CAUSE NO. D-1-GN-13-001557

HARLINGEN FAMILY DENTISTRY, P.C.,	§	**IN THE DISTRICT COURT**
Petitioner,	§	
VS.	§	
DR. KYLE JANEK, Executive Commissioner of Texas Health and Human Services Commission, and DOUG WILSON, Inspector General, for the Office of the Inspector General,	§	**353rd JUDICIAL DISTRICT**
Respondents.	§	**TRAVIS COUNTY, TEXAS**

PLEA TO THE JURISDICTION, GENERAL DENIAL, AND AFFIRMATIVE DEFENSE OF DR. KYLE JANEK AND DOUG WILSON

COME NOW Dr. Kyle Janek ("Janek"), Executive Commissioner of the Texas Health and Human Services Commission ("HHSC") in his official and individual capacities, and DOUG WILSON ("Wilson"), Inspector General for the Texas Health and Human Services Commission, Office of Inspector General ("OIG") in his official and individual capacities.

Janek and Wilson in their official capacities (together, "Respondents") each file a PLEA TO THE JURISDICTION based on sovereign immunity and failure of Petitioner Harlingen Family Dentistry ("Petitioner" or "HFD") to exhaust its remedies under the Administrative Procedure Act and a GENERAL DENIAL.

Janek and Wilson in their individual capacities each file a GENERAL DENIAL and AFFIRMATIVE DEFENSE OF OFFICIAL IMMUNITY.

I.

PLEA TO THE JURISDICTION

1. To the extent HFD seeks a writ of mandamus ordering Respondents to do anything inconsistent with the Final Order, regardless how HFD characterizes its suit, HFD is in fact challenging the Final Order without having complied with the jurisdictional prerequisites in the Administrative Procedure Act ("APA"), namely the requirement to file a proper Motion for Rehearing and the requirement that suit seeking judicial review of an agency decision be filed within 30 days after the decision becomes final.

Background

2. In response to an analysis by OIG staff of Medicaid reimbursement claims filed by HFD, OIG gave notice to HFD by letters dated September 30, 2011 and October 6, 2011 that a 40% payment hold would be imposed on HFD's Medicaid reimbursement relating to orthodontic services.

3. By letter dated October 7, 2011, HFD requested a hearing concerning the 40% payment hold, as provided by 1 T.A.C. § 371.1703(b) (repealed effective October 14, 2012). Case No. 529-12-3180 was docketed at the State Office of Administrative Hearings, and a two-day hearing was held in April 2012.

4. A final administrative order adopted by the Executive Commissioner of HHSC was issued October 10, 2012 and became final on February 7, 2013. ("Final Order"). See **Exhibit A**, the Final Order (attached to Harlingen Family Dentistry Petition for Writ of Mandamus ("Petition") as Exhibit 3).

5. In response to a letter dated October 12, 2012 from HFD's lawyer requesting that the retained funds be "returned to [HFD] immediately," (See **Exhibit B**, HFD letter, attached to Petition

as Exhibit 6, pp. 1-2)) counsel for OIG responded by email that the October 10, 2012 order was not final and "more specifically does not order nor does it require any return of the funds presently on hold." (See **Exhibit C**, OIG email, attached to Petition as Exhibit 6, pp. 4-5).

6. After a Motion for Rehearing filed by HHSC was denied January 7, 2013 (See **Exhibit D**, the January 7, 2013 order, attached to Petition as Exhibit 4), the October 10, 2012 order became final on February 7, 2013. The Final Order sustained in part and reversed in part the payment hold imposed by OIG on HFD. Specifically, the Final Order reduced the payment hold, originally 40% of HFD's total Medicaid reimbursement, to 4% of HFD's total Medicaid reimbursement.

7. As of January 7, 2013, pursuant to the Final Order, the payment hold imposed by OIG on HFD's Medicaid payments is 4%.

8. HFD did not file a Motion for Rehearing in the administrative proceeding.

9. HFD did not seek judicial review of the Final Order before February 7, 2013.

A. Petitioner Failed to Exhaust Administrative Remedies.

10. HFD asks the Court to issue a writ of mandamus or, in the alternative, an injunction ordering Janek and Wilson, in both their official capacities and their individual capacities, to abide by the Final Order.[1] Respondents are complying with the Final Order as written, not as HFD wishes it were written.

11. This lawsuit, filed May 8, 2013, challenges the Final Order but does not say so. HFD asks this Court to compel action by Respondents that conflicts with the Final Order; HFD sues Respondents for *complying* with the Final Order. HFD's Petition does not mention TEX. GOV'T

[1] Petition, p. 13, ¶ 31.

CODE § 2001.176(a), which authorizes a suit seeking judicial review of final administrative decisions in contested cases. One reason HFD does not openly challenge the Final Order might be that HFD failed to exhaust its remedies under the APA. These failures are jurisdictional.[2]

12. Unless otherwise provided, the APA's contested case and judicial review procedures apply to agency proceedings. A timely motion for rehearing is a prerequisite to an appeal in a contested case. TEX. GOV'T CODE § 2001.145(a).

13. In suits against governmental entities, a timely filed petition for judicial review is a statutory prerequisite to suit, so that failure to comply deprives the district court of jurisdiction to review the agency decision. TEX. GOV'T CODE § 2001.176(a).

14. Section 311.034 of the Code Construction Act provides that "[s]tatutory prerequisites to a suit ... are jurisdictional requirements in all suits against a governmental entity." TEX. GOV'T CODE § 311.034 (Waiver of Sovereign Immunity).

15. To the extent HFD seeks a writ of mandamus ordering Respondents to comply with the Final Order, there is no dispute. Respondents have complied with the Final Order and intend to do so as long as it is in effect.

B. Retrospective Monetary Relief Barred.

16. Despite an apparent attempt to avoid the well-established sovereign immunity of the state from suits for money,[3] HFD's suit seeks money from the state. Retrospective monetary claims are barred by sovereign immunity, even to recover money unlawfully withheld after the court finds defendant officials have acted in violation of a law:

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[2] *Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 563 (Tex.App.-Austin 2008, pet. denied).

[3] See *Tex. Nat. Res. Conserv. Comm'n v. IT–Davy*, 74 S.W.3d 849, 856 (Tex. 2002) ("*IT-Davy*,").

> We recently held that retired firefighters could not pursue a declaratory judgment action against the City to recover amounts allegedly previously withheld from lump-sum termination payments in violation of the Local Government Code. *City of Houston v. Williams*, 216 S.W.3d 827, 828 (Tex. 2007). . . . *Williams* stands for the proposition, then, that retrospective monetary claims are generally barred by immunity.[4]

17. The retroactive monetary relief sought by HFD is expressly foreclosed by the treatment given by Supreme Court of Texas in *Heinrich*, to a 1931 case ("*Epperson*")[5] that allowed retroactive monetary relief based on a finding that the defendant tax collector had no discretion under the governing law to deny payment on Epperson's contract. The *Epperson* court noted that the suit was "simply an action to compel an officer, as agent of the state, to pay over funds to a party who claims to be lawfully entitled thereto,"[6] and held that, "if successful, Epperson would be entitled to "the sum of $93,000 which belonged to him as his commission for services rendered."[7] The *Heinrich* court stated, "In that respect, *Epperson* conflicts with *Williams*," and

> Thus, while the *ultra vires* rule remains the law, *see Federal Sign*, 951 S.W.2d at 404, *Epperson's* retrospective remedy does not."[8]

18. HFD's claim for money would at best be treated like Epperson's claim, as quoted in *Heinrich*:

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[4] *City of El Paso v. Heinrich*, 284 S.W.3d 366, 374 (Tex. 2009) (*Heinrich*").

[5] *State v. Epperson*, 42 S.W.2d 228, 231 (Tex. 1931).

[6] *Epperson*, 42 S.W. 2d at 231.

[7] *Epperson*, 42 S.W.2d at 229.

[8] *Heinrich*, 284 S.W.3d at 376.

> If he withholds the payment of such funds when a person is lawfully entitled to receive same, he has failed to discharge a duty imposed upon him by law and his act is a wrongful one.[9]

19. However, after *Heinrich*, Epperson's retrospective remedy would be barred, and proving *ultra vires* conduct on the part of Respondents would not entitle HFD to the retrospective remedy it seeks in this lawsuit.

20. The Austin Court of Appeals held, in *Texas Health and Human Services Comm'n v. El Paso County Hosp. Dist.*[10] ("*El Paso*") that even though HHSC was found to have used an invalid method for determining how much to pay hospitals for providing Medicaid services, after HHSC stopped using that invalid method, the court could not enforce a right the plaintiff hospitals may have had to payment, accruing before the effective date of the order declaring the method invalid, for fiscal years 2002 through 2007:

> The Hospitals . . . suggest the supreme court's invalidation of the [method] independently implies the existence of a remedy with respect to reimbursement rates and payments in FY 2002 through 2007. . . . In its seminal *Heinrich* decision . . . the Texas Supreme Court clarified that while a statutory payment obligation of the government may be enforceable through prospective declaratory or injunctive relief, "as measured from the date of the injunction," *see Heinrich*, 284 S.W.3d at 371-72, 376, sovereign or governmental immunity generally bars such relief to the extent it establishes or enforces retrospectively a right to payment accruing prior to that time.[11]

21. The Supreme Court of Texas recently affirmed the *El Paso* decision,[12] finding that HHSC's interpretation of its own rules regarding implementation of a new method was entitled to

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[9] *Heinrich, 284 S.W.3d* at 371, quoting *Epperson*, 42 S.W. 2d at 231.

[10] *Tex. Health & Hum. Servs. Comm'n v. El Paso Cnty Hosp. Dist.*, 351 S.W.3d 460 (Tex.App.-Austin 2011, affirmed May 17, 2013).

[11] *El Paso*, 351 S.W.3d at 486.

[12] *El Paso Cnty Hosp. Dist. v. Tex. Health & Hum. Servs. Comm'n*, No. 11-0830 (May 17, 2013).

deference[13] because it was neither plainly erroneous or inconsistent with the ordinary meaning of the words and phrases used, and that:

> We agree that our prior opinion and judgment did not create a remedy for the hospitals' past reimbursement claims.[14]

Sovereign immunity bars HFD's claims for money retained in the past.

C. Attempt to Control State Action.

22. HFD alleges that by not releasing funds held under a payment hold imposed by OIG, Respondents refuse to perform non-discretionary duties imposed by Texas Human Resources Code Section 32.0291(c) ("Section 32.0291(c)")[15] and the Final Order.[16]

23. While suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money, to fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.[17]

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[13] *Id.**16, citing *El Paso* and *Public Util. Comm'n v. Gulf States Utilities Co.*, 809 S.W.2d 201, 207 (Tex. 1991) ("*Gulf States Utilities*").

[14] *Id.**16.

[15] Petition, p. 7, ¶¶ 16-17.

[16] Petition, pp. 7-10, ¶¶ 18-21.

[17] *Heinrich*, 284 S.W.3d at 372.

24. Sovereign immunity protects the state against suits seeking to "control state action."[18] A suit against a state official lawfully exercising his governmental functions is considered a suit against the state and is barred by sovereign immunity absent legislative consent.[19]

25. To the extent HFD alleges *ultra vires* conduct on the part of Respondents as grounds for a writ of mandamus, HFD is actually complaining about how Respondents interpret the Final Order, which involves an exercise of discretion. The fact that HFD seeks four different forms of alternative relief, and three different monetary amounts, negates its position that the Final Order imposes on Respondents a ministerial, non-discretionary duty to perform any of them.

26. With respect to any party having rights or duties under Section 32.0291(c) that are different from rights or duties under the Final Order, it is important to keep in mind that both sides filed exceptions to the Proposal for Decision ("PFD"). Respondents filed a Motion for Rehearing based in part on an argument about the scope of the SOAH Administrative Law Judge's authority under Section 32.0291(c).[20] The HHSC Administrative Law Judge ("ALJ") found that the most logical interpretation of Section 32.0291(c) is that, "a SOAH ALJ can determine whether the OIG should lift a payment hold, in whole or in part, in an expedited administrative hearing." If HFD thought the SOAH ALJ was improperly interpreting or applying applicable law, including Section 32.0291(c), HFD could have filed a Motion for Rehearing and appealed the Final Order under Section 2001.176(a) of the APA. Since it did not, HFD cannot now argue that Section 32.0291(c) imposes any requirement apart from, in addition to, or inconsistent with the Final Order.

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[18] *IT-Davy*, 74 S.W.3d at 855-856.

[19] *McLane Co. v. Strayhorn*, 148 S.W.3d 644, 649 (Tex.App.-Austin 2004, pet. denied).

[20] Petition, Exhibit 4, p. 2.

27. HFD has not pled facts that if true would show Respondents have abused their discretion or failed to perform ministerial duties and has therefore not invoked the Court's jurisdiction to consider its claims against Respondents in their official capacities.

D. Constitutional Claims.

28. HFD alleges that by exceeding their statutory authority Respondents are violating HFD's rights under Article I, Sections 13 (due process), 17 (taking of property), and 19 (due process) of the Texas Constitution.[21]

29. HFD asserts that this Court has jurisdiction under article III, section 8 of the Texas Constitution[22] to determine whether state officials are exceeding their statutory authority and thereby violating statutory and constitutional rights. HFD claims that it "has a property interest in funds wrongfully withheld for services actually rendered, and in the proper execution of the HHSC Final Order."[23]

Article I, § 19.

30. Article I, Section 19 of the Texas Constitution[24] is not an independent basis for this Court's jurisdiction. To establish jurisdiction using this constitutional provision, HFD must show a protected property right and allege facts that, if true, would show *ultra vires* conduct on the part of Respondents, depriving HFD of its due process rights. The facts pled by HFD show only that Respondents interpret the Final Order and Section 32.0291(c) in a way HFD disagrees with. The

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[21] Petition, p. 2, ¶ 5.

[22] This is probably a typo. Article V addresses the Judicial Department. Article III addresses the Legislative Department. Section 8 of Article III addresses elections in each house of the legislature.

[23] Petition, p. 2, ¶ 5.

[24] "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

issue for the Court, in this Plea to the Jurisdiction, is whether these interpretations are plainly erroneous or inconsistent with the ordinary meaning of the words and phrases used.

31. The standard for whether a court should defer to an agency's interpretation of its own rules was set out by the Supreme Court of Texas in 1991:

> The Commission's interpretation of its own regulations is entitled to deference by the courts. [Citations omitted]. Our review is limited to determining whether the administrative interpretation "is plainly erroneous or inconsistent with the regulation." [Citations omitted]. However, if the Commission has failed to follow the clear, unambiguous language of its own regulation, we must reverse its action as arbitrary and capricious. [Citations omitted].

Gulf States Utilities, 809 S.W.2d at 207.

32. Unless the court finds that Respondents interpret the Final Order and Section 32.0291(c) in a way that is unreasonable under the standard set out in *Gulf States Utilities*, then HFD has not pled an *ultra vires* case and has not established this Court's jurisdiction over Respondents with respect to any constitutional provisions.

33. The Fifth Circuit held, in *Personal Care Products, Inc. v. Hawkins*[25] that a provider does not have a property right in Medicaid reimbursements. ("Nothing in Texas or federal law extends a property right in Medicaid reimbursements to a provider that is the subject of a fraud investigation.") The court also noted that under Texas rules a payment hold could be imposed for other violations, including inadvertent filing mistakes.[26]

34. In that case the question was whether the provider has a due process-protected property right in its Medicaid reimbursements, including those withheld pending a fraud investigation. Noting that property interests are not created by the Constitution, the court stated that

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[25] *Personal Care Products, Inc. v. Hawkins*, 635 F.3d 155, 159 (5th Cir. 2011, cert. denied, 132 S.Ct. 111 (2011).

[26] *Id.* 635 F.3d at 157, note 6.

"they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[27]

35. With language pertinent to this case, the court said the following:

> However, Texas regulations plainly permit current reimbursements to be withheld pending investigation on prior payments. . . . Federal law does not prohibit these payment holds and state law explicitly allows them. The statutory scheme does not give PCP a property interest in its present reimbursement claims while past claims are under investigation for fraud. . . .

36. Even if HFD is not under investigation for Medicaid fraud, the process that is due is found in the Texas statutes and rules. HFD had a hearing that resulted in a Final Order that did not order Respondents to pay any retained money to HFD. By not appealing the Final Order, HFD opted to limit the process to which it was due. HFD's suit complains that Respondents have not paid retained payments, but HFD has shown no property interest in those payments. HFD has shown only that Respondents interpret the requirements of the Final Order differently from how HFD does - not an abuse of discretion or a failure to perform a purely ministerial act, and not a valid due process claim.[28]

Article I, § 17.

37. Sovereign immunity does not prevent a suit under the "taking" clause of the Texas Constitution:

> No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for [public use].

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[27] *Personal Care Products, Inc. v. Hawkins*, 635 F.3d at 158, citing *Bd. Of Regents of State Colleges v. Roth*, 92 S.Ct. 2701 (1972) and *Yorktown Med. Lab. v. Perales*, 948 F.2d 84, 89 (2d Cir. 1991) ("Property interests in Medicaid payment . . . must derive from federal or state law.")

[28] *See Heinrich*, 284 S.W.3d at 372.

38. In the absence of an allegation that the state intentionally performed acts which resulted in a "taking" of property for public use, in the context of a breach of contract action, sovereign immunity bars a suit brought against the state for alleged unconstitutional takings.[29]

39. Whenever the government acts within a color of right to take or withhold property in a contractual situation, the government cannot be said to have effected a taking because there was no intent to take, only an intent to act within the scope of the contract. Even if the government were to withhold property or payment it believed to be due the other party, the government would still be acting within the color of right to the extent it had a good faith belief that its actions were justified due to disagreements over payment due or performance under the contract.[30]

40. Except for the Final Order, the only possible basis of any obligation on the part of Respondents to pay HFD is a contract, under which HFD billed Medicaid.[31]

41. Even if Respondents are liable to Respondents under the contract, sovereign immunity bars HFD's suit for breach of the contract.[32] Artful pleading does not change the nature of the suit. Under *Green*, Respondents have acted under color of the scope of the contract, not with an intent to take HFD's property for public use without compensation, and sovereign immunity is not waived for the Court to consider HFD's claims under Article I, Section 17 of the Texas Constitution.

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[29] *See Green Int'l, Inc. v. State of Texas*, 877 S.W.2d 428, 434–36 (Tex.App.-Austin 1994, writ dism'd by agr.) ("*Green*").

[30] *Green*, 877 S.W.2d at 434.

[31] HFD is Provider No. 0096471. See Petition, p. 3, ¶ 9.

[32] *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 (Tex. 1997) ("*Federal Sign*") ("[A] private citizen must have legislative consent to sue the State on a breach of contract claim.")

Article I, § 13.

42. Article I, Section 13 of the Texas Constitution provides the following:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

43. No bail or fine has been imposed on HFD. The prohibition against cruel or unusual punishment applies in criminal proceedings. Art. 1.09 of the Code of Criminal Procedures provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." The Code of Criminal Procedure applies to criminal proceedings.[33]

44. The Open Courts provision of Section 13 "applies only to statutory restrictions of a cognizable common law cause of action."[34] HFD has cited no statutory restriction of a cognizable common law cause of action in support of an Open Courts claim.

45. HFD has not pled any facts which, if true, would establish this Court's jurisdiction to consider HFD's claims under any part of Article I, Sections 13, 17 or 19 of the Texas Constitution.

IV.

ARGUMENT

46. The issue for the Court is whether Respondents' interpretation of the Final Order is erroneous under the standard set out in *Gulf States Utilities*, 809 S.W.2d at 207.[35] If not, there is no *ultra vires* conduct, no abuse of discretion, no failure to perform a ministerial duty, no ground for a writ of mandamus or injunction, and no jurisdiction to consider HFD's claims against Respondents.

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[33] TX. CRIM. PRO. art. 1.02

[34] *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355–356 (Tex. 1990).

[35] *Gulf States Utilities*, 809 S.W.2d at 207.

A. HFD Seeks Back-Door Judicial Review of the Final Order.

47. Although HFD does not openly challenge the Final Order, HFD has sued Respondents for complying with it.

48. The Final Order calls for a payment hold of 4 percent of HFD's total Medicaid reimbursement. The first remedy HFD seeks is a writ of mandamus stating that OIG "has a ministerial duty to discontinue a payment hold against HFD pursuant to Human Resources Code § 32.0291(c)."[36]

49. A theory supporting this remedy, in contravention of the Final Order, could have been presented in the Exceptions to the Proposal for Decision filed by HFD August 31, 2012. It was not. Such a theory could have been presented in a motion for rehearing. It was not. (Respondents filed a motion for rehearing but HFD did not.) Such a theory could have been presented in a challenge to the Final Order under Section 2001.176(a) of the APA. It was not.

50. The Final Order became final when Respondents' Motion for Rehearing was denied on January 7, 2013. HFD's theory about how the 4 percent hold is prohibited by Section 32.0291(c) could have been presented to a Travis County district court for 30 days after the order became final. It was not.

51. HFD's challenges to the Final Order are not only waived; this failure to exhaust administrative remedies is jurisdictional with respect to the relief HFD actually seeks, without regard to how HFD labels its claim. ("A court must look to the substance of the plaintiff's pleadings to characterize the nature of his grievance, not its nomenclature." *Galveston, H. & S.A. Ry. Co. v. Roemer*, 20 S.W. 843, 844 (Tex. 1892)). In determining whether sovereign immunity has been

[36] Petition, p. 12, ¶ 28.

waived, the Court must look beyond a plaintiff's characterization of its claims and analyze the real substance of a plaintiff's cause of action.[37]

52. The Final Order is binding on HFD and Respondents, and that is not in dispute. Both sides filed exceptions to the Proposal for Decision ("PFD"), but the Administrative Law Judge ("ALJ") rejected both parties' requests to change the PFD. ("After reviewing these exceptions, I have concluded that the PFD requires no amendment.") HFD could have sought a rehearing but did not. HFD could have appealed the Final Order, but did not. HFD now seeks the Court's assistance to compel Respondents' compliance with an order that was not issued, and to force an interpretation of the Final Order that was rejected by the ALJ.

53. **Exhibit B**, attached to this Plea, is a true copy of a letter written by counsel for HFD ("Canales") to counsel for Respondents on October 12, 2012, two days after issuance of the Final Order dated October 10, 2012.[38] In this letter, Canales quotes from the Final Order but then adds his view that the hearing was about "whether or not HHSC-OIG was entitled to continue to retain the Petitioner's monies based on an alleged credible allegation of fraud." In fact, the hearing was "regarding the hold," as stated in TEX. HUM. RES. CODE §32.0291(c) and in TEX. GOV'T CODE § 531.102(g)(3). If HFD thought the Final Order mis-applied the law by not calling for a return of money held, HFD could have sought a rehearing and, after denial, appealed the Final Order. Instead, HFD opted to not exhaust its administrative remedies and skipped straight to this mandamus suit.

54. By email the same day, counsel for HHSC-OIG ("Medlock") responded to Canales, reminding him that "the order in this case is not yet final," and that HFD could seek rehearing. Lest

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[37] *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003).

[38] Attached as Exhibit 6 to Petition.

HFD suffer any doubt about how Respondents interpreted the Final Order, Medlock stated expressly that unless the Final Order were to be changed,

> **all money currently on hold will continue to remain on hold until the ultimate resolution of the matter, either through a settlement agreement between the parties or after the issuance of a final order after a hearing on the merits has been conducted.**

See **Exhibit C** attached to this Plea, a true copy of this email from John Medlock to Tony Canales.[39]

55. As of October 12, 2012, HFD was aware that HHSC and OIG interpreted the Final Order as applying only prospectively and as authorizing a 4% payment hold rather than a discontinuation of any payment hold. The next-to-last sentence in Medlock's email to Canales says it clearly:

> The language in the order only speaks to a reduction of the current hold in place, and more specifically *does not order nor does it require any return of the funds presently on hold.*

56. Although HFD purportedly seeks to compel Respondents to abide by the Final Order,[40] HFD ignores the actual Final Order and seeks to compel Respondents to abide by something else – HFD's unilateral post-judgment interpretation of the Final Order. HFD did not file a Motion for Rehearing and has therefore waived its right to challenge the Final Order.[41] HFD can't have it both ways - either it seeks to enforce and abide by the Final Order, which Respondents agree is proper, or under the guise of seeking to enforce it HFD actually *challenges* the Final Order - by seeking a mandamus order against Respondents to compel relief inconsistent with the Final Order.

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[39] Attached as part of Exhibit 6 to Petition.

[40] Petition, p. 13, ¶ 31.

[41] Under the APA, a timely motion for rehearing is a pre-requisite to appeal an agency's decision in a contested case. TEX. GOV'T CODE § 2001.145(a).

B. Mandamus Relief.

57. A party is entitled to mandamus relief to compel a public official to perform a ministerial act.[42] An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.[43] A writ of mandamus will not issue to compel a public official to perform an act which involves the exercise of discretion[44] but may issue to correct a clear abuse of discretion by a public official.[45]

58. If the basis of the writ is performance of a legal duty, mandamus will not be granted unless the petition shows that the party seeking mandamus has a clear right to the performance of the particular duty sought to be enforced.[46] Mandamus may not be used to establish or enforce an uncertain or disputed claim.[47] If the petitioner's right is doubtful, it must first be established in some other way than mandamus.[48] Mandamus will not issue to compel a public official to perform an official act unless the Court finds that the petitioner's right to have the act performed is clear.[49]

59. HFD has not established any clear right such that Respondents have a ministerial duty under the Final Order to pay HFD some amount of money to be determined according to an unspecified one of several alternative methods.

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[42] *M.D. Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) ("*Anderson*"), citing *Womack v. Berry*, 291 S.W.2d 677, 682 (Tex. 1956) ("*Womack*").

[43] *Community Health Choice, Inc. v. Hawkins*, 328 S.W.2d 10, 13, citing *Anderson*.

[44] *Anderson*, 806 S.W.2d at 793.

[45] *Womack*, 291 S.W.2d at 682.

[46] *Callahan v. Giles*, 155 S.W.2d 793 (Tex. 1941).

[47] *City of Houston v. Albright*, 666 S.W.2d 279, 281 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.), 677 S.W.2d 487 (Tex. 1984).

[48] *See DePoyster v. Baker*, 34 S.W. 106, 108 (Tex. 1896).

[49] *Cobra Oil & Gas Corp. v. Sadler*, 447 S.W.2d 887, 895 (Tex. 1969).

C. HFD Complains About a Valid Exercise of Discretion.

60. HHSC is responsible for administering the Medicaid program. It is directed to establish methods of administration and adopt necessary rules for the proper and efficient operation of the program and, specifically to administer federal Medicaid funds.[50] When Respondents interpreted the Final Order in light of HHSC rules and Medicaid statutes, they exercised their discretion. When they chose not to read into the Final Order a retroactive duty to pay HFD the payments being retained, they exercised their discretion.

61. When Respondents abide by the Final Order, HFD alleges Respondents have no discretion to do so. Without quoting the actual order, HFD alleges that

> [T]he terms of the final order. . . require that the OIG release the over-assessment that has been wrongfully held by the OIG. The OIG has a ministerial duty to do so, and its failure to abide by the result of the HHSC final order justifies mandamus.

62. The terms of the Final Order speak for themselves. HFD quotes no language from the Final Order that requires OIG to release money held prior to the effective date of the Final Order. HFD presents only a paraphrase that "proves" HFD's argument.

63. It is useful to contrast the Final Order with the order at the center of a case cited by HFD. At issue in *Community Health Choice, Inc. v. Hawkins* [51] ("*CHC*") was a final decision resulting from a SOAH proceeding under Chapter 2260 of the Government Code, awarding CHC $249,999 in its breach of contract claim against HHSC. The HHSC Commissioner refused to pay, and CHC filed a mandamus suit. The Austin Court of Appeals noted that a SOAH decision in

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[50] TEX. HUM. RES. CODE §§ 22.001; 32.021(a), (c); TEX. GOV'T CODE §§ 531.0055(b)(1), 531.021(a).

[51] *Community Health Choice, Inc. v. Hawkins*, 328 S.W.3d 10 (Tex.App.-Austin 2010, pet. denied) ("*CHC*"), cited in Petition, p. 11, ¶ 25.

Chapter 2260 cases "is final and may not be appealed,"[52] held that Section 2260.105 "creates a mandatory payment obligation," and found that "Section 2260.105's mandatory language requires payment of CHC's claim and leaves nothing to the Commissioner's discretion; accordingly, mandamus is proper here."

64. The Final Order in our case, by contrast says only that the action imposing a payment hold on HFD will "**BE SUSTAINED IN PART** and **BE REVERSED IN PART**, and that the payment hold against Petitioner **BE REDUCED to** . . . 4 percent of Petitioner's total Medicaid reimbursement."

65. The Final Order (final February 7, 2013) contains no order to pay. Effective January 7, 2013, pursuant to the Final Order, Respondents have held 4% of Petitioner's total Medicaid reimbursement.

66. At issue is money retained and not paid. The sum Respondents have a supposedly ministerial duty to pay, according to HFD's alternative claims, is either all money held pursuant to the September 2011 hold or some other amount – approximately one million dollars.[53] The Final Order not only contains no order to pay HFD, it contains none of the monetary amounts identified in HFD's Petition as being so clearly due that Respondents have a ministerial duty to pay one/some/all of them.

---

[52] *CHC*, 328 S.W.3d at 12. (A decision may now be appealed for abuse of discretion. TEX. GOV'T CODE § 2260.104(e)(1), applicable to claims made after September 1, 2005.)

[53] HFD claims in the alternative (see Paragraphs 28-30, pages 12-13 in Petition):

$1,436,359.86 representing all money held;

$1,378,905.50 representing all money held above 4% dating back to September 2011;

$1,124,346.34 representing money held beyond $311,995.52, "which is the full amount that the OIG has proven a *prima facie* claim to recover."

67. The fact that HFD seeks four versions of relief "in the alternative" shows that the "ministerial" duty for which Respondents may allegedly exercise no discretion actually does call for interpretation of the Final Order. Though HFD acknowledges that the Final Order must be "considered alongside" other law, HFD deems this consideration a "ministerial duty" and would restrict the scope of Respondents' consideration to "the statutory and Constitutional protections against unjustified takings."[54]

IV.

GENERAL DENIAL OF DR. KYLE JANEK, EXECUTIVE COMMISSIONER

68. Subject to the foregoing plea to the jurisdiction, Respondent Dr. Kyle Janek, Executive Commissioner of the Health and Human Services Commission, in his official capacity and his individual capacity, asserts a general denial, as authorized by Rule 92 of the Texas Rules of Civil Procedure, to the allegations contained in Petitioner's petition and requests that Petitioner be required to prove such allegations by a preponderance of the credible evidence as required by law.

V.

GENERAL DENIAL OF INSPECTOR GENERAL DOUG WILSON

69. Subject to the foregoing plea to the jurisdiction, Respondent Inspector General Doug Wilson, in his official capacity and his individual capacity, asserts a general denial, as authorized by Rule 92 of the Texas Rules of Civil Procedure, to the allegations contained in Petitioner's petition and requests that Petitioner be required to prove such allegations by a preponderance of the credible evidence as required by law.

---

[54] Petition, p. 11, ¶ 15.

VI.

AFFIRMATIVE DEFENSE OF DR. KYLE JANEK, EXECUTIVE COMMISSIONER OFFFICIAL IMMUNITY

70. Respondent Janek in his individual capacity performs no governmental functions and has no duties to HFD, ministerial or otherwise. HFD has complained of no acts of Respondent Janek done in his individual capacity. Only in his official capacity does Respondent Janek have any duty or authority with respect to Medicaid in general or HFD in particular, and mandamus relief would be nonsensical against Respondent Janek in his individual capacity.

71. Respondent Janek asserts the affirmative defense of official immunity against Petitioner's claims against him in his individual capacity.

VII.

AFFIRMATIVE DEFENSE OF INSPECTOR GENERAL DOUG WILSON OFFICIAL IMMUNITY

72. Respondent Wilson in his individual capacity performs no governmental functions and has no duties to HFD, ministerial or otherwise. HFD has complained of no acts of Respondent Wilson done in his individual capacity. Only in his official capacity does Respondent Wilson have any duty or authority with respect to Medicaid in general or HFD in particular, and mandamus relief would be nonsensical against Respondent Wilson in his individual capacity.

73. Respondent Wilson asserts the affirmative defense of official immunity against Petitioner's claims against him in his individual capacity.

Respectfully submitted,

GREG ABBOTT
Attorney General

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

ROBERT O'KEEFE
Division Chief
Financial Litigation, Tax, and Charitable Trusts Division

ANN HARTLEY
State Bar No. 09157200
Financial Litigation, Tax, and Charitable Trusts Division
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 936-1313
Telecopier: (512) 477-2348
ann.hartley@texasattorneygeneral.gov

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing PLEA TO THE JURISDICTION, GENERAL DENIAL, AND AFFIRMATIVE DEFENSE OF DR. KYLE JANEK AND DOUG WILSON was sent by fax and email to counsel for Petitioner on this 22nd day of May, 2013 as shown below:

Jason Ray
Riggs Aleshire & Ray, P.C.
700 Lavaca Street, suite 920
Austin, Texas 78701

FAX: (512) 457-9066
EMAIL: Jray@r-a-law.com

Ann Hartley
Assistant Attorney General

APPEALS DIVISION
TEXAS HEALTH AND HUMAN SERVICES COMMISSION
AUSTIN, TEXAS

HARLINGEN FAMILY DENTISTRY PETITIONER VS. TEXAS HEALTH AND HUMAN SERVICES COMMISSION OFFICE OF INSPECTOR GENERAL, RESPONDENT	§ § § § § § § § § §	SOAH DOCKET NO. 529-12-3180

FINAL ORDER

On the 10th day of October 2012, the undersigned Administrative Law Judge, a designee of the Executive Commissioner of the Texas Health and Human Services Commission, finds that, after proper and timely notice was given, the above-styled case was heard by a State Office of Administrative Hearings Administrative Law Judge, who made and filed a proposal for decision containing findings of fact and conclusions of law. This proposal for decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the administrative record. Petitioner and Respondent filed Exceptions; Petitioner filed a Reply to Respondent's Exceptions

The Texas Health and Human Services Commission, after review and due consideration of the proposal for decision, attached as Exhibit A, the Exceptions and Reply filed by the parties, and the Exceptions Letter from the Administrative Law Judge, adopts the findings of fact and conclusions of law of the Administrative Law Judge contained in the proposal for decision and incorporates those findings of fact and conclusions of law into this Final Order as if such were fully set out and separately stated in this Final Order.

IT IS, THEREFORE, ORDERED by the Texas Health and Human Services Commission that the action imposing a payment hold on Petitioner **BE SUSTAINED IN PART** and **BE REVERSED IN PART**, and that the payment hold against Petitioner **BE REDUCED** to 9 percent of

RESPONDENTS' EXHIBIT A

EXHIBIT 3

2

Petitioner's total Medicaid reimbursement that is related to orthodontics, or 4 percent of Petitioner's total Medicaid reimbursement.

Entered this 10th day of October 2012.

Executive Commissioner of the Texas Health and Human Services Commission

By: _____
Susan Nash Fekety, Administrative Law Judge
On behalf of the Executive Commissioner

Canales & Simonson, P.C.
Attorneys at Law
2601 Morgan Avenue
P.O. Box 5624
Corpus Christi, Texas 78465-5624
361.883.0601 Telephone
361.884.7023 fax

J.A. "Tony" Canales
tonycanales@canalesimonson.com

October 12, 2012

Via Facsimile (512) 833-6484
John R. Medlock
Associate Counsel
HHSC-Office of Inspector General
11101 Metric Blvd. – Building I
P.O. Box 85200 – MC 1358
Austin, Texas 78708-5200

Re: ***Harlingen Family Dentistry: TPI(s) 00096471-01; HHSC-OIG Case No. P20113092806335O3***

Dear Mr. Medlock:

As you know, I represent Harlingen Family Dentistry in the above-referenced cause.

I am in receipt of Judge Fekety's Final Order dated October 10, 2012 regarding the payment hold hearing in the above-referenced cause. The subject of the payment hold hearing was whether or not HHSC-OIG was entitled to continue to retain Petitioner's monies based on an alleged credible allegation of fraud.

RESPONDENTS' EXHIBIT B

EXHIBIT 6

The Order requires "that the payment hold against Petitioner **BE REDUCED** to 9 percent of Petitioner's total Medicaid reimbursement that is related to orthodontics or 4 percent of Petitioner's total Medicaid reimbursement."

Please accept this letter as my client's request that the monies owed it in accordance with the Final Order be returned to it immediately. Please also take the steps necessary to reduce the future payment hold against Petitioner's claims for reimbursement in accordance with the Final Order.

Please be further advised that my client has authorized the undersigned to take legal action against HHSC-OIG to recover said monies if necessary.

If you should have any questions, please let me know.

Sincerely,

J. A. Canales

JAC/rc

cc: *Via Facsimile (512) 833-6484*
Corrie Alvarado
Associate Counsel
HHSC-Office of Inspector General
11101 Metric Blvd. – Building I
P.O. Box 85200 – MC 1358
Austin, Texas 78708-5200

Subject: FW: Harlingen Demand Letter

From: Tony Canales (TonyCanales@canalessimonson.com)

To: jimorrids@austin.rr.com; vinagarcia@yahoo.com; HACanales@canalessimonson.com; oxgarcia@aol.com; RCanscoot@canalessimonson.com; TonyCanales@canalessimonson.com; jvila13@aol.com;

Date: Friday, October 12, 2012 12:09 PM

Response by HHSC as to Payment hold.

From: Medlock,John (HHSC) [mailto:John.Medlock@hhsc.state.tx.us]
Sent: Friday, October 12, 2012 11:59 AM
To: Tony Canales
Cc: oxgarcia@aol.com
Subject: RE: Harlingen Demand Letter

Tony,

I am in receipt of both your email and fax demand letter. Pursuant to Tex. Gov't Code § 2001.144 and 1 Tex. Admin. Code § 357.498, all parties are entitled to file, within 20 days after the final order is presumed received, post judgment motions in the form of motions for rehearing. Therefore, per the above sited statute and rule, the order in this case is not yet final. Furthermore, in the event that either by ruling or otherwise, the final order is not changed, any and all money currently on hold will continue to remain on hold until the ultimate resolution of the matter either through a settlement agreement between the parties or after the issuance of a final order after a hearing on the merits has been conducted. The language in the order only speaks to a reduction of the current hold in place, and more specifically does not order nor does it require any return of the funds presently on hold. If you have any other questions, feel free to let me know.

RESPONDENTS' EXHIBIT C

Thanks,

John Medlock

Associate Counsel

HHSC-OIG

From: Tony Canales [mailto:TonyCanales@canalessimonson.com]
Sent: Friday, October 12, 2012 10:05 AM
To: Medlock,John (HHSC)
Cc: oxcarcia@aol.com
Subject: Harlingen Demand Letter

Mr. Medlock:

Attach to this email that I am serving you via email and by fax today. Please advise as to the intentions of HHSC regarding our demand for the return of the "payment hold".

Thanks...

Tony Canales

APPEALS DIVISION
TEXAS HEALTH AND HUMAN SERVICES COMMISSION
AUSTIN, TEXAS

HARLINGEN FAMILY DENTISTRY, PETITIONER	§	
VS.	§	SOAH DOCKET NO. 529-12-3180
TEXAS HEALTH AND HUMAN SERVICES COMMISSION OFFICE OF INSPECTOR GENERAL, RESPONDENT	§	HHSC Cause No. 12-0789-K

ORDER

On the 7th day of January 2013 came on for consideration Respondent's Motion for Rehearing filed on 30 October 2012. After considering the Motion, Petitioner's Response, and the pleadings in this cause, this Administrative Law Judge finds that good cause to grant the Motion does not exist for the following reasons:

1. RESPONDENT OIG ARGUES THAT THE SOAH PROPOSAL FOR DECISION (PFD) EXCEEDED THE SCOPE OF SOAH'S AUTHORITY.

Under the provisions of TEX. GOV'T CODE CHAPTER 2001, the scheme of PFDs and agency final orders necessitates that a SOAH ALJ may only "recommend" a sanction.[1] However, that limit on the SOAH ALJ's authority does not eliminate her authority to determine whether sanctions should be applied, which sanctions should be applied, and what amount or level is appropriate.

Once an agency refers a contested case to SOAH, the SOAH ALJ stands in the shoes of the agency and may make any finding necessary to resolve the legal issues in the case. This includes the authority to recommend sanctions once an underlying violation is found.

The SOAH ALJ has express authority to issue a proposal for decision for the referring agency including findings of fact and conclusions of law.[2] It is agreed that the term "including" is understood as a term of enlargement

[1] *See* TEX. GOV'T CODE § 2001.058; *Tex. State Board of Dental Examiners v. Brown*, 281 S.W. 3d 692, 697 (Tex. App.—Corpus Christi 2009, pet. denied) (distinguishing an ALJ's recommendation regarding sanctions from findings of fact and conclusions of law).
[2] TEX. GOV'T CODE § 2003.042(6).

RESPONDENTS' EXHIBIT D

EXHIBIT 4

rather than a term of limitation or restriction.[3] Accordingly, the SOAH ALJ is not restricted to simply issuing findings of facts and conclusions of law, but any finding necessary to issue a valid legal order on behalf of the agency. [4] In this instance the agency is conferred sanctioning power; that same sanctioning power is vested in the SOAH ALJ by virtue of the statute requiring the agency to refer the case to SOAH.

Specifically, the Respondent cites 1 TEX. ADMIN. CODE § 371.1703(b) (Termination or Enrollment of Contract) for the proposition that the extent of the sanction is exclusively at the discretion of the OIG, yet is unable to cite any specific language from that section to sustain this argument. However, a new rule sheds light on this issue.

Tex. Hum. Res. Code Ann. § 32.0291(c) gives providers a right to an expedited administrative hearing regarding a payment hold. The statute explicitly conditions continuation of the payment hold on a SOAH determination: "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 willful misrepresentation." This statutory provision has been in effect since September 1, 2003.

HHSC-OIG recently adopted a rule relating to payment holds, effective October 14, 2012. 1 TEX. ADMIN. CODE § 371.1709(e)(3). A "payment hold may be terminated or partially lifted" when, among other instances, an "administrative law judge or judge of any court of competent jurisdiction orders OIG to lift the hold in whole or in part." 1 TEX. ADMIN CODE § 371.1709(e)(3)(I). Section 371.1709 codifies the most logical interpretation of Tex. Hum. Res. Code Ann. § 32.0291(c): a SOAH ALJ can determine whether the OIG should lift a payment hold, in whole or in part, in an expedited administrative hearing. This determination is contingent on whether "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 ANN. § 32.0291(c).

While 1 TEX. ADMIN. CODE § 371.1709(e)(3)(I) was not effective at the time of the hearing before ALJ Kilgore, the Texas Legislature did not make any changes to the respective authority of HHSC-OIG or a SOAH ALJ regarding payment holds between September 1, 2003— the effective date of TEX. HUM. RES. CODE ANN. § 32.0291(c)—and October 14, 2012—the effective date of 1 TEX. ADMIN. CODE § 371.1709(e). HHSC's previous rules relating to payment holds, repealed with the adoption of 1 TEX. ADMIN. CODE § 371.1709, are silent on this issue. *See* 37 Tex. Reg. 7989 (2012) (Tex. Health & Hum. Servs. Comm'n) (listing repealed rules). Therefore, even if 1 TEX. ADMIN. CODE § 371.1709 was not effective at the date of the hearing, HHSC-OIG's current interpretation of the statutory scheme is persuasive, namely that the SOAH ALJ has had the authority to modify a sanction since 2003. Moreover, it is consistent with this Judge's, and ALJ Kilgore's, interpretation of SOAH's authority over this matter.

[3] *Railroad Comm'n v. Arco Oil & Gas Co., 876 S.W. 2d 473, 491-92 (Tex. App. – Austin 2005, pet. denied); see Republic Ins. Co. v. Silverton Elevator, Inc.* 493 S.W. 2d 748,752 (Tex.1973).
[4] *See* Lou Bright & Prof. Ron Beal, *The Legal Authority of a SOAH ALJ to Determine Sanctions and the Power of the Agency to Modify the Same*, article presented at the University of Texas 5th Advanced Administrative Law Conference, September 2-3, 2010, at 6-7.

In the instant case, OIG applied a 100% vendor hold on Harlingen's Medicaid reimbursements related to orthodontic care after OIG determined that Harlingen incorrectly applied Medicaid policy and committed Medicaid fraud. OIG determined that Harlingen was committing Medicaid fraud because it believed that Harlingen had submitted an unusually high number of incorrect claims for reimbursement.

The SOAH ALJ decided that OIG's 100% vendor hold of Harlingen's Medicaid reimbursements was inordinate and not justified, based on her determination that OIG failed to prove that Harlingen committed fraud. The following Findings of Fact and Conclusions of Law demonstrate the basis upon which she reduced the vendor hold from 100% to 9%:

> **Finding of Fact 34.** There is no evidence that is credible, reliable, or verifying, or that has indicia of reliability, that a fraudulent lack of dysfunction existed among the 85 HFD patients reviewed by Dr. Evans.
>
> **Finding of Fact 35.** There is no evidence that is credible, reliable, or verifying, or that has indicia of reliability, that HFD committed fraud or misrepresentation.
>
> **Finding of Fact 38.** In Dr. Orr's opinion, in 8 of the 85 cases (or approximately 9 percent), the patients failed to meet the 26-point threshold for Medicaid coverage on the HLD score sheet.
>
> **Finding of Fact 39.** Prima facie evidence exists that, as to approximately 9 percent of the HFD cases reviewed, HFD: billed or caused claims to be submitted to the Medicaid program for services or items that are not reimbursable by the Medicaid program; failed to comply with the terms of the Medicaid program provider agreement; and failed to comply with a Medicaid program procedure manual.
>
> **Conclusion of Law 9.** HHSC may impose a hold on payment of 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). In a SOAH hearing on a payment hold, HHSC must make a prima facie showing that the evidence relied on in imposing the hold is relevant, credible, and material to the issue of fraud or willful misrepresentation. TEX. HUM. RES. CODE § 32.0291(c).
>
> **Conclusion of Law 10.** HHSC-OIG lacks authority to maintain the payment hold against HFD for alleged fraud or misrepresentation. TEX. GOV'T CODE § 531.102(g)(2); 42 C.F.R. § 455.23; TEX. HUM.

RES. CODE § 32.091(c); 1 TEX. ADMIN. CODE §§ 371.1703(b)(3) and (5), 371.1617(a)(1)(A)–(C).

Conclusion of Law 11. HHSC-OIG has authority to maintain a payment hold against HFD based on prima facie evidence of: billing or causing claims to be submitted to the Medicaid program for services or items that are not reimbursable by the Medicaid program; failing to comply with the terms of the Medicaid program provider agreement; and failing to comply with a Medicaid program Procedure manual. 1 TEX. ADMIN. CODE §§ 371.1703(b)(5), 371.1617(1)(K), (5)(A) and (G).

Recommendation: The ALJ recommends that any payment hold against HFD be reduced to 9 percent of the 40 percent of HFD's total Medicaid reimbursement that is related to orthodontics, or 4 percent of HFD's total Medicaid reimbursement.

Respondent correctly asserts that an agency has the ultimate responsibility to impose sanctions and determine the scope of those sanctions.[6] In cases when a SOAH ALJ recommends a finding of fact or conclusion of law, TEX. GOV'T CODE § 2001.058 governs, and a SOAH ALJ's recommendation of a sanction in a finding of fact or conclusion of law may be overturned only if the agency determines:

> (1) that the ALJ did not properly apply or interpret applicable law, agency rules, written policies or prior administrative decisions;
> (2) that a prior administrative decision on which the ALJ relied is incorrect or should be changed; or
> (3) that a technical error in a finding of fact should be changed.[8]

Therefore, to overturn the SOAH ALJ's reduction in the percentage of vendor hold to be applied, Respondent must demonstrate that one of the three criteria described above is present. Respondent's argument is that the SOAH ALJ failed to properly interpret and apply agency policy.

C. RESPONDENT/OIG ARGUES THAT PRO INCORRECTLY INTERPRETED DEFINITION OF "ECTOPIC ERUPTION."

Respondent claims the definition of "ectopic eruption," used by HHSC's Medicaid claims administrator, TMHP, when pre-approving the disputed claims, is incorrect. To support its argument, Respondent raises the principle of *ejusdem generis* in an attempt to show that the SOAH ALJ improperly interpreted the term "ectopic eruption."

Ejusdem generis is a "canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only

[6] *Sears v. Tex. State Bd. Of Dental Examiners*, 759 S.W. 2d 748, 751 (Tex. App.—Austin 1988, no writ).
[8] *Granek v. Tex. State Bd. Of Medical Examiners*, 172 S.W. 3d. 761 (Tex. App.—Austin 2005, pet. denied); *Grotti v. Tex. State Bd. Of Medical Examiners*, No. 03-04-00612-CV, 2005 WL 2464417 (Tex. App.—Austin 2005) (memo op.); *Tex. State Board of Dental Examiners v. Brown*, 281 S.W. 3d 692 (Tex. App.—Corpus Christi 2009, pet. denied).

items of the same class as those listed."[7] As this definition suggests, the principle of *ejusdem generis* applies to broad, general language that "immediately follows narrow and specific terms"[8]—and not necessarily to the reverse (i.e., specific language following general language).[9]

The rule of *ejusdem generis* does not apply to the Medicaid policy's definition of "ectopic eruption." The general term—"an unusual pattern of eruption"—does not follow a list of specifics; rather, the general term precedes the specific list: "an unusual pattern of eruption, such as high labial cuspids or teeth that are grossly out of the long axis of the alveolar ridge." Thus, the rule of *ejusdem generis* is not instructive here, and greater weight should be given to the first definitional phrase: "an unusual pattern of eruption."[10]

Texas courts have widely recognized *ejusdem generis* as a rule of *statutory* construction.[11] This ALJ is unaware of any opinion that has applied the rule of *ejusdem generis* to agency *policy*. Texas courts may construe administrative rules, which have the same force as statutes, in the same manner as statutes.[12] However, courts rarely dissect the administrative intent behind an agency policy. Agency policy, and Medicaid policy in particular, looks toward contemporary agency practice and an affected party's most likely interpretation. [redacted]

The SOAH ALJ analyzed the evidence from the hearing, including testimony from experts from both sides, and concluded that Respondent's experts lacked credibility when compared to Harlingen's witnesses. [redacted] how TMHP had interpreted "ectopic eruption." A third OIG witness, the current Medicaid director, asserted he was not an expert on the issue. [redacted] ALJ determined that OIG expert testimony carried less weight than that of Harlingen's

[7] BLACK'S LAW DICTIONARY (9th ed. 2009); *see also Stanford v. Butler*, 181 S.W.2d 269, 272 (Tex. 1944) ("Under the rule of *ejusdem generis*, where specific and particular enumerations of persons or things in a statute are followed by general words, the general words are not to be construed in their widest meaning or extent, but are to treated as limited and applying only to persons or things of the same kind or class as those expressly mentioned.").
[8] *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010).
[9] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TERMS 204–05 (2012) (arguing that *ejusdem generis* should only apply to the "species-genus pattern," where general terms follow specific terms).
[10] *Id.* at 204 ("Following the general term with specifics can serve the function of making doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics.").
[11] *See Farmers' and Mechanics' Nat. Bank v. Hanks*, 137 S.W. 1120, 1123 (Tex. 1911) ("It is a prime rule of construction that where in a statute general words follow a designation of particular subjects or classes of persons the meaning of the general words will be restricted by the particular designation in such statute.").
[12] *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

expert, who was the former director of the Medicaid dental program for nine years. The ALJ is the sole judge of a witness's credibility, and those credibility determinations cannot be challenged at the motion for rehearing stage.

For the reasons stated herein, Respondent has failed to persuade this Administrative Law Judge that the Final Order of 10 October 2012 is incorrect.

Therefore, IT IS ORDERED that Respondent's Motion for Rehearing BE DENIED.

Entered this 7th day of January 2013.

Susan Nash Fekety,
Administrative Law Judge
Appeals Division
Texas Health and Human Services Commission