jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Pearson and Viacom. The United States is satisfied that the divestiture of the assets specified in the proposed Final Judgment will facilitate continued viable competition in the market for basal elementary school science programs and in the thirty-two markets for college textbooks identified in the Complaint. The United States is satisfied that the proposed relief will prevent the merger from having anticompetitive effects in these markets. The divestitures required by the proposed Final Judgment will preserve the structure of the markets that existed prior to the merger and will preserve the existence of independent competitors.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' In making that determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e).

As the Court of Appeals for the District of Columbia Circuit held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft,* 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, ''the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.''[1] Rather,

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), *quoting United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert, denied*, 454 U.S. 1083 (1981). Precedent requires that

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is *''within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted).''[3]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

FOR PLAINTIFF UNITED STATES OF AMERICA

Dated: December 10, 1998.

Respectfully submitted,

John W. Poole (D.C. Bar #34136)

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[1] 119 Cong. Rec. 24598 (1973). *See also United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A ''public interest'' determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. 93–1463, 93rd Cong. 2d Sess. 8–9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[2] *United States* v. *Bechtel*, 648 F.2d at 666 (internal citations omitted) (emphasis added); *see United States* v. *BNS, Inc.*, 858 F.2d at 463; *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette*, 406 F. Supp. at 716. *See also United States* v. *American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983).

[3] *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983), *quoting Gillette*, 406 F. Supp. at 716; *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 96–44]

Melvin N. Seglin, M.D. Continuation of Registration

On August 21, 1996, the then-Director, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Melvin N. Seglin, M.D. (Respondent) of Evanston, Illinois, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration AS4328274, under 21 U.S.C. 824(a)(5), and deny any pending applications for renewal of such registration as a practitioner, under 21 U.S.C. 823(f), for reason that he has been excluded from participation in a program pursuant to 42 U.S.C. 1320a–7(a).

By letter dated August 29, 1996, Respondent, acting *pro se*, filed a timely request for a hearing, and following prehearing procedures, a hearing was held in Chicago, Illinois on April 9 and 10, 1997, before Administrative Law Judge Mary Ellen Bittner. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties submitted proposed findings of fact,

conclusions of law and argument. On May 29, 1998, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision, recommending that Respondent's DEA Certificate of Registration be continued. Neither party filed exceptions to the Administrative Law Judge's Opinion and Recommended Ruling and on July 1, 1998, Judge Bittner transmitted the record of these proceedings to the then-Acting Deputy Administrator.

The Deputy Administrator has considered the record in its entirety and pursuant to 21 CFR 131667, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts, in full, the Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge. His adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Deputy Administrator finds that Respondent is a psychiatrist licensed to practice medicine in Illinois. He has held DEA Certificate of Registration AS4328274 since 1971. In 1981, he enrolled as a provider with the Illinois Department of Public Aid (IDPA) Medical Assistance Program. In submitting claims for reimbursement, providers must list the appropriate code for each service performed. IDPA does not reimburse providers for either telephone consultations or for time spent documenting a patient file.

In 1990, the Illinois State Police initiated an investigation of Respondent after learning that he was filing an unusually large number of IDPA claims. Respondent routinely billed IDPA for his care of patients in long-term care facilities listing code 90844. The description accompanying code 90844 is ''[i]ndividual medical psychotherapy, with continuing medical diagnostic evaluation, and drug management when indicated, including psychoanalysis, insight oriented, behavior modifying or supportive psychotherapy; 45 minutes minimum.''

Investigators interviewed personnel at four long-term care facilities where Respondent saw patients. The personnel at these facilities indicated that Respondent spent on average between 5 and 15 minutes with each patient. The investigators later calculated the maximum average amount of time that Respondent could have spent with each patient at each facility by using the total number of patients he had at a facility and the total time he spent at the facility. These calculations revealed that on average, Respondent could not have spent more than 26 minutes with each patient at one facility; 15.4 minutes per patient at another facility; 19.6 minutes per patient at a third facility; and 10.6 minutes with each patient at the fourth facility.

On April 11, 1991, investigators interviewed Respondent concerning his billing practices. Respondent indicated that he spent approximately 15 minutes with each patient at the long-term care facilities. Respondent advised the investigators that he was familiar with the various billing codes and the amount of time he must spend with a patient to use a particular code. He indicated however that when determining the length of a patient session, he included time spent documenting the patient chart. He further indicated that although he knew that telephone consultations were not covered, he billed for them because he considered them crisis interventions. Respondent acknowledged that he was accountable for the discrepancies between the billing codes he used and the actual amount of time spent with each patient, and that he had had ''many sleepless nights'' over this matter. Respondent justified the billings by considering the time and effort he expended and the complexity of the cases. There was no attempt by Respondent to conceal his over-billing and no evidence that Respondent charged for visits that did not occur.

A second interview was conducted with a court reporter present on April 12, 1991, during which Respondent essentially repeated what he had said during the first interview. Respondent stated that other than carelessness, he could provide no explanation for the discrepancy between the billing codes he used and the actual time he spent with his patients. He stated that he was familiar with the billing codes and therefore could not plead ignorance. He acknowledged that he was legally responsible for his billing practices and that he had been improperly using the 45-minute code for his patient visits.

An auditor with the Illinois State Police Medicaid Fraud Control Unit conducted an analysis of the value of the services for which Respondent billed as opposed to the value of those he actually performed. The analysis revealed that between January 1, 1987 and March 31, 1991, Respondent was overpaid $148.309.23 by Medicare and that between October 1, 1987 and April 30, 1991, he was overpaid $224,602.08 by Medicaid. Therefore the auditor concluded that Respondent over-billed approximately $372,911.31 during the period covered by the investigation.

On February 19, 1992, Respondent was indicted in the Circuit Court of Cook County, Illinois, on one felony count of vendor fraud and two felony counts of theft. On April 21, 1993, following a bench trial, Respondent was convicted of vendor fraud, and on September 8, 1993, he was sentenced to 30 months probation and ordered to pay restitution totaling $200,000 to the IDPA and the United States Department of Health and Human Services (DHHS).

Thereafter, on April 15, 1994, DHHS notified Respondent of his five-year mandatory exclusion from participation in the Medicare program pursuant to 42 U.S.C. 1320a–7(a). Then on June 9, 1994, the IDPA terminated Respondent from its Medical Assistance Program. On December 23, 1994, Respondent and the United States Attorney for the Northern District of Illinois entered into a Stipulation for Compromise pursuant to which the United States Attorney agreed not to bring Federal criminal charges against Respondent for Medicare fraud in exchange for Respondent's agreement to pay $80,000 to the United States.

At the hearing in this matter, two psychiatrists testified who began seeing Respondent's long-term care patients following his termination from the Medical Assistance Program. Both stated that the patients had received excellent care from Respondent. One testified that seeing patients in a facility is different than seeing them in an office setting, that it is not uncommon for patients at a facility to request attention from the doctor even though they are not scheduled for a session on that day, and that he is frequently called for emergencies at odd times. The psychiatrist further testified that he does not use the 90844 code for his long-term care patients because he generally spends less time with those patients than required for that code.

Personnel from the various long-term care facilities where Respondent saw patients testified on Respondent's behalf. They indicated that Respondent is a capable physician who is honest, compassionate and attentive to his patients. He frequently had unscheduled informal and emergency contacts with his patients and he worked well with the staffs at the various facilities.

Respondent is currently providing medical services to inmates at a local jail. According to the medical director of the company that hired Respondent, he fully disclosed his background before he was hired. She testified that Respondent is a reliable and conscientious employee

whose performance is excellent. The medical administrator further testified that Respondent needs to be able to provide controlled substances to the inmates in order to keep his position with the company.

Finally, Respondent testified on his own behalf. He stated that the billing codes did not take into account the nature of the work performed in long-term care facilities, but instead seemed to be geared towards office visits. Respondent explained that he did not time his sessions with patients at the long-term care facilities because he was often approached informally by patients. Additionally, emergencies and interruptions made it difficult to accurately time the sessions. Regarding his over-billing, Respondent testified that he never intended to conceal his method of billing, that he had thought that it was acceptable to use the code he did, and that he had never thought such conduct would lead to a criminal indictment. When asked how he determined when he would use the 90844 code, Respondent replied, ''it depended on the * * * complexity, the diagnosis, how much potential was involved, how many interruptions I would have in my weekly schedule with phone calls or something having to do with a patient.'' Respondent further testified, ''I knew that I was billing for 45 minutes services and I was not providing 45 minutes services.'' Respondent distinguished his actions from those of doctors who charge for visits that never took place.

According to Respondent, the state medical board placed his medical license on probation for one year and imposed a requirement that he receive ten hours of continuing medical education. He further testified that he needs to be able to handle controlled substances in his current position treating inmates at the local jail.

The Deputy Administrator may revoke or suspend a DEA Certificate of Registration under 21 U.S.C. § 824(a), upon a finding that the registrant:

(1) Has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;

(2) Has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State relating to any substance defined in this subchapter as a controlled substance;

(3) Has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or has had the suspension, revocation, or denial of his registration recommended by competent State authority;

(4) Has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section; or

(5) Has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a–7(a) of Title 42.

It is undisputed that subsection (5) of 21 U.S.C. § 824(a) provides the sole basis for the revocation of Respondent's DEA Certificate of Registration. Pursuant to 42 U.S.C. 1320a–7(a), Respondent has been excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a five year period until approximately, mid-April 1999. The issue remaining is whether the Deputy Administrator, in exercising his discretion, should revoke or suspend Respondent's DEA Certificate of Registration.

The Government contends that Respondent is unwilling to accept full responsibility for his unlawful billing practices, that throughout the hearing Respondent attempted to justify his actions, and that therefore his DEA registration should be revoked. Respondent on the other hand does not dispute being excluded from participating in Medicare and the Illinois Medical Assistance Program, but he argues that his ''lifelong professional conduct, and current professional responsibilities'' weight against revoking his DEA registration.

In evaluating the circumstances of this case, Judge Bittner notes that Respondent's exclusion from participation in Medicare and the Illinois Medical Assistance Program did not result from any misuse of his authority to handle controlled substances. However as Judge Bittner correctly points out, misconduct which does not involve controlled substances may constitute grounds for the revocation of a DEA registration pursuant to 21 U.S.C. 824(a)(5). See Stanley Dubin, D.D.S., 61 FR 60,727 (1996); Nelson Ramirez-Gonzalez, M.D., 58 FR 52,787 (1993); George D. Osafo, M.D. 58 FR 37,508 (1993). Therefore, the Deputy Administrator agrees with Judge Bittner that the Government has established a prima facie case for the revocation of Respondent's DEA Certificate of Registration.

Nonetheless, Judge Bittner recommended that Respondent's registration not be revoked because she was ''persuaded that Respondent has accepted responsibility for his misconduct and that is not likely to recur.'' The Deputy Administrator agrees with Judge Bittner, finding it significant that Respondent did not attempt to conceal his misconduct and in fact was quite straightforward with the investigators. The Deputy Administrator disagrees with the Government that Respondent has not accepted responsibility for his actions. Respondent has never denied that he over-billed for his services, however he has attempted to explain why he did so. In addition, the Deputy Administrator finds it significant that Respondent was honest and forthcoming regarding his background with his current employer and that he need to be able to handle controlled substances in order to continue treating inmates in the local jail. Therefore, the Deputy Administrator finds that Respondent's registration should not be revoked.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AS4328274, issued to Melvin N. Seglin, M.D., be renewed and continued. This order is effective December 21, 1998.

Dated: December 8, 1998.

Donnie R. Marshall,

Deputy Administrator.

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BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning three information collections of the Office of Workers' Compensation Programs, Office of Longshore and Harbor