STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

January 18, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Paul Stein, Esq.
Associate Counsel
Bureau of Professional Medical Conduct
5 Penn Plaza-Sixth floor
New York, New York 10001

Joel S. Sankel, Esq.
Sankel, Skurman & McCartin
750 Third Avenue
New York, New York 10017

Karl Merwin Easton, M.D.
REDACTED

RE: In the Matter of Karl Merwin Easton, M.D.

Dear Mr. Stein, Dr. Easton and Mr. Sankel:

Enclosed please find the Determination and Order (No. 95-10) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "(t)he determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

REDACTED

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
KARL MERWIN EASTON, M.D.

DETERMINATION
AND
ORDER
BPMC-95-10

BENJAMIN WAINFELD, M.D., (Chair), **PEARL D. FOSTER, M.D.** and **ANN SHAMBERGER** duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to §230(10)(e) of the Public Health Law.

MARC P. ZYLBERBERG, ESQ., ADMINISTRATIVE LAW JUDGE, served as the Administrative Officer.

The Department of Health appeared by **PAUL STEIN, ESQ.**, Associate Counsel.

Respondent, **KARL MERWIN EASTON, M.D.**, appeared personally and was represented by **SANKEL, SKURMAN & McCARTIN**, by **JOEL S. SANKEL, ESQ.**, of counsel.

A hearing was held on December 14, 1994. Evidence was received and examined, witnesses were sworn or affirmed and examined. A transcript of the proceedings was made. After consideration of the entire record, the Hearing Committee issues this Determination and Order, pursuant to the Public Health Law and the Education Law of the State of New York.

STATEMENT OF CASE

The State Board for Professional Medical Conduct is a duly authorized professional disciplinary agency of the State of New York. (§230 et seq. of the Public Health Law of the State of New York [hereinafter P.H.L.])

This case, brought pursuant to P.H.L. §230(10)(p), is also referred to as an "expedited hearing". The scope of an expedited hearing is strictly limited to evidence or sworn testimony relating to the nature and severity of the penalty to be imposed on the licensee[1] (Respondent).

KARL MERWIN EASTON, M.D., (hereinafter "Respondent") is charged with professional misconduct within the meaning of §6530(9)(c) of the Education Law of the State of New York (hereinafter "Education Law"), to wit: professional misconduct ... by reason of ... "having been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, ... and when the violation would constitute professional misconduct..." (Petitioner's Exhibit # 2 and §6530[9][c] of the Education Law).

In order to find that Respondent committed professional misconduct, the Hearing Committee, pursuant to §6530(9)(c) of the Education Law, must determine: (1) whether Respondent was found guilty, in an adjudicatory proceeding, of violating a state or federal statute or regulation; (2) that a final decision or determination was issued, with no appeal pending and (3) whether Respondent's violation would constitute professional misconduct under §6530 of the Education Law.

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[1] P.H.L. §230(10)(p), fifth sentence.

A copy of the Statement of Charges is attached to this Determination and Order as Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. These facts represent evidence and testimony found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence or testimony, if any, was considered and rejected in favor of the cited evidence. Some evidence and testimony was rejected as irrelevant. Unless otherwise noted, all Findings and Conclusions herein were unanimous. The State, who has the burden of proof, was required to prove its case by a preponderance of the evidence. All Findings of Fact made by the Hearing Committee were established by at least a preponderance of the evidence.

1. Respondent was authorized to practice medicine in New York State on August 21, 1951 by the issuance of license number 071413 by the New York State Education Department. (Petitioner's Exhibits # 2 and # 3)[2].

2. Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1993 through December 31, 1994. (Petitioner's Exhibits # 2 and # 3).

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[2] Refers to exhibits in evidence submitted by the New York State Department of Health (Petitioner's Exhibit) or by Dr. Karl Merwin Easton (Respondent's Exhibit).

3. Paul Mossman personally served Respondent with a Notice of Referral Proceeding, a Statement of Charges and a summary of Department of Health Hearing Rules, (collectively hereinafter "Charges) on November 22, 1993. (Petitioner's Exhibit # 1); [T-3-12][3].

4. The People of the State of New York, through the offices of the Attorney-General, commenced an action against Respondent and several individuals and corporations (hereinafter collectively "defendants") to enjoin defendants from operating certain mental health facilities and to recoup public and residents' funds allegedly misappropriated by defendants through Medicaid and real estate fraud. (Petitioner's Exhibit # 4).

5. The Appellate Division, Second Judicial Department, issued a Decision and Order, dated July 6, 1992, which indicated the following: (Petitioner's Exhibit # 4)[4]

(a) judgment was awarded to the plaintiffs[5] and against defendant Karl Easton (Respondent) in the sum of $7,573,703, representing the proceeds of Medicaid fraud and treble damages; and

(b) a finding that "the plaintiffs carried by overwhelming evidence their burden of proving that the defendants fraudulently billed Medicaid for 'home visits' that were not actually performed, ..."; and

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[3] Numbers in brackets refer to transcript page numbers [T-].

[4] 185 A.D.2d 230, 585 N.Y.S.2d 776,(2d Dep't, July 1992), Motion for leave to appeal denied 81 N.Y.2d 702,(Jan. 1993), US Cert denied 126 L.E.2d 137, 114 S.Ct. 178, 62 U.S.L.W. 3348 (1993).

[5] The Plaintiffs in this action were: the People of the State of New York, the New York State Office of Mental Health and the New York State Department of Social Services.

(c) "that between January 1985 and October 1986, through a scheme devised and implemented by Dr. Karl Easton, BPRI[6] received $2,524,501 in public funds for 'home visits' that did not qualify for reimbursements ..." in violation of Social Services Law § 145-b and 14 NYCRR[7] 579.5 et seq.; and

(d) the trial testimony clearly showed that Dr. Easton designed, supervised and implemented BPRI's "home visit" billing fraud on Medicaid; and

(e) the plaintiffs proved that Dr. Easton and his family benefited from the Medicaid fraud.

6. No further appeals are pending on the above decision, which is a final determination. (See footnote 4 above).

7. As a result of said Court decision, Petitioner commenced this proceedings, by service of the Charges, and obtained jurisdiction over Respondent on November 22, 1993 for a hearing to be conducted pursuant to the P.H.L. (Petitioner's Exhibits # 1 and # 2).

8. Respondent then commenced a CPLR[8] Article 78 proceeding, and obtained a Stay from New York Supreme Court, to prevent the State Board for Professional Medical Conduct from going forward with this expedited proceeding. (official notice is taken of the decision issued by Honorable J. Parness under Index No. 101734/94, annexed hereto as Appendix II); [T-6-11].

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[6] Brooklyn Psychosocial Rehabilitation Institute.

[7] New York Code of Rules and Regulations.

[8] Civil Practice Law and Rule of New York.

9. Judge Parness determined, and the Hearing Committee concurs, that for the purposes of P.H.L. §230(10), the prior civil trial (the subject of the Appellate Division Decision and Order of July 6, 1992) constituted an adjudicatory proceeding. (Judge Parness' decision has been appealed [T-52-53]).

CONCLUSIONS OF LAW

The Hearing Committee makes the following conclusions, pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee.

The Hearing Committee concludes that the following Factual Allegations, from the November 8, 1993 Statement of Charges, are SUSTAINED[9]:

Paragraph A	:	(4 - 9)
Paragraph A.1.	:	(4 - 9)
Paragraph A.2.	:	(4 - 9)

The Hearing Committee further concludes, based on the above Factual Conclusion, that the FIRST SPECIFICATION OF CHARGES listed in the Statement of Charges is SUSTAINED.

[9] The numbers in parentheses refer to the Findings of Fact previously made herein by the Hearing Committee and support each Factual Allegation.

I **Service of Charges and of Notice of Hearing.**

P.H.L. §230(10)(d) requires that the Charges and Notice of Hearing be served on the licensee personally, at least twenty (20) days before the Hearing. If personal service cannot be made, due diligence must be shown and certified under oath. After due diligence has been certified, then, the Charges and Notice of Hearing must be served by registered or certified mail to the licensee's last known address, at least fifteen (15) days before the Hearing.

From the affidavit submitted, personal service of the Notice of Referral Proceeding, a Statement of Charges and a summary of Department of Health Hearing Rules was effected on Respondent on November 22, 1993. The Hearing was held on December 14, 1994, more than one (1) year after service of the Charges. Any delay in the original hearing date was caused solely by Respondent. Respondent had adequate and ample notice and opportunity to prepare his defense. In addition, Respondent had adequate notice after notification of the Court's decision under Index No. 101734/94(Judge Parness) and contact by the Petitioner's representative. (Petitioner's Exhibits # 1 and # 2); [T-3-16];(Appendix II).

Jurisdiction over the Respondent was obtained and the service of the Notice of Referral Proceeding and the Statement of Charges on Respondent was proper and timely.

II Professional Misconduct under §6530(9)(c) of the Education Law.

The Hearing Committee concludes that the Department of Health has shown, by a preponderance of the evidence, that Respondent was found guilty, in an adjudicatory proceeding, of violating a state (Social Services Law § 145-b) statute and regulation (14 NYCRR 579.5 et seq.). The record clearly shows that the Appellate Division of New York, Second Department, found that Respondent's conduct constituted intentional fraud of Medicaid benefits.

As Judge Parness indicated in the Article 78 proceeding, and the Hearing Committee concurs, "For the purpose of Public Health Law 230 (10) the prior civil trial herein constituted such "adjudicatory proceeding'...".

The Appellate Division decision of July 6, 1992 is a final decision in the matter, all appeals have been exhausted, and there are no appeals pending. (See footnote 4).

The Hearing Committee concludes that Respondent's violation would constitute professional misconduct under §6530(2) of the Education Law, to wit, practicing the profession fraudulently.[10]

The Administrative Law Judge issued instructions to the Hearing Committee with regard to the definitions of medical misconduct as alleged in this proceeding.

[10] The Hearing Committee also concludes, based on the record, that Respondent's conduct would also constitute professional misconduct under §6530(16) and/or (17) and/or (20) and/or (21) and/or (32) of the Education Law.

These definitions were obtained from a memorandum, prepared by Peter J. Millock, General Counsel for the New York State Department of Health, dated February 5, 1992. This document, entitled: Definitions of Professional Misconduct under the New York Education Law, (hereinafter "Misconduct Memo"), sets forth suggested definitions of practicing the profession fraudulently. During the course of its deliberations on these charges, the Hearing Committee consulted the Misconduct memo, as follows: "Fraudulent practice of medicine is an intentional misrepresentation or concealment of a known fact. An individual's knowledge that he/she is making a misrepresentation or concealing a known fact with the intention to mislead may properly be inferred from certain facts."

Using the above definitions and understanding, including the remainder of the Misconduct Memo, the Hearing Committee, unanimously concludes that the Department of Health has shown by a preponderance of the evidence that Respondent's conduct constituted fraudulent practice. As the Appellate Division found, Respondent committed Medicaid fraud and did so intentionally and for his own benefit.

The Department of Health has met its burden of proof.

DETERMINATION

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determines that Respondent's license to practice medicine in New York State should be REVOKED.

This determination is reached after due and careful consideration of the full spectrum of penalties available pursuant to P.H.L. §230-a, including:

(1) Censure and reprimand; (2) Suspension of the license, wholly or partially; (3) Limitations of the license; (4) Revocation of license; (5) Annulment of license or registration; (6) Limitations; (7) the imposition of monetary penalties; (8) a course of education or training; (9) performance of public service and (10) probation.

The record establishes that Respondent was found to have committed acts constituting Medicaid fraud in violation of State Law and Regulations. Respondent's conduct, as delineated in the Appellate Division Decision and Order of July 6, 1992, is indicative of deficient moral character and judgment by Respondent which can not be tolerated under these circumstances.

The Hearing Committee does acknowledges and specifically states that there was no issue or complaint in this matter regarding the quality of care provided by Respondent to any patients.

However, Respondent's lack of integrity, character and moral fitness is evident in his course of conduct.

The Hearing Committee considers Respondent's misconduct to be very serious. With a concern for the health and welfare of patients in New York State, as well as our taxpayers, the Hearing Committee determines that revocation of Respondent's license is the appropriate sanction to impose under the circumstances.

All other issues raised by both parties have been duly considered by the Hearing Committee and would not justify a change in the Findings, Conclusions or Determination contained herein.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The First Specification of professional misconduct contained within the Statement of Charges (Petitioner's Exhibit # 2) is **SUSTAINED,** and

2. Respondent's license to practice medicine in the State of New York is hereby **REVOKED.**

DATED: **Albany, New York**
January 12, 1995

REDACTED

BENJAMIN WAINFELD, M.D., (Chair),

PEARL D. FOSTER, M.D.
ANN SHAMBERGER

To: Karl Merwin Easton, M.D.
Respondent
REDACTED

Paul Stein, Esq.
Associate Counsel,
New York State Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza, 6th Floor
New York, NY 10001

Joel S. Sankel, Esq.
Sankel, Skurman & McCartin
750 Third Avenue
New York, NY 10017

APPENDIX I

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

----------X

IN THE MATTER	:	STATEMENT
OF	:	of
KARL MERWIN EASTON, M.D.	:	CHARGES

----------X

KARL MERWIN EASTON, M.D., the Respondent, was authorized to practice medicine in New York State on August 21, 1951 by the issuance of license number 71413 by the New York State Education Department. Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1993 through December 31, 1994. His current registration address is REDACTED

SPECIFICATIONS

FIRST SPECIFICATION

A. Repondent is charged with professional misconduct within the meaning of N.Y. Educ. Law Sec. 6530(9)(c) (McKinney Supp. 1993), in that he was found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, pursuant to a final decision or determination, and when no appeal is pending or after

resolution of the proceeding by stipulation or agreement, when the violation would constitute professional misconduct as defined in N.Y. Educ. Law Sec. 6530 (2) and/or (21) (McKinney Supp. 1993), specifically:

1. In a Decision and Order dated July 6, 1992, the New York State Supreme Court, Appellate Division, Second Department, in docket no. 29163/86, People of the State of New York, New York State Office of Mental Health, The New York State Office of Social Services v. Brooklyn Psychosocial Rehabilitation Institute, 3 Lafayette Ave. Corp., Cobble Hill Center Corp., Dr. Karl Easton, Jacqualine Easton, Irving Link, Theodore Rosten ruled, on appeal, after a nonjury trial in Supreme Court, Kings County, that defendant Dr. Karl Easton was responsible for fraudulently billing Medicaid for "house visits that were not actually performed, as the patient-staff interactions reported as BPRI 'home visits' did not satisfy the Medicaid regulations and guidelines" (14 NYCRR former 579.5(e), effective Aug. 10, 1982, repealed Apr. 5, 1988, and 14 NYCRR former 579.6(a)(5); (b)(5); (c)(5), effective Aug. 10, 1982, repealed Apr. 5, 1988). The Court also found that "between January 1985 and October 1986, through a scheme devised and implemented by Dr. Karl Easton, BPRI received

$2,524,501 in public funds for 'home visits' that did not qualify for reimbursement under the OMH regulations". The Court also found that "Easton designed, supervised, and implemented BPRI's 'home visit' billing fraud on Medicaid", and that he can be held personally liable pursuant to Social Services Law sec. 145-b, which places personal liability on any individual who "'knowingly by means of a false statement or representation or by deliberate concealment of any material fact' falsely obtains - or attempts to obtain - public funds, 'on behalf of himself or others'".

2. The Court awarded judgment "against the defendant Karl Easton in the principal sum of $7,573,703, representing the proceeds of Medicaid fraud and treble damages pursuant to Social Services Law sec. 145-b. . . ."

Dated: New York, New York
November 8, 1993

REDACTED

CHRIS STERN HYMAN
Counsel
Bureau of Professional Medical Conduct

APPENDIX II

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 24

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In the Matter of the Application of
KARL EASTON,

Petitioner,

Index No.
101734/94

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

STATE BOARD OF PROFESSIONAL MEDICAL
CONDUCT,

Respondent.

----------X

PARNESS, J.:

Petitioner, Karl Easton, a physician, moves to vacate the "Statement of Charges and Notice of Reference Hearing" dated November 8, 1993 served upon him by respondent, State Board For Professional Medical Conduct ("Board"), seeking to schedule a penalty hearing before a committee on professional conduct. Petitioner's Article 78 application in the nature of prohibition seeks to enjoin that hearing until he is first served with specific charges of professional misconduct and is afforded a hearing thereon before any penalty can be imposed.

Respondent cross-moves to dismiss the petition pursuant to CPLR § 7804 (f) as failing to state a cause of action, failing to set forth facts warranting a writ of prohibition and that petitioner failed to exhaust administrative remedies.

Respondent alleges that petitioner had been a defendant in a civil action brought by the State in Supreme Court, Kings County in which he was adjudged liable for substantial damages having been found to have committed Medicaid fraud based on his violation of

Medicaid Regulations and Guidelines in the practice of medicine with patients covered by Medicaid, for which the damages found were trebled pursuant to Social Services Law § 145 -b (2). That trial and the judgment entered, respondent contends, provided respondent with a sufficient basis to permit it to employ the expedited procedures provided under Public Health Law § 230 (10) (p) to seek imposition of a penalty for professional misconduct before the respondent Board without first affording petitioner a hearing to establish such misconduct.

Section 230 (10) (p) states as relevant herein:

> "In cases of professional misconduct based solely upon a violation of subdivision nine of of section 6530 of the Education Law, "the director may direct that charges be prepared and served and may refer the matter to a committee on professional conduct for its review and report of findings, conclusions as to guilt and determination. . . "

After providing for notice thereof to be given to the licensee of his right to answer and to counsel, subdivision (10) (p) further provides,

> " the department may also present evidence or sworn testimony at the hearing. A stenographic record shall be made. Such evidence or sworn testimony offered to the committee on professional conduct shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee".

However, Education Law § 6530 (9) (c) eliminated the need for such professional misconduct hearing if the licensee has,

> "been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, pursuant to a final decision or determination, and when no

> appeal is pending . . . when the violation would constitute professional misconduct pursuant to this section."

Thus, pursuant to § 6530 (9) of the Education Law once professional misconduct is established in an appropriate "adjudicatory proceeding", referral under § 230 (10 (p) of the Public Health Law to determine penalty may be made without the necessity of a prior administrative hearing to determine such misconduct.

Petitioner, a psychiatrist, was the operator of a Mental Health Clinic in downtown Brooklyn known as the Brooklyn Psychosocial Rehabilitation Institute (BPRI). He and members of his family also owned a number of buildings in the same vicinity as the clinic in which he placed his patients for treatment.

In the prior civil action, it was charged that petitioner had defrauded Medicaid by billing for "home visits" to patients which were not performed at the patients' homes nor were they rendered to each patient for the consecutive thirty minute period required by Medicaid Regulations and Guidelines. Essentially, it charged petitioner with having defrauded Medicaid by billing for "home visits" conducted at those buildings which were either not reimbursable or were not performed.

The State also sought to enjoin petitioner from operating the facilities owned by petitioner and his family and to recoup funds of the residents' therein which it claimed were misappropriated by petitioner's methods of practice.

In reversing the Trial Court's dismissal of the complaint

after trial, the Appellate Division (185 A D 2d 230) held there was overwhelming proof that petitioner had fraudulently billed Medicaid for "home visits" which are reimbursed by Medicaid at a higher rate than ordinary visits. The Court found that in the years 1984 and 1985 petitioner had initiated a practice in which every casual contact with a patient in the course of a day between any BPRI employee and a patient at the off-clinic residential premises was attributed toward a home visit and recorded as such and that he billed and logged them as continuous 30 minute visits all in violation of Medicaid Regulations and Guidelines. It concluded that petitioner "had designed, supervised and implemented BPRI's home visit billing fraud" (p.234) from which he received $2,524,501 in public funds. The court further found that petitioner had negotiated the leases funded by Medicaid for space in the said buildings owned by entities controlled by him or members of his family where his Medicaid patients were resident which were not at arms' length and were fraudulently made. These findings were made after a formal trial in a court of record with the application of the conventional rules of evidence, the standard of proof being by a preponderance of evidence and in which witnesses and the evidence produced were subject to cross-examination, including right to appeal. Such procedures satisfy due process and permit reference for imposition of penalty pursuant to Education Law § 6530 (9) (c) against a physician "having been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, pursuant to a final decision or determination . . . and when the

violation would constitute professional misconduct pursuant to this section". For the purposes of Public Health Law 230 (10) the prior civil trial herein constituted such "adjudicatory proceeding" which provided petitioner with a forum to determine his "legal rights, duties or privileges upon a record after an opportunity for a hearing" as that term is defined by the State Administrative Procedure Act § 102 (3) and as that term is generally understood.

In a similar case, the Court of Appeals affirming the Appellate Division, Third Department, in Matter of Choi v State of New York, 144 A D 2d 126, Aff. 74 N Y 2d 933, held that in a hearing before the Department of Social Services which found that a physician had not provided an acceptable level of care and an appropriate level of treatment including, inter alia, ordering excessive and unwarranted tests to Medicaid recipients, such hearing afforded the physician a full and fair opportunity to contest the allegation of professional misconduct.

The Court in Choi, though noting that the agency "did not find petitioner had violated Education Law § 6509"; found that the petitioner therein had violated several rules and regulations, which "the commissioner properly equated" with professional misconduct under Education Law § 6509 (2) and (9) so as to permit the employment of the expedited procedures of Public Health Law § 230 (10) (p) without further necessity of a hearing to determine misconduct.

That Court separately held that the prior DSS determination constituted collateral estoppel on the issue of the

physician's professional misconduct based on his violation of Medicaid Rules as was determined in the DSS hearing in which the physician as the party affected was given full opportunity to be heard and to contest the issue and would be estopped from relitigating same. (Kaufman v Eli Lily, 65 N Y 2d 449; Schwartz v Public Administrator, 24 N Y 2d 65; Ryan v New York Telephone Co., 62 N Y 2d 494).

Similarly in Camperlengo v Barell, 78 N Y 2d 674, the court affirmed the propriety of the reference to the Regents Review Committee for determination of penalty of a psychiatrist which also rested on a determination of the Department of Social Services in a prior unrelated proceeding, which found him guilty of failing to maintain proper records for his Medicaid patients in violation of DSS regulations. DSS revoked his Medicaid eligibility but made no specific finding of "professional misconduct".

The instant case presents a parallel situation. The petitioner physician was found to have committed Medicaid fraud with respect to patient care after trial and appeal. Direct reference to respondent under the expedited procedures provided by Public Health Law § 230 (p) for determination of penalty for professional misconduct was appropriate. Respondent properly "equated the findings" by the Appellate Division of petitioner's acts as "professional misconduct".

In sum, the petition fails to state a cause of action to support prohibition which, ". . . is available only where there is a clear legal right and only when an officer acts without jurisdiction or in excess of powers in a proceeding

over which there is jurisdiction in such a manner as to implicate the legality of the entire proceeding."

(Doe v Axelrod, 71 N Y 2d 484, 490 [1988; State v King, 36 N Y 2d 59 [1975]). None of these principles is applicable to the instant case. Petitioner has failed to demonstrate that the procedure employed by respondent is in violation of due process. Of course, the proceeding herein has not yet been completed (CPLR § 7801 (1); Doe v St. Clare's Hospital, 194 A D 2d 365, 598 NYS 2d 253 [1st Dept 1993]), and any errors or substantial evidence issues can be reviewed in an Article 78 proceeding at the conclusion thereof pursuant to Public Health Law § 230 - c (5).

Accordingly, the cross-motion to dismiss is granted. The petition is dismissed. Settle order and judgment.

Dated: 9/21/94

J. S. C.