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October 17, 2014

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:

We represent the Dental Association for Underserved Children (“DAUC”), a group of dental providers who offer services to children in Texas that qualify for Medicaid. Several of these providers have had first-hand experiences with the Office of Inspector General (“OIG”), and are well-aware of problems raised in your Sunset Staff Report on the Health and Human Services Commission (“HHSC”).

We would like to congratulate you and the Sunset staff on the excellent report. We realize that such a project was a massive undertaking, and are impressed with and supportive of almost all of the recommendations. We believe that the results of your efforts will provide due process to providers and also clean up the “significant questions about OIG’s processes and results” that you raised in the report.

DAUC would like to use this opportunity to ask some questions regarding Issue 11 of the report, make some comments and also mention issues that we believe should be addressed as part of the review.

I. A short timeframe for setting SOAH hearings could hurt, not help, providers seeking due process.

Requiring a case to be heard at SOAH within 30 days of the request for hearing will make it virtually impossible for a provider to conduct any pre-hearing discovery or meaningful evidence gathering. This would place the provider in the position of having to quickly investigate and defend a case that the OIG had spent months, or perhaps years, developing.

Currently payment holds are levied with a bare minimum of evidence required to be disclosed; the full legal payment hold complaint that will be heard at a SOAH payment hold hearing often takes several weeks, and sometimes several months, for the OIG to reveal. The problem can be solved by requiring that the OIG serve the “Complaint” and provide all of its evidence to the provider together with the Notice of Payment Hold. This would give the providers the notice and evidence they need to understand the OIG’s position and address the allegations that would be considered at the SOAH hearing.

In addition, the proposal could be amended to permit a relatively short continuance of the hearing (30-90 days) on request of the provider.

II. Length of hearing should be able to be extended by agreement of parties.

The parties should be permitted to mutually agree to a greater period than 4 hours per side for the presentation of their cases. Some recent payment hold cases have attempted to consolidate multiple businesses into a single hearing that involved literally hundreds of alleged “violations.” While many of the alleged violations in these hearings were “program violations” related to recordkeeping and minor rules violations, addressing a large number of discrete fraud allegations spread across a number of different providers/TPI numbers could take more than 4 hours for both the OIG and the provider.

III. Extend recommendation for final CAF Payment Hold to be made at SOAH without appeal to Overpayment/Recoupment hearings as well.

DAUC is very supportive of the proposed recommendation regarding final decisions on CAF Payment Hold cases to be made at SOAH without an appeal process but would urge that the same proposal be made in regard to Overpayment/Recoupment hearings. They should also be required to be held exclusively at SOAH without the opportunity of appeal to the district courts.

IV. Apply Sunset recommendations on restricting payment holds to cases already in the pipeline.

Any legislative changes regarding restricting payment holds to actual allegations of fraud (instead of program violations), as well as the finality of SOAH decisions and appeals, should be given retrospective effect to prevent ongoing perceptions of HHSC partiality and OIG overreaching.

V. Limit OIG from interpreting and pursuing an alleged violation of a different agency’s licensing rules before the agency itself has determined whether the provider has violated the rules impugns the jurisdiction of the licensing agency.

Many of the OIG's alleged "program violations" are not violations of the Medicaid program at all, but are actually alleged violations of the underlying licensing agency's rules. For example, the OIG often claims that dentists have committed a Medicaid violation because the dentist failed to comply with Texas State Board of Dental Examiner's informed consent rule, which requires the dentist to secure and retain a written consent for certain dental procedures.

In another example, Speech-language therapists have been accused of committing a Medicaid violation because the therapist might not have secured the State Board of Examiners for Speech-Language Pathology and Audiology registration of a therapy assistant.

Thus, Sunset should reiterate that it is the licensing agency, not the OIG, that has the sole authority to make an initial determination regarding an alleged violation of the agency's rules. Allowing the OIG to interpret and pursue an alleged violation of a different agency's licensing rules before the agency itself has determined whether the provider has violated the rules impugns the jurisdiction of the licensing agency. It also allows the OIG to force the SOAH judges to interpret the licensing agency's rules in a manner that is not consistent with the way the agency itself views its own rules.

VI. A CAF Payment Hold should never be effectuated in the case of a service that has received prior authorization by the HHSC or its agent unless additional evidence is presented that provider has materially misrepresented the proposed medical or health care services or has substantially failed to perform the proposed medical or health care services.

We propose that a CAF Payment Hold should never be effectuated in the case of a service that has received prior authorization by the HHSC or its agent. Prior authorization of a service confirms that the service was "medically necessary." The provider should not be subject to a Payment Hold for its provision of a medically necessary service absent evidence of a provider's material misrepresentation as to the services provided, or evidence that the provider did not in fact perform the referenced service.

Such a policy was not addressed in Senate Bill 1803, 83rd Regular Session, which continued to permit a Payment Hold on the determination of a credible allegation of fraud, even if the service has been prior authorized. In fact, as described above, there are OIG cases where a Payment Hold is being continued by the OIG where the only claim is that a service provided by a provider should not have been prior authorized by the state's agent.

A precedent for creating such a policy exists in the Texas Insurance Code chapter regulating Preferred Provider Benefit Plans. Section 1301.135 of the Texas Insurance

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Code addresses the preauthorization process for insurers covering health care services. Section 1301.135(f) of the Texas Insurance Code states:

If an insurer has preauthorized medical care or health care services, the insurer may not deny or reduce payment to the physician or health care provider for those services based on medical necessity or appropriateness of care unless the physician or provider has materially misrepresented the proposed medical or health care services or has substantially failed to perform the proposed medical or health care services.

This policy is intended to allow providers to be able to rely on the decision of the person providing the prior authorization unless new facts are uncovered. It is our understanding that this long-standing insurance statute has been working well and protects providers from flip-flopping by the payor or entity providing the prior authorization.

VII. A process must be created to address how previously held monies are returned to providers after successful SOAH hearings.

We are aware of a situation whereby a provider has received a determination from a SOAH judge stating that a CAF Hold should be removed. Although HHSC has agreed with the SOAH finding, the funds no longer under hold have not been returned by HHSC to the provider. Even after being granted a Writ of Mandamus, the funds were not released. We believe this is gross injustice considering the provider was cleared of fraud.

We therefore suggest that Sunset recommend that a process with short time frames be created by the Legislature to determine how and when previously held monies must be returned to a provider who wins their payment hold hearing.

* * *

Please let us know if you require any additional information about our questions or comments. We look forward to continuing to work on this matter.

Sincerely,



Mark Vane

cc: Members, Sunset Advisory Commission

From: [Sarah Kirkle](#)
To: [Danielle Nasr](#)
Cc: [Joe Walraven](#); [Cecelia Hartley](#)
Subject: Fwd: Additional suggestions for Sunset staff response on HHSC report
Date: Friday, October 24, 2014 4:54:48 PM
Attachments:

Begin forwarded message:

From: "Vane, Mark" <mvane@gardere.com>
Date: October 24, 2014 at 4:52:38 PM CDT
To: "Sarah.Kirkle@sunset.state.tx.us" <Sarah.Kirkle@sunset.state.tx.us>
Subject: **Additional suggestions for Sunset staff response on HHSC report**

Sarah:

Hope all is well. As you know, we represent the Dental Association for Underserved Children, a group of health care providers who provide dental services for children on Medicaid. DAUC filed comments with Sunset last week but wanted to add two comments following the realization that an OIG staffer was terminated for fraudulent activities related to extrapolation.

A recent Austin American Statesman article titled "Fraud inspector's falsified work could cost state millions" detailed how an OIG actuary was fired in July 2014 when the state learned that he faked data the OIG used in extrapolating claims against accused providers. The employee, Brad Nelson, supposedly worked on 18 cases at the agency.

Since the fraud was uncovered last summer, no providers have been alerted by OIG that they themselves were subject to fraud conducted by the state. This is an amazing situation considering that providers are currently in litigation and negotiations with the state. Thus, people could be setting or litigating cases in which the underlying data was based on a fraud.

For these reasons, we believe that the following two Sunset recommendations should be modified

10.10 Direct OIG to narrow its employee investigations to focus on high priority

allegations, such as those at state institutions and related to program integrity, and develop guidelines for investigations of child fatalities.

10.11 Direct OIG to actively take steps to improve training for its staff and communication with HHS system programs and providers.

10.10 should be modified to include a provision that if OIG uncovers that a state agency employee, including an OIG employee, is suspected to fraud, any provider who may be negatively impacted by the fraud must receive prompt notification of the fraud from the OIG. In addition, any payments holds must be released or timelines for settlement or hearings must be tolled until the scope of the fraud has been reported and rectified.

10.11 should be modified to including a provision stating that OIG must improve communications with harmed providers if OIG uncovers that a state agency employee, including an OIG employee, is suspected to have committed fraud. These communications should be prompt and substantial.

These changes in 10.10 and 10.11 will protect providers from future fraud and improve communications. Let me know if you have questions. Thanks,

Mark Vane | Partner
Gardere Wynne Sewell LLP

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From: [Sarah Kirkle](#)
To: [Danielle Nasr](#)
Cc: [Joe Walraven](#); [Cecelia Hartley](#)
Subject: Fwd: Dental Association for Underserved Children and issues it supports in HHSC Sunset report
Date: Friday, October 24, 2014 4:58:42 PM
Attachments:

Begin forwarded message:

From: "Vane, Mark" <mvane@gardere.com>
Date: October 24, 2014 at 3:35:36 PM CDT
To: "Sarah.Kirkle@sunset.state.tx.us" <Sarah.Kirkle@sunset.state.tx.us>
Subject: Dental Association for Underserved Children and issues it supports in HHSC Sunset report

Sarah:

Hope all is well. As you know, we represent the Dental Association for Underserved Children, a group of health care providers who provide dental services for children on Medicaid. DAUC filed comments with Sunset last week but wanted to let you know specifically that the group supports the following recommendations in the Sunset staff report for HHSC:

- 10.1 HHSC appoints IG.
- 10.2 6 years for next sunset.
- 10.3 OIG to establish via rulemaking criteria for priorities.
- 10.4 Preliminary investigations completed w in 45 days, 180 for complete investigation.
- 10.5 Scale enforcement action to nature of violation.
- 10.6 Peer review of extrapolating.
- 10.11. Better communication.

- 11.2 Clarify good cause exception for hold.
- 11.3 Holds only in serious circumstances.
- 11.4 OIG pays for hearing.

Please let me know if you have any questions. Thanks,

Mark Vane | Partner
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