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Ken Levine, Director
Sunset Advisory Commission
P.O. Box 13066
Austin, Texas 78711

Re: Comments on Sunset Staff Report on the Health and Human Services Commission

Dear Ken:

My name is Anthony Goodall. I am an attorney here in Austin and I represent what used to be one of the larger providers of orthodontic care in the State of Texas.

We congratulate you on the Commission's review and report of the Office of Inspector General. For the last 4 years Medicaid providers have been hoping for the day when someone of authority would see the oppressive handling of the OIG's office and responsibilities.

In 34 years of practicing law in Austin, Texas I have never seen governmental bullying tactics like what we are seeing from the Office of Inspector General in its oppressive actions against orthodontists and other healthcare practitioners. The experience described below happened and is happening to my client, but he is not alone. This is not an isolated anecdotal story. The OIG has pursued a nearly identical course against all of the other 37 largest orthodontic providers in the State. Now, after 3 ½ years of defending himself and hundreds of thousands of dollars in legal bills, it appears my client's day in court is still more than a year away, while the State continues to hold over $1,500,000 of the funds this practice earned while serving the Medicaid children of Texas.

Background

My client was approached several years ago by the dental director of NHIC and was urged to open offices in underserved parts of Texas where there were shortages of Medicaid providers for orthodontic care. Retired at the time, he saw an opportunity to serve and was glad to do so. The practices were opened and children successfully treated. Every attempt was made on my client's part to become the "gold standard" of how orthodontic services were to be provided under the Medicaid system. The practice hired well-respected orthodontists who had

graduated from accredited orthodontic programs.

After 2007, the State set a course of increasing and enhancing its pool of Medicaid providers in the wake of the Frew ruling; my client's practices grew accordingly. As the year 2012 opened, my client was serving Medicaid patients in 6 locations across the state and was scheduled to open the 7th within months. This all changed on February 13, 2012.

While at my client's office, the phone rang at 9:00 a.m. One of our offices had a number of OIG investigators in it demanding a sample of records. Five minutes later another call came from another office. Within 25 minutes, a horde of OIG investigators had arrived at each of the six offices demanding records, requesting interviews and otherwise disrupting the patient flow for that day and that week.

Under Jack Stick's direction, OIG had issued its demand for records showing little sympathy for the magnitude of the task or the demands placed on the practice at the spur of that moment. By Friday that week, February 17th, OIG issued a letter placing my client on 100% payment hold due to missing a few of the patients' physical cast dental models—even though TMHP had not required cast models for years in its prior authorizations process! In the days that followed, OIG engaged the services of a doctor who had never practiced Medicaid or ever filled out an HLD score sheet before to serve as their expert witness—apparently to backtrack into a credible allegation of fraud. OIG's intentions were clear—to find any reason to shut my client down. OIG's undertrained, unskilled "expert" doctor then became OIG's leading expert on whether this practice had been submitting proper Medicaid benefit applications. On the 29th of February, OIG issued an amended payment hold letter relying fully on their "expert."

Grounds for Payment Hold?

In the February 29, 2012 final payment hold letter the grounds for the 100% payment hold became:

1. Provider was missing models. From the 64 patient sample of charts, all but 4 have been found, accounted for and turned over to OIG. Remember, for most of the relevant time, TMHP did not even require models. OIG made it their requirement by applying the rules of the State Board of Dental Examiners.

2. OIG alleged that the Provider's treatment coordinators — instead of the licensed dentists — were preparing the HLD score sheets. The score sheets they picked up during the investigation did not have doctors' signatures (the client was in the process of converting to paperless records and turned over score sheets without signatures in the heat of the moment). However, TMHP (ACS/Xerox) had all of the score sheets and each one was signed by a licensed dentist—otherwise no prior authorization would have been granted.

3. OIG's "expert" concluded that the provider inflated its HLD scores for the patients. However, the provider was simply following the manual and the training by Dr. Jim Orr (who

had been the State's Dental Director for NHIC before ACS/Xerox obtained the contract). Bear in mind that in January 2012, OIG drastically changed the definition of "ectopic eruption" in the Medicaid Provider's Manual — prepared by the TMHP and HHSC — so that most of the HLD scores would no longer meet the required 26 points. They instructed their "experts" to apply this new definition retroactively to the cases collected during the investigation.

All of these sham excuses were merely contrived to end the State's over-expenditure on Medicaid orthodontics. OIG was looking for excuses in each case to put the providers on payment hold. As Jack Stick told one of the providers in a sidebar comment, "If Jesus Christ were a Medicaid provider, I could find he did something wrong to put him on hold."

A little more background on OIG's redefinition of "ectopic eruption": quoting from Judge Kilgore's ruling in the Harlingen Family Dentistry case, issued August 12, 2012, "[Dr, Evan's—OIG's "expert"] lack of Medicaid expertise, by itself, therefore, seriously calls into question the reliability and credibility of his testimony about the scoring of the patients at issue." In her conclusions of law, Judge Kilgore then said, "Dr. Evan's view of ectopic eruption and his scoring of the patients at issue lacks the credibility, reliability, and indicia of reliability, and do not verify the allegations of fraud against [Harlingen practice]." Given the State's inability to meet the minimum evidentiary standard of "indicia", imposing the payment hold under these circumstances is a substantial failing in due process; it should *never* have happened.

After being put on 100% payment hold, on behalf of our client, we timely requested an "expedited" payment hold hearing to contest the validity of the payment hold. That "expedited" hearing has recently been combined with the hearing for overpayment and will likely be scheduled for November 12, 2015 — 3-1/2 years after the 100% payment hold was imposed — another substantial failure of due process! How is a practice supposed to sustain itself for 3-1/2 years without receiving a dime for serving the patients who had been pre-approved for service? The clear intent was simply to drive my client out of business.

To continue treating the thousands of children in care in 2012, we requested an emergency meeting with Commissioner Thomas Suehs to request emergency funds. Mr. Suehs re-directed the meeting back to Jack Stick and Doug Wilson at OIG who scheduled the meeting for April 24th that year—another failure of due process, wherein we were supposed to ask the judge, jury and the executioner for help.

Among other things, we were told in the meeting:

A. The provider was under suspicion of fraud and there was no way further funds would be released.

B. Only 3% of the patients that received prior authorization from the State's hired agent, TMHP should have been approved and the OIG viewed that as the fault of the provider (not the contractor, ACS/Xerox).

C. If my client did not continue treating the children, despite the payment hold, OIG was working with the State Board of Dental Examiners and would assert its influence such that the provider lost his license to practice.

D. OIG wanted to recoup around $48M dollars from the practice.

E. If we did not resolve this immediately, the practice could expect some adverse publicity in its service area — which it did.

That meeting wasn't quite what we had expected — certainly not what we had hoped for. But at least we learned one significant thing: Informal conferences with OIG are fruitless — a shakedown!

Senate Bill 1803 seemed to grant a little relief from the oppressive actions of the OIG in indiscriminately imposing payment holds. We hoped it would establish a level of impartial review of the application of the "credible allegation of fraud" standard. We hoped it would provide such a thing as an "expedited hearing." It does appear to establish some due process, but all of those provisions are irrelevant to those who are already trapped in the grip of OIG's governmental bullying.

I doubt the Sunset Commission will ever be able to restore losses of reputation, the ruination of practices, take care of the thousands of children who have gone untreated or restore the numerous jobs to those who lost them. But perhaps the Commission can provide some vital assistance needed by the providers. For many of the providers, the cow is already out of the barn. Their professional lives are ruined. At least if the Commission can cause adoption of changes to the process, future providers can be assured a higher standard of fairness and due process as they attempt to treat the State's underprivileged children.

Recommendations

1. Require a proper vetting of the leadership of OIG — both the Inspector and the Director of Enforcement. Perhaps a vetting committee should be formed including members of the medical, dental, and legal communities as well as regular citizens. The providers are certain that giving the appointment power to the HHSC Executive Commissioner will only compound the problem.

2. Absolutely require OIG to pay all costs of CAF hearings and overpayment hearings.

3. Provide the opportunity for providers to appeal a SOAH ruling to the State District Court for a trial de novo.

4. Require the immediate termination of those existing proceedings that hinge primarily on the definition of "Ectopic Eruption." Two SOAH courts have already ruled in favor of the providers and against OIG. In the last case, the panel of two judges decided in favor

of the provider but the HHSC judge overturned and reversed all conclusions made by the trial judges.

5. Adopt clearer standards for good cause exceptions and limiting payment holds to certain circumstances. I was told in 2012 by Fread Houston (who had been an attorney with OIG but was terminated because he disagreed with the OIG's new direction) that payment holds were initially reserved for those instances where the provider would not cooperate in turning over records in the audit process.

6. Require a timely release of held funds upon the provider prevailing at the payment hold hearing.

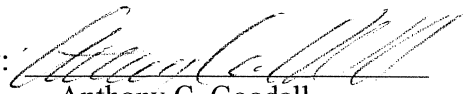
7. Prohibit OIG from making allegations against a provider for professional judgment and professional standard issues that are the domain of the licensing authorities.

8. Bind OIG to the prior authorizations rendered by its engaged contractors. It is absurd to punish the providers when the State's hired gatekeeper approved and authorized the cases.

9. Require HHSC and/or OIG to reimburse the providers for their legal expenses expended in defending against this unfair dragnet.

Thank you very much for your time and consideration.

Goodall & Davison

By: 
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