SOAH DOCKET NO. 529130997
HHSC APPEALS DIVISION NO. 13-0039-K
HHSC-OIG CASE NO.: P2011131652384891

ANTOINE DENTAL CENTER, *Petitioner*	§	**BEFORE THE**
v.	§	**TEXAS HEALTH AND HUMAN SERVICES COMMISSION**
TEXAS HEALTH & HUMAN SERVICES COMMISSION, OFFICE OF INSPECTOR GENERAL, *Respondent*	§	**APPEALS DIVISION**

AMENDED FINAL ORDER

On this 7 day of May, 2014, came to be considered the above-styled case before the Executive Commissioner of the Texas Health and Human Services Commission (HHSC).

Before the Executive Commissioner are: the Proposal for Decision (PFD) issued by the SOAH ALJs Howard S. Seitzman and Catherine C. Egan ("SOAH ALJs"), dated November 4, 2013; the Inspector General's Exceptions to the PFD, dated November 22, 2013; the Response to the Inspector General's Exceptions filed by Antoine Dental Center ("ADC"), dated December 6, 2013; the SOAH ALJs' letter amending their PFD, dated January 16, 2014; the first Final Order issued by HHSC ALJ Rick Gilpin, dated February 27, 2014; the Motion for Rehearing filed with HHSC by the Office of Inspector General, dated April 2, 2014; and the record in the case at SOAH. *See* Tex. Gov't Code Ann. §§ 2001.060, 2001.062 (West 2013).

On February 27, 2014, after consideration of the PFD, the pleadings of the parties and record, the HHSC-ALJ issued a Final Order in this case. The HHSC-ALJ served notice of the Final Order on all parties by letter dated March 12, 2014. *See* Tex. Gov't Code § 2001.142(b) (requiring a state agency to serve a party with a copy of an order that may become final first class mail). On April 2, 2014, the Inspector General filed a timely Motion for Rehearing with the HHSC Appeals Division. Tex. Gov't Code § 2001.146(a) (requiring a party to file a motion for rehearing within twenty days after the party receives notice of an order that may become final).

After considering the additional arguments raised in the Motion for Rehearing, and in accordance with Tex. Gov't Code § 2001.058(e), the Executive Commissioner issues this Amended Final Order.

The Executive Commissioner finds that the SOAH ALJs did not properly apply or interpret applicable Texas Medicaid policy and applicable laws governing the Medicaid program and this proceeding. Tex. Gov't Code § 2001.058(e)(1).

Specifically, the Executive Commissioner finds that the SOAH ALJs erred in interpreting Texas Medicaid policy as allowing Medicaid providers to apply a special interpretation to the meaning of the phrase "ectopic eruption." The SOAH ALJs' determination that ectopic eruption has a special meaning for the purposes of Medicaid eligibility that is different from, and more liberal than, the interpretation of the phrase in the general practice of dentistry contravenes Texas Medicaid policy and Texas and federal law. *See, e.g.*, 25 Tex. Admin. Code § 33.71(a) (2008) (Orthodontic Services and Prior Authorization) (providing that Medicaid's orthodontia benefit is limited to cases presenting severe handicapping malocclusion); *see also* Ex. R-14, 2008 TMPPM, § 1.2.5, Compliance with Federal Legislation (mandating that providers must "furnish covered Medicaid services in the same manner, to the same extent, and of the same quality as services provided to other patients"). The SOAH ALJs misapplied applicable law, agency rules, and policies, and then misinterpreted the testimony of witnesses regarding the limitations of Medicaid policy and regarding the meaning of ectopic eruption. *See* Tex. Gov't Code § 2001.058(e)(1); *Southwest Pharm. Solutions, Inc. v. Tex. HHSC,* 408 S.W.3d 549, 562 (Tex. App.—Austin 2013, pet. denied) ("As the agency designated to administer Medicaid, HHSC is charged with overseeing a complex regulatory scheme, and deference to its construction is particularly important." (citing *R.R. Comm'n v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629 (Tex. 2011)).

The Executive Commissioner further finds that the SOAH ALJs erred to the extent that they impermissibly misinterpreted and misapplied applicable law, rules, and policy which resulted in wrongly dismissing *prima facie* evidence that satisfies the evidentiary requirements to maintain a payment hold. *See* Tex. Gov't Code § 2001.058(e)(1). The Executive Commissioner finds that the Inspector General presented relevant, credible, and material evidence that ADC submitted fraudulent or willfully misrepresented prior authorization requests and claims for reimbursement; ADC submitted claims for services not reimbursable; and ADC failed to maintain or provide records as required by law.

The Executive Commissioner further finds that the SOAH ALJs erred to the extent that they relied on certain findings of fact in HHSC's final order in *Harlingen Family Dental v. Texas Health and Human Services Commission, Office of Inspector General.*

See Order signed by HHSC-ALJ S. Nash Fekety, dated Jan. 7, 2013, in HHSC Appeals Division, Cause No. 12-0789-K. The Executive Commissioner has determined that certain of the findings in the *Harlingen Family Dental* case incorrectly stated the law, rules, and Medicaid policy and cannot be relied on in this case. *See* Tex. Gov't Code § 2001.058(e)(2). Specifically, the Executive Commissioner concludes that Finding of Fact No. 29 in the *Harlingen Family Dental* case was erroneous to the extent that it suggested that the Inspector General's retained expert Dr. Charles Evans was not qualified to be an expert because he did not treat Medicaid patients. That finding was erroneous and cannot be relied on in this case because State and federal laws require Medicaid patients to be treated to the same standard of care as patients in the general population. *See, e.g.*, 25 Tex. Admin. Code § 33.71(a) (providing that Medicaid's orthodontia benefit is limited to cases presenting severe handicapping malocclusion); *see also* Ex. R-14, 2008 TMPPM, § 1.2.5, Compliance with Federal Legislation (mandating that providers must "furnish covered Medicaid services in the same manner, to the same extent, and of the same quality as services provided to other patients"). Accordingly, the fact that Dr. Evans did not treat Medicaid patients in his practice may not be used in properly evaluating his qualifications (skill, knowledge, experience, and training) as an expert in this case. To the extent that the SOAH ALJs in the instant case relied on Finding of Fact No. 29 from *Harlingen* in their analysis of this case and of Dr. Evans, they erred.

In addition, Finding of Fact No. 31 in the *Harlingen Family Dental* case erroneously stated and applied Texas law and Medicaid policy, to the extent that the finding suggested Medicaid policy interprets "ectopic eruption" differently and more expansively (or more liberally) than the condition is interpreted in the general practice of dentistry. As noted above, the *Harlingen Family Dental* decision applied the law and policy erroneously and cannot be relied on in this case. Tex. Gov't Code § 2001.058(e)(2).

Harlingen Family Dental Finding of Fact No. 33 was also erroneous to the extent that it explained away evidence of fraud by impermissibly claiming Dr. Evans was not a qualified expert witness. The *Harlingen Family Dental* ALJ opined that Dr. Evans has not treated Medicaid patients in his private practice and that Dr. Evans scored the HLD indices in the *Harlingen Family Dental* sample in accordance with the common interpretation in the general practice of dentistry, as opposed to the "more expansive" interpretation that the *Harlingen Family Dental* ALJ erroneously claimed had been adopted by HHSC. Thus, because the *Harlingen Family Dental* ALJ relied on these faulty premises, *Harlingen Family Dental* Finding of Fact No. 33 was a misapplication of

law. To the extent that the SOAH ALJs relied on the *Harlingen Family Dental* case for their understanding of Medicaid policy, they erred. *Id.*

The Executive Commissioner expressly disapproves of *Harlingen Family Dental* Findings of Fact Nos. 29, 31, and 33 and declares that these findings were incorrectly decided and should not be relied on in this case or any other case. *See* Tex. Gov't Code § 2001.058(e)(2) (authorizing an agency to modify a PFD when it relies on a prior administrative decision that is "incorrect or should be changed").

The Executive Commissioner also finds that the SOAH ALJs failed to both properly articulate and then properly apply the Inspector General's evidentiary burden to the evidence presented. In order to maintain the payment hold, the Inspector General is required to present *prima facie* evidence that is relevant, credible, and material to the issue of fraud or willful misrepresentation, or *prima facie* evidence that ADC has committed other, non-fraudulent program violations. *See* Tex. Hum. Res. Code Ann. § 32.0291(c) (Vernon 2003) (amended 2013) ("The department shall discontinue the hold *unless the department makes a prima facie showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible, and material to the issue of fraud or wilful misrepresentation.*") (emphasis added); *see also* Tex. Gov't Code § 531.102(g)(2) ("the [Inspector General] shall impose without prior notice a payment hold on claims for reimbursement submitted by a provider . . . on the determination that a credible allegation of fraud exists"); 42 C.F.R. § 455.23 ("The State Medicaid agency must suspend all Medicaid payments to a provider after the agency determines there is a credible allegation of fraud for which an investigation is pending under the Medicaid program against an individual or entity unless the agency has good cause to not suspend payments or to suspend payment only in part."); 1 Tex. Admin. Code § 371.1703(b) (2005) (Recovery of Overpayments) ("A payment hold on payments of future claims submitted for reimbursement will be imposed, without prior notice, after it is determined that prima facie evidence exists to support the payment hold.").

Specifically, the Executive Commissioner finds that the Inspector General presented prima facie evidence of acts and omissions by ADC justifying the imposition of a 100% payment hold, and that ADC failed to rebut such evidence. Tex. Hum. Res. Code § 32.0291(c); Tex. Gov't Code § 531.102(g)(2); 42 C.F.R. § 455.23.

The Executive Commissioner finds that when Medicaid policy and Texas laws are properly interpreted and properly applied to the facts of record in this case the Inspector General has met his evidentiary burden to maintain a 100% payment hold. Indeed, the Executive Commissioner finds that a 100% payment hold is required by law. Tex. Hum. Res. Code § 32.0291(c); Tex. Gov't Code § 531.102(g)(2); 42 C.F.R. § 455.23.

For these reasons, the Executive Commissioner declines to adopt the SOAH ALJs' proposed findings of fact 10, 21, 26, 29, 39-42, 42, 44-50, 54-55, 57, and proposed conclusions of law 4, 10, 13, 14, and 16. Instead, the Executive Commissioner finds that

the Inspector General's Exceptions have merit and should be granted. Further, the Executive Commissioner determines that the Inspector General's payment hold should be maintained at 100%.

It is now therefore ORDERED as follows:

FINDINGS OF FACT

1. Behzad Nazari, D.D.S., has owned Antoine Dental Center (ADC) since 1998. ADC has two dental clinics in Houston, Texas, that treat Medicaid and private pay clients.
2. Between November 1, 2008, and August 31, 2011, ADC provided dental and orthodontic services to Medicaid patients as a Texas Medicaid Provider holding Provider Identification Nos. 1905432, 2187031, 1952657, and 0908162.DC.
3. During this period, ADC billed Texas Medicaid approximately $8,104,875.75 for orthodontic services.
4. In 2010, approximately 70% of ADC's patients were Medicaid patients.
5. The federal government and the State of Texas share the cost of Texas Medicaid, with the federal government contributing approximately 60% of the payments for Medicaid services.
6. The Texas Health and Human Service Commission (the Commission) is the single agency responsible for the administration of the Texas Medical Assistance Program (Texas Medicaid) and does so by contracting with healthcare providers, claims administrators, and other contractors.
7. During the times in question in this case, Texas Medicaid Health Partnership (TMHP) was the contracted Texas Medicaid claims administrator.
8. During all applicable periods, the Commission's Office of Inspector General (HHSC-OIG) was responsible for monitoring and investigating allegations of fraud, waste, and abuse associated with the Texas Medicaid program.
9. As part of the enrollment process, a provider agreed to comply with the terms of the annual Texas Medicaid Provider Procedures Manual (Manual) and the bulletin updates issued every two months.
10. **Medicaid orthodontia services are limited to treatment of children aged 12 to 20 years with severe handicapping malocclusions and other related conditions, unless an exemption is expressly sought by the provider.**[1]

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[1] By letter dated January 16, 2014, the SOAH ALJs replied to the Inspector General's Exceptions and notified the Executive Commissioner that their original proposed finding of fact number 10 should be revised to read: *According to the Manual, the intent of the Medicaid dental program was to provide dental care to clients 20 years of age or younger.* For the reasons stated in this Amended Final Order, the

(The SOAH ALJs' proposed FoF No. 10 stated: *According to the Manual, the intent of the Medicaid orthodontia program was to provide orthodontic care to clients 20 years of age or younger with severe handicapping malocclusion to improve function.*)

Reason for Change:

The proposed finding is not simply a case-specific finding of fact that determines the "who, what, when, where and how" of this case. Rather, in purporting to recite Medicaid policy, the proposed finding addresses a mixed question of fact and law and is a so-called "legislative finding."[2] As such, the Executive Commissioner has "complete discretion" to modify the proposed finding. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 03-11-00316-CV, 2013 WL 3791486, at *6 (July 18, 2013, pet. filed) ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 03-02-00466-CV, 2003 WL 21401591, at *26-27 (Tex. App.—Austin June 19, 2003, no pet.) (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies proposed FoF No. 10 because it misstates Medicaid policy. *See* Tex. Gov't Code § 2001.058(e)(1) (state agency may change a finding of fact or conclusion of law if the ALJ did not "properly apply or interpret applicable law, agency rules, [or] written policies"). Proposed finding of fact number 10 misstates Texas Medicaid policy, as codified in 25 Tex. Admin. Code § 33.71 and in the Texas Medicaid Provider Procedures Manual (TMPPM). As codified in 25 Tex. Admin. Code § 33.71(a), orthodontia services are a limited benefit:

> (a) Orthodontic services for cosmetic reasons only are not a covered Medicaid service. Orthodontic services must be prior authorized and are limited to treatment of severe handicapping malocclusion and other related conditions as described and measured by the procedures and standards published in the TMPPM.

For most of the time period in question, November 1, 2008 to August 1, 2011, Medicaid orthodontia services were limited to children twelve years of age and

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Executive Commissioner also declines to adopt the SOAH ALJs recommended FoF No. 10, as stated in their January 16, 2014 letter to the Executive Commissioner.

[2] A "legislative fact" is a mixed question of fact and law and defining terms is an agency function. F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings of Conclusions of an ALJ?: Part Two*, 51 Baylor L. Rev. 63, 69-70 (1999). A finding of fact is a "legislative fact" where the finding affects not just one specific case, but is actually an explication of agency policy and therefore may be applied to other cases or implicates agency policy. *Id.*

older. *See* Ex. R-15 at 19-38 § 19.19.1 (2009 TMPPM). As written, the proposed finding does not accurately reflect Medicaid policy. Specifically, the proposed finding of fact omits the 12 year age threshold for children eligible for orthodontia, erroneously suggesting by implication that *any* child under 20 is eligible. Therefore, proposed finding of fact number 10 should be modified to more accurately reflect the limited benefit of Medicaid orthodontia as articulated in 25 Tex. Admin. Code § 33.71(a); *see* Tex. Gov't Code § 2001.058(e)(1), (3) (allowing an agency to change a PFD to correct errors of law or policy or technical errors in a proposed finding of fact). *See also, e.g.*, Ex. R-17, TMPPM (2011), Vol. 2, § 4.2.24; Ex. R-16, TMPPM (2010), Vol. 2, § 5.3.24; Ex. R-15, TMPPM (2009), Vol. 2, § 19.19; Ex. R-14, TMPPM (2008), Vol. 2 § 19.19.

A correct understanding of the limitations of Texas Medicaid's orthodontia benefit is especially important in this case, where there are a number of examples of ADC requesting full banding (braces) for children under 12 years of age.[3] *See, e.g.*, Ex. R-15 TMPPM (2009) § 19.19.1 (2009 TMPPM) (comprehensive orthodontic treatment restricted to clients who are 12 years of age or older or clients who have exfoliated all primary dentition). The SOAH ALJs may not incorrectly revise or incorrectly interpret the meaning of the agency's policies. *See Southwest Pharm.*, 408 S.W.3d at 557-58; *R.R. Comm'n of Tex.* v. *Tex. Citizens*, 336 S.W.3d at 624. The new finding of fact accurately reflects the policy of Texas Medicaid of providing a very limited benefit and thus advances the goal of preserving scarce Medicaid dollars by articulating the limited orthodontic benefit. Tex. Gov't Code § 311.023(1).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for prior approval (PA) and for reimbursement that are not authorized under Medicaid policy or Texas law. Allegations cannot be properly evaluated if the fact finder does not properly interpret and apply a policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g.*, *Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d 417, 440-41 (Tex. App.—Austin 2012, pet denied); *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711, 728

[3] ADC request full banding (braces), D8080, for three patients, P-15, P-56, and P-60 who were under 12 years of age at time of treatment.

(Tex. App.–Austin 2007, pet. denied); *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d 813, 816 (Tex. App.–Austin 1998, no pet.).

11. In 2008 through 2011, Texas Medicaid paid the providers of orthodontic services on a fee-for-service basis.

12. To be reimbursed for orthodontic services, the Manual required dental providers to first obtain prior authorization from TMHP.

13. In making prior authorization decisions in orthodontia cases, TMHP relied in part on a Handicapping Labio-lingual Deviation (HLD) score sheet contained in the Manual to determine whether orthodontic services qualified for Medicaid coverage.

14. The Manual required providers to complete and submit the HLD score sheet to TMHP together with a prior authorization request and the supporting clinical materials including the treatment plan, cephalometric radiograph with tracing models, facial photographs, radiographs, the model (or cast) of the patient's teeth if a model was made, and any additional pertinent information to evaluate the request.

15. The HLD Index is an index measuring the existence or absence of handicapping malocclusion and its severity, and is a tool used by Medicaid to measure whether a patient qualifies for the public funding program. It is not intended to be diagnostic or treatment tool.

16. The Manual described the categories of the HLD Index, and instructed providers on how to score those categories.

17. The HLD score sheet assigned a certain number of points for the following observed conditions: cleft palate, severe traumatic deviations, overjet, overbite, mandibular protrusion, open bite, ectopic eruption, anterior crowding, and labio-lingual spread in millimeters.

18. Orthodontic services provided solely for cosmetic reasons were not covered under the Texas Medicaid program.

19. Although Texas Medicaid generally restricted orthodontic treatment to children 12 years of age or older who no longer had primary teeth, a provider could request that TMHP approve prior authorization for interceptive treatment or for treatment for a child who qualified for another exception under the program.

20. In general, orthodontic benefits were limited to the treatment of children 12 years of age or older with a severe handicapping malocclusion. If the HLD Index score did not meet the 26-point threshold, a provider could submit a narrative to establish the medical necessity of the treatment.

21. **Notwithstanding TMHP's responsibility for reviewing the filed material to evaluate whether the orthodontic services were medically necessary before**

granting prior authorization, ADC was required to submit accurate HLD scoresheets and PA requests substantiating the patient's condition as meeting Medicaid's requirements.

(The SOAH ALJs' proposed FoF No. 21 stated: *TMHP was responsible for reviewing the filed material to evaluate whether the orthodontic services were medically necessary before granting prior authorization.*)

Reason for Change:

The proposed finding is not simply a case-specific finding of fact that determines the "who, what, when, where and how" of this case. Rather, the proposed finding addresses a mixed question of fact and law and is a so-called "legislative finding." As such, the Executive Commissioner has "complete discretion" to modify the proposed finding. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies proposed FoF No. 21 because the proposed finding rests upon an incorrect legal premise. The proposed finding of fact suggests that TMHP is solely responsible for the disposition of an orthodontic prior approval (PA) request. The implication of this proposed finding is that if there were any errors in the PAs at issue in this case, TMHP's approvals somehow made the State at fault for ADC's errors. Further, ADC argued at the hearing, and the ALJs' proposed finding of fact seems to suggest, that once TMHP has approved a PA request, ADC cannot be held liable for its veracity or accuracy.

Proposed finding of fact number 21 is erroneous because it misstates, misinterprets, and misapplies Texas law. The black letter law in Texas is crystal clear: the equitable defenses of estoppel and laches do not run against the State in the exercise of its sovereign powers. *See State v. Durham*, 860 S.W.2d 63, 67 (Tex. 1993).[4] *See also* Tex. Gov't Code § 2001.058(e)(1) ("A state agency may

[4] The Executive Commissioner notes that numerous Travis County District Courts have ruled on the applicability of equitable defenses, such as estoppel, laches, waiver, ratification and limitations, in actions brought by the Office of Attorney General under the authority of the TMFPA. In each of these cases, the district courts have ruled that these defenses are not available as a matter of law. *See, e.g., State of Texas ex rel. Ven-A-Care of the Fla. Keys, Inc.* v. *Roxane Labs., Inc. et al*, Cause No. GV-002327 (53rd Judicial Dist. Ct. Travis County, Tex. Aug. 15, 2003) (Order granting Plaintiffs' First Amended Motion for Partial Summary Judgment, which addressed, among others, defenses of limitations, estoppel, laches, waiver, and failure to mitigate); *State of Texas ex. rel. Ven-A-Care of the Fla. Keys, Inc. v. Sandoz, Inc.*, Cause No. D-1-GV-07-001259 (201st Judicial Dist. Ct., Travis County, Tex. Dec. 14, 2009) (tentative rulings made from bench granting State's partial motion for summary judgment concerning viability of equitable defenses against the state (limitations, estoppel, laches, ratification)); *State of Texas ex rel. Ven-A-Care of the Fla. Keys, Inc.* v. *Alpharma USPD*, Cause No. D-1-GV-08-001566 (419th Judicial Dist. Ct., Travis

change a finding of fact or conclusion of law . . . if . . .[the ALJ] did not properly apply or interpret applicable law.").

The proposed finding also ignores the responsibility ADC had to submit truthful and accurate documentation to the State (including the responsibility expressly stated in the Provider Agreement and agreed to by ADC and/or its providers), including accurate HLD scoresheets and PA requests. *See also* Ex. R-14, TMPPM (2008), § 1.2.7 Provider Certification/Assignment ("Texas Medicaid service providers are required to certify compliance with or agree to various provisions of state and federal laws and regulations. After submitting a signed claim to TMHP, the provider certifies the following: . . . The information on the claim form is *true, accurate, and* complete.") (emphasis added).

ADC produced no evidence or legal authority to show it was somehow allowed to provide fraudulent or false statements, submit claims for non-reimbursable services, or engage in any conduct in violation of the applicable Medicaid program rules, based on the mere fact TMHP approved ADC's prior authorization claims. *See id.* (Ex. R-14, TMPPM (2008), § 1.2.7 Provider Certification/Assignment); *see also Heckler* v. *Community Health Servs.*, 467 U.S. 51, 63-65 (1984) (a provider has the responsibility to "familiarize itself with the legal requirements for cost reimbursement").

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Therefore, the Executive Commissioner finds that the PFD's proposed finding of fact number 21 errs because it misstates Texas law and suggests that ADC is excused for submitting false information if TMHP approved ADC's PA requests. Given the issues in this payment hold proceeding, there is therefore a rational connection between Texas law and the altered finding of fact. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

22. The Manual clarified that prior authorization of an orthodontic service did not guarantee payment. To receive payment, the provider still had to show that the

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County, Tex. Dec. 13, 2010) (order striking defense of failure to mitigate); *State of Texas ex rel. Allen Jones* v. *Janssen Pharm., Inc.*, Cause No. D-1-GV-04-001288 (250th Judicial Dist. Ct., Travis County, Tex. Feb. 23, 2011) (order striking defenses of failure to mitigate and limitations); *State of Texas ex. rel. Gonzalez v. Mego*, Cause No. D-1-GV-11-000740 (201st Judicial Dist. Ct., Travis County, Tex. Sept. 30, 2013) (two orders, striking defendants' estoppel, laches, and waiver defenses).

orthodontic procedure was medically necessary under the terms and conditions of the Manual.

23. After ADC provided the orthodontic treatment to the patients in this case, TMHP approved payment.

24. On August 29, 2008, HHSC-OIG issued a performance audit report regarding TMHP's prior authorization process for the period between September 1, 2006, and March 31, 2008, finding that TMHP's prior authorization process did not comply with the Manual (the 2008 audit report).

25. In the 2008 audit report, HHSC-OIG found that TMHP's prior authorization staff failed to review the supporting material submitted by providers with their prior authorization requests, as required, and that TMHP's staff did not have the dental credentials necessary to evaluate whether the supporting documentation submitted by providers supported the HLD score.

26. **The Provider Agreement required ADC and its providers to certify to be truthful; to abide by the Medicaid rules; and to submit true, complete, and accurate information that can be verified by reference to source documentation maintained by ADC.**

(The SOAH ALJs' proposed FoF No. 26 stated: *ADC was unaware of the 2008 audit report and HHSC-OIG's assertion that TMHP was not properly performing prior authorization evaluations.*)

Reason for Change:

The Executive Commissioner modifies the SOAH ALJs' Proposed FoF No. 26 because the proposed finding rests upon an incorrect legal premise. As such, the Executive Commissioner has "complete discretion" to modify the proposed finding. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The proposed finding suggests that ADC could not have intentionally submitted false information to TMHP because ADC did not know that TMHP was failing to properly review PA requests. This is a misstatement of Texas law. As a threshold matter, the Inspector General does not have to show that ADC made false statements and material misrepresentations with the specific intent to defraud Medicaid. *See* Tex. Hum. Res. Code Ann. § 36.0011(b) (West 2013) (Culpable Mental State: specific intent to defraud is not required). Instead, the Inspector General's burden in this payment hold proceeding is to show by prima facie evidence that when ADC submitted false information to Texas Medicaid that

either (1) ADC knew the information was false; (2) ADC acted with conscious indifference to the truth or falsity of the information; or (3) ADC acted with reckless disregard of the truth or falsity of the information. *Id.* (a)(1)-(3).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, given the allegations at issue in this payment hold proceeding, and the actual standard under the TMFPA, there is therefore a rational connection between Texas law and the altered finding of fact. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.,* 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

27. In 2011, HHSC-OIG conducted a data analysis of paid Medicaid claims in Texas and determined that ADC was one of the top providers in the state with high utilization of orthodontia billing between 2008 and 2011. As a result, HHSC-OIG initiated a fraud investigation against ADC.

28. HHSC-OIG retained Charles Evans, D.D.S., an orthodontist, to review the clinical records for the 63-patient sample collected by HHSC-OIG for whom ADC filed prior authorization requests during the relevant period.

29. **The HLD score sheets for the 63 patients in the random sample were completed by ADC's orthodontist, Wael Kanaan, D.D.S. and Dr. Nazari, who is not an orthodontist, and in each case they scored the patient as having a score of 26 or more points. The greatest number of points was associated with the category of "ectopic eruption."**

(The SOAH ALJs' proposed FoF No. 29 stated: *The HLD score sheets for the 63 patients were completed by ADC's orthodontist, Wael Kanaan, D.D.S. and Dr. Nazari, and in each case the patient scored 26 or more points. The greatest number of points was associated with the category of "ectopic eruption."*)

Reason for Change:

The Executive Commissioner modifies the proposed finding because it mischaracterizes by omission which party has responsibility for completing the HLD score sheets – the provider. As such, the Executive Commissioner has "complete discretion" to modify the proposed finding. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing

laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

Here, Drs. Kanaan and Nazari scored the HLD scoresheets, and represented to the State the accuracy of the scores. R-83; R.R. Vol. 3 at 46-70, 96-97; R.R. Vol. 4 at 99-100. As written, the proposed fact impermissibly minimizes the active and responsible role providers have in scoring patients. Texas Medicaid depends upon the providers to submit accurate documentation to the State; thus, providers bear the responsibility to score the patients. *See* Tex. Gov't Code § 2001.058(e)(1); *see also* Ex. R-14, TMPPM (2008), § 1.2.7 Provider Certification/Assignment ("Texas Medicaid service providers are required to certify compliance with or agree to various provisions of state and federal laws and regulations. After submitting a signed claim to TMHP, the provider certifies the following: . . . The information on the claim form is *true, accurate, and complete*.") (emphasis added).

Proposed FoF No. 29 is also misleading because it omits the fact that Dr. Nazari is not an orthodontist. Therefore, the Executive Commissioner is fully authorized to correct this technical error (by omission) in FoF No. 29. Tex. Gov't Code § 2001.058(e)(3).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Given the issues in this payment hold proceeding, and the requirements of Texas law and Medicaid policy, there is therefore a rational connection between Texas law and the altered finding of fact. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.,* 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

30. Dr. Evans concluded that in all 63 cases, the clinical records did not support the scoring on the HLD score sheets submitted with the prior authorization requests because of the score assigned to the ectopic eruption category. Dr. Evans did not testify in this matter.

31. Although HHSC-OIG represented that its field investigators interviewed ADC's office staff, dentists, and the patients and their parents/guardians, it did not present this evidence during the hearing.

32. Based in large part on Dr. Evans' conclusions, on April 4, 2012, HHSC-OIG issued a letter to ADC notifying ADC that it was imposing a 100% payment hold on all future Medicaid reimbursements due to a credible allegation of fraud for claims ADC submitted from November 1, 2008 through August 31, 2011.

33. ADC timely requested a hearing to contest the payment hold, and the matter was referred to the State Office of Administrative Hearings (SOAH) on November 7, 2012.

34. HHSC-OIG referred ADC to the Medicaid Fraud Control Unit of the Office of the Attorney General (MFCU), and on March 29, 2012, MFCU opened an investigation.

35. On January 15, 2013, HHSC-OIG issued its First Amended Notice of Hearing to ADC. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the matters asserted.

36. The hearing on the merits was held May 28 through 31, 2013, before Administrative Law Judges Catherine C. Egan and Howard S. Seitzman at the State Office of Administrative Hearings (SOAH) in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. ADC appeared through its attorneys of record, J.A. Tony Canales, Hector Canales, Robert M. Anderton, Philip H. Hilder, William B. Graham, James G. Rytting, and Thomas Watkins. HHSC-OIG was represented by outside counsel Dan Hargrove, Caitlyn Silhan, James R. Moriarty, Ketan Kharod; by Assistant Attorneys General Raymond C. Winter and Margaret M. Moore, from the Office of Attorney General of Texas, and by Enrique Varela and John R. Medlock, from HHSC-OIG.

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 Manual requires providers to apply the HLD scoring methodology in accordance with their professional training, education and generally accepted standards in the dental profession. Among those standards is the standard for identifying ectopic eruption.**

(The ALJs' proposed FoF No. 39 stated: *The Manual's definition of ectopic eruption in the 2008 through 2011 Manual required subjective judgment to interpret.*)

Reason for Change:

The proposed finding addresses a mixed question of fact and law, and is a "legislative finding." As such, the Executive Commissioner has "complete discretion" to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 39 because it is erroneous for two reasons. First, the TMPPM's discussion of ectopic eruption is an instruction, not a definition. *See, e.g.*, R.R., Vol. 1 at 103:8-12 (terms in the ectopic eruption instruction are not defined but are accorded their plain and ordinary meaning in the English language); R.R., Vol. 1 at 111: 12-14 (providers must understand the manual by virtue of their professional training). This error reflects a misinterpretation of law and policy by the SOAH ALJs. *See* Tex. Gov't Code § 2001.058(e)(1); *Thompson*, 2013 WL 3791486, at *6; *Southwest Pharm.*, 408 S.W.3d at 557-58.

Second, the proposed finding erroneously suggests that it was Texas Medicaid policy to adopt a distinct "definition" of ectopic eruption in the TMPPM that differed from ectopic eruption as generally understood within the dental profession. The proposed finding would violate state and federal law because creation of a different set of standards applicable only to Medicaid patients would violate both Texas and federal law. *See, e.g.,* 1 Tex. Admin. Code § 354.1131(h); *see also* RR., Vol. 3, 250:8-19; Ex. R-14 (2008 TMPPM), § 1.2.5; Ex. R-15 (2009 TMPPM), § 1.4.5 ("Compliance with Federal Legislation. Reminder: *Each provider must furnish covered Medicaid services in the same manner, to the same extent, and of the same quality as services provided to other patients. Services made available to other patients must be made available to Texas Medicaid clients if the services are benefits of the Texas Medicaid Program.*"). And in fact, all published policy documents promulgated by HHSC require providers to apply the same standards of care to Medicaid patients they apply with the population at large. *See, e.g.,* Ex. R-16, at § 1.6; Ex. R-15, § 19.2.

Third, the SOAH ALJs' proposed finding suggests that the determination of whether a patient exhibited ectopic eruption was left entirely to the subjective opinion of the treating dentist. This is wrong because Medicaid policy documents and the testimony of agency witnesses shows that dentists were instructed to use their education, training, and experience in evaluating patients. *See, e.g.*, R.R., Vol. 1 at 103:8-12 (terms in the ectopic eruption instruction are not defined but are accorded their plain and ordinary meaning in the English language); R.R., Vol. 1 at 111: 12-14 (providers must understand the manual by virtue of their professional training).

It is the province of HHSC to determine what Medicaid policy is, and is not; the SOAH ALJs have no authority to wrongly determine Medicaid policy. *Southwest Pharm.,* 408 S.W.3d at 557-58 ("[W]e must uphold an enforcing agency's construction if it is reasonable and in harmony with the statute . . . This deference is particularly important in construing a complex statutory scheme like Medicaid.") (citing *R.R. Comm 'n of Tex.* v. *Tex. Citizens*, 336 S.W.3d at 624 (court will defer to agency's construction of statute that is committed to agency for enforcement, as long as the interpretation is reasonable and not contrary to the statute's plain language); *see also Atascosa Cnty.* v. *Atascosa Cnty. Appraisal Dist.,* 990 S.W. 2d 255, 258 (Tex. 1999) (courts may not accept interpretations of a statute that defeat the purpose of the legislation so long as another reasonable interpretation exists); Tex. Gov't Code § 311.023(6).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. Allegations cannot be properly evaluated if the fact finder does not properly interpret and apply a policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.,* 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

40. **The Manual's instruction regarding 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. This amendment clarified existing Texas Medicaid policy regarding conditions qualifying as ectopic eruption and did not substantively change Texas Medicaid policy.**

(The SOAH ALJs' proposed FoF No. 40 stated: *The Manual's 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.*)

Reason for Change:

Finding of Fact No. 40 concerns an interpretation of HHSC's intent in adopting changes to Medicaid policy. As such, the proposed finding addresses a mixed question of law and fact and is a "legislative finding." The Executive Commissioner has complete discretion to modify the proposed finding. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies the proposed finding because (i) the TMPPM's discussion of ectopic eruption is a scoring instruction, not a definition; and (ii) the proposed FoF misleadingly suggests that the 2012 amendment was substantive and not clarifying. These errors reflect a misinterpretation of law and Medicaid policy by the SOAH ALJs. *See* Tex. Gov't Code § 2001.058(e)(1); *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6; *Southwest Pharm.*, 408 S.W.3d at 557-58. First, the TMPPM provides a scoring instruction, not definition. *See, e.g.*, R.R., Vol. 1 at 103:8-12 (terms in the ectopic eruption instruction are not defined but are accorded their plain and ordinary meaning in the English language); R.R., Vol. 1 at 111: 12-14 (providers must understand the manual by virtue of their professional training).

Second, as proposed by the SOAH ALJs, FoF No. 40 erroneously suggests that the January 2012 amendment to the language in the Manual signified a substantive, rather than clarifying, change. The 2012 amendment to the instructions in the TMPPM clarified existing Medicaid policy; the amendment did not effect a substantive change. *See* R.R., Vol, 1 at 93:2-9, 94:20-23 (Dr. Altenhoff), R.R., Vol. 3 at 193:18-194:1; 294:21-23 (Jack Stick). It is the province of HHSC to determine what Medicaid policy is, and is not; the SOAH ALJs have no authority to wrongly determine Medicaid policy. *Southwest Pharm.*, 408 S.W.3d at 557-58 ("[W]e must uphold an enforcing agency's construction if it is reasonable and in harmony with the statute . . . This deference is particularly important in construing a complex statutory scheme like Medicaid.") (citing *R.R. Comm 'n of Tex.* v. *Tex. Citizens*, 336 S.W.3d at 624 (court will defer to agency's long-standing construction of statute that is committed to agency for enforcement, as long as the interpretation is reasonable and not contrary to the statute's plain language); *see also Atascosa Cnty.* v. *Atascosa Cnty. Appraisal Dist.*, 990 S.W. 2d 255, 258 (Tex. 1999) (courts may not accept interpretations of a statute that defeat the purpose of the legislation so long as another reasonable interpretation exists); Tex. Gov't Code § 311.023(6).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner

disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the finder of fact does not understand the policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.,* 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

41. **The language in the Manuals provided instructions to dentists and orthodontists to score ectopic eruption consistently with the standards for ectopic eruption that are generally recognized in the dental profession.**

(The SOAH ALJs' proposed FoF No. 41 stated: *The language in the Manuals provided a definition of ectopic eruption solely for use in scoring the HLD index to qualify for payment.*)

Reason for Change:

Finding of Fact No. 41 finding addresses a mixed question of law and fact and is a "legislative finding." The Executive Commissioner has complete discretion to modify the proposed finding. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 41 for two reasons. First, the TMPPM's discussion of ectopic eruption is an instruction, not a definition. *See, e.g.*, R.R., Vol. 1 at 103:8-12 (terms in the ectopic eruption instruction are not defined but are accorded their plain and ordinary meaning in the English language); R.R., Vol. 1 at 111: 12-14 (providers must understand the manual by virtue of their professional training). This error reflects a misinterpretation of law and policy by the SOAH ALJs. *See* Tex. Gov't Code § 2001.058(e)(1); *Thompson,* 2013 WL 3791486, at *6; *Southwest Pharm.,* 408 S.W.3d at 557-58.

Second, the proposed finding erroneously suggests that it was Texas Medicaid policy to adopt a distinct "definition" of ectopic eruption in the TMPPM that differed from ectopic eruption as generally understood within the dental

profession. The SOAH ALJs' proposed finding would violate state and federal law because creation of a different set of standards applicable only to Medicaid patients would violate both Texas and federal law. *See, e.g.,* 1 Tex. Admin. Code § 354.1131(h); *see also* RR, Vol. 3, 250:8-19; Ex. R-14 (2008 TMPPM), § 1.2.5; Ex. R-15 (2009 TMPPM), § 1.4.5 ("Compliance with Federal Legislation. Reminder: *Each provider must furnish covered Medicaid services in the same manner, to the same extent, and of the same quality as services provided to other patients. Services made available to other patients must be made available to Texas Medicaid clients if the services are benefits of the Texas Medicaid Program.*"). And in fact, all published policy documents promulgated by HHSC require providers to apply the same standards of care to Medicaid patients they apply with the population at large. *See, e.g.,* Ex. R-16, at § 1.6; Ex. R-15, § 19.2.

Rather than impermissibly employing a special or unique definition of ectopic eruption solely for use in the Medicaid context, HHSC policy makers instead instructed providers to use their training, education, experience, and definitions generally understood in the practice of dentistry in qualifying and treating Medicaid patients and to serve these patients in the same manner as other patients. *See, e.g.*, R.R., Vol. 1 at 103:8-12 (terms in the ectopic eruption instruction are not defined but are accorded their plain and ordinary meaning in the English language); R.R., Vol. 1 at 111: 12-14 (providers must understand the manual by virtue of their professional training).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the finder of fact does not understand the policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.,* 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

42. **The Manual did not address how an orthodontist diagnosed or treated a patient, but only instructed providers to score anterior teeth consistently with the generally understood definition of ectopic eruption in the orthodontic profession.**

(The SOAH ALJs' proposed FoF No. 42 stated: *The Manuals did not address how an orthodontist diagnosed or treated a patient, but only defined ectopic eruption for scoring the HLD score sheet to determine a Texas Medicaid patient's eligibility for orthodontic treatment.*)

Reason for Change:

Proposed FoF No. 42 addresses a mixed question of fact and law, and is therefore a so-called "legislative finding." Because the SOAH ALJs' proposed finding of fact number 42 reflects a misinterpretation and gross misapplication of Texas Medicaid policy, the Executive Commissioner has complete discretion to modify the proposed finding. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 42 for two reasons. First, the TMPPM's discussion of ectopic eruption is an instruction, not a definition. This error reflects a misinterpretation of law and policy by the SOAH ALJs. *See* Tex. Gov't Code § 2001.058(e)(1); *Thompson*, 2013 WL 3791486, at *6; *Southwest Pharm.*, 408 S.W.3d at 557-58.

Second, the proposed finding erroneously suggests that it was Texas Medicaid policy to adopt a distinct "definition" of ectopic eruption in the TMPPM that differed from ectopic eruption as generally understood within the dental profession. The SOAH ALJs' proposed finding would violate state and federal law because creation of a different set of standards applicable only to Medicaid patients would violate both Texas and federal law. *See, e.g.,* 1 Tex. Admin. Code § 354.1131(h); *see also* R.R. Vol. 3, 250:8-19; Ex. R-14 (2008 TMPPM), § 1.2.5; Ex. R-15 (2009 TMPPM), § 1.4.5 ("Compliance with Federal Legislation. Reminder: *Each provider must furnish covered Medicaid services in the same manner, to the same extent, and of the same quality as services provided to other patients. Services made available to other patients must be made available to Texas Medicaid clients if the services are benefits of the Texas Medicaid Program.*"). And in fact, all published policy documents promulgated by HHSC require providers to apply the same standards of care to Medicaid patients they apply with the population at large. *See, e.g.,* Ex. R-16, at § 1.6; Ex. R-15, § 19.2. The Manuals did, in fact, instruct providers to use their training and education in the treatment of Medicaid patients and to treat those patients in the same manner as other patients. Ex. R-15 (2009 TMPPM), § 1.4.5. The Executive Commissioner is therefore authorized to correct this error by the ALJs. *See* Tex. Gov't Code § 2001.058(e)(1), (3) (allowing an agency to change a PFD to correct errors of law or policy or technical errors in a proposed finding of fact).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the finder of fact does not understand the policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.,* 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

43. After HHSC-OIG imposed the payment hold on ADC, it hired Larry Tadlock, D.D.S., an orthodontist, to review the 63 patients previously reviewed by Dr. Evans.

44. After reviewing the patients' HLD score sheets, Dr. Tadlock found only one patient, Patient 15, who met the 26-point threshold.[5]

45. **In reviewing the 63 ADC patient files in the statistically valid random sample, Dr. Tadlock applied the definition of ectopic eruption that is generally recognized within the dental profession and scored the patients as instructed by the Manuals. Dr. Tadlock properly applied Medicaid policy.**

(The SOAH ALJs' proposed FoF No. 45 stated: *Dr. Tadlock did not apply the Manuals' definition of ectopic eruption in scoring the HLD index for the 63 ADC patients.*)

Reason for Change:

Proposed finding of fact number 45 addresses a mixed question of fact and law, and is a "legislative finding." The Executive Commissioner has complete discretion to modify the proposed finding. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws,

[5] By letter dated January 16, 2014, the SOAH ALJs replied to the Inspector General's Exceptions and notified the Executive Commissioner that their original proposed finding of fact number 44 should be revised. The Executive Commissioner adopts the ALJs' recommendations regarding revised proposed finding of fact number 44.

rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 45 for two reasons. First, the TMPPM's discussion of ectopic eruption is an instruction, not a definition. This error reflects a misinterpretation of law and policy by the SOAH ALJs. *See* Tex. Gov't Code § 2001.058(e)(1); *Thompson*, 2013 WL 3791486, at *6; *Southwest Pharm.*, 408 S.W.3d at 557-58.

Second, the proposed finding erroneously suggests that it was Texas Medicaid policy to adopt a distinct "definition" of ectopic eruption in the TMPPM that differed from ectopic eruption as generally understood within the dental profession. The SOAH ALJs' proposed finding would violate state and federal law because creation of a different set of standards applicable only to Medicaid patients would violate both Texas and federal law. *See, e.g.,* 1 Tex. Admin. Code § 354.1131(h); *see also* R.R., Vol. 3, 250:8-19; Ex. R-14 (2008 TMPPM), § 1.2.5; Ex. R-15 (2009 TMPPM), § 1.4.5 ("Compliance with Federal Legislation. Reminder: *Each provider must furnish covered Medicaid services in the same manner, to the same extent, and of the same quality as services provided to other patients. Services made available to other patients must be made available to Texas Medicaid clients if the services are benefits of the Texas Medicaid Program.*"). And in fact, all published policy documents promulgated by HHSC require providers to apply the same standards of care to Medicaid patients they apply with the population at large. *See, e.g.,* Ex. R-16, at § 1.6; Ex. R-15, § 19.2.

Also, the proposed finding misconstrues Dr. Tadlock's testimony. In fact, Dr. Tadlock's testimony shows that in his view, the Manual's instructions are consistent with the generally understood definition of ectopic eruption. R.R., Vol. 1, 202:21-203:10. This error reflects a misinterpretation of law and policy by the SOAH ALJs, a misinterpretation that resulted in misconstruing Dr. Tadlock's testimony. Tex. Gov't Code § 2001.058(e)(1).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the finder of fact does not understand the policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately

reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

46. **Despite the SOAH ALJs finding Dr. Nazari's testimony to be credible, Dr. Nazari did not properly follow Medicaid policy in his identification of ectopic eruptions; the overwhelming evidence of the consistent pattern of inflated HLD scores submitted by ADC establishes prima facie evidence that is reliable, relevant and material that ADC's misrepresentations of medical necessity constitute willful misrepresentations.**

(The SOAH ALJs' proposed FoF No. 46 stated: *Dr. Nazari was a credible witness and properly utilized the Manuals' definition in scoring the HLD index.*)

Reason for Change:

Proposed FoF No. 46 addresses a mixed question of fact and law, and, as such, is a so-called "legislative finding." Therefore, the Executive Commissioner has complete discretion to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 46 for two reasons. First, the TMPPM's discussion of ectopic eruption is an instruction, not a definition. *See, e.g.*, R.R., Vol. 1 at 103:8-12 (terms in the ectopic eruption instruction are not defined but are accorded their plain and ordinary meaning in the English language); R.R., Vol. 1 at 111: 12-14 (providers must understand the manual by virtue of their professional training). This error reflects a misinterpretation of law and policy by the SOAH ALJs. *See* Tex. Gov't Code § 2001.058(e)(1); *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6; *Southwest Pharm.*, 408 S.W.3d at 557-58.

Second, the proposed finding erroneously suggests that it was Texas Medicaid policy to adopt a distinct "definition" of ectopic eruption in the TMPPM that differed from ectopic eruption as generally understood within the dental profession. The SOAH ALJs' proposed finding would violate state and federal law because creation of a different set of standards applicable only to Medicaid patients would violate both Texas and federal law. *See, e.g.*, 1 Tex. Admin. Code § 354.1131(h); *see also* RR., Vol. 3, 250:8-19; Ex. R-14 (2008 TMPPM), § 1.2.5; Ex. R-15 (2009 TMPPM), § 1.4.5 ("Compliance with Federal Legislation. Reminder: *Each provider must furnish covered Medicaid services in the same manner, to the same extent, and of the same quality as services provided to other patients. Services made available to other patients must be made available to*

Texas Medicaid clients if the services are benefits of the Texas Medicaid Program."). And in fact, all published policy documents promulgated by HHSC require providers to apply the same standards of care to Medicaid patients they apply with the population at large. *See, e.g.,* Ex. R-16, at § 1.6; Ex. R-15, § 19.2.

Moreover, contrary to Texas Medicaid policy requirements that providers treat Medicaid patients to the same standard of care as the general population, Dr. Nazari testified that orthodontics for Medicaid patients is different than orthodontics for non-Medicaid patients. R.R., Vol. 4, at 103:13-16, 104:1-4, 145:9-10. Further, Dr. Nazari was unable to define a "severe handicapping malocclusion." *Id.* at 144:17-145:6. This testimony reflects that, though Dr. Nazari may be viewed by the finder of fact as credible, Dr. Nazari was unable to properly apply Texas Medicaid policy to the scoring of patients.

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

The proposed finding reflects a fundamental misunderstanding and misapplication of Texas Medicaid policy by the SOAH ALJs. An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the fact finder does not properly interpret and apply a policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d 417, 440-41 (Tex. App.—Austin 2012, pet denied); *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711, 728 (Tex. App.–Austin 2007, pet. denied); *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d 813, 816 (Tex. App.—Austin 1998, no pet.).

47. **Despite the SOAH ALJs finding Dr. Kanaan's testimony to be credible, Dr. Kanaan did not properly follow Medicaid policy in his identification of ectopic eruptions; the overwhelming evidence of the consistent pattern of inflated HLD scores submitted by ADC establishes prima facie evidence that is reliable, relevant and material that ADC's misrepresentations of medical necessity constitute willful misrepresentations.**

(The SOAH ALJs' proposed FoF No. 23 stated: *Wael Kanaan, D.D.S. an orthodontist who worked with ADC was a credible witness and properly utilized the Manuals' definition of ectopic eruption in scoring the HLD index.*)

Reason for Change:

Proposed FoF No. 47 addresses a mixed question of fact and law, and is a so-called "legislative finding." Therefore, the Executive Commissioner has complete discretion to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 47 for three reasons. First, the TMPPM's discussion of ectopic eruption is an instruction, not a definition. *See, e.g.*, R.R., Vol. 1 at 103:8-12 (terms in the ectopic eruption instruction are not defined but are accorded their plain and ordinary meaning in the English language); R.R., Vol. 1 at 111: 12-14 (providers must understand the manual by virtue of their professional training). This error reflects a misinterpretation of law and policy by the SOAH ALJs. *See* Tex. Gov't Code § 2001.058(e)(1); *Thompson*, 2013 WL 3791486, at *6; *Southwest Pharm.*, 408 S.W.3d at 557-58.

Second, the proposed finding erroneously suggests that it was Texas Medicaid policy to adopt a distinct "definition" of ectopic eruption in the TMPPM that differed from ectopic eruption as generally understood within the dental profession. The SOAH ALJs' proposed finding would violate state and federal law because creation of a different set of standards applicable only to Medicaid patients would violate both Texas and federal law. *See, e.g.,* 1 Tex. Admin. Code § 354.1131(h); *see also* RR., Vol. 3, at 250:8-19; Ex. R-14 (2008 TMPPM), § 1.2.5; Ex. R-15 (2009 TMPPM), § 1.4.5 ("Compliance with Federal Legislation. Reminder: *Each provider must furnish covered Medicaid services in the same manner, to the same extent, and of the same quality as services provided to other patients. Services made available to other patients must be made available to Texas Medicaid clients if the services are benefits of the Texas Medicaid Program.*"). And in fact, all published policy documents promulgated by HHSC require providers to apply the same standards of care to Medicaid patients they apply with the population at large. *See, e.g.*, Ex. R-16, at § 1.6; Ex. R-15, § 19.2.

For example, Dr. Kanaan testified that the word "handicapping" in the phrase "severe handicapping malocclusion" means "extreme deviation from the norm." R.R., Vol. 3, at 101:3-8. Yet, of the 63 patients in the statistically valid random sample, Kanaan agreed that of his patients he scored at least seven ectopic teeth in each patient, a rate of 100%. *Id.*, 97:5-8. This testimony reflects that, though Dr. Kanaan may be viewed by the finder of fact as credible, Dr. Kanaan did not properly apply Texas Medicaid policy to the scoring of patients.

Third, Dr. Kanaan scored 23 of 27 patients exactly the same way—with the same eight teeth being scored as ectopic. R-83; Vol. 3 at 43-70. The SOAH ALJs acknowledged this undisputed evidence. PFD, at 25. This evidence of Dr. Kanaan's pattern of scoring is prima facie evidence that Dr. Kanaan acted with requisite knowledge under the TMFPA. Tex. Hum. Res. Code § 36.0011(b). The Executive Commissioner is authorized, therefore, to correct the SOAH ALJs' error. Tex. Gov't Code § 2001.058(e)(1).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

The proposed finding reflects a fundamental misunderstanding and misapplication of Texas law and Medicaid policy by the SOAH ALJs. An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the fact finder does not properly interpret and apply a policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d 417, 440-41 (Tex. App.—Austin 2012, pet denied); *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711, 728 (Tex. App.–Austin 2007, pet. denied); *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d 813, 816 (Tex. App.–Austin 1998, no pet.).

48. **HHSC-OIG presented evidence that is credible, reliable, and verified, and that has indicia of reliability when analyzed consistently with Texas law and Medicaid policy, that ADC knowingly incorrectly scored the HLD index on orthodontic prior approval requests submitted to Texas Medicaid.**

(The SOAH ALJs' proposed FoF No. 48 stated: *There is no evidence that is credible, reliable, or verifiable, or that has indicia of reliability, that ADC incorrectly scored the HLD Index to obtain Texas Medicaid benefits for patients or to obtain Texas Medicaid payments.*)

Reason for Change:

Proposed FoF No. 48 addresses a mixed question of fact and law, and is a so-called "legislative finding." Therefore, the Executive Commissioner has complete discretion to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an

ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 48 because the SOAH ALJs misinterpreted and misapplied Texas law and Medicaid policy. First, the proposed finding misapplies law and Medicaid policy by stating that there is no evidence that ADC incorrectly scored the HLD index. In fact, the evidence shows that the HLD scores submitted by Drs. Nazari and Kanaan were incorrect because of their interpretation of ectopic eruption. *See, e.g.*, testimony of Dr. Tadlock at RR, Vol. 1, at 173:3-6; 174:6-175:1; 176:14-20; 177:1-16; *see also* testimony of Dr. Nazari, RR, Vol. 4, at 144:17-145:6; and testimony of Dr. Kanaan, RR, Vol. 3, at 43-70. The totality of the evidence, which includes the testimony of ADC's own witnesses, as well as the Inspector General's fact witnesses and experts, is much more than *prima facie*, and is relevant, credible and material. *See* Tex. Hum. Res. Code § 32.0291(c).

Second, the proposed finding is erroneous because implicit in it are the assumptions that the definition of ectopic eruption is wholly open to subjective interpretation, and that Texas Medicaid adopted a "special" definition of ectopic eruption that was more liberal than the generally accepted definition of ectopic eruption in the orthodontic profession (and contrary to the TMPPM's instruction to providers to be "conservative" in their scoring). These errors reflect misinterpretations and misapplications of law and Medicaid policy by the SOAH ALJs.

Third, Dr. Kanaan scored 23 of 27 patients exactly the same way—with the same eight teeth being scored as ectopic. R-83; Vol. 3 at 43-70. Further, the SOAH ALJs acknowledged this undisputed evidence. PFD, at 25. This evidence of Dr. Kanaan's pattern of scoring is prima facie evidence that Dr. Kanaan acted with requisite knowledge under the TMFPA. Tex. Hum. Res. Code § 36.0011(b). The Executive Commissioner is authorized, therefore, to correct the SOAH ALJs' error. Tex. Gov't Code § 2001.058(e)(1).

Finally, this proposed finding reflects a further misapplication of law in suggesting that the Inspector General bears the burden of proving intent to defraud Medicaid. As the SOAH ALJs acknowledge in the narrative section of their PFD, the Inspector General does not have the burden to show specific intent to defraud the Medicaid program to show that ADC has committed an unlawful act under the TMFPA. *See* PFD at 15, citing definition of "knowingly" at section 36.0011 of the TMFPA; *see also* CoL No. 6, at page 42 of the PFD (same proposition). Nevertheless, in proposed FoF No. 48, the SOAH ALJs write that the Inspector General failed to present credible, reliable, or verifiable evidence that ADC

incorrectly scored HLD indices "*to obtain Texas Medicaid benefits for patients or to obtain Texas Medicaid payments*."

The burden on the Inspector General is only to demonstrate relevant, credible and material evidence that ADC knowingly submitted scores that overstated the child's true condition. Tex. Hum. Res. Code § 32.0291(c). Drs. Kanaan and Nazari acknowledge they applied an interpretation of ectopic eruption that did not comport with Medicaid policy. To the extent the SOAH ALJs attempt to hold the Inspector General to the additional burden of proving intent on the part of ADC to defraud the Medicaid program, proposed FoF No. 48 is erroneous.

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed finding reflects a fundamental misunderstanding and misapplication of Texas law and Medicaid policy by the SOAH ALJs. An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. These allegations cannot be properly evaluated if the finder of fact does not properly interpret and apply a policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d 417, 440-41 (Tex. App.—Austin 2012, pet denied); *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711, 728 (Tex. App.–Austin 2007, pet. denied); *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d 813, 816 (Tex. App.–Austin 1998, no pet.).

49. **HHSC-OIG presented *prima facie* evidence that is credible, reliable, and verified, and that has indicia of reliability when analyzed consistently with Texas law and Medicaid policy, that ADC committed fraud or willful misrepresentations to Texas Medicaid.**

(The SOAH ALJs' proposed FoF No. 49 stated: *There is no evidence that is credible, reliable, or verifiable, or that has indicia of reliability, that ADC committed fraud or engaged in willful misrepresentation with respect to the 63 ADC patients in this case.*)

Reason for Change:

Proposed FoF No. 49 addresses a mixed question of fact and law, and is a so-called "legislative finding." Therefore, the Executive Commissioner has complete discretion to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an

ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 49 because the SOAH ALJs misinterpreted and misapplied Texas law and Medicaid policy. First, the proposed finding misapplies Texas law governing the Inspector General's burden of proof in this case. As noted in CoL No. 12, to maintain the payment hold, the Inspector General must only make a *prima facie* showing of evidence that is credible, reliable or verifiable, or that has indicia of reliability that ADC has committed fraud or willful misrepresentations in this case.

The SOAH ALJs' determination that the Inspector General presented "no evidence" on this issue is the result of the SOAH ALJs' legally erroneous interpretation of Medicaid policy with respect to the definition of ectopic eruption. As the Inspector General noted in his Exceptions, the SOAH ALJs' determinations that the following are all errors in the interpretation and application of Texas Medicaid policy and law: (1) Texas Medicaid "defined" ectopic eruption uniquely and differently in the TMPPM than the generally accepted definition in the orthodontic profession; (2) that said definition was wholly open to subjective interpretation; and (3) that the 2012 changes to the TMPPM "definition" were substantive rather than clarifying.

Further, the SOAH ALJs also misapplied law and policy to the following evidence, which they themselves acknowledged: Dr. Kanaan scored 23 of 27 patients exactly the same way—with the same eight teeth being scored as ectopic. R-83; Vol. 3 at 43-70. This evidence of Dr. Kanaan's pattern of scoring is prima facie evidence that Dr. Kanaan acted with requisite knowledge under the TMFPA. Tex. Hum. Res. Code § 36.0011(b). The Executive Commissioner is authorized, therefore, to correct the SOAH ALJs' error. Tex. Gov't Code § 2001.058(e)(1).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed finding reflects a fundamental misunderstanding and misapplication of Texas law and Medicaid policy by the SOAH ALJs. An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the decision maker does not understand

the policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the modified finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

50. **HHSC-OIG presented *prima facie* evidence that is credible, reliable, and verified, and that has indicia of reliability when analyzed consistently with Texas law and Medicaid policy, that ADC committed fraud or willful misrepresentations in filing requests for prior authorization with TMHP for a substantial majority of patients in the OIG audit sample.**

(The SOAH ALJs' proposed FoF No. 50 stated: *There is no evidence that is credible, reliable, or verifiable, or that has indicia of reliability, that ADC committed fraud or misrepresentation in filing requests for prior authorization with TMHP for the 63 patients at issue in this case.*)

Reason for Change:

Proposed FoF No. 50 addresses a mixed question of fact and law, and is a so-called "legislative finding." Therefore, the Executive Commissioner has complete discretion to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 50 because the SOAH ALJs misinterpreted and misapplied Texas law and Medicaid policy. First, the proposed finding misapplies Texas law governing the Inspector General's burden of proof in this case. As noted in CoL No. 12, to maintain the payment hold, the Inspector General must only make a *prima facie* showing of evidence that is credible, reliable or verifiable, or that has indicia of reliability that ADC has committed fraud or willful misrepresentations in this case.

The SOAH ALJs' determination that the Inspector General presented "no evidence" on this issue is the result of the SOAH ALJs' legally erroneous interpretation of Medicaid policy with respect to the definition of ectopic eruption. As the Inspector General noted in his Exceptions, the SOAH ALJs' determinations that the following are all errors in the application of Texas Medicaid policy and law: (1) Texas Medicaid "defined" ectopic eruption uniquely and differently in the TMPPM than the generally accepted definition in the orthodontic profession; (2) that said definition was wholly open to subjective interpretation; and (3) that the 2012 changes to the TMPPM "definition" were substantive rather than clarifying.

Further, Dr. Kanaan scored 23 of 27 patients exactly the same way—with the same eight teeth being scored as ectopic. R-83; Vol. 3 at 43-70. The SOAH ALJs acknowledged this undisputed evidence. PFD, at 25. This evidence of Dr. Kanaan's pattern of scoring is prima facie evidence that Dr. Kanaan acted with requisite knowledge under the TMFPA. Tex. Hum. Res. Code § 36.0011(b). The Executive Commissioner is authorized, therefore, to correct the SOAH ALJs' error. Tex. Gov't Code § 2001.058(e)(1).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed finding reflects a fundamental misunderstanding and misapplication of Texas law and Medicaid policy by the SOAH ALJs. An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the fact finder does not understand the policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the modified finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

51. When HHSC-OIG arrived at ADC in November 11, 2012, and asked for 63 case files, prima facie evidence exists that ADC could not locate eight dental models, four HLD score sheets, and two pre-treatment x-rays.

52. ADC forwarded the HLD score sheets and supporting documentation to TMHP when ADC filed its requests for prior authorization.

53. HHSC-OIG presented prima facie evidence that ADC failed to retain these records and models for the required five years.

54. **HHSC-OIG presented *prima facie* evidence that is credible, reliable, and verified, and that has indicia of reliability when analyzed consistently with Texas law and Medicaid policy, that ADC billed or caused claims to be submitted to Texas Medicaid for services or items that are not reimbursable by the Texas Medicaid program.**

(The SOAH ALJs' proposed FoF No. 54 stated: *HHSC-OIG failed to present prima facie evidence that ADC billed or caused claims to be submitted to Texas*

Medicaid for services or items that are not reimbursable by the Texas Medicaid program.)

Reason for Change:

Proposed FoF No. 54 addresses a mixed question of fact and law, and is a so-called "legislative finding." Therefore, the Executive Commissioner has complete discretion to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 54 because it misapplies Texas law and Medicaid policy. If the SOAH ALJs had applied the proper standard for ectopic eruption, consistent with the TMPPM provision requiring providers to be "conservative" in scoring, to the facts of this case, then the SOAH ALJs would have concluded that HHSC-OIG presented prima facie evidence that in at least 58 of the 63 cases in the sample ADC submitted PA requests for patients who were not qualified for full orthodontia.

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed finding reflects a fundamental misunderstanding and misapplication of Texas law and Medicaid policy by the SOAH ALJs. An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the decision maker does not understand the policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the modified finding of fact, which accurately reflects that policy. *See, e.g.*, *Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

55. **ADC committed program violations when it submitted prior authorization requests and HLD forms for D8080 comprehensive orthodontic treatment, of Patients 15, 56, and 60 when these patients did not qualify for comprehensive orthodontics.**

(The SOAH ALJs' proposed FoF No. 55 stated: *Patient 15, 56, and 60, were eligible for interceptive treatment under Texas Medicaid.*)

Reason for Change:

Proposed FoF No. 55 addresses a mixed question of fact and law, and is a so-called "legislative finding." Therefore, the Executive Commissioner has complete discretion to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

The Executive Commissioner modifies Proposed FoF No. 55 because it misapplies Texas law and Medicaid policy. To the extent the SOAH ALJs use "interceptive" treatment to mean something less than comprehensive orthodontics [D8080] (and therefore outside the requirement that patients be 12 or older or have no baby teeth), the SOAH ALJs misstate the evidence. ADC billed the code D8080 for these patients, meaning they falsely represented to the state that these patients were 12 or older or had lost all baby teeth. To the extent the SOAH ALJs use "interceptive" to include code D8080, *see* Ex R-15 at § 19.18.7, they are again in error: D8080 is explicitly not applicable to patients like these who have baby teeth and are under 12 years old.

These patients may well have been eligible for interceptive treatment – that is, something less than comprehensive orthodontics – but the evidence in this case is clear: ADC billed Medicaid for – and represented to the State that these patients qualified for – D8080, or comprehensive orthodontics. For example, with regard to Patient 15, the PFD states that ADC requested "prior authorization for interceptive treatment." PFD at 33. ADC requested D8080, comprehensive orthodontics, for this patient, even though the patient was 9 years old and had baby teeth. Ex. P-15 at P15-0019 (ADC Prior Authorization Request Form for Patient 15 requesting "D8080".) This is a program violation. 1 Tex. Admin. Code § 371.1617(1)(K) and (5)(G).

With regard to Patient 56, ADC requested D8080 comprehensive orthodontics for this patient, even though the patient was 9 years old and had baby teeth. Ex. P-56 at P56-0015 (ADC Prior Authorization Request Form for Patient 56 requesting "D8080" for a charge of $775.00.) This is a program violation. 1 Tex. Admin. Code § 371.1617(1)(K) and (5)(G).

Finally, for Patient 60, ADC requested D8080 comprehensive orthodontics, even though this patient was under 12 and had baby teeth. Ex. P-60 at P60-0004(ADC Prior Authorization Request Form for Patient 60 requesting "D8080" for a charge

of $775.00.). This is a program violation. 1 Tex. Admin. Code § 371.1617(1)(K) and (5)(G).

The fact that ADC billed for comprehensive orthodontics when their patients did not qualify for that treatment is a program violation, and warrants a payment hold.

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of any dispute. Allegations cannot be properly evaluated if the decision maker does not properly interpret and apply a policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the altered finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d 417, 440-41 (Tex. App.—Austin 2012, pet denied); *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711, 728 (Tex. App.–Austin 2007, pet. denied); *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d 813, 816 (Tex. App.–Austin 1998, no pet.).

56. Program violations range from "very innocuous" to "very important."

57. **ADC's record keeping violations, together with the *prima facie* evidence presented by HHSC-OIG of ADC's fraud and willful misrepresentations, when analyzed consistently with Texas law and Medicaid policy, justify maintaining the payment hold.**

(The SOAH ALJs' proposed FoF No. 57 stated: *ADC's violation is a technical violation and based upon this record does not rise to a level of substantive concern.*)

Reason for Change:

Proposed FoF No. 57 addresses a mixed question of fact and law, and is a so-called "legislative finding." Therefore, the Executive Commissioner has complete discretion to modify it. *Tex. Dep't of Licensing & Regulation* v. *Thompson*, 2013 WL 3791486, at *6 ("'An agency enjoys *complete discretion* in modifying an ALJ's findings and conclusions when those findings and conclusions reflect a lack of understanding or misapplication of the existing laws, rules, or policies.'" (quoting *Smith* v. *Montemayor*, 2003 WL 21401591, at *26-27 (emphasis added)); Tex. Gov't Code § 2001.058(e)(1).

Proposed FoF No. 57 is erroneous because it misapplies Texas law and Medicaid policy, including to the extent this finding rests on the false premise that ADC's

record keeping violations are the only actionable violations found by the Inspector General. The SOAH ALJs appear to reason that ADC's program violations, by themselves, do not justify continuation of the payment hold. The underlying premise, in turn, is based the SOAH ALJs misapplication of Texas Medicaid policy regarding ectopic eruption. This finding is also erroneous because it is within the sound discretion of the Executive Commissioner, and not the SOAH ALJs, to determine whether or not ADC's record keeping violations are cause for concern.

The Inspector General based his payment hold, in part, on ADC's failure to provide records pursuant to the Inspector General's request. In some cases, ADC had these records, and entered them into evidence in this case *over a year after the Inspector General requested them.* ADC's failure to provide these records *immediately* is a program violation and may result in a payment hold. 1 Tex. Admin. Code § 371.1617(2)(A); R-14 at 1-8 ("Failure to supply the requested documents and other items, within the time frame specified, may result in a payment hold . . . or exclusion from Medicaid.").

Proposed FoF No. 57 is erroneous in characterizing these program violations as "technical violation[s]" that are not "of substantive concern," particularly in light of the fact that the Inspector General is obligated to investigate Medicaid fraud, waste, and abuse, and, in the course of investigating, is entitled to request documents of providers. Ex. R-14 (2008 TMPPM) § 1.2.3. Furthermore, the Inspector General is entitled to base payment hold determinations on the records that Medicaid providers provide in response to a proper request on the part of the Inspector General. Medicaid providers' failure to provide documents to the Inspector General pursuant to a written request for them is a "substantive concern," particularly in cases, like this one, where the provider later attacks the validity of the payment hold based on the existence of documents it failed to provide to the Inspector General. The existence and provision of documents necessary to fully document and evaluate the necessity and delivery of medical services is paramount to the integrity of the Medicaid system. *See Pierce v. Tex. Racing Comm'n*, 212 S.W.3d 745, 754 (Tex. App.—Austin 2006, pet. denied) (agency determines appropriate penalty to further agency's goals of compliance with state law) (citing *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer,* 662 S.W.2d 953, 956 (Tex.1984)); *see also Tex. State Bd. of Dental Exam'rs v. Brown*, 281 S.W.3d 692, 697 (Tex. App.—Corpus Christi 2009, pet. denied) (agency, not ALJ, determines appropriate sanction).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an

incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed finding reflects a fundamental misunderstanding and misapplication of Texas law and Medicaid policy by the SOAH ALJs. An accurate understanding of the scope and limitations of Texas Medicaid policy is critically important to the outcome of this dispute. The fundamental allegation brought by the Inspector General is that ADC has submitted claims for PA and for reimbursement that are not authorized under Medicaid policy or Texas law. These allegations cannot be properly evaluated if the fact finder does not understand the policy. Therefore, there is a rational connection between the correct articulation of Medicaid policy and the modified finding of fact, which accurately reflects that policy. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

CONCLUSIONS OF LAW

1. HHSC-OIG has jurisdiction over this case. Tex. Gov't Code ch. 531; Tex. Hum. Res. Code ch. 32.

2. SOAH has jurisdiction over the hearing process and the preparation and issuance of a proposal for decision, with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.

3. Notice of the hearing was properly provided. Tex. Gov't Code ch. 2001.

4. **The Inspector General's burden to maintain the payment hold under section 531.102(g)(2) of the Government Code or section 32.0291(c) of the Human Resources Code, is to show by reliable or *prima facie* evidence that ADC has committed fraud or made willful misrepresentations.**

   (The SOAH ALJs' proposed CoL No. 4 stated: *HHSC-OIG had the burden of proof.*)

   Reason for Change:

   The Executive Commissioner modifies Proposed CoL No. 4. Proposed CoL No. 4 is erroneous because it is a misstatement of the law. *See* Tex. Gov't Code § 2001.058(e)(1). The Inspector General is required by law to impose a payment hold "on receipt of reliable evidence that the circumstances giving rise to the hold on payment involve fraud or willful misrepresentation under the state Medicaid program in accordance with 42 C.F.R. Section 455.23." Tex. Gov't Code § 531.102(g)(2). Additionally, "[t]he department shall discontinue the hold unless the department makes a *prima facie* showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible and material to the issue of fraud or willful misrepresentation." Tex. Hum. Res. Code § 32.0291(c)

(emphasis added). Because the SOAH ALJs' proposed conclusion of law misstated the applicable law, the Executive Commissioner has discretion to modify it. *Thompson*, 2013 WL 3791486, at *6; Tex. Gov't Code § 2001.058(e)(1).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed conclusion reflects a fundamental misunderstanding and misapplication of Texas law by the SOAH ALJs. Therefore, there is a rational connection between Texas law and Medicaid policy and the modified conclusion of law. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

5. It is an unlawful act to knowingly make or cause to be made a false statement or misrepresentation of a material fact to permit a person to receive a benefit or payment under the Medicaid program that is not authorized or that is greater than the benefit or payment that is authorized. Tex. Hum. Res. Code § 36.002(1) (2003).

6. The term "knowingly" means that the person has knowledge of the information, acts with conscious indifference to the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information. Proof of the person's specific intent to commit an unlawful act under § 36.002 is not required to show that a person acted "knowingly." Tex. Hum. Res. Code § 36.0011 (2003).

7. "Fraud" is an intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person or some other person, including any act that constitutes fraud under applicable federal or state law. Tex. Gov't Code § 531.1011(1) (2011).

8. HHSC-OIG must impose a hold on payment of claims for reimbursement submitted by a provider on receipt of reliable evidence that the circumstances giving rise to the hold on payment involve fraud or willful misrepresentation under the state Medicaid program. Texas Gov't Code § 531.102(g)(2) (2011).

9. All Medicaid payments to a provider must be suspended after the state Medicaid agency determines that there is a credible allegation of fraud for which an investigation is pending, unless the agency has good cause not to suspend payments (or to suspend payments only in part). If the state's Medicaid fraud control unit accepts a referral for investigation of the provider, the payment

suspension may be continued until such time as the investigation and any associated enforcement proceedings are completed. 42 C.F.R. § 455.23 (2011).

10. **A "Credible allegation of fraud" may be "an allegation, which has been verified by the State, from any source" including, but not limited to, 'fraud hotline complaints, claims data mining, and patterns identified through provider audits, and law enforcement investigations. Allegations are considered credible when they have indicia of reliability and the State Medicaid agency has reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis." 42 C.F.R. § 455.2.**

(The SOAH ALJs' proposed CoL No. 10 stated: *"Credible allegation of fraud" is "an allegation, which has been verified by the State, from any source," including, for example, fraud hotline complaints, claims data mining, and provider audits. Allegations are considered credible when they have indicia of reliability and the State Medicaid agency has reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis. 42 C.F.R. § 455.2 (2011).".*)

Reason for Change:

The Executive Commissioner modifies Proposed CoL No. 10. Proposed CoL No. 10 omits words and phrases from the statute, all essential to the meaning of the statute: "'patterns identified through' provider audits"; the SOAH ALJs also deleted the phrase "and law enforcement investigations" and substituted the word "is" for "may be" and "for example" for "but not limited to."

Because Proposed CoL No. 10 incorrectly states the law, the Executive Commissioner has complete discretion to modify CoL No. 10 to correctly state the law, add the essential phrases and words of "patterns identified through" and "and law enforcement investigations" and substitute the words "can be" for "is" and "but not limited to" for "for example." *See Thompson*, 2013 WL 3791486, at *6; Tex. Gov't Code § 2001.058(e)(1).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, because the proposed conclusion reflects a fundamental misunderstanding and misapplication of law by the SOAH ALJs, there is a rational connection between Texas law and Medicaid policy and the modified conclusion of law. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

11. HHSC-OIG may impose a payment hold on future claims submitted by a provider if there is reliable evidence that the provider has committed fraud or willful misrepresentation regarding a claim for reimbursement under the medical assistance program. Tex. Hum. Res. Code § 32.0291(b) (2003).

12. In a SOAH hearing on a payment hold, HHSC-OIG must make a prima facie showing that the evidence relied upon in imposing the payment hold is relevant, credible, and material to the issue of fraud or willful misrepresentation. Tex. Hum. Res. Code § 32.0291(c) (2003).

13. **HHSC-OIG should maintain the payment hold against ADC for alleged fraud or willful misrepresentation, and program violations. Tex. Gov't Code § 531.102(g) (2011); 42 CFR § 455.23 (2011); Tex. Hum. Res. Code § 32.091(c) (2003); 1 Tex. Admin. Code §§ 371.1703(b)(3), and (b)(5), 371.1617(a)(1)(A)-(C), (I), (K), (2)(A), (5)(A), (5)(G) (2005).**

(The SOAH ALJs' proposed CoL No. 13 stated: *HHSC-OIG lacks authority to maintain the payment hold against ADC for alleged fraud or misrepresentation. Tex. Gov't Code § 531.102(g) (2011); 42 CFR § 455.23 (2011); Tex. Hum. Res. Code § 32.091(c) (2003); 1 Tex. Admin. Code §§ 371.1703(b)(3), 371.1617(a)(1)(A)-(C) (2005).*)

Reason for Change:

The Executive Commissioner modifies Proposed CoL No. 13. Proposed CoL No. 13 is erroneous because it misapplies Texas law and Medicaid policy to the facts of this case. This conclusion rests on the SOAH ALJs' misinterpretation and misapplication of Medicaid's limited orthodontic benefit and their misconstruction of ectopic eruption. Further, this conclusion reflects the SOAH ALJs' failure to apply the proper evidentiary burden in this case.

Because CoL No. 13 rests on faulty applications of law as well as erroneous interpretations of Medicaid policy the Executive Commissioner enjoys complete discretion to correct it. *Thompson*, 2013 WL 3791486, at *6; Tex. Gov't Code § 2001.058(e)(1). Further, the Executive Commissioner, and not the SOAH ALJs, determines the appropriate sanction if the law has been violated. *See Pierce v. Tex. Racing Comm'n*, 212 S.W.3d 745, 754 (Tex. App.—Austin 2006, pet. denied) (agency determines appropriate penalty to further agency's goals of compliance with state law (citing *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex.1984)); *see also Tex. State Bd. of Dental Exam'rs v. Brown*, 281 S.W.3d 692, 697 (Tex. App.—Corpus Christi 2009, pet. denied) (agency, not ALJ, determines appropriate sanction).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an

incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed conclusion reflects a fundamental misunderstanding and misapplication of Texas law by the SOAH ALJs. Therefore, there is a rational connection between Texas law and Medicaid policy and the modified conclusion of law. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

14. **The Texas Government Code mandates a payment hold when reliable evidence has been presented of fraud or willful misrepresentation. Tex. Gov't Code § 531.102(g)(2). The Executive Commissioner shall discontinue the hold unless the department makes a *prima facie* showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible and material to the issue of fraud or willful misrepresentation. Tex. Hum. Res. Code § 32.0291(c).**

(The SOAH ALJs' proposed CoL No. 14 stated: *A payment hold should be reasonably related to the magnitude of the violation.*)

Reason for Change:

The Executive Commissioner modifies Proposed CoL No. 14. Proposed CoL No. 14 is erroneous because it misstates the law. *See* Tex. Gov't Code § 2001.058(e)(1). The Texas Government Code mandates a payment hold when reliable evidence was been presented of fraud or willful misrepresentation. Tex. Gov't Code § 531.102(g)(2). Additionally, "[t]he department shall discontinue the hold unless the department makes a *prima facie* showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible and material to the issue of fraud or willful misrepresentation." Tex. Hum. Res. Code § 32.0291(c) (emphasis added).

Because the SOAH ALJs' proposed conclusion of law misstated the applicable law, the HHSC-ALJ had complete discretion to modify it. *Thompson*, 2013 WL 3791486, at *6; Tex. Gov't Code § 2001.058(e)(1).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed conclusion reflects a fundamental misunderstanding and misapplication of Texas law by the SOAH ALJs. Therefore, there is a rational connection between Texas law and Medicaid policy and the modified conclusion

of law. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.,* 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

15. The prima facie evidence established that ADC committed program violations by failing to maintain certain patient records for the required five years. 1 Tex. Admin. Code §§ 371.1703(b)(5),(6); 371.1617(2)(A), (5)(A) and (G) (2005).

16. **ADC's failure to immediately provide HHSC-OIG with the documents and other items requested in writing, along with the extensive and overwhelming pattern of willful misrepresentations or fraud in ADC's HLD scoresheets, and ADC's billing for non-reimbursable services, should result in a continuing payment hold. Tex. Gov't Code § 531.102(g) (2011); Tex. Hum. Res. Code § 32.0291(c); 1 Tex. Code § 371.1617(2)(A) (2005); 2008 TMPPM at 1.2.3.**

(The SOAH ALJs' proposed CoL No. 16 stated: *These technical violations are very limited in number and are innocuous; therefore, they do not warrant a payment hold in this case.*)

Reason for Change:

The Executive Commissioner modifies Proposed CoL No. 16. Proposed CoL No. 16 is erroneous because (1) failure to provide records to HHSC-OIG is also a program violation; and (2) failure to provide records to HHSC-OIG is neither a technical violation nor innocuous, as HHSC-OIG decided to impose a payment hold on ADC based on the patient records it provided in response to HHSC-OIG's written request, and based on the fact that ADC failed to provide certain records at that time.

Because CoL No. 16 rests on faulty applications of law as well as erroneous interpretations of Medicaid policy the Executive Commissioner enjoys complete discretion to correct it. *Thompson*, 2013 WL 3791486, at *6; Tex. Gov't Code § 2001.058(e)(1). Further, the Executive Commissioner, and not the SOAH ALJs, determines the appropriate sanction if the law has been violated. *See Pierce v. Tex. Racing Comm'n*, 212 S.W.3d 745, 754 (Tex. App.—Austin 2006, pet. denied) (agency determines appropriate penalty to further agency's goals of compliance with state law (citing *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer,* 662 S.W.2d 953, 956 (Tex.1984)); *see also Tex. State Bd. of Dental Exam'rs v. Brown*, 281 S.W.3d 692, 697 (Tex. App.—Corpus Christi 2009, pet. denied) (agency, not ALJ, determines appropriate sanction).

The SOAH ALJs also erred to the extent that they relied on the *Harlingen Family Dental* decision, particularly, FoF 29, 31, and 33, for their understanding of the scope and limitations of Texas Medicaid policy. The Executive Commissioner disapproves of these findings, and expressly concludes that they were based on an incorrect interpretation and application of Texas law and Medicaid policy, and therefore, cannot be relied on. Tex. Gov't Code § 2001.058(e)(2).

Moreover, the proposed conclusion reflects a fundamental misinterpretation and misapplication of Texas law by the SOAH ALJs. Therefore, there is a rational connection between Texas law and Medicaid policy and the modified conclusion of law. *See, e.g., Heritage on the San Gabriel Homeowners Assoc. v. TCEQ*, 393 S.W.3d at 440-41; *State v. Mid-South Pavers, Inc.*, 246 S.W.3d at 728; *Levy v. Tex. State Bd. of Med. Exam'rs*, 966 S.W.2d at 816.

It is further ORDERED that the 100% payment hold instituted on April 4, 2012 shall remain in place until further order of the Executive Commissioner.

Signed this 2 day of May, 201_.

Kyle L. Janek, M.D.
Executive Commissioner