DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Charles W. Wheeler,	DATE: JUN 8, 1989
Petitioner,	
- v. -	Docket No. C-61
	DECISION CR 28
The Inspector General.	

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.1/ This Decision and Order resolves this case on the basis of written briefs and a stipulated record.2/

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.

2/ In a preliminary ruling, I granted the Petitioner's request to consolidate his hearing, docketed as No. C-61, with the hearing for Petitioner Joan K. Todd, Docket No. C-63. The Petitioner is the son of Petitioner Todd, and the circumstances underlying their convictions, and the I.G.'s action to exclude them were essentially identical. The I.G. had no objection to the consolidation. See December 9, 1988 Prehearing Order and Notice of Hearing Schedule.

As I indicated in my December 9, 1988 Ruling, a separate Decision and Order is being rendered simultaneously in Petitioner Todd's case.

dismiss. I conclude that the I.G. was required under federal law to exclude the Petitioner from Medicare, and to direct his exclusion from Medicaid, for five years.

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

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 other 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 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

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3/ This 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.

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

BACKGROUND

By letter dated September 30, 1988, 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.4/ The I.G.'s basis for the exclusion here was the Petitioner's guilty plea and conviction in the Circuit Courts of Mercer and Fayette Counties, West Virginia, of criminal offenses related to the delivery of an item or service under Medicaid.5/

On October 18, 1988, the Petitioner and Petitioner Todd timely filed a joint request for hearing on the I.G.'s determination. I held a prehearing telephone conference call on December 7, 1988, at which I determined that the issues raised by the Petitioner's hearing request were primarily legal issues, which could be further developed by the parties in written briefing. As reflected in the December 9, 1988 Prehearing Order and Notice of Hearing

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4/ 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.

5/ Petitioner Joan K. Todd also received a letter dated October 6, 1988 from the I.G., notifying her of her mandatory five-year exclusion from Medicare and Medicaid because of her guilty plea and conviction in the Circuit Court of Fayette County, West Virginia of a criminal offense related to the delivery of an item or service under Medicaid.

Schedule, I stated that, if it were 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 the following exhibits concerning the underlying State court documents pertaining to the guilty pleas of the Petitioner and his mother, Petitioner Joan Todd: the indictments against the Petitioner in Fayette County and Mercer County (I.G. Exs. 1 and 3, respectively); the indictment against Petitioner Todd in Fayette County (I.G. Ex. 2); the transcript of the Petitioner's plea, along with Petitioner Todd's plea, in Fayette County (P.Ex. A-1); and the signed plea agreement of both Petitioners for the charges in both counties. (P. Ex. A-2).6/ 7/ See also, Tape, containing the parties' stipulation to the authenticity of all exhibits.

The Petitioner acknowledges that he pleaded guilty in State court to misdemeanors of "falsifying accounts by falsely certifying Medicaid cost reports" under State law, under "an Alford plea arrangement," which the Petitioner's counsel described as "equivalent to a nolo contendere plea." P. Br. 1. 8/

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

Petitioner's Brief	P. 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)
Petitioner's Reply Brief	P. Rep. Br. (page)
Tape of March 10, 1989 oral argument (by telephone conference)	Tape

7/ The record does not contain the transcript of the Petitioner's plea or sentencing in the Mercer County case.

8/ The record indicates that the Petitioner actually pleaded guilty to the lesser offense of "attempting to commit the offense of falsifying accounts . . . ." P.Ex. A-2. The distinction is irrelevant for purposes of this Decision, however, since either an attempt to commit or an actual commission of the offense charged against

(continued...)

ISSUES 9/10/

1. Whether the Petitioner is subject to the minimum mandatory five-year exclusion provision 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.

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.

8/ (...continued)
Petitioner are crimes which similarly concern the Medicaid program.

9/ The Petitioner's 43 page brief was highly repetitive, and contained numerous variations of the same issues outlined here. Some arguments raised by the Petitioner are not directly addressed in this Decision and Order because I found them to be either cumulative or irrelevant under the Act and Regulations.

10/ The issues raised in this case are nearly identical to those raised by the Petitioner before me in Arthur B. Stone, D.P.M., Petitioner, v. The Inspector General, Docket No. C-52, decided May 5, 1989. Counsel for the Petitioner in this case was also the Petitioner's counsel in Stone.

FINDINGS OF FACT AND CONCLUSIONS OF LAW 11/

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 State of West Virginia, and was an officer of incorporated nursing homes in the State. I.G.Exs. 1 and 3.

2. On March 2, 1987, a bill of indictment was returned in Fayette County, West Virginia against the Petitioner, charging him with two counts of "falsifying accounts" in submission of Medicaid cost reports to the State Department of Welfare.12/ I.G.Ex. 1.

3. On June 9, 1987, a bill of indictment was returned in Mercer County, West Virginia against the Petitioner, charging him with one count of "obtaining money by false pretenses" in the submission of Medicaid claims to the State Department of Welfare, and three counts of "falsifying accounts" in the submission of Medicaid claims. I.G.Ex. 3.

4. On December 15, 1987, the Petitioner entered into a Plea Agreement whereby he agreed to plead guilty in Mercer County, West Virginia to two counts of "attempting to commit the offense of falsifying documents," a misdemeanor. P.Ex. A-2.

5. The Mercer County Circuit Court accepted the Petitioner's guilty plea to the two misdemeanor counts. P.Ex. A-1/2.

6. The December 15, 1987 plea agreement also included the Petitioner's agreement to plead guilty in Fayette County, West Virginia to one count of "attempting to commit the offense of falsifying accounts," a misdemeanor. P.Ex. A-2.

7. On February 16, 1988, the Fayette County Circuit Court accepted the Petitioner's plea. P.Ex. A-1.

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

12/ The West Virginia State Department of Welfare is now the State Department of Human Services.

8. The Petitioner informed the Fayette County Circuit Court that his guilty plea was taken pursuant to Kennedy v. Frazier, 357 S.E.2d 43 (W.Va. 1987) and North Carolina v. Alford, 400 U.S. 25 (1970). P.Ex. A-1/5.

9. At the time the Petitioner entered his guilty plea, he was advised that the guilty plea would result in a judgment of guilt. P.Ex. A-1/25.

10. The offenses to which the Petitioner pleaded guilty in Mercer and Fayette Counties, West Virginia, are criminal offenses related to the delivery of an item or service under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

11. The Petitioner's guilty plea was entered knowingly and voluntarily. P.Ex.A-1/16, 20.

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

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

14. In accordance with section 1128 of the Act, the Petitioner was properly excluded from participation in Medicare and Medicaid for a period of five years.

15. 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.

16. 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.

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

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

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

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

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

DISCUSSION

I. A Minimum Mandatory Five Year Exclusion Was Required in this Case.

As I stated in Stone, section 1128(a)(1) of the Act requires the I.G. to exclude individuals and entities from the Medicare program, and to 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 offense 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.

II. The Petitioner was "Convicted" of a Criminal Offense as a Matter of Federal Law.

Section 1128(i) of the Act provides, in pertinent part, that:

> A physician or other individual is considered to have been "convicted" of a criminal offense --
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> . . .

(3) when a plea of guilty or nolo contendere by the physician or individual has been accepted by a Federal, State, or local court; . . . .

The Petitioner admits that he pleaded guilty to a misdemeanor offense related to the delivery of a service or item under the Medicaid program, but he contends that he did so under West Virginia state procedure, which permitted him to enter a guilty plea but maintain his innocence, in reliance upon Kennedy v. Frazier, 357 S.E.2d 43, 45 (W.Va. 1987) and North Carolina v. Alford, 400 U.S. 25, 35-38 (1970). P. Rep. Br. 1. The Petitioner argues that his Kennedy/Alford plea can not be used to conclusively determine the nature of his underlying conduct, and that he is now free in this forum to challenge the I.G.'s allegations as to the nature of his criminal offense. P.Br. 3. The I.G. notes that although the Petitioner's guilty plea could be considered the equivalent of a nolo contendere plea, it is nonetheless a guilty plea under North Carolina v. Alford, 400 U.S. 25 (1970), and further, that it is undisputed that, for purposes of section 1128, there is a conviction when a plea of guilty or nolo contendere is accepted by a court.

Although an Alford plea does not require an admission of guilt, it is nonetheless a plea of guilty. I find and conclude that the Petitioner was "convicted" within the meaning of section 1128(a)(1) and (i). It is axiomatic that the interpretation of a federal statute or regulation is a question of federal and not state law. United States v. Allegheny Co., 322 U.S. 174, 183(1944); United States v. Anderson County, Tennessee, 705 F.2d 184, 187 (6th Cir. 1983), cert. denied, 464 U.S. 1017 (1984). My task is to interpret the words of the Act in light of the purposes they were designed to serve and to discern the meaning of those words. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

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."

In Alford, the issue presented did not involve whether a plea of guilty was "accepted," but rather, concerned the validity of the guilty plea entered. Mr. Alford pleaded guilty, but maintained that he was innocent and was choosing to plead guilty only to avoid the possible imposition of a harsher penalty. The Court in Alford concluded that a guilty plea is valid if the plea

represents a "voluntary and intelligent choice among the alternative courses of action open to the defendant." 400 U.S. at 30. The Court held that the desire of the defendant in Alford to limit a possible penalty would not "demonstrate that the plea of guilty was not the product of free and rational choice, especially where the defendant was represented by competent counsel." Id. The Court in Alford stated that it would defer to the States' wisdom in deciding whether to accept or reject guilty pleas under the terms of Alford. The State of West Virginia has chosen to accept Alford pleas and view them as the guilty pleas they are. See Kennedy v. Frazier, 357 S.E.2d 43 (W.Va. 1987).

The Fayette County Circuit Court made the following inquiries to the Petitioner regarding the nature of his plea:

> 1. Is it your intention and desire to give those rights up and to enter this plea of "Guilty" to this charge that's been described? P. Ex. A-1/13;
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> 2. A plea of "Guilty" cannot be accepted unless it's freely and voluntarily given. Has anyone promised you that if you enter a plea of "Guilty" this Court will be lenient with you? P. Ex. A-1/16;
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> 3. Now, I want you to listen to this, and that's why I asked Mr. Billings to bring this case over, as I've asked him on other occasions when we were taking pleas under this case--or under this theory. "An accused may voluntarily, knowingly, and understandingly consent to the imposition of a proven sentence even though he is unwilling to admit participation in the crime if he intelligently concludes that his interests require a guilty plea" -- now, here's the part -- "and the record supports the conclusion that a jury can convict him." Now, do you feel, sir, that the record in this case so far, what you've told me, would support a conclusion that the jury would convict these two folks? P. Ex. A-1/19-20;
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> 4. Now, listen. Generally, this Court will not accept a plea of guilty unless the defendant states that he or she is actually guilty of the offense. Do you-all understand that? P. Ex. A-1/20;
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> 5. Now, under this plea bargain agreement that Mr. Billings has entered into here, and your counsel, you are proceeding under a case in which the law is as I just read it to you. And that is that you have to

> intelligently conclude that your interests require a guilty plea. Do you both arrive at that conclusion? P. Ex. A-1/20;
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> 6. Do you do so after a full and fair examination of all the facts and circumstances and available evidence in this case? P. Ex. A-1/20-21;
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> 7. And do you feel, considering all of these circumstances, that the record, as you know it, is such that a jury might -- could convict you-all and that it is in your best interest to enter this plea and to expose yourselves to these penalties that I've described to you? Do you both feel that way? P. Ex. A-1/21. 13/

The Petitioner responded affirmatively to each of these questions. The State accepted the Petitioner's plea, and by doing so, in its wisdom, determined in effect that the plea was entered voluntarily and intelligently. The finding of guilt and acceptance by the State of the Petitioner's plea thus satisfies the definition set forth in section 1128(i)(3) for finding that the Petitioner was "convicted."

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 in Mercer County Circuit Court under West Virginia law of two counts of attempting to commit the offense of falsifying accounts with the West Virginia Department of Human Services. P. Ex. A-2/1. In Fayette County Circuit Court, the Petitioner was convicted of one count of attempting to commit the offense of falsifying accounts against the West Virginia Department of Human Services. P. Ex. A-2/2.

The Petitioner argues that his offenses did not relate to "delivery of an item or service," but, rather, related to a misrepresentation based upon incorrect information in his accounting records. The Petitioner contends that his offenses relate strictly to the reimbursement function of the Medicaid program, which is separate and distinct from

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13/ The Fayette County Circuit Court accepted the guilty plea of the Petitioner simultaneously with that of his mother, Petitioner Joan K. Todd.

the delivery of items or services. The I.G. responds that the Petitioner was convicted of several counts of attempting to commit the crime of falsifying accounts in his capacity as an officer of St. Mary's Nursing Home, and that, as a result of his plea bargain, the Petitioner agreed to make restitution to the State of West Virginia in the amount of $31,149.68.14/ The Petitioner's convictions involved his attempt to falsify Medicaid cost reports to fraudulently increase the level of Medicaid reimbursement, which the I.G. contends necessarily involves misrepresentations concerning such providers' delivery of health care under the Medicaid program. I.G. Br. 5. Thus, the I.G. asserts that the Petitioner's convictions were for crimes related to his nursing homes' delivery of items or services under the Medicaid program. Id.

I find that crimes involving financial misconduct in the submission of 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." 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, commonsense 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 Medicare or Medicaid. 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 offenses to which the Petitioner pleaded guilty involved fraud and financial misconduct, and were "related to the delivery of an item or service" under Medicaid. The criminal offenses of which the Petitioner was convicted involved the Petitioner obtaining

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14/ The Petitioner and his mother, Petitioner Joan K. Todd, agreed jointly to make restitution to the State. In addition, they jointly agreed to pay $13,397.46 as investigative costs in exchange for the dismissal of the indictment counts which were not related to the guilty pleas. I.G. Br. 3.

reimbursement from Medicaid for items or services which were not rendered as claimed.15/

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

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15/ 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 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."

for offenses relating to fraud and other types of financial misconduct, for all such programs.16/

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-3. 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." P. Ex. A-3/5.

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 of 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. 10; P. Ex. A-3/(attached curriculum vitae). The affiant's opinions

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16/ 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 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.

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 guilty to attempting to falsify accounts filed with the West Virginia Department of Welfare. 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.17/

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. 1 et seq. He argued that, because of this, he lacked "notice" of the effect of his court plea. P. Br. 7, 9, 10, 22.

There is no basis for the conclusion that there exists any ambiguity in the Act such that the promulgation of regulations to distinguish the two authorities would be necessary or appropriate.18/ Section 1128(a)(1) clearly

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17/ Another argument raised by the Petitioner was that his Alford guilty 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. The federal exclusion statute 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. Section 1128(i)(3) of the Act.

18/ 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. 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, Petitioner, v. The Inspector General, Docket No. C-56, decided January

(continued...)

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 relating to delivery, or for fraud and other financial misconduct, clearly 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 the statute) 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).

18/ (...continued)
31, 1989, Michael I. Sabbagh, M.D., Petitioner v. The Inspector General, Docket No. C-59, decided February 22, 1989, and Howard B. Reife, D.P.M., Petitioner, v. The Inspector General, Docket No. C-64, decided May 5, 1989, the ALJ concluded that he 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. The regulations governing hearings under the Civil Monetary Penalties Law, section 1128A of the Act, provide at 42 C.F.R. 1003.115(c) ("Authority of ALJ."):

> 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, 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 hearing exclusion cases.

Since I find 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. Br. 9. The Petitioner submitted (as P. Ex. A-4) 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 merely 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.

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

I also find to be without merit the Petitioner's argument that he is entitled to an evidentiary hearing concerning the classification of his exclusion. P. Br. 23-26. The Petitioner availed himself of the opportunity to present oral argument on the legal issues raised in his briefs. 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 the criminal proceedings against the Petitioner, and has even presented an affidavit from an expert concerning the meaning of the phrase "delivery of services."

In his final brief, the Petitioner maintained that he would demonstrate at an evidentiary hearing that his conduct was not criminal in nature. P. Rep. Br. 6. 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.

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

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 Administration, and 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. 32-33. 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. 34.

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."19/ The term "program" is subject to various

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19/ The I.G. argued in his brief that I lack jurisdiction to decide this question, relying on Jack W. Greene, Petitioner, 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; see note 18, above. As I noted with regard to

(continued...)

meanings, and the Petitioner has cited no authority that Congress intended this term to encompass exclusion determinations or other fraud and abuse sanction activities.

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. In fact, 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.

19/ (...continued)
the Petitioner's arguments concerning the Secretary's promulgation of regulations, 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.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude that 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