

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

May 7, 2015

Kyle Janek, Executive Commissioner  
Texas Health and Human Services Commission  
4900 North Lamar Avenue, 4<sup>th</sup> Floor  
Austin, Texas 78751

VIA INTERAGENCY

**RE: SOAH Docket No. 529-14-0799; Cheryl L. Rhoden, DDS, LLP, v. Texas Health and Human Services Commission — Office of Inspector General.**

Dear Commissioner Janek:

Please find enclosed a Proposal for Decision in this case. It contains our recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Hunter Burkhalter".

Hunter Burkhalter  
Administrative Law Judge

A handwritten signature in black ink, appearing to read "Beth Bierman".

Beth Bierman  
Administrative Law Judge

A handwritten signature in black ink, appearing to read "Casey A. Bell".

Casey A. Bell  
Administrative Law Judge

SOAH Docket No. 529-14-0799

Proposal for Decision

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HB/BB/CAB/mle/eh/nm

Enclosure

xc: Kevin Heyburn, Staff Attorney, Texas Health and Human Services Commission, 4900 N. Lamar, 4<sup>th</sup> Floor, Austin, Texas 78751 – **VIA INTERAGENCY**  
Carole Hurley, Director, Department of Legal -Hearings, Texas Health and Human Services Commission, Appeals Division, 8407 Wall Street, 300 Austin, Texas 78754 - (with 1 CD) – **VIA INTERAGENCY**  
Frederick J. McCutcheon, Wood, Boykin & Wolter, PC, 615 N. Upper Broadway, Ste. 1100, Corpus Christi, Texas 78477 – **VIA REGULAR MAIL**

SOAH DOCKET NO. 529-14-0799

CHERYL L. RHODEN, DDS, LLP           §           BEFORE THE STATE OFFICE  
v.                                           §                                           OF  
TEXAS HEALTH & HUMAN           §  
SERVICES COMMISSION,           §  
OFFICE OF INSPECTOR GENERAL   §           ADMINISTRATIVE HEARINGS

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**SOAH DOCKET NO. 529-14-0799**

<b>CHERYL L. RHODEN, DDS, LLP</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
	<b>§</b>	
<b>v.</b>	<b>§</b>	<b>OF</b>
	<b>§</b>	
<b>TEXAS HEALTH &amp; HUMAN SERVICES COMMISSION, OFFICE OF INSPECTOR GENERAL</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

Cheryl L. Rhoden, DDS, LLP (The Rhoden Group) requested a hearing to appeal the “payment hold” imposed upon it by the Office of Inspector General (OIG) within the Texas Health and Human Services Commission (HHSC) based on: (1) a purported credible allegation of fraud; and (2) the purported commission of Medicaid program violations.<sup>1</sup> The Administrative Law Judges (ALJs) recommend that: (1) the payment hold be lifted in its entirety and all payments held by OIG be remitted to The Rhoden Group immediately; (2) OIG reimburse The Rhoden Group for all of its costs, including attorneys’ fees, incurred in this matter through February 12, 2015 (in the amount of \$361,402.66); (3) OIG refund to The Rhoden Group the \$19,740 deposit made by the group for hearing costs; and (4) OIG be responsible for 100% of all costs charged by the State Office of Administrative Hearings (SOAH) and all costs of transcribing the hearing.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The hearing on the merits was held on October 20-24, 2014, before ALJs Casey Bell, Beth Bierman, and Hunter Burkhalter in Austin, Texas. The staff (Staff) of OIG was represented by attorney Kevin Heyburn. The Rhoden Group appeared and was represented by attorney Frederick J. McCutcheon. A follow-up evidentiary hearing was held on February 12, 2015, to admit evidence relating to the costs incurred by the parties during the prosecution of the case. A telephonic hearing was held on March 18, 2015, to discuss OIG’s motion to correct an error in

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<sup>1</sup> This case originally involved two components: (1) an appeal of the payment hold; and (2) a request for a finding of overpayment and recoupment (the Overpayment Claim). However, in Order No. 3 issued on March 27, 2014, the Overpayment Claim was severed and assigned SOAH Docket No. 529-14-2869. The Overpayment Claim remains pending before the State Office of Administrative Hearings (SOAH) as SOAH Docket No. 529-14-2869.

the transcript of the hearing on the merits. On March 23, 2015, the ALJs issued Order No. 19, which corrected an error in the transcript, and the record closed on that day.

Staff offered competent evidence establishing jurisdiction and that appropriate notice of the hearing was provided to The Rhoden Group. Those matters are set out in the Findings of Fact and Conclusions of Law.

## II. APPLICABLE LAW

HHSC is the state agency responsible for administering the federal Medicaid program in Texas.<sup>2</sup> OIG is a division within HHSC tasked with performing fraud and abuse investigation and enforcement functions.<sup>3</sup> In that role, OIG is empowered to, among other things, enforce federal and state laws related to Medicaid against any provider of Medicaid services in the state. A provider is generally defined as any person, such as a physician or dentist, who furnishes Medicaid services under an agreement or contract with HHSC.<sup>4</sup>

By law, OIG may, in limited circumstances, impose a payment hold upon a provider without prior notice or hearing. Pursuant to federal law, OIG must impose a payment hold if it “determines there is a credible allegation of fraud” against the provider.<sup>5</sup> Pursuant to the state law in effect during the relevant time period, OIG shall impose a payment hold to compel production of records or when requested by the state’s Medicaid fraud control unit,<sup>6</sup> and may impose a payment hold when it “has reliable evidence that the provider has committed fraud or willful misrepresentation regarding a claim for reimbursement.”<sup>7</sup>

“Fraud” is defined as “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

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<sup>2</sup> Tex. Gov’t Code § 531.021.

<sup>3</sup> Tex. Gov’t Code §§ 531.008(c)(2), 531.102.

<sup>4</sup> 1 Tex. Admin. Code § 371.1607(64).

<sup>5</sup> 42 C.F.R. § 455.23.

<sup>6</sup> Tex. Gov’t Code § 531.102(g)(2) (2005).

<sup>7</sup> Tex. Hum. Res. Code §32.0291(b) (in effect prior to September 1, 2013).

some other person, including any act that constitutes fraud under applicable federal or state law.”<sup>8</sup> Effective September 1, 2013, a definition of “credible allegation of fraud” was added to the statute. That term is now defined as follows:

[A]n allegation of fraud that has been verified by the state. An allegation is considered to be credible when the commission has:

- (A) verified that the allegation has indicia of reliability; and
- (B) reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis.<sup>9</sup>

HHSC rules regarding payment holds are found in 1 Texas Administrative Code chapter 371. Those rules were revised effective October 14, 2012. The rules in effect during the time period at issue in this case (2006-2011) provided that OIG could, without prior notice, impose a payment hold on a Medicaid provider in the following circumstances:

- (1) to compel production of records;
- (2) when requested by the Attorney General’s Medicaid Fraud Control Unit, if applicable;
- (3) in the instance of fraud or willful misrepresentation;
- (4) when the U.S. Health and Human Services imposes a payment hold . . . against the provider . . .;
- (5) *for any reason specified in §§ 371.1609, 371.1617, 371.1621 of this subchapter, or any other provisions delineated in these rules; or*
- (6) *for any other reason specified by statute or regulation.*<sup>10</sup>

The italicized language quoted above “clearly expanded” the circumstances under which a payment hold could be imposed upon a provider beyond those authorized by statute.<sup>11</sup> For example, the rule allowed OIG to impose a payment hold for “program violations” listed in rule 371.1617, which sets out a several-pages-long, “non-exclusive” list of acts and omissions constituting program violations. Included in the list of program violations for which a payment hold could be imposed were failing to retain records for the required amount of time; failing to comply with the terms of a Medicaid program contract or provider agreement; and “failing to

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<sup>8</sup> Tex. Gov’t Code § 531.1011(4).

<sup>9</sup> Tex. Gov’t Code § 531.1011(3) (2013).

<sup>10</sup> 1 Tex. Admin. Code § 371.1703(b) (2005) (emphasis added).

<sup>11</sup> *Harlingen Family Dentistry, P.C. v. Tex. Health and Hum. Svcs. Comm’n*, 452 S.W.3d 479, 483 (Tex. App.—Austin 2014, pet. filed) (hereinafter *Harlingen*).

comply with Medicaid or other [Health and Human Services] program policies, published Medicaid or other HHS bulletins, policy notification letters, provider policy or procedure manuals, contracts, statutes, rules, regulations, or interpretation.”<sup>12</sup> Under the rule, failure to comply with the Texas Medicaid Provider Procedures Manual (TMPPM) constitutes a program violation. A new TMPPM is issued each year and updates to the manual are issued twice a month (24 times per year). Thus, according to the rule, during the six-year period of the investigation in this case, any failure by The Rhoden Group to comply with six different TMPPMs and the 144 updates to the manuals could be deemed a program violation justifying a payment hold.<sup>13</sup>

In this case, OIG justifies its institution of a payment hold against The Rhoden Group on two grounds: (1) that the group committed various program violations; and (2) that there exists a credible allegation of fraud against the group. After the hearing on the merits concluded in this case, OIG’s rules authorizing imposition of a payment hold based upon program violations was struck down by the Texas Third Court of Appeals in *Harlingen*, a case that is now on appeal before the Texas Supreme Court.<sup>14</sup>

A provider against whom OIG has imposed a payment hold may request a hearing before SOAH to challenge the merits of the hold.<sup>15</sup> By statute, a provider must, before the hearing, advance security for a portion of the costs of the hearing.<sup>16</sup> The HHSC rule implementing this requirement directs that the provider must remit to OIG a deposit for one-half of the estimated costs charged by (1) SOAH and (2) the court reporter.<sup>17</sup> Following the conclusion of the hearing, an accounting of the funds will be provided by HHSC.<sup>18</sup> Unless the ALJ determines otherwise for good cause, a party to such a hearing is responsible for:

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<sup>12</sup> 1 Tex. Admin. Code § 371.1617(2)(A), (5)(A), (G) (2005).

<sup>13</sup> Tr. Vol. 1 at 121-23.

<sup>14</sup> *Harlingen*, 452 S.W.3d at 488.

<sup>15</sup> Tex. Gov’t Code § 531.102(g)(3).

<sup>16</sup> Tex. Gov’t Code § 531.102(g)(4).

<sup>17</sup> 1 Tex. Admin. Code § 371.1615(b)(5)(B).

<sup>18</sup> 1 Tex. Admin. Code § 371.1615(b)(5)(B)(vi).

- (1) one-half of the costs charged by SOAH;
- (2) one-half of the costs for transcribing the hearing;
- (3) the party's own costs, including costs of discovery, depositions, subpoenas, service of process and witness expenses, and investigation expenses; and
- (4) all other costs incurred by the party, including attorneys' fees.<sup>19</sup>

### III. DISCUSSION

#### A. Evidence

Cheryl Rhoden, DDS, is a dentist in private practice in Corpus Christi, Texas. She has been licensed to practice general dentistry in Texas since 1985.<sup>20</sup> She is the president of The Rhoden Group, a dental practice that includes Dr. Rhoden and other dentists.<sup>21</sup> It is the group, not Dr. Rhoden individually, that is the Petitioner in this case.

In late 1999, Dr. Rhoden, on behalf of The Rhoden Group, executed an HHSC Medicaid Provider Agreement (Agreement), which is the written contract that allowed The Rhoden Group to be a provider of Medicaid services (Provider).<sup>22</sup> The Agreement identifies The Rhoden Group as a practice in which all the dentists within the group will bill for Medicaid services under the group's Texas Provider Identifier (TPI) number. By signing the Agreement, The Rhoden Group agreed to abide by, among other things, the requirements of the TMPPM and all updates to the TMPPM.<sup>23</sup> Since 1999, and through various renewals of the Agreement, The Rhoden Group has remained enrolled as a Provider. One of the dentists employed by the group was Edith Rojas, DDS. She was employed at least as early as August 2003.<sup>24</sup> Dr. Rojas practices pediatric dentistry and is board-certified in that specialty.

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<sup>19</sup> Tex. Gov't Code § 531.102(g)(3); 1 Tex. Admin. Code § 169.7.

<sup>20</sup> Staff Ex. 1 at 3292.

<sup>21</sup> Tr. Vol. 4 at 93.

<sup>22</sup> Staff Ex. 1.

<sup>23</sup> Staff Ex. at 3332.

<sup>24</sup> Staff Ex. 2 at 3331; Staff Exs. 20, 21.

Dr. Rhoden explained that, from 2006 to 2011 (the years at issue in this case), The Rhoden Group had three offices, one on Alameda Street, one on Airline Road, and one on Weber Road in Corpus Christi. The Alameda Street and Airline Road locations were general dentistry offices, while the Weber Road location was a pediatric dentistry office. Dr. Rojas was the only dentist who worked at the Weber Road location. Dr. Rhoden estimated that roughly 70 to 75% of the patients at the Weber Road office were Medicaid patients, while Medicaid played a much smaller role at the other offices.<sup>25</sup> Dr. Rhoden testified that Dr. Rojas left The Rhoden Group in 2011 to open her own practice.<sup>26</sup>

In 2010, Diana Buxo, a senior investigator employed at OIG, was assigned to work on an investigation of The Rhoden Group. She testified that the investigation was initiated in response to a complaint from a mother of a patient who was treated by Dr. Rojas.<sup>27</sup> Staff never identified the mother, the patient, or the nature of the complaint. On November 14, 2011, Ms. Buxo sent a letter notifying The Rhoden Group that OIG was conducting an “investigation of certain claims filed by or on behalf of [The Rhoden Group] and paid by the Medicaid program.” In the letter, Ms. Buxo requested a copy of all records related to services rendered to 87 of the group’s patients from December 1, 2006, through August 31, 2011.<sup>28</sup>

Ms. Buxo testified as to her belief that the 87 patient files requested by OIG were selected using a “statistically valid random sample from [OIG’s] research and statistics department.”<sup>29</sup> She has no personal knowledge as to whether the sample was, in fact, statistically random. Rather, she was told by OIG’s research and statistics department that the sample was selected using a “statistically valid random tool.”<sup>30</sup> Ms. Buxo conceded that if the 87 files were not, in fact, a randomly selected sample, it might artificially skew the extrapolated rate of program violations in The Rhoden Group’s overall patient files. On this point, Ms. Buxo

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<sup>25</sup> Tr. Vol. 4 at 132-34.

<sup>26</sup> Tr. Vol. 4 at 95.

<sup>27</sup> Tr. Vol. 1 at 62-63, 141.

<sup>28</sup> Staff Ex. 3.

<sup>29</sup> Tr. Vol. 1 at 65.

<sup>30</sup> Tr. Vol. 1 at 93.

admitted that the lack of a true random sample would be a “huge deal.”<sup>31</sup> In its responses to discovery, Staff has maintained that the 87 files were selected using a “Statistically Valid Random Sample.”<sup>32</sup> The OIG employee in the research and statistics department who selected the 87 patient files was Brad Nelson.<sup>33</sup> Of the 87 patient files requested, The Rhoden Group produced to OIG 84 files. The other three files could not be found.<sup>34</sup>

William Steinhauer, DDS, is a pediatric dentist who practices in San Antonio, Texas. Roughly 75% of his practice is for Medicaid patients. He was retained by OIG to review The Rhoden Group’s dental records for errors. Ms. Buxo provided to Dr. Steinhauer the 84 patient files obtained from the group. However, for reasons that were not explained, Dr. Steinhauer was asked by OIG to review only 61 of the 84 patient files. Ms. Buxo explained that someone within OIG (but she did not know who) made the decision that Dr. Steinhauer should only review 61 of the 84 files provided to him.<sup>35</sup> He produced a report and addendum in which he identified 10 categories of program violations allegedly committed by dentists in The Rhoden Group.<sup>36</sup>

Dr. Steinhauer assumed, but does not know, that the 61 files he reviewed represented a randomly selected sample of The Rhoden Group’s patients. He explained that he was asked by OIG not to review all dental procedures in the 61 files. Rather, he was asked to review only specific procedures. Again, he assumed, but does not know, that the procedures that he was asked to review were selected by a “randomized sampling.”<sup>37</sup> Bonnie Van Sickle also testified at the hearing. She is the director of staff for The Rhoden Group. She reviewed the records and estimated that OIG asked Dr. Steinhauer to review less than half of the procedures performed by dentists at The Rhoden Group on the 61 patients.<sup>38</sup>

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<sup>31</sup> Tr. Vol. 1 at 142.

<sup>32</sup> Rhoden Ex. 15 at 132.

<sup>33</sup> Tr. Vol. 1 at 97.

<sup>34</sup> Tr. Vol. 1 at 69-70.

<sup>35</sup> Tr. Vol. 1 at 73-74, 130.

<sup>36</sup> Staff Exs. 31, 32. Dr. Steinhauer’s reports also identified a number of “additional observations,” but he testified that these additional observations did not rise to the level of Medicaid violations. Tr. Vol. 4 at 60-61.

<sup>37</sup> Tr. Vol. 3 at 171-77.

<sup>38</sup> Tr. Vol. 4 at 170-71.

Dr. Steinhauer testified extensively at the hearing. His testimony was limited to the issue of program violations. In fact, during the hearing, Staff repeatedly made it clear that Dr. Steinhauer was not asked to opine on the issue of whether a credible allegation of fraud existed in this case, but was instead asked only to evaluate whether The Rhoden Group had committed program violations. Indeed, Staff repeatedly objected to any question posed to Dr. Steinhauer regarding the issue of fraud.<sup>39</sup> Similarly, Dr. Steinhauer repeatedly testified that he had no knowledge as to whether there was a credible allegation of fraud in this case.<sup>40</sup> He also testified that he was never told by Staff that the procedures he was reviewing were suspect for fraud.<sup>41</sup>

Paul A. Kennedy Jr., DDS, testified on behalf of The Rhoden Group. Dr. Kennedy is also a pediatric dentist, with roughly 50% of his practice dedicated to Medicaid patients.<sup>42</sup> Like Dr. Steinhauer, Dr. Kennedy's testimony dealt exclusively with the question of whether or not The Rhoden Group committed program violations.

Ms. Van Sickle testified that when the payment hold was first put in place in September 2012, it was set by OIG at 100%, meaning that OIG withheld payment for 100% of the value of all Medicaid bills received from The Rhoden Group from all of its office locations after the date the hold was put in place. In November 2012, the amount of the payment hold was reduced to 50%. At that time, Staff justified the reduction by acknowledging that the alleged wrongdoings were committed by Dr. Rojas, who was no longer with The Rhoden Group.<sup>43</sup> At some later but unspecified date, the payment hold was further reduced to 40%, where it remains today. According to Ms. Van Sickle, OIG Staff agreed to the reduction to 40% only after a meeting in which The Rhoden Group showed Staff financial data demonstrating the dire straits

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<sup>39</sup> See, e.g., Tr. Vol. 2 at 159, 162.

<sup>40</sup> Tr. Vol. 2 at 191-92; Vol. 4 at 21.

<sup>41</sup> Tr. Vol. 4 at 42.

<sup>42</sup> Tr. Vol. 3 at 5.

<sup>43</sup> Rhoden Ex. 36.

that the payment hold was putting the group in. Moreover, as a condition of the drop to 40%, The Rhoden Group had to promise it would not declare bankruptcy.<sup>44</sup>

At all times, the payment hold has applied to all Medicaid services performed by The Rhoden Group by all of its providers at all of its locations. As of the date of this Proposal for Decision (PFD), OIG is holding the following monies pursuant to the payment hold:

- September to November 2012--100% of the Medicaid claims billed by The Rhoden Group;
- November 2012 to an unspecified date--50% of the Medicaid claims billed by The Rhoden Group; and
- The unspecified date to the present--40% of the Medicaid claims billed by The Rhoden Group.<sup>45</sup>

At some time after its investigation of The Rhoden Group, OIG initiated a separate investigation into Dr. Rojas based upon the same alleged program violations that are at issue in the present case (*i.e.*, the program violations alleged to have been committed by Dr. Rojas while she was still at The Rhoden Group).<sup>46</sup>

An evidentiary hearing was held on February 12, 2015, to admit evidence as to the costs incurred by each party in this case. The parties presented evidence of the following costs incurred by each party up to February 12, 2015, the date of the evidentiary hearing:

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<sup>44</sup> Tr. Vol. 4 at 182-84, 196-97.

<sup>45</sup> Tr. Vol. 4 at 213-15.

<sup>46</sup> Tr. Vol. 1 at 117-18.

**OIG's Costs (not including attorneys' fees)**

Copy costs	\$3,201.24 <sup>47</sup>
Deposition costs	\$11,806.45 <sup>48</sup>
Travel expenses	\$2,278.53 <sup>49</sup>
Postage	\$28.84 <sup>50</sup>
Expert witness fees (partial) <sup>51</sup>	\$3,420.00 <sup>52</sup>
Transcript costs	\$1,499.15 <sup>53</sup>
SOAH costs	\$30,165.00 <sup>54</sup>
Court reporter costs	\$8,145.80 <sup>55</sup>
<b>Total</b>	<b>\$60,545.01</b>

Steve Johnson, Trial Team Manager for OIG's Sanctions Department, testified on OIG's behalf. He explained that because OIG used in-house lawyers (as opposed to hiring outside counsel), the agency has no invoices for the time spent by OIG lawyers on this case. Moreover, the agency does not keep records of the hours spent by its attorneys on specific cases. However, according to Mr. Johnson, OIG estimated that its attorneys spent a total of 1,048 hours working on this case.<sup>56</sup>

<sup>47</sup> Staff Exs. R1, R8.

<sup>48</sup> Staff Exs. R2, R8.

<sup>49</sup> Staff Exs. R3, R8.

<sup>50</sup> Staff Exs. R4, R8.

<sup>51</sup> Staff's counsel explained that, as of February 11, 2015, its expert witness had not yet submitted all of his invoices for payment.

<sup>52</sup> Staff Exs. R5, R8.

<sup>53</sup> Staff Exs. R7, R8.

<sup>54</sup> Staff Exs. R6, R8.

<sup>55</sup> Staff Exs. R7, R8.

<sup>56</sup> Tr. from Feb. 12, 2015 hearing, at 21-23.

**The Rhoden Group's Costs (including attorneys' fees)**

Attorneys' fees	\$326,490.00 <sup>57</sup>
Expenses and costs	\$27,964.58 <sup>58</sup>
Travel expenses	\$6,948.08 <sup>59</sup>
<b>Total</b>	<b>\$361,402.66</b>

The Rhoden Group offered evidence that its attorneys' fees were reasonable and necessary.<sup>60</sup> Staff offered no evidence to the contrary.

**B. Analysis****1. Payment Hold Based on Program Violations**

The evidence in support of the payment hold dealt entirely with the issue of whether The Rhoden Group had committed program violations. However, pursuant to the *Harlingen* decision, OIG lacks legal authority to impose a payment hold based on program violations.<sup>61</sup> In other words, the *Harlingen* decision rendered Staff's evidence as to program violations irrelevant, and the payment hold imposed on The Rhoden Group cannot be upheld on this ground.

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<sup>57</sup> Rhoden Exs. P5, P7.

<sup>58</sup> Rhoden Exs. P5, P7

<sup>59</sup> Rhoden Ex. P6.

<sup>60</sup> Tr. from Feb. 12, 2015 hearing, at 43-45.

<sup>61</sup> *Harlingen*, 452 S.W.3d at 488. Staff argues that, because HHSC/OIG has, in the *Harlingen* case, filed a petition for review before the Texas Supreme Court, "the challenged HHSC rules remain in effect, and the Third Court of Appeals decision does not at present have an impact on this case." Staff's Post-Hearing Brief at 64. Staff does not cite to any legal authority for this proposition. The ALJs disagree with Staff's legal argument and conclude that the Court of Appeals' decision is binding even though it is pending further appeal. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

## 2. Payment Hold Based on a Credible Allegation of Fraud

Again, the evidence in this case dealt entirely with the issue of whether The Rhoden Group had committed program violations. No testimony was offered on the issue of fraud. Throughout the hearing, Staff's witnesses and counsel continually and assertively disclaimed any notion that the witnesses had anything to say on the issue of fraud. No questions were asked of The Rhoden Group's witnesses on the issue of fraud.

Staff's premise as to the issue of fraud only became clear when it filed its post-hearing briefs, which occurred after the *Harlingen* decision was issued. In those briefs, Staff argued for the first time that fraud on the part of The Rhoden Group is shown by the quantity of program violations alleged to have been committed by the group.<sup>62</sup> Staff asserts, without any evidence in the record to support the claim, that "it is 'not possible' to observe this pattern and frequency [of program violations] in nature," and "the fact that Rhoden consistently committed the same program violations constitutes reliable, verified evidence with an indicia of reliability that . . . supports a sufficiently credible allegation of fraud to mandate a payment hold."<sup>63</sup>

Staff's premise is that the quantity of program violations is so vast that it could not possibly be caused by anything other than fraud. Yet the evidence does not remotely support this claim. Even if one assumed that all deficiencies identified by Dr. Steinhauer were, in fact, program violations, the total value of those violations would be in the range of \$26,000.<sup>64</sup> In other words, Staff's best evidence would be that, over the course of six years, a dental practice with multiple dentists working at three locations and generating millions of dollars of work, committed program violations totaling \$26,000. This does not constitute credible evidence of fraud. Moreover, OIG's rule in effect during the relevant time period expressly recognized that "not all actions resulting in overpayment to a provider [*i.e.*, program violations] are necessarily

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<sup>62</sup> See, Staff's Post-Hearing Brief at 70-71.

<sup>63</sup> See, Staff's Post-Hearing Brief at 71.

<sup>64</sup> Tr. Vol. 5 at 55-56. Staff never identified a specific monetary value of the alleged program violations discussed by Dr. Steinhauer.

fraudulent.”<sup>65</sup> Staff made no effort to explain why the specific program violations alleged here rose to the level of fraud.

“Fraud” is defined as “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.”<sup>66</sup> When proving fraud, it generally must be shown that the party making the misrepresentation knew it was false or made the misrepresentation without knowing if it was true or not.<sup>67</sup> There is no evidence in the record that any of the alleged program violations were caused by intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person, and Staff made no effort to develop such evidence. Indeed, when specifically asked whether Dr. Rojas intended to commit various program violations, Dr. Steinhauer declined to offer any opinion.<sup>68</sup> Of the program violations alleged by Staff, more than 99% were committed by Dr. Rojas,<sup>69</sup> but no effort was made to call Dr. Rojas as a witness or ask her questions about the alleged violations or her knowledge or intent as to them.

Moreover, there is no evidence of an allegation of fraud in the first place, credible or otherwise. Ms. Buxo testified that OIG initiated an investigation of The Rhoden Group in response to a complaint from a mother of a patient who was treated by Dr. Rojas.<sup>70</sup> However, Staff never identified the mother, the patient, or the nature of the complaint. There is no indication that the mother alleged fraud. Indeed, as is clear from Dr. Steinhauer’s testimony, the investigation focused solely on program violations.

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<sup>65</sup> 1 Tex. Admin. Code § 371.1603(f) (2005).

<sup>66</sup> Tex. Gov’t Code § 531.1011(4).

<sup>67</sup> *In Re: Internat’l Profit Associates, Inc.*, 274 S.W.3d 672, 678 (Tex. 2009).

<sup>68</sup> Tr. Vol. 2 at 199.

<sup>69</sup> Tr. Vol. 4 at 180-81.

<sup>70</sup> Tr. Vol. 1 at 62-63, 141.

There are other indicia in the record suggesting that OIG is aware that no fraud exists in this case. For example, in 2012 OIG referred the case against The Rhoden Group to the Medicaid Fraud Control Unit (MFCU), a unit within the Texas Attorney General's Office tasked with prosecuting, civilly and/or criminally, Medicaid providers who engage in fraud. Pursuant to the rules in effect during the relevant time period, OIG was obligated to refer all cases of suspected Medicaid fraud to MFCU.<sup>71</sup> In this case, MFCU reviewed the file and determined not to investigate The Rhoden Group any further.<sup>72</sup>

Simply put, Staff presented no evidence to support the claim of a credible allegation of fraud. The payment hold must be discontinued and all funds held by OIG must be released to The Rhoden Group immediately.<sup>73</sup>

### 3. Allocation of Costs

The Rhoden Group was obligated to advance security for certain costs of the hearing.<sup>74</sup> Specifically, Order No. 6 directed The Rhoden Group to deposit \$19,740 with OIG, which represented an estimate of one-half of the costs charged by SOAH and the court reporter for the hearing. The group complied with that order, submitting deposit payments to OIG in July and September 2014.<sup>75</sup>

The statute pursuant to which the payment hold hearing was held specifies that costs are to be allocated between the parties as follows:

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<sup>71</sup> 1 Tex. Admin. Code § 371.1603(i) (2005).

<sup>72</sup> Rhoden Ex. 21 at 234.

<sup>73</sup> Staff asserts that the ALJs may only rule prospectively and may not address the issue of whether funds already held under the payment hold should be released. See Staff's Post-Hearing Brief at 65. The ALJs disagree. Pursuant to *Janek v. Harlingen Family Dentistry*, 451 S.W.3d 97 (Tex. App.—Austin 2014, pet. filed), it is clear that if OIG lacked a legitimate basis for the payment hold, then the agency's right to hold funds applies not only to funds that might be held in the future, but also to funds that were held in the past.

<sup>74</sup> Tex. Gov't Code § 531.102(g)(4); 1 Tex. Admin. Code § 371.1615(b)(5)(B).

<sup>75</sup> Rhoden Exs. R8, P2.

*Unless otherwise determined by the Administrative Law Judge for good cause* . . . , the state and the provider shall each be responsible for:

- (A) one-half of the costs charged by [SOAH];
- (B) one-half of the costs for transcribing the hearing;
- (C) the party's own costs related to the hearing, including the costs associated with preparation for the hearing, discovery, depositions, and subpoenas, service of process and witness expenses, travel expenses, and investigation expenses; and
- (D) all other costs associated with the hearing that are incurred by the party, including attorneys' fees.<sup>76</sup>

OIG's rules implementing this statutory requirement specify that, upon conclusion of the proceeding, an accounting of hearing funds expended will be made.

The ALJs have determined that good cause exists to allocate costs and fees in a manner that differs from the standard allocation set forth in the statute quoted above. Specifically, the ALJs find that OIG should be responsible for: (1) 100% of the costs charged by SOAH, the costs charged by the court reporter, and the costs incurred by OIG (including its attorneys' fees); and (2) 100% of The Rhoden Group's costs (including its attorneys' fees) incurred to February 12, 2015.<sup>77</sup> The ALJs reach this conclusion because, in a number of different ways, various actions of HHSC and OIG greatly contributed to the costs and burdens of this case.

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<sup>76</sup> Tex. Gov't Code § 531.102(g)(3) (emphasis added). As a general proposition, a party cannot recover attorneys' fees from an opposing party unless permitted by statute or by contract between the parties. Moreover, authority to award attorneys' fees may not be inferred from a statute. Rather, the statute in question must provide express authorization. *Tucker v. Thomas*, 419 S.W.3d 292, 297 (Tex. 2013); *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91 (Tex. 1999). In this case, Tex. Gov't Code § 531.102(g)(3) expressly authorizes the ALJs to hold HHSC responsible for The Rhoden Group's attorneys' fees for good cause.

<sup>77</sup> Staff argues that the ALJs lack the legal authority to order OIG to pay The Rhoden Group's costs and attorneys' fees because the legislature has not waived its sovereign immunity from liability for such costs. See Staff's Response to Petitioner's Motion for Costs Including Sanction. The ALJs disagree. A statute should not be construed as a waiver of sovereign immunity "unless the waiver is effected by clear and unambiguous language." Tex. Gov't Code § 311.034. In determining whether a statute's language provides a sufficiently clear and unambiguous waiver, the Texas Supreme Court has declared that a statute will be found to contain a waiver of sovereign immunity when the statutory language in question "would be meaningless unless immunity were waived." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003) (citing *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8 (Tex. 2000)). In the present case, Tex. Gov't Code § 531.102(g)(3) provides that, "*unless otherwise determined by the administrative law judge for good cause* at an expedited administrative hearing, *the state and the provider shall each be responsible for*" half of the costs charged by SOAH, half of the transcribing costs, each party's own costs, and each party's attorneys' fees. The italicized verbiage would be meaningless unless it meant that the state's immunity from liability for all such costs was waived.

First, OIG prosecuted this case exclusively on the premise that The Rhoden Group had committed program violations, and all of the week-long hearing was devoted to proving or disproving the existence of program violations. All of this effort was for naught, however, because as discussed above, HHSC exceeded its statutory authority when it adopted the rules allowing it to impose a payment hold based on program violations. In other words, this case involved an attempt by OIG to enforce rules that have been determined to be invalid, all to The Rhoden Group's detriment.

Second, the preponderance of the evidence establishes that the actions and omissions of HHSC and/or its agent, the Texas Medicaid Health Care Partnership (TMHP), served to unnecessarily increase the number of program violations alleged against The Rhoden Group. As explained by Dr. Kennedy, beginning in 2007 HHSC contractually arranged to have TMHP manage the handling and payment of Medicaid claims on HHSC's behalf. The preponderance of evidence in this case establishes that TMHP did a poor job of managing the program. According to Dr. Kennedy, there was abuse and neglect within TMHP, and HHSC did a poor job of overseeing TMHP. Dr. Kennedy described the whole program as "bad." He explained that although there were rules in place, TMHP was lax in enforcing them, such that almost no claims submitted by dentists were ever rejected. Staff never challenged Dr. Kennedy's testimony on this point.

The evidence further establishes that for a number of years (which happen to coincide with the years at issue in this case), HHSC and OIG were aware that TMHP was doing a poor job, yet the agency failed to act decisively to ensure that its obligation to manage Medicaid in Texas was being properly carried out by its agent. For example, Dr. Kennedy testified that, on multiple occasions, he and others made suggestions to HHSC that the program needed to be improved, to no avail. Moreover, in 2008 the federal government commissioned an audit of TMHP's work in the context of its management of orthodontia work. The audit found a number of faults with TMHP.<sup>78</sup> Then, in 2012 a follow-up audit was performed, which again resulted in a number of criticisms of TMHP's work, such as "TMHP is not hiring medically knowledgeable

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<sup>78</sup> Rhoden Ex. 22 at 239-53.

personnel.”<sup>79</sup> Nevertheless, as admitted to by Doug Wilson, the Inspector General, OIG continued to renew TMHP’s contract.<sup>80</sup> Ultimately, the State of Texas filed a lawsuit against the companies comprising TMHP, in which the state now seeks to recoup Medicaid funds allegedly improperly paid by TMHP for orthodontia work.<sup>81</sup> In March 2012, HHSC terminated the contract with TMHP and arranged to have various managed care organizations manage the handling and payment of claims.<sup>82</sup>

There is no evidence that The Rhoden Group was aware of the problems at TMHP. Rather, Dr. Rhoden testified that she was merely aware that TMHP reviewed Medicaid reimbursement claims from providers, and that if a claim was inappropriate it would be declined. She was also aware that TMHP was the source that providers were to call if they had a question about the Medicaid billing process.<sup>83</sup> Similarly, Ms. Van Sickle understood that TMHP was reviewing and approving Medicaid bills. If there had been problems with the bills (such as program violations), The Rhoden Group would have expected TMHP to notify the group.<sup>84</sup>

Staff contends that TMHP’s poor performance is irrelevant to this case, asserting, “[t]he mere fact that TMHP approved [The Rhoden Group’s] claims does not prove the claims were valid.”<sup>85</sup> This misses the point. The significance of TMHP’s poor performance is that it prevented The Rhoden Group from learning about any possible defects in the claims it submitted much sooner. In its briefing, Staff places great emphasis on the number of program violations alleged to have been committed by The Rhoden Group. Indeed, as to the issue of fraud, Staff’s entire premise is that fraud is shown merely by the *quantity* of alleged program violations. For example, Staff stresses that Dr. Steinhauer identified 231 instances of inadequate or incomplete documentation in patient records.<sup>86</sup> Yet if HHSC had acted sooner to replace TMHP or

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<sup>79</sup> Rhoden Ex. 22 at 254-85.

<sup>80</sup> Rhoden Ex. 31.

<sup>81</sup> Rhoden Ex. 9.

<sup>82</sup> Tr. Vol. 3 at 25-28.

<sup>83</sup> Tr. Vol. 4 at 99-100.

<sup>84</sup> Tr. Vol. 4 at 203-04.

<sup>85</sup> Staff’s Post Hearing Brief at 21.

<sup>86</sup> See Staff’s Post-Hearing Brief at 70-71.

otherwise improve its management of the Medicaid program, the number of program violations now alleged against The Rhoden Group would be smaller. For example, if over the years at issue (2006-2011), The Rhoden Group unknowingly submitted claims that contained inadequate or incomplete documentation and TMHP repeatedly failed to catch the errors, then The Rhoden Group would have had no reason to be aware of the problem. If, on the other hand, TMHP had required the group to correct the errors, then it is reasonable to conclude that the group would have committed fewer such errors going forward.

A third reason for the ALJs' decision as to allocate costs to OIG is that the payment hold has inflicted considerable hardship on The Rhoden Group. Ms. Van Sickle explained that the payment hold has been "pretty rough" financially for the group. According to Ms. Van Sickle, Dr. Rhoden typically does not work full-time because she suffers from rheumatoid arthritis. However, in recent months Dr. Rhoden has been working full-time because she has been "trying to keep everyone employed." It has been physically difficult for Dr. Rhoden to maintain a full-time schedule. After Dr. Rojas' departure, the group was in the final stages of hiring a new dentist to work at the Weber Road location. A few days after the group had completed the paperwork to add the new dentist as a Medicaid provider, it received notice that OIG was imposing a 100% payment hold on the group. Because Medicaid is a program largely targeted at children, and the Weber Road location treats children exclusively, the payment hold made it impossible for the group to hire the replacement dentist. Nevertheless, despite the payment hold, the group has continued to treat the underserved children that the Medicaid program is designed to protect.<sup>87</sup>

A fourth reason for the ALJs' decision as to cost allocation is that the monetary value of the payment holds imposed by OIG is out of all proportion to the alleged violations to be remedied. This issue is more than merely academic because the ALJs have the authority to make a finding as to the appropriate size of a payment hold.<sup>88</sup> At the hearing, counsel for the parties stipulated that the total value of all alleged program violations identified by Dr. Steinhauer is in

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<sup>87</sup> Tr. Vol. 4 at 153-55.

<sup>88</sup> 1 Tex. Admin. Code § 371.1709(e)(3)(l).

the range of \$26,000.<sup>89</sup> As of the date of the hearing, however, more than \$300,000 had been withheld from The Rhoden Group pursuant to the payment hold, and the amount continues to grow.<sup>90</sup> Moreover, OIG has imposed a payment hold against Dr. Rojas at her new practice for the same \$26,000 of alleged program violations. That is, the payment hold against Dr. Rojas' new practice is based on the program violations alleged to have been committed by Dr. Rojas while she was still at The Rhoden Group. The payment hold against Dr. Rojas is at 100%. As of August 19, 2014, approximately \$374,000 had been withheld from Dr. Rojas and the amount, presumably, continues to grow.<sup>91</sup>

The only logical way to justify a payment hold that is more than 10 times greater than the value of the alleged violations (or 26 times greater if the payment hold against Dr. Rojas is also taken into account) would be if Staff were to argue that the roughly \$26,000 in alleged program violations identified by Dr. Steinhauer should be extrapolated to the entire population of The Rhoden Group's patients, using a random sampling method. This is precisely what Staff is doing in the severed Overpayment Claim against The Rhoden Group, in which they use extrapolation to argue that they should recoup a much larger amount of money from the group.<sup>92</sup> This is why Ms. Buxo was at pains to testify that the patient files requested by OIG were selected using a "statistically valid random sample from the [OIG] research and statistics department."<sup>93</sup> In its post-hearing briefing, Staff continues to make the same argument.<sup>94</sup> Ms. Buxo conceded that if the 87 files were not, in fact, a randomly selected sample, it would be a "huge deal" because it could artificially skew the extrapolated rate of program violations in The Rhoden Group's overall patient files.<sup>95</sup>

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<sup>89</sup> Tr. Vol. 5 at 55-56.

<sup>90</sup> Tr. Vol. 5 at 56.

<sup>91</sup> Rhoden Ex. 21 at 233.

<sup>92</sup> Staff's Post Hearing Brief at 60-61. The amount Staff claims it is entitled to recoup from The Rhoden Group has varied considerably over time. In December 2012, Staff asserted that the amount totaled \$3,225,669. By August 2013, the amount claimed by Staff had dropped to \$2,442,800. By May 8, 2014, the amount had dropped still further, to \$2,007,429. See Staff's Formal Complaint and attachments thereto in SOAH Docket No. 529-14-2869, the Overpayment Claim.

<sup>93</sup> Tr. Vol. 1 at 65.

<sup>94</sup> Staff's Post Hearing Brief at 11.

<sup>95</sup> Tr. Vol. 1 at 142.

Yet there is considerable evidence in this case to support the conclusion that the 87 patient files selected *do not* represent a statistically valid random sample of The Rhoden Group's patient files. Ms. Buxo testified that the employee in OIG's research and statistics department who selected the 87 patient files was Brad Nelson.<sup>96</sup> At the time, Mr. Nelson was employed as an actuary in the department.<sup>97</sup> His job was, among other things, to verify and validate random samples used in OIG Medicaid investigations.<sup>98</sup> According to Mr. Nelson, from 2008 through at least September 2012, his department used a Microsoft Excel random sample generator to select its random samples.<sup>99</sup> At the hearing, The Rhoden Group called as an expert witness Bruce McCullough, PhD., a statistics professor at Drexel University. He testified about the inadequacies of Microsoft Excel as a random number generator. Dr. McCullough has published a number of articles in peer-reviewed statistical journals explaining why Microsoft's Excel program should not be used for statistical calculations.<sup>100</sup> Dr. McCullough testified, convincingly, that "Excel cannot be used to generate a reliable random sample for the purpose of extrapolating to a population" because the program "is a bad random number generator."<sup>101</sup> According to Dr. McCullough, Microsoft itself has, to a limited extent, admitted that there are problems with Excel's ability to generate random samples.<sup>102</sup> Staff presented no evidence to refute Dr. McCullough's claims or to otherwise establish that the patient files reviewed by Dr. Steinhauer were selected as a statistically valid random sample. Moreover, in July 2014 HHSC terminated Mr. Nelson's employment based upon its stated belief that he had falsified an allegedly random sample used by OIG in an investigation of another dental group.<sup>103</sup>

A fifth reason for the ALJs' decision as to the allocation of costs stems from the fact that OIG's primary reason for the payment hold ceased to exist when Dr. Rojas left The Rhoden Group. Because a purpose of a payment hold is to protect Medicaid from potential future abuse

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<sup>96</sup> Tr. Vol. 1 at 97

<sup>97</sup> Rhoden Ex. 43 at 11.

<sup>98</sup> Rhoden Ex. 43 at 26.

<sup>99</sup> Rhoden Ex. 43 at 31-33.

<sup>100</sup> See, e.g., Rhoden Ex. 45 at Attachment Exs. 6, 7, 8, 9, 10.

<sup>101</sup> Tr. Vol. 5 at 59

<sup>102</sup> Tr. Vol. 5 at 60-61; see also, Rhoden Ex. 45 at Attachment Ex. 3.

<sup>103</sup> Rhoden Ex. 44.

by a provider under investigation, OIG has chosen the wrong target in this case. The payment hold was instituted against The Rhoden Group months after Dr. Rojas had already left the group. Yet, of the program violations alleged by Staff, 99.4% were committed by Dr. Rojas, while 0.6% were committed by Dr. Rhoden.<sup>104</sup> Because Dr. Rojas left The Rhoden Group in 2011, there was zero chance that The Rhoden Group would continue to submit improper Medicaid bills from Dr. Rojas to HHSC.

The ALJs find that the costs, expenses, and attorneys' fees incurred by The Rhoden Group through February 12, 2015, were reasonable and necessary, given the scope and complexity of this case. The ALJs note that, in addition to the week-long hearing, there were numerous pre-hearing matters (such as protracted discovery disputes initiated primarily by Staff, and multiple motions for summary disposition filed by Staff) all of which necessitated substantial time and effort on behalf of The Rhoden Group's counsel. The ALJs also note that The Rhoden Group's costs (not including attorneys' fees) are substantially in the same range as OIG's. An apples-to-apples comparison of the attorneys' fees paid by each party is not possible because OIG did not pay such fees out-of-pocket. Nevertheless, the number of hours expended by both parties appears to be roughly comparable, further buttressing the ALJs' conclusion that The Rhoden Group's fees are reasonable.

#### IV. CONCLUSION

In light of the foregoing, the ALJs recommend the following:

- The payment hold should be lifted in its entirety and all payments held by HHSC/OIG should be remitted to The Rhoden Group immediately;
- HHSC/OIG should reimburse The Rhoden Group for all of its costs, including attorneys' fees, incurred in this matter through February 12, 2015, in the amount of \$361,402.66;
- HHSC/OIG should refund The Rhoden Group's deposit for one-half of the costs charged by SOAH and the court reporter, in the amount of \$19,740; and

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<sup>104</sup> Tr. Vol. 4 at 180-81.

- HHSC/OIG should pay 100% of all costs charged by SOAH and all costs of transcribing the hearing.

In support of these recommendations, the ALJs make the following Findings of Fact and Conclusions of Law.

## V. FINDINGS OF FACT

1. Cheryl Rhoden, DDS, is a dentist in private practice in Corpus Christi, Texas.
2. Dr. Rhoden is the president of Cheryl L. Rhoden, LLP (The Rhoden Group), a dental practice that includes Dr. Rhoden and other dentists.
3. The Texas Health and Human Services Commission (HHSC) is the state agency in Texas responsible for administering the federal Medicaid program.
4. The Office of Inspector General (OIG) is a division within HHSC tasked with performing fraud and abuse investigation, and enforcement functions.
5. Since at least 1999, The Rhoden Group has been a Medicaid “provider,” meaning that dentists in the group furnish Medicaid services pursuant to an agreement with HHSC.
6. Edith Rojas, DDS, is a pediatric dentist who, between roughly August 2003 and sometime in 2011, worked for The Rhoden Group.
7. During the years at issue in this case (2006-2011), The Rhoden Group maintained three dentist offices, one on Alameda Street, one on Airline Road, and one on Weber Road in Corpus Christi.
8. The Weber Road location focused on pediatric dentistry, and roughly 70% of the patients at that location were Medicaid patients.
9. The Alameda Street and Airline Road locations focused on general dentistry, and only a small portion of the patients at those locations were Medicaid patients.
10. Dr. Rojas is the only dentist from the group who worked at the Weber Road location.
11. Dr. Rojas left The Rhoden Group in 2011 to open her own dental practice.
12. On November 14, 2011, the staff (Staff) at OIG advised The Rhoden Group that it was under investigation, and asked the group to produce 87 patient files.
13. Staff failed to prove that the 87 patient files requested by OIG represent a statistically valid random sample of The Rhoden Group’s patient files.

14. William Steinhauer, DDS, is a pediatric dentist who was asked by Staff to review The Rhoden Group's patient files for errors. For unknown reasons, Staff asked Dr. Steinhauer to review only 61 of the 87 patient files requested from the group. Further, Dr. Steinhauer was not asked to review all dental procedures in the 61 files. Rather, he was asked to review only a small subset of the procedures reflected in the files.
15. Staff failed to prove that the 61 files and the specific procedures reviewed by Dr. Steinhauer represent a statistically valid random sample of The Rhoden Group's patient files and procedures.
16. Dr. Steinhauer was retained by Staff solely to examine whether The Rhoden Group had committed program violations. He was not asked to evaluate whether The Rhoden Group had engaged in fraud and he had no opinions on that topic.
17. In September 2012, after Dr. Rojas had ceased working there, OIG instituted a 100% payment hold against The Rhoden Group, meaning that OIG withheld payment of 100% of the value of all Medicaid bills submitted by the group.
18. In November 2012, the amount of the payment hold was reduced to 50%.
19. At some later but unspecified date, OIG reduced the amount of the payment hold to 40%, where it remains today.
20. At all times, the payment hold has applied to all Medicaid services performed by the group, by all of its providers, for all patients, procedures, and office locations.
21. As of the date of this Proposal for Decision (PFD), OIG is holding the following monies pursuant to the payment hold:
  - September to November 2012—100% of the Medicaid claims billed by The Rhoden Group;
  - November 2012 to an unspecified date—50% of the Medicaid claims billed by The Rhoden Group; and
  - The unspecified date to the present—40% of the Medicaid claims billed by The Rhoden Group.
22. As of October 2014, more than \$300,000 had been withheld from The Rhoden Group as a result of the payment hold, and the amount has continued to grow since then.
23. The payment hold has inflicted significant economic hardship on The Rhoden Group.
24. At some time after its investigation of The Rhoden Group, OIG initiated a separate investigation of Dr. Rojas based upon the same alleged program violations that are at issue in this case (i.e., the program violations alleged to have been committed by Dr. Rojas while she was still at The Rhoden Group).

25. OIG has instituted a 100% payment hold against Dr. Rojas at her new practice for the same alleged violations that OIG relies on to justify the payment hold against The Rhoden Group. As of August 19, 2014, more than \$374,000 had been withheld from Dr. Rojas as a result of the payment hold against her, and the amount continues to grow.
26. In his review of the patient files, Dr. Steinhauer identified a number of alleged program violations by The Rhoden Group. More than 99% of the alleged violations identified by Dr. Steinhauer were committed by Dr. Rojas.
27. Assuming (without deciding) that all deficiencies identified by Dr. Steinhauer were, in fact, program violations, the total value of the violations would be in the range of \$26,000.
28. The monetary value of the payment holds against The Rhoden Group and Dr. Rojas is greatly out of proportion to the alleged violations to be remedied.
29. Dr. Rojas did not testify at the hearing in this matter.
30. Through February 12, 2015, The Rhoden Group had incurred costs, expenses, and attorneys' fees in this matter totaling \$361,402.66 (of which \$326,490 represent attorneys' fees).
31. The costs, expenses, and attorneys' fees incurred by The Rhoden Group through February 12, 2015, were reasonable and necessary.
32. As ordered to do by the ALJs, The Rhoden Group deposited with OIG \$19,740 as security for certain hearing costs.
33. The evidence presented in this case dealt exclusively with the issue of whether The Rhoden Group committed program violations.
34. No testimony was offered or sought on the issue of whether a credible allegation of fraud existed against The Rhoden Group.
35. There is no evidence in the record that any of the alleged program violations were caused by intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person.
36. There is no evidence of an allegation of fraud against The Rhoden Group, credible or otherwise.
37. In 2012, OIG referred the case against The Rhoden Group to the Medicaid Fraud Control Unit (MFCU), a unit within the Texas Attorney General's Office tasked with prosecuting, civilly and/or criminally, Medicaid providers who engage in fraud. MFCU reviewed the file and determined not to investigate The Rhoden Group any further.

38. There is no evidence to support the claim of a credible allegation of fraud against The Rhoden Group.
39. There is no evidence that is credible, reliable, or verifying, or that has indicia of reliability, that The Rhoden Group engaged in fraud.
40. Staff failed to prove that there is a credible allegation of fraud against The Rhoden Group.
41. In 2007, HHSC contractually arranged to have the Texas Medicaid Health Care Partnership (TMHP) manage the handling and payment of Medicaid claims in Texas on HHSC's behalf.
42. During the years 2006-2011, TMHP did a poor job of reviewing The Rhoden Group's claims for program violations.
43. During many of the years at issue in this case, HHSC failed to ensure that its obligation to manage Medicaid in Texas was being properly carried out on its behalf by its agent, TMHP.
44. If TMHP had thoroughly and properly reviewed all of The Rhoden Group's claims, then the number of program violations now alleged against The Rhoden Group would be smaller.
45. OIG's primary reason for the payment hold against The Rhoden Group ceased to exist when Dr. Rojas left the group.
46. The Rhoden Group timely requested an administrative appeal of the imposition of the payment hold.
47. OIG issued a Notice of Hearing to The Rhoden Group containing 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.
48. The hearing on the merits was held on October 20-24, 2014, in the William P. Clements Building, 300 West 15th Street, Austin, Texas. Staff was represented by attorney Kevin Heyburn. The Rhoden Group was represented by attorney Frederick J. McCutcheon.
49. A follow-up evidentiary hearing was held on February 12, 2015, to admit evidence relating to the costs incurred by the parties in the case.
50. A telephonic hearing was held on March 18, 2015, to discuss OIG's motion to correct an error in the hearing transcript.
51. On March 23, 2015, the ALJs issued Order No. 19, which corrected an error in the transcript, and the record closed on that day.

## VI. CONCLUSIONS OF LAW

1. HHSC/OIG has jurisdiction over this matter. Tex. Hum. Res. Code chs. 32 and 36; Tex. Gov't Code ch. 531.
2. The State Office of Administrative Hearings has authority to hear this matter and issue a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. The Rhoden Group received timely and adequate notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052.
4. OIG may institute a payment hold on the payment of Medicaid claims for reimbursement submitted by a provider if there exists a credible allegation of fraud against the provider. Tex. Hum. Res. Code § 32.0291(b) (2005); 42 C.F.R. § 455.23 (2005).
5. HHSC-OIG does not have the authority to institute a payment hold based on the commission of program violations by a provider, and the payment hold in this case cannot be sustained on those grounds. *Harlingen Family Dentistry, P.C. v. Tex. Health and Hum. Svcs. Comm'n*, 452 S.W.3d 479, 483 (Tex. App.—Austin 2014, pet. filed).
6. OIG had the burden of proving that there existed a credible allegation of fraud to support the payment hold. Tex. Hum. Res. Code § 32.0291 (2005); Tex. Gov't Code § 531.102 (2005); 42 C.F.R. § 455.23; 1 Tex. Admin. Code § 155.427.
7. There is no credible allegation of fraud to support a payment hold against The Rhoden Group.
8. If the ALJs find good cause to do so, the following costs may be allocated to one party or the other: (a) the costs charged by the State Office of Administrative Hearings (SOAH); (b) the costs for transcribing the hearing; (c) the party's own costs related to the hearing, including the costs associated with preparation for the hearing, discovery, depositions, and subpoenas, service of process and witness expenses, travel expenses, and investigation expenses; and (d) all other costs associated with the hearing that are incurred by the party, including attorneys' fees. Tex. Gov't Code § 531.102(g)(3).
9. Good cause exists to allocate costs and fees such that OIG shall be responsible for: (1) 100% of the costs charged by SOAH, the costs charged by the court reporter, and the costs incurred by OIG (including its attorneys' fees); and (2) 100% of The Rhoden Group's costs (including its attorneys' fees) incurred to February 12, 2015.
10. The payment hold should be lifted in its entirety and all payments held by HHSC/OIG should be remitted to The Rhoden Group immediately. *Janek v. Harlingen Family Dentistry*, 451 S.W.3d 97 (Tex. App.—Austin 2014, pet. filed).

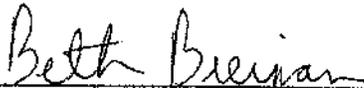
11. HHSC/OIG should reimburse The Rhoden Group for all of its costs, including attorneys' fees, incurred in this matter through February 12, 2015, in the amount of \$361,402.66.
12. HHSC/OIG should refund The Rhoden Group's deposit for one-half of the costs charged by SOAH and the court reporter, in the amount of \$19,740.

SIGNED May 7, 2015.



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HUNTER BURKHALTER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS



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BETH BIERMAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS



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CASEY A. BELL  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS