . . or financial misconduct" and was not "related to the delivery of an item or service" under Medicaid. The Petitioner also characterized the criminal charges as concerning the false submission "of an invoice for a service which had not occurred." P. Br. 1. However, as the I.G. observed in his brief, the record indicates that this description of the criminal charges is incorrect. I.G. Br. 10 (fn. 3). The transcript of the plea hearing, and an affidavit of a State Medicaid investigator "in Support of Probable Cause for Arrest," describe the Medicaid claims (which were the subject of the criminal charges) as involving procedures different from those actually performed by the Petitioner. P. Ex. A-4/10; I.G. Ex. 2/3.9/

9/ In any event, even if the criminal charges in question here had concerned the billing for services which were never rendered, I would still find that the Petitioner's conviction "related to the delivery of an item or service" under Medicaid within the meaning of section 1128(a)(1) of the Act. The Petitioner offered no explanation for why Congress would have chosen to treat

(continued...)

I find that crimes involving financial misconduct in the submission of an Medicaid claims are "related to" the "delivery of an item or service." Black's Law Dictionary, Fifth Edition (West Pub. Co., 1979) defines "related" as: ". . . standing in relation; connected; allied; akin." Clearly, the offense for which the Petitioner was convicted was "connected to" the delivery of an item or service under Medicaid. This case should not be decided in a vacuum, or with a strict, hypertechnical interpretation of the term "related to" in section 1128(a)(1) of the Act. There is a simple, common-sense connection, supported by the record, between the actions associated with the Petitioner's conviction and the Medicaid program. The Petitioner's interpretation of "related to" is that the criminal offense must be "restricted to" the delivery of an item or service under Medicaid or Medicare. The Petitioner's strained interpretation of "related to" is not borne out by the plain words of section 1128 of the Act or its legislative history.

The offense to which the Petitioner pleaded nolo contendere involved fraud and financial misconduct, and was "related to the delivery of an item or service" under Medicaid. The criminal offense for which the Petitioner was convicted involved the Petitioner in fraudulently obtaining reimbursement from Medicaid for items or services which were not rendered as claimed.10/

9/ (...continued)
convictions concerning the claiming for services which were not rendered at all differently from convictions for services not rendered as claimed. The statute does not state that the offense in question must concern acts which occurred as part of the actual delivery of medical services, only that they be "related to" their delivery. The fraudulent billing of Medicaid for medical services, whether they were actually rendered or not, clearly "related to" the delivery of such services.

10/ Congress intended to exclude individuals convicted of this type of offense. In the legislative history to the 1977 enactment, Congress stated that:

> Perhaps the most flagrant fraud involves billings for patients whom the practitioner has not treated. A

(continued...)

Congress's purpose in enacting a separate permissive exclusion authority in section 1128(b)(1) was not to provide a more lenient treatment as to any provider convicted of offenses concerning "financial misconduct." The separate authority of section 1128(b)(1) was designed to broaden the scope of the law to authorize the I.G. to exclude providers who were convicted of offenses involving government funded health programs in addition to Medicaid and Medicare, as well as to permit exclusions for offenses relating to fraud and other types of financial misconduct, for all such programs.11/

10/ (...continued)
related form of fraud involves claims for services to a practitioner's patients that were not actually furnished and intentionally billing more than once for the same service.

H.R. Rep. No. 393-Part II, 95th Cong., 1st Sess. 47, reprinted in 1977 U.S. Code Cong. & Ad. News 3039, 3050.

Congress reiterated its intent by enacting the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. 100-93 (August 18, 1987), and by stating that its purpose in enacting the legislation was:

> to improve the ability of the Secretary and Inspector General of the Department of Health and Human Services to protect the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Title XX Social Services Block Grant from fraud and abuse, and to protect the beneficiaries from incompetent practitioners and from inappropriate and inadequate care.

S. Rep. No. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Ad. News 682. Congress did this by providing a minimum mandatory period of exclusion for those convicted of crimes that "relate to the delivery of an item or service."

11/ Since I find that the offense for which the Petitioner was convicted "related to" the delivery of services under Medicaid, I conclude that the I.G. properly classified this case as falling under the mandatory exclusion authority. It is not relevant here that the offense in question might hypothetically also fall within the scope of section 1128(b). Congress clearly provided
(continued...)

As support for his contention that the offense for which he was convicted did not relate to the "delivery" of medical services, the Petitioner submitted an affidavit from a former employee of the Health Care Financing Administration (HCFA), which administers the Medicaid and Medicare programs. P. Ex. A-5. In the context of a provider's compliance with program requirements, the affiant drew a distinction between more serious deficiencies which the affiant described as relating to the "delivery of patient care," such as "an unsafe and hazardous environment," and those allegedly less critical deficiencies involving Medicare "conditions of participation" under the regulations, such as "inadequate social worker visits" and the proper signing of medical records. The affiant explained that those more serious deficiencies relating to "delivery of care" would result in termination of a provider from the program, while a violation of other conditions of participation would only require submission of a plan of correction. In considering the present case, the affiant concluded that the offenses for which the Petitioner was convicted related to "reimbursement through financial misconduct" and were not "related to the delivery of an item or service within the conceptual context of the Department's Medicare/Medicaid programs."

Assuming the affiant's distinction to be a valid one regarding HCFA's certification of providers, this would have no relevance in determining Congress's intent in distinguishing exclusions based upon a conviction for crimes relating to the "delivery" of medical services from convictions relating to fraud or other financial misconduct. As noted by the I.G., the affiant has no expertise with either the Office of Inspector General, any health program to detect fraud and abuse, or with section 1128 of the Act. I.G. Br. 9; P. Ex. A-5/(attached

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11/ (...continued)
that if an offense falls within the scope of 1128(a), the I.G. has no choice but to exclude the provider for a minimum five year period. Given that I find that the plain meaning of section 1128 of the Act to be clear, I also do not address here any arguments raised by the Petitioner concerning the legislative history of the Act, which, in any event, I did not find to support his interpretation.

curriculum vitae).12/ The affiant's opinions are not germane to the issue of defining the phrase "related to the delivery of an item or service." The Petitioner's conviction in this case clearly "related to" the delivery of medical services, because the Petitioner pleaded nolo contendere to improperly billing for services that were not delivered as claimed. Thus, the criminal offense for which the Petitioner was convicted is one "related to the delivery of an item or service" within the meaning of section 1128(a)(1) of the Act.13/

IV. The I.G. Has Complied With The Administrative Procedure Act.

The Petitioner argued that the I.G. (1) failed to comply with the federal Administrative Procedure Act, 5 U.S.C. 552(a)(1) and 553, by not promulgating regulations to distinguish section 1128(a) from 1128(b), and (2) was, instead, relying on "unpublished guidelines/directives in implementing the statutory provisions." P. Br. 3 et seq. He argued that, because of this, he lacked "notice" of the effect of his court plea. P. Br. 8, 22.

12/ Neither the affiant nor the Petitioner explained how the distinction which the affiant drew between deficiencies relating to "delivery of services" and what he describes as less serious deficiencies are supported by the scheme of the federal regulations concerning certification of providers. Department regulations describe in detail the various deficiencies to consider in determining whether to certify a facility, and themselves do not distinguish deficiencies concerning "delivery" from other types of deficiencies. See, e.g., 42 C.F.R. 442.16.

13/ Another argument raised by the Petitioner was that his nolo contendere plea was improperly used by the I.G. as "evidence" against the Petitioner in a subsequent proceeding, contrary to the Federal Rules of Criminal Procedure and other authority. P. Rep. Br. 2-3; Tape. I find that the Petitioner's plea was not used as "evidence" against him in the sense intended by the authority cited. Section 1128(i)(3) of the Act directs the I.G. to exclude individuals who are convicted of criminal offenses related to delivery of services under Medicaid, and the statute itself defines the term "convicted" to encompass pleas of guilty or nolo contendere.

There is no ambiguity in the Act such that the promulgation of regulations to distinguish the two authorities would be necessary or appropriate.14/ Section 1128(a)(1) of the Act clearly provides that the I.G. must exclude any provider who has been convicted of an offense "related to the delivery of an item or service" under Medicare or Medicaid. The separate authority of section 1128(b)(1), providing for a permissive exclusion based on a conviction "in connection with the delivery of a health care item or service" or for "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," is clear on its face and without a doubt it

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14/ The I.G. argued in his brief that I lack jurisdiction to decide questions relating to whether the Secretary should promulgate regulations in this circumstance. I.G. Br. 18. (The Petitioner did not present argument on this issue.) Since I conclude that there is no ambiguity in section 1128 of the Act so that the promulgation of regulations would be necessary, I do not resolve this question. In Jack W. Greene v. The Inspector General, Docket No. C-56, decided January 31, 1989, and Michael I. Sabbagh, M.D., v. The Inspector General, Docket No. C-59, decided February 22, 1989, the ALJ in both cases concluded that he indeed lacked such jurisdiction, based on the language of the governing statute and regulations. For instance, 42 C.F.R. 1001.172 limits the grounds on which an excluded provider may request a hearing before an ALJ.

On the other hand, a comparison of the regulations pertaining to exclusion actions with regulations governing the other major health care sanction authority of the I.G. may support accepting jurisdiction in matters such as these. Part 1003 of 42 C.F.R., governing hearings under the Civil Monetary Penalties Law, section 1128A of the Act, provides at section 1003.115 ("Authority of ALJ."):

> (c) The ALJ does not have the authority to decide upon the validity of Federal statutes or regulations.

This provision might be interpreted to preclude an ALJ's review of whether the Secretary must promulgate regulations in certain circumstances. By comparison, no restrictions on the "authority" of the ALJ are contained in either the Regulations or the Act governing exclusion cases, and it would seem a reasonable conclusion that the Secretary may have intended for the ALJ to review matters concerning the validity of the Regulations in these cases.

concerns programs "financed in whole or in part by any Federal, State, or local government agency . . . ." Section 1128(b)(1) by its terms does nothing to alter the I.G.'s charge to exclude providers for a minimum five-year period when an individual has been convicted (as defined in section 1128) of a criminal offense "related to the delivery of an item or service" under Medicaid or Medicare. An agency is not required to promulgate implementing regulations when the express terms of the statute are clear. See, e.g., S.E.C. v. Chenery Corp., 332 U.S. 194, 201 (1947).

Since I find that the terms of the Act itself to be clear, I find that the Petitioner had "notice" that his court plea would result in an exclusion for a minimum five year period.

I likewise find that the I.G. did not rely upon "unpublished guidelines/directives" in classifying the Petitioner's offense. P. Statement 2-3. The Petitioner submitted (as P. Ex. A-3) a 15-page document entitled "Civil Monetary Penalty and Exclusion Authorities," which contains a listing of each of the statutory authorities under which the I.G. may proceed in sanctioning a health care provider. The document contains a brief description of "conduct" and the corresponding period of exclusion or other appropriate information. The Petitioner presented no direct support for his allegation that the I.G. used this document in determining whether to classify a particular case as subject to section 1128(a) or 1128(b), nor did the Petitioner even speculate how these pages might conceivably serve such a purpose. An examination of the document indicates that it was apparently used as a convenient listing of the numerous statutory authorities which authorize the I.G.'s sanction activities. By its terms, the document provides no guidance in determining how to classify a particular case between the various statutory provisions.15/

15/ Another argument by the Petitioner concerning P. Ex. A-3 is that it used the language from an earlier version of section 1128(a)(1), referring to "an individual or entity convicted of a criminal offense related to participating in Medicare or any State health program." (Emphasis added). The Petitioner also noted that similar language was used in a letter from the I.G. tentatively informing the Petitioner that he would be excluded. P. Br. 10-11, citing P. Ex. A-6. The Petitioner argued

(continued...)

V. There Is No Need For An Evidentiary Hearing In This Case.

I also find the Petitioner's argument that he is entitled to an evidentiary hearing concerning the classification of his exclusion to be without merit. P. Br. 37-38. The Petitioner availed himself of the opportunity to present oral argument on the legal issues raised in his briefs.16/ The Petitioner does not convincingly explain how the record might be further developed through the holding of an evidentiary hearing.

The issue of "categorizing" the Petitioner's offense as being subject to the mandatory exclusion authority is a legal issue. The Petitioner has already stipulated to the court documents concerning the nature of his criminal conviction, and has even presented an affidavit from an expert concerning the meaning of the phrase "delivery of services." There are no material facts in issue.

15/ (...continued)
that the use of this language somehow prejudiced the Petitioner. Even if I accepted that P. Ex. A-3 were a rule or guidance of the I.G., there is no basis to find that the use of this "participation" language would harm the Petitioner. The criminal offense to which the Petitioner pleaded nolo contendere, the improper billing for Medicaid services, was both "related to delivery of an item or service" under Medicaid, as well as being "related to" the Petitioner's participation in the Medicaid program. In any event, I am not convinced, contrary to the Petitioner's assumption here, that the phrase "participating in Medicare or any State health care program" is a more expansive category than that described by the present language "related to the delivery of an item or service" under Medicaid. If the standard is to require a provider's actual participation in the delivery of items or services, this would appear to limit the circumstances subject to the mandatory exclusion, since it might require the provider's actual involvement in the delivery of services.

16/ It was unclear at the closing of the record whether the Petitioner continued to assert the need for an evidentiary hearing since, at oral argument, the Petitioner's counsel did not renew his request. Tape.

In his final brief, the Petitioner maintained that he would demonstrate at an evidentiary hearing that his "omissions for which he was prosecuted" will be shown at a hearing to be related "to his failure to properly supervise his staff" and not to be "criminal." P. Rep. Br. 4-5. This is a collateral attack on a criminal judgment issued in another forum and a frivolous argument as it relates the I.G.'s determination to exclude the Petitioner under the section 1128(a)(1) authority. I have already addressed the Petitioner's arguments concerning whether the activities at issue "related to the delivery of an item or service" or were instead related only to "fraud" or "other financial misconduct." The underlying activities that gave rise to the criminal charges against him are otherwise irrelevant; while such matters might be pertinent to actually trying criminal charges against him, or to the State Criminal Court for purposes of sentencing, they would have no further relevance to a determination in this case.17/

VI. The I.G.'s Participation In The Exclusion Process Does Not Violate Federal Law.

The I.G.'s "participation" in the exclusion process is not contrary to the Act, because it does not conflict with the prohibition on the "transfer of program operating responsibilities" to the I.G. 42 U.S.C. 3526(a). The need for such a prohibition arose when the Office of Inspector General was created from other components of the Department, such as the Health Care Financing

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17/ The Petitioner submitted two affidavits concerning the reasons underlying his criminal conviction and nolo contendere plea, one from the Petitioner himself, and the other from an employee of the Petitioner who had knowledge of the circumstances at issue in the criminal proceedings. These statements appear, largely, to address the Petitioner's state of mind or intent, a matter irrelevant to this particular mandatory exclusion case, since the Petitioner conceded that he pleaded nolo contendere to the charges against him. If the Petitioner presented this evidence to contend that the Petitioner was subject only to the permissive exclusion authority, I also do not find this evidence to be relevant, since the only pertinent inquiry here is whether the Petitioner's offense was "related to the delivery of an item or service" under Medicaid, a matter which I have already fully addressed above, and about which these affidavits shed no light.

Administration; Congress wanted to maintain the independent and objective nature of the I.G. S. Rep. No. 1324, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. Code Cong. and Ad. News 5420, 5427; see 42 U.S.C. 3521. The Petitioner argued, in effect, that the act of excluding providers from federal programs violates this prohibition since this constitutes a "program." As support for this position, the Petitioner cited certain Department regulations which refer to the transfer of "responsibility" to the I.G. for fraud and abuse determinations. P. Br. 31-32. The Petitioner also argued that the I.G. would be unable to "objectively assess the Department's administrative law process if the OIG is a participant." P. Br. 32.

The Petitioner has provided no basis for me to conclude that the exclusion of a provider from the Medicare and Medicaid programs is a "program operating responsibility."18/ The term "program" is subject to various meanings, and the Petitioner has cited no authority that Congress intended this term to encompass exclusion determinations or other fraud and abuse sanction activities. That regulations refer to the transfer of fraud and abuse "responsibility" to the I.G. is

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18/ The I.G. argued in his brief that I lack jurisdiction to decide this question, relying on Jack W. Greene v. The Inspector General, Docket No. C-56, decided January 31, 1989, in which the ALJ concluded that he lacked such jurisdiction, based on the language of the governing statute and regulations. I.G. Br. 18. As I noted in footnote 14, above, I do not need to resolve this jurisdictional question, since I find the Petitioner's argument here to be so clearly without merit. As I also noted in the context of the promulgation of regulations, the issue of my jurisdiction over this matter is not so clearly established. For instance, in contrast to the regulations governing exclusion determinations, the regulations pertaining to the Civil Monetary Penalties law, 42 C.F.R. Part 1003, specifically preclude an ALJ's review of the "validity of Federal statutes or regulations," (section 1003.115(c)) which could encompass the issue of the I.G.'s "involvement" in the exclusion process, through its issuance of regulations which in effect delegate the Secretary's authority to the I.G. Moreover, even if I did not have authority to rule on the validity of federal statutes or regulations, I do have authority to interpret them.

irrelevant, since they do not describe this responsibility as involving a "program."

Moreover, Congress, in amending and strengthening the exclusion law, has itself approved the involvement of the I.G. in the exclusion process, since it is the I.G. who has performed this responsibility from the law's inception. Indeed, the legislative history of the 1987 amendments to the law expressly approves the Secretary's delegation of the exclusion authority to the I.G.:

> Under current practice, the Secretary has delegated all existing suspension, exclusion, and civil monetary penalty authorities to the Department's Inspector General. The Committee believes that this delegation of authority by the Secretary is entirely consistent with the statutory mandate of the HHS Inspector General (42 U.S.C. section 3521 et seq.) and has resulted in the efficient administration of these authorities. The Committee expects the Secretary both to continue this existing practice and to delegate all new statutory exclusion authorities created by this bill to the Department's Inspector General.

S. Rep. No. 109, 100th Cong., 1st Sess. 14, reprinted in 1987 U.S. Code Cong. and Ad. News 682, 695.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude the I.G. properly excluded the Petitioner from the Medicare program, and directed his exclusion from State health care programs, for the minimum mandatory period of five years.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge