



COMMITTEE ON GENERAL INVESTIGATING

Chair Matt Krause • Vice Chair Victoria Neave

August 26, 2021

The Honorable Ken Paxton
Attorney General of Texas
Attn: Opinion Committee
PO Box 12548
Austin, Texas 78711-2548
opinion.committee@oag.texas.gov

c/o Charlotte M. Harper, Deputy Chair, Opinion Committee

Re: Attorney General Opinion Request No. RQ-0420-KP; Modification of Request

Dear General Paxton:

On July 30, 2021, I submitted a request for your opinion regarding the definition or two terms (“Specialty provider” and “Continuity of Care with Out of Network Providers/Coordination of Benefits”) originally enacted in 2019 by Senate Bill 1207 and codified as Government Code section 533.038. You assigned the request file number RQ-0420-KP. I wish to amend my request in light of the Health and Human Services Commission’s recent adoption of administrative rules that purport to implement S.B. 1207. In my view, the adopted rules do not correspond to the Legislature’s intent in providing the benefits enumerated in section 533.038.

The entire motivation for section 533.038 was to address shortcomings in Commission’s policies that compelled families and guardians to confront a terrible choice when encountering barriers to access timely care:

- Terminate beneficial provider and care relationships—many nurtured over several years—because their Medicaid health plan cannot or will not enroll the preferred provider,
- Pay for such care out of their own pockets, or worse,
- Forego care altogether if the family cannot financially afford such care, thus potentially resulting in increased risk of hospitalization, increased emergency room visits, and potential institutionalization due to the delay in appropriate access.

If anything, S.B. 1207 was specifically intended to spare families these awful choices. Regrettably, the Commission’s rules do not appear to fully reflect this intent.

On August 12, 2021, the Commission adopted administrative rules to implement S.B. 1207 that originally were published as proposed rules on February 12, 2021. 46 Tex.Reg. 997 (Feb. 12,

2021). The preamble to the adopted rules notes that the Commission received comments on the proposed rules from 26 parties, including Representative Tan Parker and, before publication, Senator Charles Perry, Representative Jeff Leach and myself (Feb.10, 2021).

I am not privy to all comments filed in connection with the proposed rules, but virtually all of the comments described in the preamble opposed the rules, several commenters disputing the policies' conformity to legislative intent. Despite the great weight of objections to the proposed rules, the Commission made no changes on adoption. Instead, the Commission rejected the comments either by invoking its own expertise or preexisting policies, deferring answers to an as-yet unscheduled rulemaking to implement Senate Bill 1648 of the recently-concluded 87th regular session, or by simply declaring (without explaining) that the adopted rules implement legislative intent.

I do not believe either the adoption of the February proposed rules or the pledge to adopt rules to implement S.B 1648 moot the issues raised by my original request or the comments to the recently adopted rules.

In view of these developments, I wish to clarify my questions:

1. *May the Commission, consistent with the plain language of section 533.038 and legislative intent, condition an individual's continuity of care on the person having other insurance (as it did in its adopted rules) when the Legislature did not impose such precondition?*

“Coordination of benefits” and “continuity of care” are independent concepts. The former ensures Medicaid is the payer of last resort as required by federal law when a Medicaid recipient has other insurance. The latter (encompassed in subsection (g) of section 533.038) ensures a Medicaid recipient does not lose access to a provider with which the recipient has an established relationship. I do not believe the Commission was delegated authority to limit the right to continuity of care assured under the statute to Medicaid recipients who have other insurance.

2. *May the Commission, consistent with the plain language of section 533.038 and legislative intent, limit access to the continuity of care assured under subsection (g) only to children (persons under the age of 21)?*
3. *May the Commission, consistent with the plain language of section 533.038 and legislative intent, define “complex medical needs” under subsection (g) to mean specific levels of care defined in its pre-existing contracts with managed care organizations?*
4. *May the Commission, consistent with the legislative intent expressed in SB 1207 and SB 1648, limit the definition of “specialty provider” to a schedule of disciplines described in **preexisting commission contracts**—i.e., physicians who practice certain medical specialties, audiologists, chiropractors, dieticians, optometrists, and podiatrists?*

In my view, the answer to each of these questions is, “No.” The legislature did not limit

the benefits of subsection (g) to children. Neither does the legislative history support the limits placed on the definition of “complex medical needs” or “specialty provider” in the Commission’s adopted rules. The Legislature did not limit the scope of these terms, and the unanimous testimony before both houses of the Legislature in 2019 (S.B. 1207) or 2021 (S.B. 1648) and the multiple advisory committees the Commission is required by state and federal law to consult before enacting Medicaid program policies supported a broad definition of both terms.

The testimony indicates that, rather than the narrow taxonomy the Commission adopted, the terms “complex medical needs” and “specialty provider” were meant to be broadly construed to first, go further than pre-existing Commission policies, and second, to include any provider that is not a primary care provider.

The Commission was granted broad authority to develop and implement the program authorized under S.B. 1207. But none of the conditions described above were expressly authorized by S.B. 1207. And considering the broad support for the benefit in 2019, it does not seem that the Legislature delegated the Commission authority to, in effect, amend the statute in ways that limit access to it. Indeed, the cruel irony of the adopted rules is that some of the families and individuals who appeared and testified in support of the bill will not be eligible to benefit from it. The rules also further restrict many Medicaid beneficiaries’ rights to continuity of care. This the Legislature did not authorize.

I recognize that I speak only for myself; however, I believe that the legislative record and public testimony will support my views. I also believe that other members of the Legislature will soon weigh in and express similar views. I know that you and your staff will carefully review the record to assist all interested parties to better understand and adjust their expectations.

Your office requested interested parties submit briefs on my request by September 2nd. In light of the new developments described above, I request that your office consider the clarifications to my original questions and extend the time for interested parties to brief your office on the issues.

Thank you, as always, for your service to Texans.

A handwritten signature in black ink that reads "Matt Krause". The signature is written in a cursive, slightly slanted style.

Matt Krause
State Representative, District 93
Chairman, Texas House Committee on General Investigating

TEXAS HOUSE *of* REPRESENTATIVES

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By Opinion Committee at 3:47 pm, Aug 02, 2021



RQ-0420-KP

FILE# ML-48983-21

I.D.# 48983

COMMITTEE ON GENERAL INVESTIGATING

Chair Matt Krause • Vice Chair Victoria Neave

July 30, 2021

Via Email

Office of the Attorney General
c/o Opinions Division
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Austin, Texas 78711-2548
Email: opinion.committee@oag.texas.gov

Dear General Paxton,

During the 86th Legislative Session a bipartisan coalition of legislators passed Senate Bill 1207 to help children in the Medically Dependent Child Program (MDCP) in Texas. Unfortunately there have been issues with the implementation of portions of SB1207 and therefore I request an opinion on the following topics:

1. Specialty Provider definition; and
2. Continuity of Care with Out of Network Providers/Coordination of Benefits definition

If you or your team has any questions or if there is anything my office can do, please reach out to my Chief of Staff, Shane Birdwell, at shane.birdwell@house.texas.gov or (512) 463-0562.

Sincerely,

A handwritten signature in black ink that reads "Matt Krause".

Chairman Krause
General Investigating

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Members: Stephanie Klick, Leo Pacheco, Reggie Smith

Darren Keyes, Committee Clerk & General Counsel

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