



**Texas Association of Health Plans**

1001 Congress Ave., Suite 300

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P: 512.476.2091

www.tahp.org

March 21, 2023

Dear Chair Kolkhorst & Members of the Senate Health & Human Services Committee,

A core function of health plans is to root out health care fraud and address the associated costs that affect all Texans. For emergency care, that's been a significant problem with hospitals and freestanding ERs routinely "upcoding" for services. These fraudulent billing practices increase costs for Texas taxpayers, businesses, and families.

**The Texas Association of Health Plans (TAHP) opposes HB 1236 without the amendment added on the House Floor which would clarify that diagnosis codes can be used to identify fraud and abuse in ER billing. Patients should be protected from unfair denials as well as fraudulent and abusive billing practices.**

TAHP worked for months with the House bill author to ensure that patients are protected from coverage denials but are also still protected from ER billing fraud. We believe there is a way to address both of the concerns at the same time.

HB 1236 seeks to modify the "prudent layperson standard" for emergency care health insurance coverage in Texas, ensuring that a health plan cannot deny coverage for ER care based on a final diagnosis. However, the bill's language extends beyond this intent, creating significant unintended consequences for combating emergency department fraud in Texas. **It is crucial to note that both current Texas law and federal law already prohibit a health plan from denying ER coverage based on a final diagnosis.**

TAHP strongly supports the existing prudent layperson standard in Texas and federal law, which mandates that a health plan must cover an emergency room visit if a "prudent layperson," possessing an average knowledge of medicine and health, believes their condition necessitates immediate medical care. This standard, already in place in Texas and federally, safeguards patients who reasonably believe their situation is an emergency, regardless of the final diagnosis. Furthermore, Texas' current "prudent layperson" standard has been adopted by nearly every state and was included in the Affordable Care Act's emergency care definition.

**Recent federal rules for the "No Surprises Act" have also clarified that a health plan cannot deny an emergency claim based solely on the final diagnosis.** This means that even if a patient's ultimate diagnosis is not emergency-related, the health care claims for the patient



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must be treated as emergency claims. However, the federal rules also clarified that health plans can continue to use diagnosis codes to hold hospital ERs and freestanding ERs accountable for fraud, waste, and abuse.

HB 1236 alters this definition significantly, preventing health plans from using a final diagnosis in any capacity. This change would render Texas law inconsistent with federal law and other states' legislation, and more importantly, it would prohibit health plans from investigating and addressing patterns of fraud detected through final diagnoses.

### **Why is this a problem?**

Texas has a well documented history of fraudulent upcoding and other ER billing fraud in hospital ER and in freestanding ERs. Lawsuits, federal and state investigations, whistleblowers, and researchers uncovered rampant abuse.

The FBI lists upcoding as one of four common types of health care provider fraud. Upcoding happens when an emergency care staffing company falsely claims a higher severity code for a patient than what should apply. ER firms have a choice of 5 levels of severity to apply to a patient's bills, with level 5 being the most severe emergency and level 1 being the least severe. The highest severity codes should only be used for the most complicated patients and are reimbursed at significantly higher rates.

- **ER upcoding is now common** - In emergency departments, level 4 and 5 codes [now](#) make up the majority of claims. In the emergency department, the most common claim in 2004 was level 3. However, by 2021, level 4 was the most common and accounted for over one third (35%) of claims. Level 4 and 5 claims used to be 33% of all ER claims in 2004. This has grown to be 60% in 2021, a 71% increase in upcoding.
- A [report in Tennessee](#) found that one of the nation's largest ER staffing firms "has shelled out nearly \$100 million to settle thousands of complaints from emergency room patients billed thousands of dollars for treatment of minor ailments."
- Freestanding ERs routinely apply level 5 ER codes for simple, arguably even non-emergency care. This includes examples like asymptomatic COVID-19 testing with charges [as high as \\$54,000](#) for a single test.



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- The Center for Public Integrity discovered that “thousands of medical professionals have billed Medicare at progressively higher rates over a decade’s time, costing taxpayers at least \$11 billion in inflated charges.”

**Medicare and Medicaid programs have successfully identified fraud in ERs.**

- Texas Medicaid uses diagnosis codes to stop fraudulent billing and save taxpayer dollars for years. In, 2021, a [“data led initiative” by the OIG](#) resulted in nearly \$20 million in fines for inappropriate ER billing.
- In 2022, “all 11 defendants [implicated in the \\$300 million](#) Spectrum/Reliable healthcare fraud have pleaded guilty, announced U.S. Attorney for the Northern District of Texas.
- [Tarrant County’s John Peter Smith Hospital](#) (JPS) has agreed to pay more than \$3.3 million to settle allegations that it violated the False Claims Act by upcoding certain claims submitted to federal healthcare programs

For the commercial health care market—where payment rates to providers are significantly higher than in both Medicare and Medicaid— Texas health insurers must catch this fraud and abuse.

**TAHP requests that HB 1236 only move forward if language remains in the bill to clarify that nothing in this bill prohibits health plans from considering diagnosis codes, in addition to all pertinent documentation and presenting symptoms, in emergency service determinations.**

Sincerely,

A handwritten signature in black ink that reads "Jamie Dudensing". The signature is written in a cursive, flowing style.

Jamie Dudensing, RN  
CEO  
Texas Association of Health Plans