Texas Hospital Association

1108 Lavaca Street, Suite 700, Austin, Texas 78701
512/465-1000
www.tha.org

October 18, 2019

Via electronic submission to: comments@tdi.texas.gov

The Honorable Kent Sullivan
Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714

PUBLIC COMMENT LETTER

Re: Texas Department of Insurance Rules Implementing Senate Bill 1264

Dear Commissioner Sullivan:

On behalf of our more than 470 member hospitals and health systems, including rural, urban, children's, teaching and specialty hospitals, the Texas Hospital Association appreciates the opportunity to provide comments on the Texas Department of Insurance's proposed rules implementing Senate Bill 1264, 86th Legislature. Texas hospitals remain committed to carrying out SB 1264's intent, which—for facilities—is to prohibit surprise balance billing of patients for out-of-network emergency care. The vast majority of Texas hospitals are "in-network" with all major payors at any given time. Hospitals find themselves out-of-network for usually brief periods of time due to an inability to contract with a payor on terms that both sides determine to be fair. Health plan enrollees should not have to absorb the cost of these disputes. In addition to the comments below, THA would like to point TDI to THA's comments provided to TDI on July 15, which are largely not addressed by the proposed rules.

1. **The rules necessary to implement SB 1264 require substantial coordination among TDI, the Texas Medical Board and the Texas Health & Human Services Commission.**

TDI includes a notice on its website, stating:

> TDI is coordinating with other agencies that have roles in implementing SB 1264, which authorizes the appropriate licensing agencies to adopt rules as needed to implement the law and discipline providers who violate the prohibition on balance billing. Texas Medical Board staff say they are developing rules related to SB 1264 for consideration by the board during its October meeting.

THA is encouraged that an agenda item on out-of-network notice and disclosure related to SB 1264 appears on the agenda for TMB's October board meeting. For SB 1264 to work properly, the Texas licensing entities need to work together to hold their licensees accountable under uniform standards. THA respectfully requests TDI post or provide information regarding coordination with THHSC.

2. The requirement to use "best efforts" to utilize an appeal process or reach an agreement is difficult to demonstrate.

Section 21.5011(g) of TDI's proposed rules require a facility to use "best efforts to resolve a claim payment dispute through a health benefit plan issuer's or administrator's internal appeal process before requesting mediation." The same "best efforts" phrase also appears in § 21.5021(e) for arbitration and in both sections referencing an informal telephone conference. *See* §§ 21.5012 (existing rules for mediation) 21.5022 (proposed rules for arbitration). THA is concerned that proving "best efforts" is vague and difficult to demonstrate. As recently noted by the Texas Supreme Court, the term "best efforts" is susceptible to a variety of interpretations. *See Dallas/Fort Worth International Airport Board v. Vizant Technologies*, 576 S.W.3d 362 at FN 12 (Tex. 2019). TDI should select a more concrete term, such as "attempt." This modification would also help prevent unnecessary delays borne by the health benefit plan issuer's internal appeals process.

3. TDI should provide additional information regarding the selection of a benchmarking database and the submission requirements.

THA seeks information from TDI regarding the selection of a benchmarking database, including details about the process and a timeline. TDI's proposed rules require health benefit plan issuers to submit 2019 plan data by Feb. 1, 2020. At this point in time, there is little additional information available to providers, health benefit plan issuers and the public. The proposed rules also do not specify the format in which health benefit plan issuers are required to provide the data to the database, the level of security that the database is required to provide for the data, and that all data provided to the database is confidential. TDI should include these elements in its rules, given the heightened confidentiality concerns for such data.

4. As proposed, the rules do not provide needed additional clarity regarding whether a claim qualifies as emergency care subject to the balance billing prohibition.

As THA mentioned in our July 15 comment letter, SB 1264 and current TDI rules do not adequately address situations where a health benefit plan issuer summarily disallows, denies (in whole or in part) or "down codes" as nonemergent a claim for emergency care. A health benefit plan issuer's unilateral and unwarranted determination that a service does not qualify as emergency care could skirt the intent of the new law. THA asks that TDI subject claims to both the balance billing prohibition and initial payment standard based on whether the claim submitted by the provider or facility originates from a claim for covered emergency care, rather than based on the health benefit plan issuer's subsequent determination. THA also asks that TDI's rules prevent health benefit plan issuers from requiring prior authorization for emergency care. Hospitals are required by federal law to treat any emergency medical condition without delay, and therefore any prior authorization requirement only serves to provide a basis to deny payment to a provider. Similarly, THA recommends that TDI adopt more stringent regulations for retrospective reviews, particularly reviews that take into account final diagnosis. A claim for emergency care that is subsequently classified by a health benefit plan issuer as non-emergent no longer includes the protections of SB 1264 and can result in a balance bill well after a patient's encounter. Any retrospective review should be limited to the patient's presenting symptoms and not the final diagnosis given. These clarifications would result increased predictability under the new law, which would benefit consumers.

5. **TDI's enforcement should be uniform and include health benefit plan issuers.**

SB 1264 includes fines, penalties and injunctive relief for providers and facilities that fail to adhere to the new law. THA asks that TDI develop comparable fines, penalties and injunctive relief for payers that exhibit a pattern of unwarranted coverage denials or underpayment related to out-of-network medical bills. Payers and providers should be equally accountable for improper or illegal practices.

6. **TDI should require mandatory notification by health plans to consumers for out-of-network services subject to the prohibition on balance billing.**

SB 1264 does not include notification requirements to consumers in the event they receive out-of-network care subject to the balance billing prohibition. To increase consumer awareness and equip consumers with the information they need to make informed decisions, THA recommends that TDI enact rules requiring health benefit plans to notify their enrollees when they see out-of-network providers subject to SB 1264. This requirement will help consumers understand the scope of their coverage and the nature of their cost sharing obligations.

7. **TDI should permit facilities and health benefit plan issuers to designate an email or physical address for mediation notices on TDI's website.**

Under proposed § 21.5011, if a health benefit plan issuer requests mediation, the health benefit plan issuer is required to send the facility notice at either the mailing address or email address on the facility's claim form. There are two issues with this: First, claim forms do not contain an email address. Second, mailing addresses on claim forms sometimes route to a lockbox, which will either delay the mediation notice getting to the right person, or could result in it not getting to the right person at all.

If a facility requests mediation, the facility is required to send notice of the request to the health benefit plan issuer at the email address specified on its explanation of benefits. EOBs typically do not contain email addresses; however, § 24.5040 of the proposed rules requires health benefit plan issuers to provide an email address on all EOBs where the mediation process is available. It is common for facilities not to receive EOBs. Instead, facilities often receive electronic remittance data in electronic format only, and there is no place on the ERA to include an email address.

To solve the issues related to notice, THA proposes that TDI permit health benefit plan issuers and facilities to designate an email (or address) for all mediation notices on the TDI website. This prevents delays in receipt of the mediation notice.

8. **SB 1264 does not require the parties to submit settlement offer amounts made in an informal settlement conference prior to mediation.**

Proposed § 21.5011(c) requires the parties to submit certain information to TDI following the required informal settlement conference that takes place prior to the mediation, including any settlement offer amounts made during the teleconference. SB 1264 does not require this information for mediation (although it is a consideration where providers are before an arbitrator), and it may not be in anyone's interests for the TDI to receive and potentially

track settlement proposals that facilities and health benefit plan issuers make in this context. Typically settlement offers conveyed through mediation are kept strictly confidential by the mediator unless the party agrees to disclosure. *See* Tex. Civ. Prac. & Rem. Code § 154.053(b). Even though all information submitted during this process is protected from disclosure to the public, the potential for abuse is fairly high. TDI should strike the requirement to submit "settlement offer amounts" in proposed § 21.5011(c).

9. TDI should specify a deadline for payment of a mediator fees.

Proposed § 21.5011(d)(2) provides that each party must pay the mediator fee "promptly" and failure to do so constitutes bad faith. Because bad faith participation can result in a penalty, TDI should specify the timeframe for payment of mediator fee.

10. TDI should not limit the requesting party's right to mediate multiple claims in a single mediation.

Proposed § 21.5011(g)(5) permits, and implicitly requires, the parties to agree to aggregate in mediation claims between the same facility and same health benefit plan issuer. Requiring agreement between the parties to mediate multiple claims is inconsistent with current law. Section 1467.056, Texas Insurance Code, states, "Nothing in this chapter prohibits mediation of more than one claim between the parties during mediation." TDI should instead permit the party that requested mediation to decide, without limitation, whether to bundle multiple claims in mediation. In addition, the reference to "same facility" in proposed § 21.5011(g)(5) should include any facility affiliate.

11. Written complaints regarding mediators and arbitrators should be confidential.

Proposed § 21.5030 permits a party to submit a written complaint to TDI regarding the settlement of an out-of-network claim that was subject to the mediation or arbitration process. The section does not specify that complaints are confidential; theoretically, if a complaint questioned the adequacy of a mediator or arbitrator, it could get back to that mediator or arbitrator without confidentiality in place. TDI should specify that complaints are confidential.

12. Network adequacy is fundamental and integral to preventing out-of-network medical bills.

THA is perplexed by the assertion of one commenter that network adequacy rules have little impact on out-of-network surprise billing. On a fundamental level, the more providers that a health benefit plan issuer includes in its network, the more likely the enrollee is to receive care from an in-network provider. Network adequacy is the foundation for decreasing the likelihood that a patient will have an encounter with an out-of-network provider and failing to include network adequacy in any discussion about surprise out-of-network medical bills would be ill-advised. TDI should ensure that its current network adequacy rules are enforced and review requirements for efficacy.

Again, thank you for the opportunity to provide comments on these proposed rules. Please do not hesitate to contact me directly with questions at 512/465-1539 or cduncan@tha.org.

Respectfully submitted,

D. Cameron Duncan III
Associate General Counsel
Texas Hospital Association