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February 19, 2024

TO: The Honorable Joseline Peña-Melnyk
Chair, Health & Government Operations Committee

FROM: W. Zak Shirley
Director, Medicaid Fraud and Vulnerable Victims Unit

RE: **House Bill 1002 - Office of the Attorney General - Investigative Authority**

The Office of the Attorney General (“OAG”) urges a favorable report on HB 1002 - **Maryland Department of Health - Office of the Attorney General - Investigative Authority**. HB 1002 grants subpoena power to the OAG in furtherance of its healthcare fraud investigations.

The U.S. Department of Justice estimates that up to 10% of all healthcare expenditures every year are lost to fraud. Since 1979, the Medicaid Fraud and Vulnerable Victims Unit (the “MFVVU” or the “Unit”) in the Maryland Office of the Attorney General has investigated and prosecuted these frauds in our state. These investigations rely heavily on the review of medical records produced by providers in order to establish that services billed were (1) actually provided, (2) medically necessary, and (3) properly billed. In short, without access to recipient medical records, healthcare fraud prosecutions simply could not take place.

Until 2010, the MFVVU was focused on criminal prosecutions. Following the passage of the Maryland False Health Claims Act (the “FHCA”), however, the Unit was also able to pursue fraudulent claims under civil causes of action. This development was a tremendous benefit to the MFVVU as fraud is often perpetrated by companies or practices where a single criminally culpable individual is difficult to identify. Under the FHCA, the Unit is able to recover improper payments with a multiplier of up to triple the original amount from the company itself. Notably, however, the FHCA did not provide for “subpoena” power as other state corollaries do. Instead, the FHCA

provides the OAG with traditional discovery powers afforded to private litigants. While these powers are no less compulsory, they are not a traditional “subpoena,” a distinction that creates confusion and delay in investigations involving opposing counsel who are unfamiliar.¹ Perhaps more importantly, however, not permitting subpoena power for civil investigations creates confusion with existing state laws governing the disclosure of certain health records essential to the Unit’s investigations, specifically mental health records and substance use disorder records. Finally, the inability to issue subpoenas as part of healthcare fraud investigations hampers efforts to share valuable information among other state agencies investigating similar claims.

Maryland Medical Records Act

The Maryland Medical Records Act establishes important protections for privacy of patient medical records. Md. Code Ann., Health Gen. § 4-301 *et seq.* Generally, to compel a health care provider to disclose such records, the requestor would need to issue “compulsory process” (*e.g.*, a subpoena) accompanied by either a certification regarding prior notification to patients providing them an opportunity to object to disclosure or a court order authorizing the disclosure. *Id.* § 4-306(b)(6).

The MFVVU does not presently have the ability to issue a subpoena to investigate potential violations of the FHCA. Instead, the FHCA provides that during an investigation by the State conducted pursuant to the FHCA, “the Attorney General shall have the same rights of discovery as a civil litigant in the circuit court under Title 2, Chapter 400 of the Maryland Rules.” Md. Code Ann., Gen. Prov. § 2-604(b)(2)(i). While these powers are compulsory, they are not the traditional avenue for investigative demands and are unfamiliar to most in the legal community. Moreover, they are not included in the definition of “compulsory process” established in the Medical Records Act which is limited to a “subpoena, summons, warrant, or court order.” In short, the Medical Records Act did not contemplate the creation of a new civil discovery process in the False Health Claims Act, and the interaction of the two is unnecessarily complex and confusing.

The most notable context in which this lack of subpoena power presents an obstacle to investigation is in MFVVU’s mental health provider cases. Under Md. Code Ann., Health Gen. § 4-307(k)(1)(v), a healthcare provider can disclose mental health records without patient authorization “[i]n accordance with a subpoena for medical records on a specific recipient.” This disclosure is allowed “to prosecution agencies...for the sole purposes of investigation and prosecution of a provider for theft and fraud [and] related offenses,” among others, so long as certain additional requirements are met. *Id.* § 4-307(k)(1)(v)(2). Here again, the statute speaks directly to a subpoena and no other form of discovery.

Information Sharing with Other State Agencies

¹ As the narrower statute, OAG’s position has long been that the FHCA controls in any conflict with the Medical Records Act. *See Dorsey v. State*, 185 Md. App. 82 (2007) (when faced with two statutes that apply to the same situation but are not reconcilable, the narrower statute applies). FHCA grants discovery authority only to the Attorney General and only to investigate the enumerated acts that constitute false health claims. As the legislature is assumed to have known that medical records would be a necessary part of FHCA investigations, if it had wanted to condition the ability of the government to obtain this information on issuing a subpoena, notifying patients, or obtaining a court order, it would have done so.

MFVVU's investigations into both fraud and abuse of vulnerable adults often overlaps with that of other state agencies. Many of those state agencies have their own confidentiality provisions that limit disclosure of information and records related to their activities. Without subpoena power, the MFVVU is often hamstrung in its efforts to obtain that information and must instead retread the same steps already taken by those agencies to obtain already-available information. Primary examples include the State Long-term Care Ombudsman, who cannot disclose information related to complaints by resident of long-term care facilities absent a court order, Adult Protective Services, who likewise cannot disclose the details of past investigations absent a court order, and vital records, who cannot disclose death records absent a compulsory demand. Were the MFVVU to have subpoena power, investigations involving these state agencies would benefit from a streamlined process by which to obtain information and develop investigations.

Proposed Amendments

While not altering the material terms of the bill, the following amendments are suggested to better position the OAG's subpoena power within Maryland law.

Strike existing language of the bill and replace with:

Adding:

MD Code, State Government, § 6-901

§ 6-901. Subpoena Power for Healthcare Fraud Investigations

Authorization

(a)(1) For the limited purpose of furthering an ongoing healthcare fraud investigation under the Maryland false claims statutes or other civil authorities, the Attorney General or a Deputy Attorney General or an assistant attorney general designated in writing by the Attorney General may issue in any court in the State a subpoena requiring a person or entity to:

- (i) Produce documentary material for inspection, copying, or reproduction;
- (ii) Answer, under oath and in writing, written interrogatories;
- (iii) Give sworn oral testimony; or
- (iv) Furnish any combination of such material, answers, or testimony.

(2) A subpoena issued under this subsection may be served in the same manner as a subpoena issued by a circuit court.

Failure to obey

(b)(1)(i) If a person fails to obey a lawfully served subpoena under subsection (a) of this section, the Attorney General may report the failure to obey the subpoena to the circuit court with jurisdiction over the matter.

(ii) The Attorney General shall provide a copy of the subpoena and proof of service to the circuit court.

(2) After conducting a hearing at which the person that allegedly failed to comply with a subpoena issued under subsection (a) of this section has had an opportunity to be heard and be represented by counsel, the court may grant appropriate relief.

Contravention, denial, or abrogation of privileges or rights

(c) This section does not allow the contravention, denial, or abrogation of a privilege or right recognized by law.