SUBJECT: Modifying HHSC's Office of Inspector General

COMMITTEE: General Investigating and Ethics — favorable, without amendment

VOTE: 7 ayes — Kuempel, Collier, S. Davis, Hunter, Larson, Moody, C. Turner

0 nays

WITNESSES: For — Jason Ray, Riggs and Ray; Maureen Milligan, Teaching Hospitals of Texas; (*Registered, but did not testify*: Mark Vane, Gardere Wynne Sewell LLP; Fred Shannon, Hewlett Packard; David Mintz, Texas Academy of General Dentistry; Bill Pewitt, Texas Association for Home Care and Hospice; Michelle Romero, Texas Medical Association)

Against — None

On — (*Registered, but did not testify*: John Adamo, Department of Family and Protective Services; Sarah Kirkle and Danielle Nasr, Sunset Advisory Commission)

BACKGROUND: The Texas Legislature created the Office of Inspector General (OIG) in 2003 as part of its reorganization of the health and human services (HHS) system. The office is subject to Sunset review but not abolishment.

Office structure. The office is a division of the Health and Human Services Commission (HHSC), but OIG largely operates independently, separate from HHSC. The office's inspector general is appointed by the governor to serve a one-year term.

Office function. OIG is charged with preventing, detecting, and investigating fraud, waste, and abuse throughout the HHS system. OIG has a wide variety of functions and performed 103,618 investigations, reviews, and audits in fiscal 2013. OIG includes five divisions: operations, compliance, internal affairs, enforcement, and chief counsel. OIG also directs the operation of the Health Insurance Premium Payment (HIPP) program, which reimburses a Medicaid-eligible person or family for the

cost of commercial insurance premiums when those costs are less than the cost of Medicaid services.

Funding. In fiscal 2014, OIG had 774 people on staff and a $48.9 million budget, which has increased by nearly 30 percent since 2011.

DIGEST:

Appointment of the inspector general. HB 3279 would require the executive commissioner of HHSC, rather than the governor, to appoint the inspector general. This change would apply to an inspector general appointed on or after September 1, 2015.

Definition of fraud. HB 3279 would change the definition of "fraud" in Government Code, sec. 531.1011(4) to specify that the term does not include unintentional technical, clerical, or administrative errors.

Time limits on investigations. The bill would require OIG to complete preliminary investigations of Medicaid fraud and abuse by the 45th day after the date the commission received a complaint or allegation or had reason to believe that fraud or abuse had occurred. It would require OIG to complete a full investigation by the 180th day after the date the full investigation began unless the office determined that more time was needed. Under the bill, if OIG determined that it needed more time, the office would have to notify the provider subject to the investigation of the delay and would have to specify why the office was unable to complete the investigation within the 180-day period. These changes would apply only to a complaint or allegation received on or after September 1, 2015. The bill would not require the office to give notice to a provider if notice would jeopardize the investigation.

Payment holds and provider notice. The bill would specify that a payment hold is a serious enforcement tool that the office imposes to mitigate ongoing financial risk to the state and that a payment hold would take immediate effect.

HB 3279 would require OIG to notify a provider affected by the payment hold within five days of imposing the payment hold. The bill would

require that the notice given to the provider include a detailed summary of OIG's evidence relating to the allegation and a description of administrative and judicial due process rights and remedies. These remedies would include providers' "option," rather than "right," to seek informal resolution, their right to seek a formal administrative appeal hearing, or both. The notice would have to include a detailed timeline for the provider to pursue these rights and remedies.

HB 3279 would specify under which circumstances OIG could impose a payment hold or could find that good cause existed not to impose a payment hold, not to continue a payment hold, to impose a partial payment hold, or to convert a full payment hold to a partial payment hold. OIG could not impose a payment hold on claims for reimbursement that a provider had submitted for medically necessary services and for which the provider had obtained prior authorization unless the office had evidence that the provider had materially misrepresented documentation of the provided services.

The bill would specify that OIG could impose a payment hold without notice to a provider only if a payment hold was needed to compel the provider to give records to OIG, when requested by the state's Medicaid fraud control unit, or on the determination that a credible allegation of fraud existed.

These changes would apply only to a complaint or allegation received on or after September 1, 2015. The executive commissioner of HHSC would have to adopt by March 1, 2016, the rules necessary to change the circumstances under which a payment could be placed on claims for reimbursement submitted by Medicaid providers.

Administrative hearings. HB 3279 would require OIG to file a request with the State Office of Administrative Hearings (SOAH) for an expedited administrative hearing regarding a payment hold within three days after the date the office received a provider's request for such a hearing. The bill also would require a provider to request an expedited administrative hearing within 10 days after receiving notice from OIG regarding a

payment hold. Under the bill, SOAH would have to hold the expedited administrative hearing within 45 days after receiving a hearing request.

During expedited administrative hearings, the bill would:

- require the provider and the office each to limit testimony to four hours;
- entitle the provider and the office each to two continuances under reasonable circumstances; and
- require the office to show probable cause that the credible allegation of fraud that was the basis of the payment hold had an indication of reliability and that continuing to pay the provider would be an ongoing significant financial risk to the state and a threat to the integrity of the Medicaid program.

These changes would apply only to a complaint or allegation received on or after September 1, 2015.

SOAH hearing costs. HB 3279 would remove the requirement in existing law that OIG and the provider share costs of an expedited administrative hearing and instead would make OIG responsible for the costs of the hearing and make the provider responsible for its own costs incurred in preparing for the hearing. The bill also would remove the requirement in law that a provider advance a security payment for the costs of the hearing. These changes would apply only to a complaint or allegation received on or after September 1, 2015.

Continuation of payment holds. Under the bill, a SOAH judge would have to decide in an expedited administrative hearing if a payment hold should continue but could not adjust the amount or percent of the payment hold. The judge's decision would be final and could not be appealed. The bill would remove the ability of a provider subject to a payment hold to appeal a final administrative order. These changes would apply only to a complaint or allegation received on or after September 1, 2015.

Informal resolution process. HB 3279 would allow OIG to decide whether to grant a provider's request for a first or second informal

resolution meeting. The bill would remove existing time requirements for when OIG would have to schedule the meeting or when the office would have to give notice of the meeting. The bill would require the informal resolution process to run concurrently with the administrative hearing process and would discontinue the informal resolution process once SOAH issued a final determination on the payment hold. These changes would apply only to a complaint or allegation received on or after September 1, 2015.

Future Sunset review. The Sunset Advisory Commission would conduct a special-purpose review of the overall performance of OIG as part of its review of agencies for the 87th Legislature in 2021. OIG would not be abolished solely because it was not explicitly continued following the review.

Rules on OIG operation and duties. The executive commissioner of HHSC would set rules for opening and prioritizing cases. In addition, the executive commissioner would have to adopt rules detailing OIG investigation procedures and criteria for enforcement and punitive actions. These rules would include direction for categorizing provider violations according to the nature of the violation and for scaling resulting enforcement actions, taking into consideration the seriousness of the violation, the prevalence of the provider's errors, financial harm, and mitigating factors. The rules also would have to include a specific list of potential penalties. In addition, staff members not directly involved in OIG investigations would be required to review OIG's investigative process.

The bill would specify the duties of OIG regarding:

- investigations of possible fraud, waste, and abuse by certain managed care organizations;
- training and oversight of special investigative units established by managed care organizations;
- requirements for approving managed care organizations' plans to prevent and reduce fraud and abuse;

- evaluation of statewide fraud, waste, and abuse trends in the Medicaid program; and
- assistance to managed care organizations in discovering or investigating fraud, waste, and abuse.

Extrapolation review. HB 3279 would require OIG to review its investigative process, including its use of sampling and extrapolation to audit provider records. The bill would require the review to be performed by staff who were not directly involved in OIG investigations.

Pharmacies subject to audits. HB 3279 would specify that a pharmacy has a right to request an informal hearing before the HHSC's appeals division to contest an audit that did not find that the pharmacy engaged in Medicaid fraud. The bill would require staff of the HHSC's appeals division, assisted by vendor drug program staff, to make the final decision on whether an audit's findings were accurate. It would disallow OIG staff from serving on the panel that makes a decision regarding the accuracy of the audit.

OIG would have to provide pharmacies under audit with detailed information, if OIG has access to it, relating to the extrapolation methodology used as part of the audit and the methods used to determine whether the Medicaid program overpaid the pharmacy.

By March 1, 2016, the executive commissioner of HHSC would have to adopt the necessary rules to implement these changes.

Audit or investigation reports. HB 3279 would allow a confidential draft report on an audit or investigation that concerned the death of a child to be shared with the Department of Family and Protective Services, but the draft report would remain confidential.

Participation in HIPP and managed care. The bill would repeal the prohibition on an individual's participation in both the Health Insurance Premium Payment Program (HIPP) and Medicaid managed care.

Federal waivers. HB 3279 would direct a state agency needing a waiver or authorization from a federal agency to implement a provision of the bill to request that waiver or authorization. The affected state agency could delay implementation of affected provisions in the bill until the agency received the waiver or authority.

The bill would take effect September 1, 2015.

SUPPORTERS SAY:

HB 3279 would help address management and due process concerns found during the Sunset review of the Health and Human Services Commission (HHSC). The bill would address issues in the efforts of the Office of Inspector General (OIG) to detect and deter Medicaid fraud, waste, and abuse, including overzealous investigation of providers, an overly broad definition of fraud, and a lack of transparency. OIG's investigative processes lack structure, guidelines, and performance measures to ensure consistent and fair results. The bill would require OIG to undergo a special Sunset review in six years, remove the one-year gubernatorial appointment of the inspector general, and require the executive commissioner of HHSC to appoint and directly supervise the inspector general. These actions would help ensure the integrity of state health and human services programs and Medicaid fraud investigations.

Appointment of OIG. Current law requiring the governor to appoint the inspector general fosters confusion about whether the inspector general answers to the governor or the HHSC executive commissioner. Problems with this structure and its lack of clear accountability were illustrated by the inability of the HHSC executive commissioner to properly hold the inspector general accountable for overzealous Medicaid investigations and excessive spending on badges and other items.

HB 3279 would clear up this confusion by giving the executive commissioner of HHSC the authority to appoint and directly supervise the inspector general. The executive commissioner would maintain full oversight responsibilities for OIG's functions, removing any questions about the executive commissioner's authority and making the executive commissioner clearly accountable for OIG's performance, which is common in other state offices of inspector general. In cases of conflict of

interest, OIG could refer those allegations to the Texas Rangers for investigation through the same mechanisms available to other state agencies.

Sunset review. Given the lack of data to fully evaluate OIG's performance, especially related to investigations, the bill would require OIG to undergo special review by Sunset in six years. Within that period, OIG should have a case management system and the ability to track data to better illustrate its overall performance and the effectiveness and efficiency of its processes. Because OIG does not have its own Sunset date, it is subject to review, but not abolishment. Any concerns that may emerge in the six years before the next review could be addressed at the will of the Legislature and would not depend on this timeline.

Definition of fraud. By making the definition of "fraud" less broad and specifying that the definition does not include unintentional technical, clerical, or administrative errors, the bill would focus OIG's fraud investigations on those actually committing fraud and would help prevent resources from being wasted on providers who commit clerical errors. Previously, OIG cast too wide a net and spent time and money on investigating providers who made mistakes but were not committing fraud. Overzealous investigations based on a broad definition of fraud also caused communities with limited health resources to unnecessarily lose access to Medicaid providers.

Participation in HIPP and managed care. The bill appropriately would remove an outdated prohibition on the participation of an individual in both HIPP and Medicaid managed care to allow Medicaid clients in the HIPP program to access long-term care services and supports through Medicaid managed care.

Payment holds and provider notice. The bill would streamline the payment hold process to more quickly mitigate state financial risks and reduce any undue burden on providers. The timelines in the bill would increase efficiency in the payment hold and appeal processes. HB 3279 would ensure that providers were not subject to payment holds any longer

than necessary. The bill also would clarify the intended serious nature of payment holds and would specify that payment holds should be reserved for significant events such as fraud and to compel the production of records. It would respond to concerns that OIG had used payment holds as a bargaining chip to encourage providers to settle their cases, even in cases that did not pose a significant financial risk to the state.

Rules on OIG operation and duties. HB 3279 would require rules for opening cases, prioritizing cases, prioritizing investigations, and scaling penalties to the nature of the violation, which would increase workload efficiency and investigation transparency, consistency, and fairness at OIG. The rules also would ensure that Medicaid providers were not overly penalized for less serious violations. The state needs a robust network of Medicaid providers, and scaling penalties to the severity of violations would ensure that Medicaid providers' practices were not subjected to a payment hold for an unnecessarily long period of time.

Time limits on investigations. HB 3279 would require OIG to complete preliminary investigations within 45 days of receiving a complaint or referral, which would provide time for OIG to determine whether to refer the matter to the Medicaid fraud control unit for criminal prosecution and ensure that investigations were completed in a timely manner. Requiring a 180-day time limit on full-scale investigations and requiring OIG to notify the provider if an investigation took longer than 180 days would increase transparency for providers about the investigative process while ensuring the timely completion of investigations.

Informal resolution process. Turning informal resolution meetings before a payment hold hearing into an option rather than a statutory right would aid in streamlining the hearing process and making it more efficient. It also would bring the process more in line with comparable processes before Medical Board and Board of Nursing hearings. A provider still would have a right to two informal resolution meetings before proceeding to the hearing.

Extrapolation review. By requiring OIG to review its extrapolation

methodology and provide its methodology to pharmacies subject to audits, HB 3279 would help ensure the integrity of the sampling and extrapolation methodology the office uses in its reviews. This provision also would respond to concerns over the improper use of the office's methodology.

SOAH hearing costs. OIG should cover costs of expedited administrative hearings to reduce the burden to providers in accessing due process. The bill still would require providers to cover their own costs in preparing for the hearing. This would align payment hold hearings with the standard state practice of requiring the agency to pay for SOAH hearings.

Pharmacies subject to audits. HB 3279 would make clear that pharmacies have the right to request a hearing to contest an OIG audit and would increase transparency by allowing pharmacies to review the methodology OIG used as part of the audit.

Utilization review. Issues related to utilization review at hospitals were not included in HB 3279 because they are outside of the bill's scope.

OPPONENTS SAY:

Appointment of OIG. HB 3279 unadvisedly would remove the appointment of the office's inspector general from the governor's responsibilities. The inspector general should continue to be appointed by the governor so that the position maintains an arm's length relationship with the HHSC executive commissioner. Retaining this arrangement would ensure accountability and independence in the position, with oversight of OIG being provided by the governor and the Legislature and OIG continuing to be accountable to the HHSC council. The executive commissioner still would have a great deal of oversight of OIG even without appointing the office's inspector general. The Legislature should not let an overreaction to recent overzealous investigations of Medicaid providers and excessive spending on staff furniture and badges lead to a change in this mostly sound appointment structure.

Sunset review. Given the important work done by OIG and the management and other concerns uncovered in the Sunset review, it would

be more appropriate for OIG to undergo special review in three years rather than six. This would permit enough time for changes to be made without allowing any problems to get out of hand. The Legislature would have enough information to evaluate changes made by the bill and make any necessary adjustments.

Definition of fraud. The Medicaid program has had significant problems in the past with providers who were actually committing fraud, waste, or abuse and endangering the health of children. Limiting the definition of fraud might impair OIG's ability to investigate providers and find those who had legitimately committed fraud. The OIG does not order payment holds with enough frequency to significantly limit access to Medicaid providers or indicate that the definition of fraud is too broad.

Informal resolution process. The bill should not allow OIG to determine whether a provider should be granted an informal resolution meeting and should not remove timelines that were just recently added to code. These changes would make the informal resolution process less transparent and slower.

SOAH hearing costs. The bill would remove recently added requirements in code for providers and OIG to share costs and provide for expedited administrative hearings. Providers agreed to share these costs and provide a security deposit for the cost of the hearing. Cost sharing would not pose an undue burden for providers.

Payment holds. The timeline proposed in the bill for how soon a provider would have to respond to notice of a payment hold is too short. Providers need more than 10 days to get billing sheets from the billing company in order to respond.

OTHER OPPONENTS SAY:

The bill should require OIG to use federal medical coding guidelines for utilization review regarding hospitals. Using federal medical coding guidelines in utilization review would increase consistency and accountability.

NOTES:

The companion bill, SB 207 by Hinojosa, was reported favorably as substituted from the Senate's Health and Human Services Committee on April 7.