

- SUBJECT:** Information sharing and criminal offenses involving Medicaid fraud
- COMMITTEE:** Public Health — favorable, without amendment
- VOTE:** 8 ayes — Laubenberg, Jackson, Cohen, Coleman, Gonzales, S. King, Olivo, Truitt
- 0 nays
- 1 absent — Delisi
- WITNESSES:** For — None
- Against — None
- On — (*Registered, but did not testify:* Brian Johnson, Office of the Attorney General)
- BACKGROUND:** It is illegal for providers, provider employees, or Medicaid recipients to provide inducements to select a certain Medicaid provider or to use certain drugs or services provided under the Medicaid program. Acts of Medicaid fraud are punishable based upon the monetary or in-kind value of a benefit provided in the perpetration of fraud.
- DIGEST:** HB 3310 would establish the rules by which participating agencies could exchange information regarding potential cases of Medicaid fraud or abuse. A participating agency would be the Medicaid fraud enforcement division of the Office of the Attorney General or any licensing or regulatory body for health care professionals or managed care organizations participating in the state Medicaid program. Participating agencies could submit requests to one another for information regarding a health care professional or managed care organization that was the subject of an investigation. A participating agency also could provide information to another agency without being prompted by request if the agency discovered information that might indicate fraud or abuse.
- An agency receiving an information request would have to submit the requested information unless it was not legal to do so or it would jeopardize an ongoing investigation by that agency. If an agency was unable to submit requested information for either of these reasons, the

agency would have 30 days to inform the requesting agency of this determination in writing.

Information shared among participating agencies regarding Medicaid fraud or abuse would be subject to the confidentiality restrictions and open record provisions of the agency providing the information. Before using shared information in a licensure or enforcement action, an agency would have to obtain written permission from the agency that shared the information.

In addition to Medicaid recipients, providers, and provider employees, it would be a violation for a provider agent, third-party vendor, or public servant to receive an inducement to influence or be influenced in a decision regarding:

- selection of a Medicaid provider;
- use of Medicaid goods or services; or
- inclusion or exclusion of Medicaid goods or services.

These offenses or the intentional obstruction of investigations into these offenses would constitute a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000).

An offense involving securing execution of a document by deception would be punished by the next higher offense category if it involved Medicaid fraud. Punishments would be based upon the value of the property, service, or pecuniary interest involved in the offense, ranging from a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) for offenses involving less than \$20 to a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to \$10,000) if the offense involved \$100,000 or more.

Penalties for Medicaid fraud could be assessed based upon the amount of a Medicaid claim. If the value involved in the case could not be ascertained, the penalty would be a state-jail felony. Property of any nature used in the commission of a Medicaid fraud felony would be subject to forfeiture.

The bill would take effect September 1, 2007, and would apply only to offenses and investigations originating after that date.

SUPPORTERS
SAY:

HB 3310 would create uniformity of procedures and ease the exchange of information between agencies and the attorney general in investigating alleged Medicaid fraud. Under the current system, agency general counsels invest significant time determining the mechanism by which they can obtain information relevant to an investigation. In the end, agencies often subpoena one another for information, and the receiving agency must review and agree to extensive confidentiality rules to use the evidence. This process bogs down investigations. HB 3310 would clarify that agencies could exchange information without subpoena and that the confidentiality requirements of the agency providing the information would be applied.

While it currently is illegal to give kickbacks to a provider to recommend particular drugs and services, it is not illegal to induce someone to *include* particular drugs and services in the Medicaid program. HB 3310 would require executives to make objective decisions about what drugs and products would be covered by Medicaid and the order in which they were placed on the formulary. The bill also would expand the parties to Medicaid fraud who could be penalized, including those who received inducements as well as those who provided them.

HB 3310 would allow assessment of penalties based on the amount of a claim in the event that a claim had been paid only in part or had been placed on hold. This is an existing practice in insurance fraud cases. The bill would clarify that anything of value obtained in the commission of Medicaid fraud would be returned to the Medicaid program.

Two sessions ago, obstruction of a Medicaid fraud investigation was made a crime, yet no punishment was associated with it. HB 3310 would provide the associated state-jail felony punishment for obstruction. State jails were designed to punish people for low-level, non-violent property offenses. As always, courts would use discretion in imposing punishments within the allowed range. Under Penal Code, sec. 12.44, a state-jail felony can be reduced to a class A misdemeanor with the option to elect deferred adjudication if mitigating circumstances made a lower punishment appropriate.

OPPONENTS
SAY:

The state-jail felony offense could prove too harsh for some individuals implicated in the obstruction of a Medicaid fraud investigation or charged with Medicaid fraud in a case in which the monetary value could not be determined. For example, a loyal office worker might shred documents for

her boss not fully understanding the implications of a Medicaid fraud investigation against her employer. Such an individual should not be charged with a state jail-felony. Not only would this punishment not fit the crime, but state jails already are overburdened with criminals who committed more serious offenses.

NOTES:

The companion bill, SB 1694 by Nelson, passed the Senate on April 19 on the Local and Uncontested Calendar and was reported favorably, without amendment, by the House Public Health Committee on April 30, making it eligible to be considered in lieu of HB 3310.