

## Testimony of Fread Houston in Support of HB 1536

I'd like to thank the Chair and the Committee for the opportunity to speak in favor of HB 1536. My name is Fread Houston of Austin, Texas. I formerly served as the Director of Sanctions for the HHSC Office of Inspector General (OIG) from January 2009 to May 2012. Among other duties it was the responsibility of the Sanctions Division to review and prosecute cases received from the OIG investigators and to initiate payment holds.

The fact that the OIG has a responsibility to reduce fraud, waste and abuse in the Medicaid program is beyond question, however the enforcement approach of any agency should be competent, ethical, in accord with due process and have an awareness and sensitivity to the program's purpose and intent. To be clear, the OIG has a dedicated staff that works hard to carry out the policies set by the agency's management. The current OIG management has charted a more aggressive stance in seeking to recoup dollars. However, this aggressive enforcement stance is not supported by a focus on the fundamentals of adequately developing a case but instead it relies upon a process heavily driven by potential collection amounts and novel reinterpretations of policy instead of evidence and proper enforcement of the Medicaid rules. While I was at the OIG I encountered a number of concerns regarding the agency's processes:

There were concerns about the process of retaining experts who had little to no experience with the Medicaid program and the use of those experts to reliably interpret Medicaid policy.

I received expert reports that were unsigned by the expert. I was told that expert reports were edited by Enforcement management to remove statements that were supportive of a provider's actions.

Normal intake processes for reviewing cases for legal and evidentiary sufficiency and for the determination to initiate prosecution were effectively removed from attorneys in the Sanctions Division who are legally and professionally responsible for those prosecutions, such that it resided almost solely in the discretion of the Deputy of Enforcement (DOE), who directly oversees the Medicaid Program Integrity (MPI) Division which is responsible for initiating and conducting investigations on providers.

Once the Sanctions case intake process was overturned in fact, payment hold cases were transferred directly to Sanctions under the credible allegation of fraud process and a payment hold was mandated to be put in place immediately. Under the orthodontic initiative, the agency retroactively applied a new Medicaid policy interpretation regarding ectopic eruptions and declared past orthodontic treatment to be fraud or willful misrepresentation under the new credible allegation of fraud mandate. This strategy would allow the agency to impose 100% payment holds on Medicaid practices based upon a reinterpretation of policy with no evidence of actual fraud. Despite recent claims by OIG management made to the Legislature of an extensive case vetting process, any questioning of the evidentiary sufficiency of a case by legal staff was met with swift disapproval from the IG, the DOE and the Chief Counsel. The discretion to consider any good cause exception including financial burden was limited to the IG's personal discretion instead of being based upon the recommendation of the Sanctions Division Accountants who would typically perform an independent review of the provider's financials.

The actual evidentiary case itself could take years to complete investigation and even a payment hold hearing could take 8 months or more before a decision is issued and the payment hold remains in place during that time. This process could easily destroy a medical or dental practice in a short amount of time if it treats a significant amount of Medicaid patients.

As an alternative a provider could request an informal conference. These conferences were normally conducted by Sanctions Division attorneys, however the policy was changed so that an informal conference could not be held without the attendance of the DOE. That quickly progressed to having the DOE actively heading the informal conference. The informal conferences focused heavily on the agency's demand for payment as articulated by the DOE and very little discussion of the evidentiary merits of the case itself. Due to the high error rates determined by the new policy reinterpretation and the process of extrapolating the resulting dollar amounts, the overpayments typically ran into the millions of dollars.

In the sole OIG CAF payment hold case to complete the contested case process, the administrative law judge of the State Office of Administrative Hearings found insufficient evidence of fraud or willful misrepresentation by the provider. When the SOAH judge's proposal for decision was returned to the HHSC's administrative law judge who was delegated the responsibility of entering a final order for cases referred to SOAH under current rules, the HHSC judge entered the final order as required. However, the OIG challenged the HHSC judge's entry of the final order in an attempt to overturn the findings of the SOAH judge who actually heard the case. The final order was inexplicably put on hold for months until the final decision was once again affirmed. The HHSC judge then retired from the HHSC. This has led to concern as to the independence of the HHSC judges and the HHSC contested case process. An independent and fair contested case process is essential to constitutional due process and is the very reason why the State Office of Administrative Hearings was formed. I believe those concerns are valid and applicable to the enforcement of OIG contested cases and that the best route for protection of due process rights and a fair and impartial hearing would be to give providers the right to have their cases heard by the State Office of Administrative Hearings.

Also, in order to ensure fairness throughout the process, I also believe that it may be necessary to consider having a panel of independent experts review Medicaid cases after the investigative process and before the initiation of prosecution to ensure proper sufficiency of the cases.

HB 1536 will help to ensure that the OIG can continue its duty to investigate fraud, waste and abuse while also ensuring providers that the enforcement process will be fair and impartial and protect due process rights.