

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 27, 2012

Thomas Suehs, Executive Commissioner
Texas Health and Human Services Commission
4900 North Lamar Avenue, 4th Floor
Austin, Texas 78751

VIA FACSIMILE NO. 512/424-6587

RE: **Docket No. 529-12-3180; Harlingen Family Dentistry v. Texas Health and Human Services Commission, Office of Inspector General**

Dear Commissioner Suehs:

I issued the Proposal for Decision (PFD) in this case on August 15, 2012. Both parties filed exceptions to the PFD. After reviewing the exceptions, I have concluded that the PFD requires no amendment. However, there are several exceptions that raise new arguments, or about which further explanation would be helpful. I will address those briefly here.

The Texas Health and Human Services Commission, Office of the Inspector General (HHSC-OIG) excepts to Finding of Fact No. 35 because the PFD at pages 27-28 states that Harlingen Family Dentistry's (HFD's) submission of claims, only 91 percent of which were reimbursable, is not suggestive of "knowing or intentional fraud or misrepresentation." HHSC-OIG's objection is that the PFD failed to address the mental states of reckless disregard or conscious indifference. This objection is incorrect. Language about reckless disregard or conscious indifference is found in the definition of "knowingly" in chapter 36 of the Texas Human Resources Code.¹ When I stated in the PFD that the evidence is not suggestive of "*knowing* or intentional fraud,"² I considered all of the mental states included in the applicable definition of "knowingly."

¹ Tex. Human Res. Code § 36.011.

² Emphasis added.

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HHSC-OIG also asserts that I failed to give sufficient weight to the testimony of Dr. Linda Altenhoff in the PFD's analysis of whether there is a credible allegation of fraud against HFD. HHSC-OIG asserts that Dr. Altenhoff, a dentist who works for the Texas Department of State Health Services (although she does some consulting to HHSC), "might be authorized" to speak on behalf of HHSC about what the definition of "ectopic eruption" encompassed at the time of the events at issue in this case.³ As noted in the PFD, Dr. Altenhoff opined that the pre-2012 definition of "ectopic eruption" would not have included a tooth that was only rotated or leaning out of place. However, she acknowledged that she did not know how the term had been interpreted by the Texas Medicaid contractor prior to the 2012 rule change.⁴ She offered no testimony about any longstanding interpretation of the term by the state. She is not an orthodontist.⁵

HHSC-OIG also indicates that the PFD should have relied on the testimony of Billy Ray Millwee, the state's Medicaid director, in interpreting the term "ectopic eruption." Staff points to general testimony by Mr. Millwee that he did not believe that the eligibility rules were vague and that any recent change did not alter the definition of ectopic eruption. However, Mr. Millwee made clear that he was not qualified to address the specifics of the definition of ectopic eruption. When asked about the particulars of Texas' requirements for Handicapping Labio-lingual Deviation (HLD) scoring, Mr. Millwee declined to testify, saying that he is not a dental professional and adding, "I'll have to say I am not an expert on that."⁶ It is undisputed that the definition of ectopic eruption was amended to be effective after the times relevant to this case, but Mr. Millwee was unaware of that fact and had no familiarity whatsoever with the amendment.⁷ Because Mr. Millwee had no knowledge of the definition change, he could not explain why an amendment was necessary, if the rule's longstanding meaning had been unambiguous.

Without citation to the record, HHSC-OIG objects to the PFD's reliance on the testimony of Dr. James Orr because of the "longstanding relationship" between Dr. Orr and the owner of HFD.⁸ HHSC-OIG's objection suggests bias on Dr. Orr's part. There is no support in the record for such a suggestion. There is evidence in the record that Dr. Orr, when he served as the Texas

³ Texas Health and Human Services Commission, Office of Inspector General's Exceptions to Proposal for Decision at 4. Dr. Altenhoff is not an orthodontist.

⁴ Petitioner's Ex. 11 at 20-21. Staff also points to a statement by Dr. Altenhoff that there are images of ectopic eruption on the Internet that can be Googled. No such images are in evidence.

⁵ Petitioner's Ex. 11 at 36, 39. Nor is there evidence that she is an expert in malocclusion.

⁶ Petitioner's Ex. 10 at 81-82.

⁷ *Id.* at 81-85. ("I don't know. I'm not a dentist. It wasn't my direction." *Id.* at 85.)

⁸ Texas Health and Human Services Commission, Office of Inspector General's Exceptions to Proposal for Decision at 5.

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Medicaid dental director from 1995 through 2003, discussed cases with providers, including the owner of HFD.⁹ This is not evidence of a relationship that would cast doubt on the objectivity of Dr. Orr's opinions. HHSC-OIG, also without citation to the record, states that Dr. Orr was "the very person who had once presided over the broken prior authorization process."¹⁰ The record does not establish, and the PFD does not find, that the process was "broken," and certainly not during any particular period of time related to Dr. Orr's tenure.¹¹

In addition, HHSC-OIG asserts that the PFD, in addressing the issue of handicapping malocclusion or dysfunction, places the burden of proof on the wrong party. This assertion is incorrect. It is the agency's burden to offer evidence indicating a credible allegation of fraud. In support of its exception, HHSC-OIG cites to a rule establishing that a provider's failure to maintain adequate clinical documentation constitutes a program violation for which a recoupment of Medicaid dollars can be made.¹² However, HHSC-OIG did not plead such a violation as a basis for the payment hold, and any alleged noncompliance with the rule is therefore not at issue in this case.

Also in connection with the question of handicapping malocclusion, HHSC-OIG contends that the PFD speculates, unsupported by evidence, that the Manual may deem a score of 26 points on the HLD score sheet to indicate the presence of a handicapping malocclusion. The evidence on which I relied in discussing this ambiguity in the Manual's requirements is the actual language of the Manual itself, which the PFD quotes in the discussion.¹³

HFD excepts to consideration in the PFD of HHSC-OIG's allegation, added in its Third Amended Complaint, that acceptance of a fraud investigation referral by the state's Medicaid Fraud Control Unit (MFCU), and the MFCU's subsequent certification that HFD is still under investigation for fraud, together constitute a credible allegation of fraud. HFD had moved to strike the allegation due to its being added to the HHSC-OIG's complaint shortly before the hearing. I denied the motion to strike because the state offered only one document, a letter, to prove the allegation, and the dispute between the parties lay in their differing interpretations of the law; therefore, the parties could address the issue in post-hearing briefing,

⁹ Tr. at 376-377, 462-463.

¹⁰ Texas Health and Human Services Commission, Office of Inspector General's Exceptions to Proposal for Decision at 7-8.

¹¹ The PFD only noted that Mr. Millwee suggested the prior authorization review process lacked rigor at some point, and that the state's Medicaid contractor had been audited in 2008 and 2011 and given recommendations for changes. PFD at 8-9.

¹² 1 Tex. Admin. Code § 371.1617(2)(A).

¹³ PFD at p. 29 (citing to Ex. R-X at 61).

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and HHSC-OIG gained no unfair advantage by the addition of the allegation. (In the PFD, I concluded that the MFCU referral and its acceptance did not constitute a credible allegation of fraud.)

The PFD is ready for consideration.

Sincerely,



Shannon Kilgore
Administrative Law Judge

SK/ap
xc:

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Fairy Davenport-Rutland, Director, Texas Health and Human Services Commission, Appeals Division, 8407 Wall Street, S300 Austin, Texas 78754 - VIA FACSIMILE NO. 512/231-5779 AND CERTIFIED EVIDENTIARY RECORD, HEARING CD, AND TRANSCRIPT VIA HAND DELIVERY

J.A. Tony Canales, Canales & Simonson, P.C., P.O. Box 5624, Corpus Christi, TX 78465 - VIA FACSIMILE NO. 361/884-7023