

Disability Rights Education & Defense Fund



December, 2019

*via Electronic Submission
(Medicaid.gov)*

The Honorable Alex Azar, Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

RE: Proposed Amendment 42 to TennCare II Demonstration

Dear Secretary Azar:

The Disability Rights Education and Defense Fund (“DREDF”) appreciates the opportunity to provide comment on proposed Amendment 42 to the TennCare II Demonstration. DREDF is a national cross-disability law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and development of legislation and public policy. We are committed to increasing accessible and equally effective healthcare for people with disabilities and eliminating persistent health disparities that affect the length and quality of their lives. DREDF's work is based on the knowledge that people with disabilities of varying racial and ethnic backgrounds, ages, genders, and sexual orientations are fully capable of achieving self-sufficiency and contributing to their communities with access to needed services and supports and the reasonable accommodations and modifications enshrined in U.S. law.

In particular, DREDF has significant experience in Medicaid law and policy, given that disabled individuals disproportionately live in poverty and depend on health care services and supports. Medicaid is also the only publicly-funded provider of long-term services and supports, and thus is a very significant or sole source of essential health care for many people with disabilities.

DREDF unequivocally opposes Tennessee’s proposed amendment to its Medicaid Demonstration (TennCare), which would change the financing structure for its program to a block grant. The proposal will create new barriers to health care for hundreds of thousands of low-income people, including people with disabilities. It will result in large health coverage losses, thus undermining the express purposes of the Medicaid program. Under Section 1115 of the

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Social Security Act ("SSA"), which only permits the HHS Secretary to approve waiver applications that promote the objectives of Medicaid, the proposal cannot stand.

I. TennCare's Proposed Block Grant Is Unlawful Under Section 1115 of the Social Security Act

Section 1115 of SSA gives the HHS Secretary authority to waive a State's compliance with certain requirements of the Medicaid Act, but only for an "experimental, pilot, or demonstration project which . . . is likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. § 1315(a). The express purpose of the Medicaid Act is to enable each State "to furnish [] medical assistance on behalf of [individuals] whose income and resources are insufficient to meet the costs of necessary medical services" and to provide "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." *Id.* § 1396-1.

By its own terms, the changes called for in the Tennessee proposal apply to "its core population," which includes the children, adults, elderly, and blind and disabled eligibility categories. (Proposal at iii, 7). These categories encompass nearly all of the 1.4 million TennCare enrollees. A proposal for permanent changes that affect such a significant number of low-income Tennesseans cannot be called a "pilot," nor "experimental"—except in the euphemistic sense of lacking any documented connection between the waiver's proposed actions and achieving the Medicaid Act's stated purpose.

The proposed amendment does not promote, and indeed will undermine, the objectives of the Medicaid program by decreasing access to "medical assistance" and "other services" that individuals, and in particular people with disabilities, depend on "for independence and self-care." See 42 U.S.C. § 1396-1. By definition, a block grant will cap the amount of funding that the State of Tennessee receives from the federal government. Under the current federal matching structure, the federal funding that TennCare receives fluctuates based on the needs of TennCare enrollees and the program's correlated expenditures. By foregoing this financing structure in favor of a block grant, the State will be artificially limiting the federal contributions that it needs to respond to unpredictable expenditures—meaning that the State will be forced to either raise taxes to cover those additional costs by itself, or cut TennCare benefits and/or restrict eligibility. This predictable outcome, should this amendment be approved, is not what Congress intended in creating the Medicaid program. It will surely serve to decrease access to health care for low-income Tennesseans and thus cannot be approved via a Section 1115 waiver. See 42 U.S.C. §§ 1315(a), 1396-1.

II. Disabled Enrollees Will Be Disproportionately Harmed by TennCare's Proposed Block Grant

A. TennCare's Proposed Block Grant Will Cut Services and Restrict Eligibility for Disabled Enrollees

Proposed Amendment 42 to the TennCare II Demonstration applies to the “core population” of TennCare enrollees, which explicitly includes people who are eligible for TennCare on the basis of being blind or disabled. (Proposal at iii, 7). While the State may be attempting to carve out individuals who are dually eligible for both Medicaid and Medicare (which would include many people with disabilities) and people with intellectual disabilities covered by Tennessee's separate 1915(c) waiver,¹ even these carved out populations cannot be shielded from the harms that will result when TennCare can no longer afford to fund its entire program. Regardless, there will be many people with disabilities, who are not dually enrolled or covered by the separate 1915(c) waiver, who will be explicitly included within this proposed financial restructuring. And for these individuals, many of whom utilize more health care and thus produce higher expenditures for TennCare, their eligibility and access to services will be at risk.

There are approximately 300,000 individuals who qualify for TennCare on the basis of disability.² For these individuals, equal and sufficient access to TennCare's health care services and supports is critical to ensuring that they can maintain employment, raise their families, and participate in their communities. Benefits as simple as a wheelchair, physical therapy, prescription medications, cognitive behavioral therapy, or an accurate glucose monitor are essential to ensuring that people with chronic conditions and disabilities can live and function independently. Without sufficient access to these benefits, or eligibility for the health program that covers them, many individuals will be denied equal access to their communities.

Take, for example, coverage of mobility devices, such as a wheelchair. For people with mobility disabilities, access to a working and properly fitted wheelchair can be a gateway to full participation in their communities. Without health insurance coverage of appropriate equipment, people are often homebound—unable to work, go to school, or even get out of bed. Others may be forced to obtain lesser devices than what they medically need, putting their health and safety at risk. Still others face institutionalization because they cannot function in their own homes.

¹ For further discussion on the impact of this proposal on these populations, see *infra* Section II.B.

² See KAISER FAMILY FOUND., *Medicaid Enrollees by Enrollment Group* (last visited Dec. 6, 2019), <https://www.kff.org/medicaid/state-indicator/distribution-of-medicaid-enrollees-by-enrollment-group/>.

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The health care benefits that TennCare offers to people with disabilities are critical. However, they are also sometimes expensive, which places disabled TennCare enrollees in a precarious position—they may be a prime target for a reduction of services or eligibility *when* the State of Tennessee exceeds the block grant cap under this proposal. TennCare’s “disabled” enrollment category encompasses approximately 19 percent of all TennCare enrollees,³ yet accounts for approximately 38 percent of all expenditures.⁴ As the highest cost group of all of the enrollment categories, it is easy to see how their eligibility and coverage would be an early target for the State, when they are forced to make cuts to TennCare. Perversely then, the group of individuals that most needs access health care services to equally function in society will be put at the highest risk for elimination or reduction of services.

The Secretary only has authority to grant a Section 1115 waiver when the program “is likely to assist in promoting the objectives” of the Medicaid Act, which are, in part, “to furnish [] medical assistance” and to provide “services to help [individuals] attain or retain capability for independence or self-care.” 42 U.S.C. §§ 1315(a), 1396-1. TennCare’s block grant proposal will not promote these goals. Instead, it would disproportionately impact disabled enrollees and risk decreasing access to the medical assistance that they rely on to maintain health, independence, and livelihoods. Thus, by approving a waiver that runs contrary to these principles, as articulated in the Medicaid Act, the Secretary will exceed his Section 1115 authority.

B. The Proposal Would Negatively Impact the Long Term Services and Supports (“LTSS”) That Many People with Disabilities Need

Many people with disabilities rely on long term services and supports to support their independent, community-based living. Within TennCare, LTSS is provided through two programs: CHOICES and Employment and Community First (“ECF”) CHOICES. The CHOICES program serves adults with disabilities, while ECF CHOICES serves people with intellectual and developmental disabilities. TennCare proposes to include both CHOICES and ECF CHOICES within its block grant. We strongly oppose this proposal.

³ For FY2014, there were 284,100 TennCare enrollees who qualified for the program on the basis of disability, out of a total of 1,526,200 enrollees. KAISER FAMILY FOUND., *Medicaid Enrollees by Enrollment Group* (last visited Dec. 6, 2019), <https://www.kff.org/medicaid/state-indicator/distribution-of-medicaid-enrollees-by-enrollment-group/>.

⁴ TennCare enrollees who qualified on the basis of disability account for \$3,572,566,300 in spending, out of a total \$9,310,791,500 for FY2014. KAISER FAMILY FOUND., *Medicaid Spending by Enrollment Group* (last visited Dec. 6, 2019), <https://www.kff.org/medicaid/state-indicator/medicaid-spending-by-enrollment-group/>.

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Both CHOICES and ECF CHOICES are projected to grow significantly in the coming years. As the “baby boomer” generation ages, the number of adults who will need LTSS through CHOICES is anticipated to expand considerably. Likewise, there is already a wait list of approximately 7,000 adults and children for the ECF CHOICES program. If TennCare were restructured into a block grant, it would make it far more difficult to provide LTSS services to the expanding population of people who need it. Block grant funding would make it extremely difficult for the TennCare program to meet the growing LTSS needs of low-income Tennesseans.

C. The Proposal Will Negatively Impact People Dually Eligible for Medicaid and Medicare and People with Intellectual Disabilities Covered Under the Separate 1915(c) Waiver

TennCare’s proposal provides for a few exemptions to the block grant restructuring, including “[e]xpenditures on behalf of individuals who are enrolled in Medicare, including cost sharing and premium assistance (including Medicare Part D ‘claw back’ payments) paid on behalf of individuals who are dually enrolled in Medicare and TennCare” and “services provided to individuals with intellectual disabilities under the authority of a separate 1915(c) waiver.” (Proposal at 11–12).

First, this language is vague and does not make clear precisely who or what services are exempt from the proposed financial restructuring. For dual eligibles, the language could be read to exempt only “partial duals,” i.e., people enrolled in the Medicare Savings Program but not eligible for any other Medicaid benefits, instead of people who also receive full Medicaid benefits. Similarly, the proposal uses differing language throughout to describe the 1915(c) population that is exempt. It remains unclear which populations Tennessee is attempting to carve out, and without such necessary specificity, such a proposal cannot be considered.

Second, even reading the proposal’s exemptions broadly, purportedly “exempt” individuals will still be negatively impacted by a block grant restructuring. While the proposal may not directly limit the eligibility and coverage for these specific populations of seniors and people with disabilities, reduced spending to the overall TennCare program (which will inevitably happen when the program hits the cap) will still impact these populations. For example, if the State reduces provider reimbursement rates (or even if its unable to make an annual adjustment to increase them), then fewer health care providers will accept TennCare, meaning decreased access for all enrollees.⁵

⁵ JUSTICE IN AGING, *Medicaid Funding Caps Would Harm Older Americans* (Feb. 2017), <https://www.justiceinaging.org/wp-content/uploads/2017/02/Medicaid-Funding-Caps-Would-Harm-Older-Americans.pdf>.

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D. The Proposal Would Decrease Access to Needed Prescription Drugs

TennCare's block grant proposal additionally proposes to adopt a commercial-style closed formulary, whereby as few as only one drug may be available per therapeutic class. (Proposal at 14). We strongly oppose this proposal, which is a departure from TennCare's traditional alliance with the federal Medicaid drug rebate program.

Many people with chronic conditions or disabilities rely on prescription drugs to manage symptoms associated with their disability or health conditions that they may have. A formulary that allows for only one drug per class is simply insufficient to meet the needs of many TennCare enrollees with disabilities. Prescription drugs in the same therapeutic class can still have different mechanisms of action, drug interactions, or side effects depending on the individual, their condition(s), and their other necessary medications. Take, for example, prescription medications used to treat disabling depression, anxiety, or other mental health conditions. One antidepressant, for example, may actually exacerbate an individual's condition or cause suicidal thoughts; while a different antidepressant in the same class may reduce the symptoms of their disabling mental health condition, thus allowing them to better function. Limiting a formulary to only one option is shortsighted and against all generally accepted clinical guidelines.

Further, there is no mechanism of appeal built into TennCare's proposal, should a TennCare enrollee need or their treating physician determine that an alternative prescription medication is required for the individual. Thus, for example, if an individual has relied on a specific medication for years, yet that medication is no longer covered under the new formulary, they would have no mechanism of recourse. This lack of attention to detail highlights, yet again, how ill-conceived TennCare's proposal is.

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Should it be approved, TennCare's proposed block grant would disproportionately harm the health and livelihood of people with disabilities. For this reason, as described in detail above, DREDF strongly opposes Amendment 42 to the TennCare Demonstration. Thank you again for the opportunity to comment on the TennCare proposal. Please do not hesitate to contact us if you have any questions about the above.

Sincerely,



Carly A. Myers
Staff Attorney



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