**Cause No. D-1-GN-14-002229**

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| **ANTOINE DENTAL CENTER** | § | **IN THE DISTRICT COURT** |
| **Plaintiff,** | § | |
| | § | |
| **v.** | § | |
| | § | |
| **TEXAS HEALTH AND HUMAN SERVICES COMMISSION AND OFFICE OF INSPECTOR GENERAL** | § | **OF TRAVIS COUNTY, TEXAS** |
| | § | |
| | § | |
| **Defendant.** | § | |
| | § | **200th JUDICIAL DISTRICT** |

# PLAINTIFF ANTOINE DENTAL CENTER'S REPLY BRIEF TO DEFENDANT'S RESPONSE BRIEF

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## SUMMARY OF THE REPLY

Like any appellate court who reviews a lower court decision, agencies have limited power to change a SOAH decision. Having entrusted the fact-finding portion of a contested case to SOAH, HHSC has no power to simply disregard those factual findings and reverse the ultimate outcome of the case. HHSC's power is limited to changing incorrect interpretations of law and agency policy, and making any concomitant fact changes that necessarily result from a SOAH judge's incorrect interpretation. The most obvious problem for HHSC in this case can be summed up thusly: when HHSC decided that the SOAH judges misapplied the law (Medicaid policy), HHSC changed pivotal facts about the witnesses and the evidence. Changing those facts does not naturally and necessarily result from the application of HHSC's interpretation of its policy to the facts. Even if the SOAH ALJ's misapplied Medicaid policy to the facts, the facts do not conclusively or undeniably establish that ADC's dentists inflated HLD scores. It is the SOAH ALJs, not the HHSC, that get to apply the "correct" law to the evidence. Moreover, even under HHSC's interpretation of its policy, the facts do not require that ADC's dentists *intentionally* did anything wrong. ADC disputes that the SOAH judges misapplied agency policy, but even if the SOAH judges got it wrong on the law, HHSC does not get to decide what the outcome of the "correct" application of will be, especially when an analysis of disputed facts and witnesses credibility is required.

It is simply too much to allow HHSC to gin up a dubious "misapplication of policy" argument regarding ectopic eruption (that "new" policy is actually an *ex post facto* reversal of the official HHSC policy on ectopic eruption which had been handed down less than 6 months prior), and then conclude on these disputed facts that if the policy had been "properly applied" the result would have been: 1) that ADC would have mis-scored ectopic eruption on an "overwhelming" number of the patients at issue in the case, 2) that the mis-scoring would have

resulted only in inflated HLD scores for ADC's patients, 3) that the inflated score sheets would have demonstrated a "consistent pattern" of inflation as a result of ectopic eruption, and 4) that ADC's dentist's actions were intentional.

## REPLY ARGUMENT

The HHSC's Response is filled with unnecessary and irrelevant detail concerning specific ADC patients. It appears the HHSC wants to highlight that information in an attempt to convince this Court that some of ADC's dental patients did not exhibit conditions that would merit Medicaid braces. But that is not the question that was answered in the SOAH hearing, and it is not a proper inquiry in this appeal.

### A. Federal law requires preventative Medicaid orthodontic care for children.

The HHSC severely misstates the law regarding Medicaid braces. The HHSC's brief goes into great detail regarding how severely out of place a patient's teeth must be to merit braces, and how limited the State's orthodontic benefits are.[1] The HHSC's briefing on the law is incomplete at best, and is completely misleading to the Court. To the extent that the HHSC's incorrect legal argument might try to sway the Court on the facts, this is the truth: All of ADC's patients considered at the SOAH hearing were children. Under Federal Medicaid law, specifically known as EPSDT (Early and Periodic Screening Diagnostic and Treatment) all children are entitled to orthodontic benefits as long as those benefits are medically necessary. EPSDT is a part of the Federal Medicaid system that mandates all States provide certain minimum care for children, regardless of whether the State has elected to include those services in its standard (non-EPSDT) Medicaid plan. The "severe handicapping malocclusion" standard, which is applicable to the

[1] HHSC's Brief at 3-5, 32 (HHSC stating that the standard for Medicaid coverage is "severe handicapping malocclusion" and not merely "true orthodontic need.").

larger, adult Medicaid population at large, does not apply to EPSDT children.[2] Nor is it required that the child have a cleft palate, or a head injury involving severe traumatic deviation.[3] The EPSDT standard requires that States provide dental and orthodontic services to prevent bad dental conditions from becoming worse, and to restore teeth to full function. "States must provide orthodontic services to EPSDT-eligible children to the extent necessary to prevent disease and promote oral health, and restore oral structures to health and function."[4] It is patently false for the HHSC to claim that Medicaid braces are improper unless a child currently exhibits a severe handicapping malocclusion or some other drastic, awful dental condition. Since the Federal Government created the EPSDT program in 1967, Texas has been required to provide full preventative and therapeutic dental and orthodontic services to its EPSDT eligible children, even if those services are not otherwise offered in the State's Medicaid program. In fact, in 2004 the Federal Centers for Medicare & Medicaid Services (CMS) published its "Guide to Children's Dental Care in Medicaid" which clearly stated that orthodontic care was appropriate for "children with developing malocclusions," and dedicated many pages to the need to prevent and treat malocclusions that might become worse later.[5] In short, Federal law requires that orthodontic services be provided to children that present a medically necessary need, regardless of whether the services are offered by the State through its regular Medicaid system. *See Mitchell v. Johnston*, 701 F.2d 337, 340 (5th Cir. 1983) (finding that even though Texas did not provide certain services in its Medicaid program, it violated EPSDT because it did not provide certain minimum mandatory dental care to children).

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[2] HHSC makes that allegation in this Brief at page 3.
[3] HHSC Brief at 3-4.
[4] CMS, State Medicaid Manual § 5124.B.2.b; *see also* 2014 EPSDT Coverage Guide, found at http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf at page 13.
[5] 2004 Guide to Children's Dental Care in Medicaid, page 5, 12, 14

When the HHSC claims in its brief that "ectopic eruption" is an exceedingly rare condition, the HHSC is simply restating the argument it presented at SOAH.[6] That position was rejected by the SOAH panel, which heard that there are many different and broad interpretations for ectopic eruption,[7] and ultimately determined in Finding of Fact 39 that the term required subjective judgment to interpret.[8] The HHSC improperly changed that finding in its Amended Final Order.[9] It is clear from the SOAH decision that, although the HHSC wishes "ectopic eruption" would have been interpreted and applied by ADC in a specific and limited and narrow manner, neither the Medicaid Provider Manual nor contemporary dental literature supported the HHSC's argument that its narrow interpretation of ectopic eruption was unambiguous and objective. Thus, the question of how ADC and its dentists interpreted "ectopic eruption" is crucial to determining whether they made a mistake in their scoring. And even if the SOAH judges had determined that ADC's dentists did make a mistake in how they scored ectopic eruption (and the SOAH judges most decidedly did not find that there was an error in their scoring), the question of how those dentists interpreted and applied "ectopic eruption" is dispositive on the issue of whether they ***intentionally*** mis-scored. Therefore, all of the HHSC's briefing on the definition and application of the term "ectopic eruption" remains irrelevant to the ultimate question of whether ADC's actions reflect the requisite scienter to support a claim of fraud or willful misconduct.

Pages 16-20 are simply an attempt by HHSC to reargue and reweigh the evidence it presented at the SOAH hearing. It is improper to do so before this Court. ADC objects to this argument. Furthermore, the HHSC's introduction of selective parts of patient documents (on

[6] Although the HHSC's position on this point is largely found in its "Statement of Facts" section, the HHSC's claim is clearly argument, not fact.
[7] AR 1210-1215; At the time of ADC's hearing, HHSC decisions on have .
[8] AR 1234, FOF 39.
[9] AR 1757-59.

pages 16-20 of its brief) is an obvious attempt to have this Court (who is, respectfully, uneducated on dental conditions, how to identify and classify those dental conditions, or how to apply the applicable rules) decide as a layperson whether those patients merited orthodontic care. Respectfully, the HHSC's argument is inappropriate under the standard of review, since this Court is not in a position to independently determine from a few photographs whether ADC's scoring of those patients is evidence of fraud.

**B. HHSC's Brief misstates the Standard of Review**

The HHSC also misstates the standard of review in this Court. The cases cited by the HHSC to explain what a substantial evidence review means all apply to a circumstance whereby the agency adopted the proposal for decision. In that instance, the reviewing court must affirm the agency decision if it is supported by substantial evidence in the record. "Substantial evidence" in that circumstance means more than a scintilla. *R.R. Com'n of Texas v. Torch Operating Co.*, 912 S.W.2d 790, 793 (Tex. 1995).

But of course this is not a case where the agency adopted the recommendations in the proposal for decision. Certainly, the standard of review for this case is **NOT** an inquiry into whether there is at least a scintilla of evidence to support the HHSC's Amended Final Order. If that was the case, then every State agency would always be able to simply reverse an independent SOAH decision it did not like. After all, if a prosecuting agency in an administrative proceeding didn't present at least a scintilla of evidence at SOAH to support its claims, the agency's case would be frivolous. And in a "he-said, she-said" case that turns on the credibility of the witnesses or evidence, there is always "substantial evidence" to support both parties' claims.

Normally, a substantial evidence review would require this Court to determine "whether there is some reasonable basis in the record for the action taken by the agency." *R.R. Com'n of*

*Texas v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995). But agencies are not permitted to ignore factual findings, create their own factual findings, or reweigh evidence. It is well settled that an agency cannot substitute its judgment on evidentiary rulings or the weight to assign to the evidence. *Jordan Paving Corp. v. Texas Dept. of Transportation,* No. 03-04-00782-CV, 2009 WL 1607916 at *8-9 (Tex. App.—Austin, June 3, 2009 no pet. hist.) (agency changes to findings and conclusions was improper where legislature delegated that responsibility to the ALJ); *see Texas State Bd. of Medical Examiners v. Dunn,* 2003 WL 22721659, *3 (Tex.App.—Austin 2003, no pet.); *see also Flores v. Employees Retirement System of Texas*, 74 S.W.3d 532, 539 (Tex.App.—Austin 2002, pet. denied) (stating that "We again emphasize that where the hearing officer has weighed the credibility of the evidence in making a finding about the causal effect of the preexisting condition, it is not the Board's function to reweigh the evidence and change the adjudicative facts."); *cf. Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 564-65 (Tex. 2000) ("Having chosen to delegate the fact-finding role to the hearing examiner, a board cannot then ignore those findings with which it disagrees and substitute its own additional findings"); *but see Smith v. Montemayor*, Not Reported in S.W.3d, 2003 WL 21401591 *8 (Tex.App.—Austin 2003) (allowing modification of the facts and conclusions in a PFD because the changes did not involve adjudicative facts). The agency is limited to the changes that it is permitted to make to a PFD:

> An ALJ, as an independent and impartial fact finder, is better suited to decide questions of so-called "adjudicative fact," meaning questions of fact affecting only the parties to a contested case, "the 'who, what, when, where and how' disputes of the case." On the other hand, agencies are "relatively" free to review and correct an ALJ's "legislative facts," which "provide a foundation for developing law, rules, or policies and, consequently, affect the outcome of many cases."

*Dunn*, 2003 WL 22721659, *3. Based on the *Dunn* analysis, it should be clear that these questions are adjudicative questions that resulted in adjudicative fact finding:

1) Did ADC's dentists correctly utilize the Medicaid manual when they completed their HLD scoring for the patients at issue? (Findings of Fact 46 and 47, and Conclusion of Law 13)

2) Were ADC's witnesses credible, especially regarding their stated intent to properly complete HLD score sheets? (Findings of Fact 46 and 47, and Conclusion of Law 13)

3) Was there credible evidence of fraud or willful misrepresentation? (Findings of Fact 48, 49, and 50, and Conclusion of Law 13)

4) Did the OIG's expert witnesses properly apply the Medicaid manual's definition of ectopic eruption? (Finding of Fact 45)

**C. HHSC is simply not allowed to change a decision that is rooted in SOAH's evidentiary findings.**

This case is a textbook example of the question all State agencies wrestle with when they lose their case at SOAH and they do not like the proposed decision: *How can the agency fabricate a legal basis for changing the SOAH decision when the agency has lost on the facts?* Where can the agency say that the SOAH judge made an error of law, and that, with a change in the way the judge should have applied the law, the case must necessarily be reversed in the agency's favor? In this case, the HHSC manufactures "legal errors" as a pretext for changing the outcome of the case. Those changes fall into two categories: first, the HHSC changed the SOAH judges' findings that Drs. Nazari and Kanaan properly utilized the definitions in the Manual and completed their scoring accurately; second, the HHSC completely fabricated evidence of Dr. Nazari's and Dr. Kanaan's *intent* to misscore. Simply put, none of the errors HHSC complained of in its Amended Final Order permit the agency to make the factual changes necessary to reverse the SOAH decision.

**C.1. The SOAH ALJs applied stated HHSC policy, they did not misapply it**

The SOAH judges could not have incorrectly interpreted or applied HHSC policy, since the judges followed actual, stated, officially adopted HHSC policy. In *Harlingen Family*

*Dentistry v. HHSC,*[10] the SOAH judge made certain findings about the term "ectopic eruption." That PFD in *Harlingen*, which was adopted into existence as official HHSC policy when the *Harlingen* decision became final in 2012, made these findings regarding "ectopic eruption:"

25. The Manual has, for many years, defined ectopic eruption as "an unusual pattern of eruption, such as high labial cuspids or teeth that are grossly out of the long axis of the alveolar ridge."

26. The Manual's references to high labial cuspids and teeth grossly out of the long axis of the alveolar ridge are nonexclusive examples of ectopic eruption.

27. The Manual's definition of ectopic eruption is vague and requires the exercise of subjective judgment to interpret.

28. There is no evidence in the record indicating that there exists a widespread, non-Medicaid understanding of the specifics of the meaning of ectopic eruption among orthodontic providers.

31. For decades in Texas Medicaid practice, prior authorization was granted and benefits paid based on an interpretation of the definition of ectopic eruption that was more expansive than the one employed by Dr. Evans in his review of the HFD cases.

32. The Manual's definition of ectopic eruption was amended, to be effective after the times relevant to this case, to explicitly exclude teeth that are rotated or teeth that are leaning or slanted, especially when the enamel-gingival junction is within the long axis of the alveolar ridge.

See *Harlingen* Proposal for Decision at CR 1739. If the Court compares those *Harlingen* findings to the independent findings in this case, the similarities are obvious:

[10] CR 1703-1744

37. In the 2008 through 2011 Manuals (Manuals), the HLD index described the term "ectopic eruption" as "an unusual pattern of eruption, such as high labial cuspids or teeth that are grossly out of the long axis of the alveolar ridge." The Manuals instructed providers not to include (score) teeth from an arch if the provider counted the arch in the category for anterior crowding. For each arch, the Manual further instructed that either the ectopic eruption or anterior crowding could be scored, but not both.

38. The Manuals' references to high labial cuspids and teeth grossly out of the long axis of the alveolar ridge were nonexclusive examples of ectopic eruption.

39. The Manuals' definition of ectopic eruption in the 2008 through 2011 Manual required subjective judgment to interpret.

40. The Manuals' definition of ectopic eruption was amended, effective January 1, 2012 (2012 Manual), to include the following sentence:

> Ectopic eruption does not include teeth that are rotated or teeth that are leaning or slanted especially when the enamel-gingival junction is within the long axis of the alveolar ridge.

CR 1234, ADC Proposal for Decision. It is difficult to understand how the HHSC can claim that the SOAH judges misunderstood and misapplied Texas Medicaid Policy when their analysis, which was rendered independent of the *Harlingen* case,[11] is still exactly what *Harlingen* held. The *Harlingen* case definitively communicates HHSC policy, and the SOAH judges in ADC's case followed that policy. For example, in this case, HHSC's Brief at page 29 states:

> Rather than concluding that the definition of ectopic eruption is open to subjective interpretation, *the ALJs should have adopted the agency's own construction*, as presented by agency staff witnesses and by the Inspector General's testifying expert. The record presented by agency staff witnesses and disinterested experts shows that the TMPPM's instruction regarding ectopic eruption is not vague and is in fact consistent with the widely recognized understanding of ectopic eruption in the dental community.

The SOAH judges in this case reiterated the construction of HHSC policy exactly as it was stated in *Harlingen*—namely, that the Manual's definition of ectopic eruption required subjective

[11] AR 1196. ("Prior to the commencement of the hearing on the merits, ADC requested that HSSC-OIG be bound by certain of the Commission's findings in *Harlingen Family Dentistry v. Texas Health and Human Services Commission, Office of Inspector General*, SOAH Docket N0. 52942-3180 *(Harlingen)* based upon the doctrines of res judicata and collateral estoppel. The ALJs denied ADC's motion. Having developed the evidentiary record, the ALJs find no basis for applying either doctrine in this case.")

judgment to interpret.[12] Not only was that HHSC's policy, it is exactly what the OIG's witness Dr. Altenhoff testified to![13]

Finally, to the extent the HHSC argues that ADC's case was the first time the Executive Director was exercising a ***new*** policy that was a departure from *Harlingen,* this Court knows it is well settled that an agency cannot wait until after a SOAH hearing to apply a new policy. *Flores v. Employees Retirement System of Texas*, 74 S.W.3d 532, 545 (Tex.App.—Austin 2002, pet. denied) (finding error in an agency order when it failed to give notice of its intention to not follow previous decisions); *Texas State Bd. of Pharm. v. Seely*, 764 S.W.2d 806, 814 (Tex.App.—Austin 1988, writ denied) (a licensee is entitled to notice, before an administrative hearing, of the standards that would be applied to the facts); *Madden v. Texas Bd. of Chiropractic Exmr's*, 663 S.W.2d 622, 626 (Tex.App.—Austin 1984, writ ref'd n.r.e.) (holding that a Chiropractic Board order violated procedural due process by defining the operative term only after a prospective licensees' administrative hearing); *Starr County v. Starr Indus. Servs.*, 584 S.W.2d 352, 356 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.) (holding that the Water Quality Board could not create additional requirements for a permit after the application was submitted for approval); *see also South Plains Lamesa Railroad, Ltd. v. High Plains Underground Water Conservation District No. 1*, 52 S.W.3d 770, 780-81 (Tex.App.—Amarillo 2001, no pet.) (water district did not have authority retroactively impose a "reasonable use" rule to revoke a water permit). Violating the principles of prior notice of the issues which will control the decision "contravenes fundamental fairness and renders the agency decision arbitrary and

[12] The HHSC argues that the definition is not vague, but the SOAH judges *did not* find the definition was vague. There is no finding in this case that the term "ectopic eruption" is vague. It is unclear why the HHSC is arguing against a position that the judges did not take.

[13] AR 1923, testimony of OIG witness Dr. Altenhoff at lines 2-10 (Q Well, more than that, the question for you, Madame, is whether or not is the HLD scoring definition ectopic eruption for the year in question we are talking about, is that -- is that definition subject to a subjective interpretation? A It is subject to the individual's opinion. Q That being subjective, right? I can't hear you. Is that a yes? A Yes.);

unreasonable." *South Plains Lamesa Railroad, Ltd.,* at 778. (J Quinn, concurring). Therefore, HHSC's retroactive application of a newly fabricated "policy" violated ADC's procedural due process rights, and constitutes an error of law, and represents an arbitrary and capricious action by the HHSC.

**C.2. Even if the HHSC is correct that the SOAH judges misapplied HHSC policy, the HHSC is not permitted to make adjudicative findings about whether the score sheets were properly scored under the proper policy.**

Assuming the SOAH judges misapplied HHSC policy in this case regarding "ectopic eruption," the HHSC still does not have the power to summarily reverse Findings of Fact 45-47, because the HHSC does not have the power to determine whether the dentists properly scored (or, in the alternative, mis-scored) the dental condition of patients under the "correct" HHSC policy. The HHSc does not have that power because that question is an adjudicative fact, entrusted solely to SOAH as the agency fact finder. It should be indisputable that the HHSC does not have the power to make or change adjudicative facts; the Legislature expressly gave that power to SOAH. *See Jordan Paving Corp. v. Texas Dept. of Transportation,* No. 03-04-00782-CV, 2009 WL 1607916 at *8-9 (Tex. App.—Austin, June 3, 2009 no pet. hist.) (agency changes to findings and conclusions was improper where legislature delegated that responsibility to the ALJ); *see Texas State Bd. of Medical Examiners v. Dunn,* 2003 WL 22721659, *3 (Tex.App.—Austin 2003, no pet.); *see also Flores v. Employees Retirement System of Texas,* 74 S.W.3d 532, 539 (Tex.App.—Austin 2002, pet. denied) (stating that "We again emphasize that where the hearing officer has weighed the credibility of the evidence in making a finding about the causal effect of the preexisting condition, it is not the Board's function to reweigh the evidence and change the adjudicative facts."). So even if the SOAH judges used the wrong "policy standard," the designated fact-finder must determine whether Dr. Nazari, Dr. Kanaan, and Dr. Tadlock properly scored the patients under the correct "policy standard." The HHSC cannot simply

assume that the SOAH judges got it 100% wrong and backwards just because the ALJs misapplied Medicaid policy. Whether ADC, under the appropriate "construction of ectopic eruption,"[14] should have rendered lower HLD score sheets is a question of fact the SOAH ALJs did not address. It is entirely possible—indeed, it is likely—that many or most of the patient scores would not change significantly. It is also possible that even if the scores changed, the patient would still qualify for orthodontic service under the different, stricter standard. Since the SOAH ALJs did not make a factual finding on the issue, it was inappropriate for HHSC to stand in the shoes of the trier of fact.

Because the HHSC cannot make adjudicative findings, HHSC acts much like an appellate court in its review of a SOAH PFD. Under these circumstances, where the evidence is disputed and does not clearly dictate that only one result is possible under the "correct policy standard," HHSC cannot make original findings of fact, it can only unfind facts. *See generally Texas Nat'l Bank v. Karnes,* 717 S.W.2d 901, 903 (Tex.1986) ("[A] court of appeals cannot make original findings of fact, it can only 'unfind' facts."). Therefore, HHSC's creation of additional adjudicative facts regarding whether ADC mis-scored orthodontic patients is an error of law, and it was arbitrary and capricious, and it requires the Amended Final Order be reversed and remanded to HHSC with instructions to have SOAH apply the HHSC's "construction of ectopic eruption" to the facts of this case and determine whether ADC inflated HLD scores.

**C.3. Even if the application of the "correct" HHSC policy means that Dr. Nazari and Dr. Kanaan submitted erroneously higher HLD score sheets, HHSC is not entitled to make adjudicative findings regarding *scienter*.**

There is too much evidentiary ground between, on one hand, the SOAH ALJ's finding that ADC's dentists acted completely properly, on the other hand, the HHSC's decision that

[14] HHSC brief at 29. Again, this statement assumes the SOAH judges used the wrong standard. ADC disputes the assertion that the ALJs used the wrong definition of ectopic eruption.

ADC's actions reflect fraud. That middle ground includes simple inaccuracy, honest mistake, ignorance of the HHSC's interpretation of ectopic eruption, etc., up to and including gross negligence by ADC. Assuming the SOAH ALJ's incorrectly interpreted or applied HHSC policy, and assuming further that reconsideration under the correct definition of "ectopic eruption" would only lead to the inescapable conclusion that some of ADC's score sheets were mis-scored higher than they should have been, the HHSC still does not have the power to conclude that ADC's inflated score sheets reflect willful misconduct. Willful misconduct requires knowledge and intent. Neither HHSC, nor this Court, can assume that incorrect scoring is *de facto* evidence of intent to defraud. If this case was remanded to SOAH for a review under the "correct standard," the SOAH ALJs would have to engage in a determination of how many score sheets ADC mis-scored, and by how much those sheets were mis-scored, and the SOAH judges would probably want to review which of the nine HLD criteria contributed to ADC's mis-scoring on any given patient. Even HHSC's expert Dr. Tadlock agreed that there is no one "right" score for a patient. Dr. Tadlock also testified that the fact his scores differed from ADC's scores is not necessarily evidence of fraud. It is entirely possible that ADC could have rendered scores that were higher than the HHSC's expert, but those scoring differences still may not constitute evidence of fraud due to the way the final scores was calculated.

This logic is sound and is followed both by State courts and Federal courts. *See generally U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (The government's "claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims") and subsequent federal cases reiterating this rule; *see also Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998) (fraud claim requires evidence of intent to deceive). This Court would be following precedent and reason by finding that even if the HHSC could revise the Findings of Fact to

create evidence that ADC improperly scored HLD score sheets, it does not necessarily follow that those improper score sheets were completed intentionally. HHSC cannot assume that a mis-scored patient is evidence of fraud, because it is just as possible that any mis-scoring was the result of an unintentional mistake, an inaccurate measurement, a negligent (but non-fraudulent) review of the dental condition of the patient, or any other non-intentional basis for the mis-scoring.

There is no getting away from this factual finding: whether or not Dr. Nazari and Dr. Kanaan "did it right" when scoring ADC's patients for braces, *the SOAH judges found that Dr. Nazari and Dr. Kanaan thought they were doing it right.* That fact alone is dispositive on the intent element. HHSC cannot change this fact; it is a pure "witness credibility" determination entrusted to SOAH. Thus, for many of the same reasons articulated in C.2. above, HHSC's conclusion that ADC's actions reflect evidence of willful misrepresentation is an error of law, and it was arbitrary and capricious for HHSC to make the change to the Proposal for Decision, and it requires the HHSC's Amended Final Order be reversed and remanded back to HHSC with instructions to send the matter to SOAH to answer the question of whether the HHSC's evidence constitutes prima facie evidence of intentional acts by ADC.

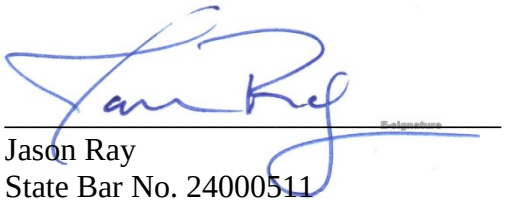
## CONCLUSION

HHSC's changes to Findings of Fact 45-50, and Conclusion of Law 13 simply require the agency to make too many assumptions about what result would have occurred if the SOAH judges would have applied a different definition of "ectopic eruption." Agencies cannot be permitted to change policy after the fact, blame the SOAH judges so as to create an error of law upon which the agency can tinker with the Proposal For Decision, and then assume that the application of the alleged "correct policy" will permit the factual reversal that the agency wants to see.

## PRAYER

FOR THESE REASONS, Plaintiff, Antoine Dental Center, prays that this Court reverse the Texas Health and Human Services Commission's Amended Final Order and that this Court grant to Antoine Dental Center such other relief, at law and in equity, to which it shows itself to be entitled.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***Antoine Dental Center's Reply Brief*** was served via email and eservice on this 17th day of June, 2015 to the following:

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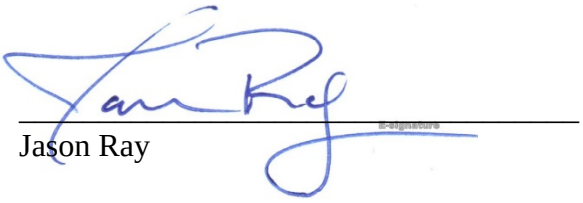

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