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HB18-1211: MEDICAID PROVIDER FRAUD
Sponsors: Smallwood/Aguilar/Wist/Foote
****Passed HJC and the House Floor Unanimously***

BACKGROUND:

- Federal law requires Colorado to have a Medicaid Fraud Control Unit in order to receive the state's nearly \$4 billion in federal Medicaid funding.
- 75% of the MFCU's budget is funded with federal dollars.
- The MFCU prevents wasteful spending in the Medicaid program and protects vulnerable Coloradans from neglect and abuse.
- The MFCU must investigate and prosecute both Medicaid provider fraud and patient abuse, neglect and exploitation cases to maintain Colorado's federal funding for the Medicaid program.
- A 2016 federal audit by the U.S. Inspector General concluded that the MFCU is not prosecuting enough patient abuse and neglect cases, as required by federal law.¹
- 42 U.S.C. § 1396b(q) requires that the MFCU be in the AG's office or another state agency, unless the Constitution prohibits it.²

¹ Of the 673 cases that were open during the review period, less than 4 percent (25 cases) were patient abuse or neglect cases. Moreover, the number of abuse or neglect referrals that the Unit processed declined each year from 2013 to 2015.

² "State medicaid fraud control unit" means a single identifiable entity of the State government which the Secretary certifies as meeting the following requirements:

(1) The entity (A) is a unit of the office of the State Attorney General or of another department of State government which possesses statewide authority to prosecute individuals for criminal violations, (B) is in a State the constitution of which does not provide for the criminal prosecution of individuals by a statewide authority and has formal procedures, approved by the Secretary, that (i) assure its referral of suspected criminal violations relating to the program under this subchapter to the appropriate authority or authorities in the State for prosecution and (ii) assure its assistance of, and coordination with, such authority or authorities in such prosecutions, or (C) has a formal working relationship with the office of the State Attorney General and has formal procedures (including procedures for its referral of suspected criminal violations to such office) which are approved by the Secretary and which provide effective coordination of activities between the entity and such office with respect to the detection, investigation, and prosecution of suspected criminal violations relating to the program under this subchapter. 42 U.S.C. § 1396b (2018).

SUMMARY OF THE BILL:

Codifies the Authority of the Medicaid Fraud Control Unit (MFCU) in the Office of Attorney General (OAG)

- Pursuant to Executive Order D1787 signed by Governor Roy Romer in March of 1987 and 42 C.F.R. § 1007.1(a), the MFCU has the authority to prosecute individuals criminally for Medicaid fraud and patient abuse, neglect and exploitation pursuant to existing crimes in Title 18 as well as civilly pursuant to the False Claims Act.
- Medicaid Fraud Control Units are classified as health oversight organizations by the federal government and as such, are exempt from HIPAA. The occurrence reports contain significant amounts of patient information and protected health information. This makes the MFCU uniquely situated to investigate and prosecute Medicaid patient abuse, neglect and exploitation cases, as well as Medicaid fraud.

Defines the Crime of Medicaid Fraud and Waste

- Currently, the AG prosecutes criminal Medicaid fraud and waste offenses pursuant to the theft and forgery statutes in Title 18. The bill creates the new crime of Medicaid Fraud and Waste.
- The new crime of Medicaid Fraud and Waste has the same penalties and statute of limitations as theft and forgery.
- The bill makes clear that a provider cannot be prosecuted under the new crime of Medicaid Fraud and Waste *in addition to* theft and forgery.
- The bill limits Medicaid Fraud and Waste prosecutions to people who knowingly and willfully make false Medicaid claims or people who knowingly and willfully cause such false claims to be made. Additionally, most of the criminal behavior that would constitute Medicaid Fraud and Waste, as defined by the bill, requires the specific intent to defraud.
- Under current law, third parties who cause false claims to be made cannot be prosecuted. The new language will allow the Attorney General to go after pill mills (facilities involved in illegal diversion of prescription drugs) and third party billing companies who prepare false claims on behalf of Medicaid providers.

Provides for state enforcement of anti-kickback violations

- Federal law currently prohibits Medicaid providers from giving or accepting a kickback in exchange for referring a Medicaid patient.
- The proposed anti-kickback provision will put a similar provision in state law and includes the same safe-harbor provisions that exist under federal law.



**Written Comments Regarding HB18-1211
Establishment of the Medicaid Fraud Control Unit**

Mr. Chairman, Madame Vice-Chairman and members of this Committee.

My name is Patrick Hackney. I currently am employed by Disability Law Colorado as the team leader for Disability Law Colorado's Facilities Team. I am writing today to express support for HB18-1211 which establishes the Medicaid Fraud Control Unit, especially the provision of HB18-1211 that authorizes the Unit to investigate and prosecute abuse, neglect, and exploitation cases.

If I may, I would like to provide some brief background regarding Disability Law Colorado. Established in 1976 as The Legal Center for People with Disabilities and Older People, Governor Lamm, in 1977, designated our organization as Colorado's state protection and advocacy agency. Congress created the protection and advocacy system after a report exposed horrific abuse and neglect at Willowbrook State School in New York. Willowbrook was an institution that served individuals with developmental disabilities. In 1988, we added two programs to support older adults: The Colorado Long-Term Care Ombudsman Program and the Legal Assistance Developer Program. In 2015, The Legal Center for People with Disabilities and Older People officially became Disability Law Colorado.

Disability Law Colorado's facilities team focuses on providing advocacy services to Coloradans with disabilities residing in institutional placements, such as the state-operated mental health institutes, regional centers and juvenile detention centers. Due to limited resources, Disability Law Colorado cannot monitor every entity in Colorado that serves individuals with disabilities nor can we investigate every allegation of abuse and neglect. Furthermore, our tools to remedy concerns we discover is somewhat limited. These remedies usually include making recommendations to prevent future similar occurrences, issuing a public report to highlight our concerns, or if necessary, filing litigation.

Because Disability Law Colorado does not have the resources to investigate every allegation of abuse and neglect of a person with a disability, we support the passage and enactment of HB18-1211. Persons residing in facilities that serve persons with disabilities are often isolated from their communities. That isolation, along with the nature of some disabilities, makes these individuals vulnerable to abuse and neglect.

Everyone would certainly agree that individuals with disabilities should be free from abuse and neglect. Unfortunately, however, instances of abuse and neglect of persons with disabilities occur. HB18-1211 provides the Medicaid Fraud Control Unit with a focused mandate to investigate abuse and neglect allegations. Additional

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resources, like the Medicaid Fraud Control Unit, can help limit such abuse and neglect by investigating these instances and seeking both civil and criminal remedies from the perpetrators.

For these reasons, Disability Law Colorado unequivocally supports the passage of HB18-1211.

Thank you for taking the time to read and consider these comments.

To the Members of the Legislature

My name is Anne Meier, I currently serve as Colorado's State Long-Term Care Ombudsman. Disability Law Colorado is the sponsoring agency for my office. I am writing today to express support for HB18-1211 which establishes the Medicaid Fraud Control Unit. Their mission is an essential one, and contributes to the fabric of support for those who are older or have disabilities or illnesses which create vulnerability.

If I may, I would like to provide some brief background regarding the Long-Term Care Ombudsman Program. Established in the Older Americans Act, the Long-Term Care Ombudsman Program is found in all states and territories. The federally mandated mission is to serve as a resident-directed advocate and work to resolve concerns regarding quality of care and quality of life complaints by residents who live in either an assisted living home or a nursing home. Some concerns are easily addressed such as room temperature. However, ombudsmen also work to resolve complaints which arise from care concerns that involve criminal charges such as caregiver neglect.

Colorado's Long-Term Care Ombudsman Program brings advocates face-to-face with residents in the 900 homes across Colorado, serving approximately 44,000 people each year. Recently, the LTCOP grew with the addition of adding the State PACE Ombudsman Program, which provides advocacy to the 4,000 people across Colorado who receive PACE services in their communities.

Everyone would certainly agree that older people and individuals with disabilities should be free from abuse and neglect. Unfortunately, however, instances of abuse and neglect do occur. HB18-1211 codifies the Medicaid Fraud Control Unit with a focused mandate to investigate and prosecute abuse and neglect allegations. The Colorado Long-Term Care Ombudsmen have referred cases to the Medicaid Fraud Control Unit on the direction of long-term care residents. And some of those referrals have resulted in court action, protecting residents from further harm.

On behalf of vulnerable people who are dependent upon long-term care for their quality of care and quality of life, I support the passage of HB18-1211.

I thank you in advance for your consideration,

Anne K. Meier
State Long-Term Care Ombudsman
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