STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

Testimony in Support of H.R. 3891

Presented to House Committee on Energy and Commerce

Subcommittee on Health

By Kansas Attorney General Derek Schmidt

September 5, 2018

Chairman Burgess, Ranking Member Green, and Members of the Subcommittee:

Thank you for this opportunity to testify in support of H.R. 3891, legislation that would eliminate an outdated limitation in federal law, thereby expanding the authority of Medicaid Fraud Control Units (MFCUs) to detect, investigate and prosecute Medicaid patient abuse in non-institutional settings. I appreciate and commend the work by Representatives Walberg and Welch to bring this important legislation forward.

I am the Attorney General for the State of Kansas, a statewide, elected constitutional officer of our state. I have served in this capacity since January 2011. As Kansas attorney general, I have made a priority of building capacity and focusing resources on fraud and abuse investigations and prosecutions, including but not limited to fraud and abuse in the Medicaid program.

Policy of the National Association of Attorneys General

I also am the immediate past president of the National Association of Attorneys General (NAAG), the nonpartisan association that represents all 56 state, territory and District of Columbia attorneys general in the United States. During my year as NAAG president in 2017-2018, I led our Presidential Initiative

titled: “Protecting America’s Seniors: Attorneys General United Against Elder Abuse.” As part of that initiative, our organization worked in a bipartisan, or nonpartisan, manner to gather information, hear from experts and practitioners, and help build capacity to prevent and combat elder abuse throughout the country and in our respective jurisdictions.

One specific action that came from our NAAG initiative was the endorsement from our organization for H.R. 3891 and its proposed expansion of authority to allow MFCUs to detect, investigate and prosecute Medicaid patient abuse in non-institutional settings. To that end, our organization authored two letters: A May 9, 2017, letter to then-Health and Human Services Secretary Tom Price expressing support for the policy of expanded MFCU authority and a March 28, 2018, letter to Representatives Walberg and Welch specifically supporting H.R. 3891. The first letter was signed by 38 attorneys general and the second by 49. Both were bipartisan. Under our NAAG procedures, both letters reflect the official policy statements of NAAG. Both are attached as exhibits to this testimony, and I incorporate them by reference as part of my testimony so that NAAG policy on this subject may be fully presented to the Committee. Also attached are the July 17, 2017, response from Secretary Price and the August 7, 2017, response from Health and Human Services Inspector General Daniel R. Levinson.

Thus, to the extent my testimony today reflects the content of those NAAG letters, it constitutes the views of the National Association of Attorneys General; to the extent I testify to matters outside those two letters, my testimony constitutes only my views as Attorney General for the State of Kansas.

The Value of MFCUs

The Social Security Act requires that every state, as a condition of participation in the Medicaid program, either maintain a MFCU or obtain a waiver. All but one state maintains a MFCU. States choose to situate their MFCU in various positions within state government. Forty-four MFCUs are housed in the state attorney general’s office; Kansas is one of those states. Five states – Connecticut, Illinois, Iowa, Tennessee, and West Virginia – and the District of Columbia house the MFCU in another state agency.

North Dakota has received a waiver from the federal government and does not have a MFCU. None of the five territories has established a MFCU.

Our MFCU has both civil and criminal jurisdiction. When appropriate, we seek both injunctive and monetary relief in instances of civil false claims to the Medicaid program or other unlawfully made payments. We also investigate and prosecute criminal Medicaid fraud and patient abuse. While our MFCU attorneys occasionally work in federal court enforcing federal law as cross-designated Special Assistant United States Attorneys, most of our work is in state court enforcing state laws against Medicaid fraud and patient abuse. Because of the joint federal-state nature of the Medicaid program, we work closely with the United States Attorney and with appropriate federal law enforcement agencies. Our federal-state working relationship is excellent.

The size of MFCUs varies substantially by state, with the overall size continually overseen and subject to approval by the Department of Health and Human Services-Office of Inspector General (HHS-OIG). In Kansas, our MFCU employs four attorneys, four fiscal analysts, one nurse investigator, one legal assistant, a special agent-in-charge, and six special agents. The special agent-in-charge and the special agents all are sworn law enforcement officers. The total annual budget for the Kansas MFCU is approximately $1.8 million. Of that amount, 75 percent is paid with federal funds and the other 25 percent with state matching funds. In a small state like Kansas, this federal financial support is critically important to enable us to maintain the important capacity to detect, investigate and prosecute instances of Medicaid fraud and of the criminal abuse – physical, sexual or financial – of Medicaid beneficiaries.

The federal funding that supports MFCUs is known as Federal Financial Participation, or FFP. It comes with conditions. Those conditions limit the uses of our MFCU assets. One of those conditions governs the type of cases our MFCU may handle. In general, cases within a MFCU's jurisdiction fall into one of two categories: Fraud committed against the Medicaid program itself, and abuse of patients who are Medicaid beneficiaries. Under federal rules, our MFCU may investigate and prosecute cases of financial *fraud*

against the Medicaid program *wherever it may be discovered*. Consequently, we have handled cases of Medicaid fraud in billing services, in nursing homes, in medical offices, in home health care settings, and in other situations. However, our MFCU may only investigate and prosecute cases of patient *abuse* when it occurs *in a health care facility or board and care facility*.

In a small state like Kansas, our MFCU provides important services in detecting, investigating and prosecuting the abuse of Medicaid patient-beneficiaries. Sadly, we have had occasion to investigate and prosecute almost every type of patient abuse imaginable – financial abuse, physical abuse and sexual abuse. Consider several recent examples of criminal abuse cases we have handled:

- Prosecuted a nursing home employee for physical or sexual abuse of five residents. The defendant was convicted of one count of attempted criminal sodomy and four counts of mistreatment of a dependent adult and sentenced to 91 months in state prison.
- Prosecuted a nursing home employee for sexual abuse of a resident. The defendant was convicted of one count of aggravated sexual battery and sentenced to 130 months in state prison.
- Prosecuted a couple who illegally used the assets of one of the defendants' mother, while acting as her power of attorney and trustee, to make purchases for themselves, including a house, farm and truck, while the mother was living in a nursing home and her expenses were going unpaid. Both defendants were convicted of mistreatment of a dependent adult and conspiring to mistreat a dependent adult and each defendant was sentenced to more than 90 months in state prison.

We are currently prosecuting a nurse for allegedly stealing narcotics intended for beneficiaries in nursing homes and diverting them for illicit use, thereby denying patients the pain treatment to which they were entitled. The defendant is charged with multiple counts in three different counties. This case remains pending, and of course the charges are merely accusations and the accused is presumed innocent unless and until proven guilty. Our office has more than a dozen similar cases of suspected or alleged patient abuse currently being investigated or prosecuted.

Clearly, the MFCU is an important instrument for justice and for protecting Medicaid beneficiaries from abuse. This is consistent with the intention of Congress in creating the MFCUs as evidenced by the statutory instruction that MFCUs were created, in part, to help ensure "that *beneficiaries* under the [State] plan [for medical assistance] will *be protected from abuse and neglect* in connection with the provision of medical assistance under the plan." *See* 42 U.S.C. SEC 1396a(a)(61)(emphasis added). But under current federal law, we are constrained from using these same important law enforcement tools in the MFCUs to protect Medicaid beneficiaries from abuse and neglect when the crime occurs someplace other than in a health care facility or, at the discretion of individual states, in a board and care facility – someplace such as in a home-health setting.

For emphasis, I would note that the expanded MFCU authority proposed in H.R. 3891 is a particularly important tool for combating elder abuse. As we noted in our NAAG letter:

> Today, more than 74 million Americans are enrolled in Medicaid. Of those, more than 6.4 million are age 65 or older. Statistics cited by the Centers for Disease Control and Prevention (CDC) suggest that 1 in 10 persons age 65 and older who live at home will become a victim of abuse. Not surprisingly, CDC figures also suggest that most elder abuse is never detected, with one study concluding that for every case of elder abuse that is detected or reported, 23 more remain hidden.

See NAAG Letter to HHS Secretary Tom Price, May 9, 2017 (internal citations omitted). While the expanded authority would not be limited to addressing abuse against elder Medicaid beneficiary-patients, the importance of this tool in addressing elder abuse is what led NAAG to lend our support to this legislation as an outgrowth of our presidential initiative on combating elder abuse.

Importance of H.R. 3891

The difference in scope between a MFCU's anti-fraud authority and its narrower anti-abuse authority is the subject of H.R. 3891. This bill proposes to allow states the option of expanding their MFCU's scope to combat Medicaid beneficiary-patient abuse wherever it may occur, including in non-institutional settings. That state-by-state option, which mirrors the flexibility in current law that allows states to opt-in to using MFCUs to combat patient abuse in board-and-care facilities, is an important component of the bill. That is optional authority that, if H.R. 3891 is enacted, Kansas intends to exercise. From my vantage point, it makes little sense to allow broad MFCU authority to combat fraud when the public treasury is the victim but to insist on narrower MFCU authority to combat abuse when the Medicaid beneficiaries themselves are the victim. Whatever its original rationale, this distinction seems, at best, outdated. Nevertheless, states must abide by that distinction and limit the scope of the efforts to combat patient abuse or risk losing their FFP.

In practice, the limitation on using MFCU assets to detect, investigate and prosecute patient abuse outside of an institutional setting has real consequences. In Kansas, we have seen at least two real-world, detrimental effects of this limitation:

- We have seen cases in which our MFCU agents, in the course of conducting a lawful investigation in connection with suspected fraud in home health care services being funded by Medicaid and provided in the beneficiary's home, have uncovered evidence of abuse of the Medicaid beneficiary-patient. Under current law, our MFCU could proceed to investigate and prosecute the fraud committed against the government program but could not proceed to investigate and prosecute the abuse committed against the beneficiary-patient. That is because of the current statutory restriction that limits a MFCU's authority over patient abuse only to institutional settings such as in a health care facility.

- We also have seen cases involving so-called “pill mills” involving the illegal diversion of narcotics from the lawful supply chain to the illicit market. In some cases, that diversion results in the misuse of these drugs causing death or great bodily harm. But if the diversion occurs entirely in a setting outside a health care facility or a board and care facility – for example, at a doctor’s office – our MFCU is permitted to pursue the relatively small fraud (the stealing of pills from the Medicaid program) but not the much greater harm done to patients as a result of the diversion (the death or great bodily harm from misuse of the drugs).

That difference in scope between our MFCU’s anti-fraud authority and its anti-abuse authority is poor public policy and, at least in my view, logically unjustifiable. It has roots in an era long ago when the delivery of most health services was in an institutional setting and, therefore, the opportunity for Medicaid beneficiary-patient abuse in a non-institutional setting, such as a home health care setting, was remote.

But today, far more care is delivered to patients, including Medicaid beneficiaries, through home and community-based services outside of health care facilities. And when we discover that a patient-beneficiary is being abused in that non-institutional setting, I can see no logical policy reason to be prohibited from using MFCU assets to appropriately pursue that abuse.

H.R. 3891 is designed to eliminate that barrier in federal law to using existing MFCU assets to protect Medicaid beneficiaries from patient abuse, regardless of where the abuse may occur. It proposes a small change in statute that has a large likelihood of providing better protection, and better justice, for Medicaid beneficiary-patients who are the victims of abuse.

For that reason, I strongly support passage of H.R. 3891 both as Kansas Attorney General and on behalf of the National Association of Attorneys General. This legislation, if enacted, would take the blinders off the MFCUs and let them detect, investigate and prosecute Medicaid beneficiary-patient abuse wherever it may occur. I commend Representatives Walberg and Welch for their leadership in bringing this

legislation forward, and I offer to work with the Committee in whatever manner may be helpful to advance this legislation and, I hope, find a way for it to reach the President's desk before this calendar year is through.

Thank you for your consideration of this important matter.

National Association of Attorneys General

PRESIDENT
George Jepsen
Connecticut Attorney General

PRESIDENT-ELECT
Derek Schmidt
Kansas Attorney General

VICE PRESIDENT
Jeff Landry
Louisiana Attorney General

MMEDIATE PAST PRESIDENT
Marty Jackley
South Dakota Attorney General

EXECUTIVE DIRECTOR
James McPherson

2030 M Street, NW
Eighth Floor
Washington, DC 20036
Phone: (202) 326-6000
http://www.naag.org/

May 10, 2017

The Honorable Tom Price
Secretary, U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Secretary:

As the Attorneys General of our respective states, we write to request a change in federal policy to allow use of the federal funds provided to our Medicaid Fraud Control Units (MFCUs)[1] for the detection, investigation and prosecution of a wider range of abuse and neglect committed against Medicaid beneficiaries or in connection with Medicaid-funded services. Under the pertinent provisions of the Social Security Act, most state attorneys general have an important working relationship with their state's MFCU; in many states, the MFCU is housed within the state attorney general's office.[2]

As implied by its commonly used name, the MFCU has as its principal focus the detection and elimination of *fraud* within the Medicaid program. But Congress also created the MFCUs to help ensure "that beneficiaries under the [State] plan [for medical assistance] will be protected from *abuse and neglect* in connection with the provision of medical assistance under the plan."[3] Indeed, at one place in the Social Security Act, Congress expressly refers to MFCUs as "medicaid fraud *and abuse* control unit[s]".[4]

Today, more than 74 million Americans are enrolled in Medicaid.[5] Of those, more than 6.4 million are age 65 or older.[6] Statistics cited by the Centers for Disease Control and Prevention (CDC) suggest that 1 in 10 persons age 65 and older *who live at home* will become a victim of abuse. Not surprisingly, CDC figures also suggest that most elder abuse is never detected, with one study concluding that for every case of elder abuse that is detected or reported, 23 more remain hidden.[7]

---

[1] These federal funds are referenced in regulation as "federal financial participation," or "FFP." *See* 42 C.F.R. § 1007.19.
[2] *See* 42 U.S.C. § 1396b(q).
[3] *See* 42 U.S.C. § 1396a(a)(61) (emphasis added).
[4] *Id.* (emphasis added).
[5] January-March 2016 Medicaid MBES Enrollment report (Updated December 2016), available at https://www.medicaid.gov/medicaid/program-information/downloads/cms-64-enrollment-report-jan-mar-2016.pdf (last accessed March 28, 2017).
[6] *See* http://kff.org/medicaid/state-indicator/medicaid-enrollment-by-age/?dataView=1&currentTimeframe=0&selectedDistributions=65-plus&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last accessed March 28, 2017).
[7] *See* https://www.cdc.gov/violenceprevention/elderabuse/consequences.html.

In light of those realities, the current strict federal limitations on states' ability to use MFCU assets to investigate and prosecute abuse and neglect are outdated, arbitrarily restrict our ability to protect Medicaid beneficiaries from abuse and neglect as Congress intended, and should be replaced or eliminated. We request authority to use federally funded MFCU assets to detect, investigate and prosecute abuse and neglect of Medicaid beneficiaries or in connection with Medicaid-funded services to the full extent the federal statute allows. Toward that objective, we offer two specific recommendations, both of which can be accomplished by changing current federal regulations:

First, we recommend allowing the use of federally funded MFCU assets to investigate and prosecute abuse and neglect of Medicaid beneficiaries in non-institutional settings. The Social Security Act expressly allows use of MFCUs to investigate and prosecute patient abuse/neglect in "health care facilities"[8] or "board and care facilities,"[9] but the statute *does not prohibit* use of federal MFCU funds to investigate abuse/neglect in non-institutional settings—only the regulations impose that prohibition.[10] This regulatory restriction arbitrarily limits the scope of potential abuse or neglect cases our MFCUs can investigate or prosecute—for example, by excluding abuse or neglect of a beneficiary alleged to have occurred in a home health care or other non-institutional setting. This regulatory restriction appears to us in conflict with Congress's broad command that the MFCUs are to help ensure that Medicaid beneficiaries "will be protected from abuse and neglect in connection with the provision of medical assistance" under Medicaid. We recommend these regulations be broadened to allow use of federal MFCU funds to freely investigate and prosecute suspected abuse or neglect of Medicaid beneficiaries in whatever setting it may occur, including non-institutional settings.

Second, we recommend improving detection of abuse and neglect of Medicaid beneficiaries by broadening the permissible use of federal MFCU funds to screen complaints or reports alleging potential abuse or neglect. Under current regulations, federal MFCU funds may be used only for the "review of complaints of alleged abuse or neglect of patients *in health care facilities*."[11] As with the first restriction discussed above, the regulatory limitation on the screening of only those complaints alleging patient abuse or neglect *in health care facilities* arbitrarily narrows the permissible use of MFCU assets and appears in conflict with the broad congressional command to help ensure that all Medicaid beneficiaries, not just those in institutions, "will be protected from abuse and neglect." This regulation effectively places blinders on the MFCUs in their ability to search for and identify cases of possible abuse and neglect of beneficiaries. The regulations should be broadened to allow use of federal MFCU funds to freely screen or review any and all complaints or reports of whatever type, in whatever setting, that may reasonably be expected to identify cases of abuse of neglect of any Medicaid beneficiary. The MFCUs should have the widest possible latitude to detect and identify potential abuse and neglect of Medicaid

---

[8] 42 U.S.C. § 1396b(q)(4)(A)(i).
[9] 42 U.S.C. § 1396b(q)(4)(A)(ii).
[10] *See, e.g.*, 42 C.F.R. § 1007.19(d)(1) ("Reimbursement will be limited to costs attributable to the specific responsibilities and functions set forth in this part in connection with the investigation and prosecution of suspected fraudulent activities and the review of complaints of alleged abuse or neglect of patients *in health care facilities*." (emphasis added)).
[11] *See* 42 C.F.R. § 1007.19(d)(1) (emphasis added); *see also* 42 C.F.R. § 1007.11(b)(1) ("The unit will also review complaints alleging abuse or neglect of patients in health care facilities....").

beneficiaries. We favor permitting the MFCUs to cast a wide net at the screening stage: Better to err on the side of reviewing complaints or reports that ultimately are determined to involve conduct outside the scope the MFCU may investigate or prosecute than to err through narrow screening criteria that can leave abuse or neglect of Medicaid beneficiaries undetected by the MFCU.

Mr. Secretary, we know you share our strongly held view that all persons should live free from abuse and neglect. The MFCUs are valuable assets to help make that freedom a reality for Medicaid beneficiaries. We respectfully request you take swift action to eliminate federal regulations that needlessly narrow our use of these valuable assets. Instead, we request to be freed to use federal MFCU funds to detect, investigate and prosecute abuse and neglect committed against Medicaid beneficiaries or in connection with Medicaid-funded services to the fullest extent permitted by federal statute.

Thank you for considering our recommendations. We stand ready to work with you to achieve this important objective.

Sincerely,

George Jepsen
Connecticut Attorney General

Derek Schmidt
Kansas Attorney General

Jahna Lindemuth
Alaska Attorney General

Mark Brnovich
Arizona Attorney General

Leslie Rutledge
Arkansas Attorney General

Cynthia H. Coffman
Colorado Attorney General

Karl A. Racine
District of Columbia Attorney General

Doug Chin
Hawaii Attorney General

Curtis T. Hill, Jr.
Indiana Attorney General

Tom Miller
Iowa Attorney General

Andy Beshear
Kentucky Attorney General

Jeff Landry
Louisiana Attorney General

Brian Frosh
Maryland Attorney General

Maura Healey
Massachusetts Attorney General

Bill Schuette
Michigan Attorney General

Lori Swanson
Minnesota Attorney General

Jim Hood
Mississippi Attorney General

Josh Hawley
Missouri Attorney General

Tim Fox
Montana Attorney General

Douglas Peterson
Nebraska Attorney General

Adam Paul Laxalt
Nevada Attorney General

Hector Balderas
New Mexico Attorney General

Eric T. Schneiderman
New York Attorney General

Josh Stein
North Carolina Attorney General

Mike DeWine
Ohio Attorney General

Mike Hunter
Oklahoma Attorney General

Ellen F. Rosenblum
Oregon Attorney General

Josh Shapiro
Pennsylvania Attorney General

Peter F. Kilmartin
Rhode Island Attorney General

Alan Wilson
South Carolina Attorney General

Marty J. Jackley
South Dakota Attorney General

Herbert H. Slatery, III
Tennessee Attorney General

Sean Reyes
Utah Attorney General

T. J. Donovan
Vermont Attorney General

Mark R. Herring
Virginia Attorney General

Patrick Morrisey
West Virginia Attorney General

Brad Schimel
Wisconsin Attorney General

Peter K. Michael
Wyoming Attorney General

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JUL 17 2017

The Honorable George Jepsen
President
National Association of Attorneys General
Washington, DC 20036

Dear Attorney General Jepsen:

Thank you for your letter requesting that the U.S. Department of Health and Human Services change its current regulations to allow Medicaid Fraud Control Units (MFCUs) to receive federal financial participation to detect, investigate, and prosecute abuse and neglect of Medicaid beneficiaries in non-institutional settings. We share your concerns regarding the safety and well-being of Medicaid beneficiaries in all settings, and we are diligently working on responding to your inquiry.

This matter has been referred to Inspector General Daniel R. Levinson, from whom you can expect a direct response. As the agency responsible for overseeing MFCUs and administering the MFCU grant award, the Office of Inspector General would be in a position to respond to the issue you have raised.

Thank you again for your letter and your focus on protecting the safety and well-being of Medicaid beneficiaries.

Yours truly,

Thomas E. Price, M.D.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201

AUG 07 2017

The Honorable George Jepsen
President
National Association of Attorneys General
Washington, DC 20036

Dear Attorney General Jepsen:

Thank you for your letter to Secretary Thomas E. Price, M.D., requesting that the U.S. Department of Health and Human Services (HHS) change its current regulations to allow Medicaid Fraud Control Units (MFCUs) to receive Federal financial participation (FFP) to detect, investigate, and prosecute abuse and neglect of Medicaid beneficiaries in non-institutional settings. As indicated by Secretary Price's letter of July 17, 2017, your letter has been referred to the Office of Inspector General (OIG) for response.

We share your concerns regarding abuse and neglect of Medicaid beneficiaries. We recognize that the laws governing Federal matching were established almost 40 years ago and do not reflect the shift in delivery and payment for health care services to home- and community-based settings. OIG believes that the law should be changed to expand MFCUs' use of FFP to include the detection, investigation, and prosecution of abuse and neglect of Medicaid beneficiaries in non-institutional settings. However, we do not believe that the change can be made by regulation.

The Social Security Act (the Act) currently allows for payment of FFP for MFCU activities in abuse and neglect cases involving Medicaid beneficiaries.[1] Section 1903(q)(4)(A) of the Act specifically sets forth only two settings in which MFCUs may review complaints of abuse or neglect of patients: (1) health care facilities that receive Medicaid payments and (2) board and care facilities. Other non-institutional settings, such as home-based care and transportation, are not listed. Because the statute specifically enumerates some settings in which MFCUs can investigate abuse and neglect cases and receive FFP, the failure to include the others, according to statutory construction principles, is read as excluding them.

In cases in which a beneficiary is receiving services in his or her own home, the requirements of the statute are not met. Homes and most other non-institutional settings are neither health care facilities that receive Medicaid payments nor board and care facilities. Thus, the statute does not

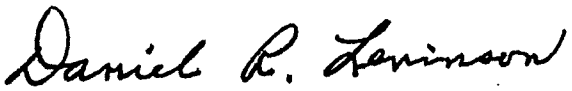
[1] Section 1903(a)(6) of the Act requires HHS to pay a portion of the sums expended by a State "which are attributable to the establishment and operation of (including the training of personnel employed by) a State medicaid fraud control unit (described in subsection (q))." Section 1903(q) of the Act defines MFCU requirements, including MFCU duties regarding patient abuse and neglect.

permit FFP for the detection, investigation, and prosecution of abuse or neglect of patients in non-institutional settings.

HHS is bound by the statute and cannot expand the regulatory definition of "health care facilities receiving payments under the State Medicaid plan" to include non-institutional settings that do not receive Medicaid payments. While we cannot make the requested regulatory change, we have been and continue to be supportive of efforts to effect a statutory change that would allow MFCUs to receive FFP for the detection, investigation, and prosecution of abuse and neglect in non-institutional settings. OIG representatives have also identified the need for a statutory change in testimony before congressional committees, including, most recently, in May 2017 testimony.[2]

Thank you for raising this important issue. We continue to support the concept that MFCUs should receive FFP to conduct these investigations of abuse and neglect. If you have questions or seek additional information, please contact me, or someone from your staff may contact Ann Maxwell, Assistant Inspector General for Evaluation and Inspections, at (202) 619-2482.

Sincerely,



Daniel R. Levinson
Inspector General

[2] Testimony of Christi A. Grimm, Chief of Staff, before House Committee on Energy and Commerce: Subcommittee on Oversight and Investigations: "Combatting Waste, Fraud, and Abuse in Medicaid's Personal Care Services Program," May 2, 2017, available at https://oig.hhs.gov/testimony/docs/2017/grimm-testimony-05022017.pdf

National Association of Attorneys General

PRESIDENT
Derek Schmidt
Kansas Attorney General

PRESIDENT-ELECT
Jeff Landry
Louisiana Attorney General

VICE PRESIDENT
Tim Fox
Montana Attorney General

IMMEDIATE PAST PRESIDENT
George Jepsen
Connecticut Attorney General

EXECUTIVE DIRECTOR
Chris Toth

1850 M Street, NW
Twelfth Floor
Washington, DC 20036
Phone: (202) 326-6000
http://www.naag.org/

March 28, 2018

Honorable Tim Walberg
2436 Rayburn House Office Building
Washington, D.C. 20515

Honorable Peter Welch
2303 Rayburn House Office Building
Washington, D.C. 20515

Dear Representatives Walberg and Welch:

As the Attorneys General of our respective states, we write in support of your legislation, H.R. 3891, that would expand the authority of Medicaid Fraud Control Units (MFCUs) to detect, investigate and prosecute Medicaid patient abuse in non-institutional settings.

On May 10, 2017, thirty-eight attorneys general wrote to then-Secretary Tom Price at the U.S. Department of Health and Human Services urging expanded authority for MFCUs to address patient abuse and neglect ("the NAAG letter"). Specifically, the NAAG letter requested HHS alter its regulations implementing the pertinent statutory provisions to broaden the permissible authority for MFCUs, and the associated use of federal financial participation (FFP), in two regards. First, it recommended "allowing the use of federally funded MFCU assets to investigate and prosecute abuse and neglect of Medicaid beneficiaries in non-institutional settings." Second, it recommended "improving detection of abuse and neglect of Medicaid beneficiaries by broadening the permissible use of federal MFCU funds to screen complaints or reports alleging potential abuse or neglect."

On August 7, 2017, HHS Inspector General Daniel R. Levinson responded to the NAAG letter stating "OIG believes that the law should be changed to expand MFCUs' use of FFP to include the detection, investigation, and prosecution of abuse and neglect of Medicaid beneficiaries in non-institutional settings." However, HHS concluded that such a change requires statutory amendment and could not be accomplished solely by regulation.

On September 28, 2017, you introduced H.R. 3891. We are informed that, in the drafting of your legislation, you were mindful of the NAAG letter and that you intended to implement the letter's recommendations. We have reviewed H.R. 3891 and understand that, if adopted, it would enable HHS-OIG to implement all changes requested in the NAAG letter. Your legislation permits, but does not require, each MFCU to exercise the expanded authority the bill proposes, just as current law does with board and care facilities. It is our understanding that States electing to operate under the expanded authority of H.R. 3891 would be able to use their MFCUs to detect, investigate and

prosecute cases of abuse or neglect of Medicaid patients in whatever setting abuse or neglect may occur and to do so without losing federal financial participation. [1]

This change is vitally important because it eliminates the blinders current law places on MFCUs' ability to detect, investigate and prosecute cases of abuse or neglect of Medicaid patients. Since the current statute was enacted decades ago, substantial growth has occurred in home and community-based services, office-based services, transportation services, and other settings that are neither "health care facilities" nor "board and care facilities" but where services are provided and thus patient abuse or neglect may occur. H.R. 3891 proposes a common-sense change that will better protect an often-vulnerable population and will maximize the benefits and efficient use of MFCU assets.

We also note that your bill is particularly timely and important in light of the national opioid epidemic. Consider, for example, a situation in which a Medicaid beneficiary in a home or community-based setting is provided prescription opioid painkillers in an unlawful manner, resulting in death or great bodily harm to the patient. Under current law, although the patient harm caused by distribution of those opioids may have been criminal, our MFCUs would be hampered or prevented from investigating or prosecuting the case of patient abuse because it occurred in a setting other than a health care facility or a board and care facility. Under H.R. 3891, however, MFCUs could exercise clear authority to pursue that sort of investigation and, if appropriate, prosecute that patient abuse, thus bringing more criminal and civil investigation and prosecution assets to bear in the fight against the opioid epidemic.

Thank you for your leadership in proposing H.R. 3891. We hope it can become law soon so our states may have the option to use the important new tools it would make available in the fight

---

[1] The NAAG letter requested expanded authority for MFCUs to "detect, investigate and prosecute" a wider range of abuse and neglect cases, and Mr. Levinson's response confirms that OIG favors "use of FFP to include the detection, investigation, and prosecution" of such cases. By "detect," the NAAG letter specifically sought broader authority for MFCUs to use FFP to "screen" complaints or reports alleging potential abuse or neglect." Current HHS regulations constrain states' ability to use MFCU assets to *review* complaints in order to detect which may allege patient abuse or neglect that would warrant investigation or prosecution using MFCU assets. *See, e.g.*, 42 C.F.R. Sec. 1007.19(d)(1)(limiting FFP to "review of complaints of alleged abuse or neglect of patients *in health care facilities*")(emphasis added); *see also* 42 C.F.R. Sec. 1007.11(b)(1)(restricting authority of MFCU to "review[ing] complaints alleging abuse or neglect of patients *in health care facilities*" and to "review[ing] complaints of the misappropriation of patient's private funds *in such facilities*.")(emphasis added). For states that would choose to exercise the expanded authority in H.R. 3891, we read the bill to require elimination of these and similar regulatory barriers that restrict MFCUs authority to review complaints. Obviously, a review will necessarily precede a determination whether a complaint or report alleges Medicaid patient abuse or neglect that would fall within H.R. 3891's expanded authority to investigate or prosecute, and it would make no sense to arbitrarily limit review to complaints from patients in health care facilities if the authority to investigate and prosecute abuse and neglect is expanded to other settings.

against the abuse and neglect of *all* Medicaid patients -- wherever that may occur. If we may be of assistance in advancing this legislation, please let us know.

Sincerely,

George Jepsen
Connecticut Attorney General

Derek Schmidt
Kansas Attorney General

Mike Hunter
Oklahoma Attorney General

T.J. Donovan
Vermont Attorney General

Steve Marshall
Alabama Attorney General

Jahna Lindemuth
Alaska Attorney General

Mark Brnovich
Arizona Attorney General

Leslie Rutledge
Arkansas Attorney General

Xavier Becerra
California Attorney General

Cynthia H. Coffman
Colorado Attorney General

Matthew P. Denn
Delaware Attorney General

Karl A. Racine
District of Columbia Attorney General

Pamela Jo Bondi
Florida Attorney General

Christopher M. Carr
Georgia Attorney General

Russel A. Suzuki
Hawaii Acting Attorney General

Lawrence Wasden
Idaho Attorney General

Lisa Madigan
Illinois Attorney General

Tom Miller
Iowa Attorney General

Jeff Landry
Louisiana Attorney General

Maura Healey
Massachusetts Attorney General

Lori Swanson
Minnesota Attorney General

Josh Hawley
Missouri Attorney General

Doug Peterson
Nebraska Attorney General

Gordon MacDonald
New Hampshire Attorney General

Hector Balderas
New Mexico Attorney General

Curtis T. Hill Jr.
Indiana Attorney General

Andy Beshear
Kentucky Attorney General

Brian Frosh
Maryland Attorney General

Bill Schuette
Michigan Attorney General

Jim Hood
Mississippi Attorney General

Tim Fox
Montana Attorney General

Adam Paul Laxalt
Nevada Attorney General

Gurbir S. Grewal
New Jersey Attorney General

Eric T. Schneiderman
New York Attorney General

Josh Stein
North Carolina Attorney General

Ellen F. Rosenblum
Oregon Attorney General

Peter F. Kilmartin
Rhode Island Attorney General

Marty J. Jackley
South Dakota Attorney General

Sean Reyes
Utah Attorney General

Mark R. Herring
Virginia Attorney General

Patrick Morrisey
West Virginia Attorney General

Peter K. Michael
Wyoming Attorney General

Mike DeWine
Ohio Attorney General

Josh Shapiro
Pennsylvania Attorney General

Alan Wilson
South Carolina Attorney General

Herbert H. Slatery III
Tennessee Attorney General

Claude Earl Walker
Virgin Islands Attorney General

Robert W. Ferguson
Washington Attorney General

Brad Schimel
Wisconsin Attorney General