December 27, 2019

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

Dear Secretary Azar,

The Center for Public Representation (CPR) writes to express our strong opposition to Tennessee’s proposed amendment to its TennCare II demonstration, Amendment 42. CPR is a national legal advocacy organization that promotes the full integration and community participation of people with disabilities. We are deeply concerned by Tennessee’s proposal to convert its Medicaid financing into a block grant, the massive reduction in federal oversight sought by the state, and the reduction in protections for beneficiaries that will have an outsized impact on Tennesseans with disabilities and urge you to reject it.

**Tennessee’s request is too vague for effective public comment and should thus be rejected.**
While there are a number of concerning elements in the proposal, those elements lack specific details necessary to make an educated determination of how exactly they will affect stakeholders. The state avoids defining key terms, is often vague in its promises, and qualifies its supposed intentions in such a way as to render them meaningless. The state sees this as part of the “autonomy” it seeks under the block grant, stating that “it is not the intention of the state to enumerate in detail in this document every innovation, reform, or policy change that might take place over the life of the demonstration, since the purpose of the block grant is precisely to give the state a range of autonomy within which it can make decisions about its Medicaid program.”\(^1\) While we can, and will, provide comments on the problems inherent in the proposed changes, more detail is necessary to allow stakeholders a full understanding of what these changes would mean for them. Without more detail and specificity, stakeholders, including people with disabilities and service providers, have not been given an opportunity for meaningful public comment and the state’s desire for “autonomy” should not be used to justify denying them that opportunity.

The state seeks fundamental changes to the way its Medicaid program, known as TennCare, works, including changing its financing system, waiving federal regulations governing managed care programs, severely limiting its prescription drug coverage, and granting the state

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\(^{1}\) State of Tennessee, *TennCare II Demonstration: Amendment 42 Modified Block Grant and Accountability 13 (November 20, 2019)* (hereinafter Tennessee Application).
unrestricted authority to change TennCare enrollment processes, service delivery systems, and other critical program elements without federal approval. Allowing the state such broad authority without a full understanding of what the state plans to do with that authority and without a proper opportunity for comment from stakeholders is, as others before us have noted, contrary to law and policy and should not be permitted.²

**HHS lacks authority to approve Tennessee’s proposal because the Medicaid requirements it seeks to waive are not among those requirements that are waivable under 1115 authority.** Section 1115 allows waiver of a variety of Medicaid requirements relating to mandatory coverage and services, optional coverage and services, eligibility processes, service delivery, and beneficiary protections. However, several of the state’s requests in its proposal fall outside of HHS’ authority under Section 1115. The state, for example, seeks a waiver of Medicaid’s financing system and matching rate, which are not among the requirements waivable under Section 1115, meaning the block grant proposed by Tennessee cannot approved.³ The state also seeks an exceedingly broad waiver of federal managed care requirements. Tennessee does not enumerate all of the regulatory requirements it seeks to waive in its application, but the statutory basis for the managed care requirements Tennessee seeks to waive lies outside of the purview of an 1115 waiver, meaning that HHS lacks the authority to approve waiving those requirements.⁴ The state fails to provide a reason why it needs those regulations to be waived, beyond “flexibility” and calling the regulations, which again, serve to protect the health and civil rights of disabled beneficiaries “unnecessary.”⁵ This lack of analysis throughout Tennessee’s application is disturbing and shows a lack of consideration that makes providing Tennessee the “flexibility” it seeks a troubling proposition at best.

**HHS lacks authority to approve the request because, furthermore, Tennessee’s request does not promote the objectives of Medicaid.** Section 1115 waivers must be “likely to assist in promoting the objectives” of Medicaid in order to be approvable under the law.⁶ Those objectives are to enable states to provide “medical assistance” to people with disabilities, seniors, and families with dependent children, “whose income and resources are insufficient to meet the costs of necessary medical services” and to provide services to help such individuals

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⁴ 42 C.F.R. § 438.1.
⁵ Tennessee Application 20.
and families “attain or retain...independence and self-care.”

Tennessee’s proposal, contrary to those objectives, provides financial incentives to the state to limit enrollment, reduce benefits, and otherwise cut its Medicaid program.

One incredibly blatant example of this financial incentive is the state’s “shared savings” proposal, under which, in any year that the state spends below the block grant given to it by the federal government, it is allowed to retain 50% of the excess funds, without any apparent federal oversight on how the funds are spent. Such an arrangement goes far beyond the statutory boundaries for federal financial participation because the funds would not be tied to actual, specific Medicaid-reimbursable services or administrative activities, but rather, amorphous “state health-related priorities.” The state also suggests it may use some undefined portion of its block grant “on public health initiatives that are not specifically targeted at the TennCare population but which can reasonably be expected to result in health benefits for the TennCare population.” The purpose of Medicaid is to provide services for specific populations because those populations were historically underserved, not to fund general public health initiatives. The proposal fails to provide sufficient assurances that enrollment reductions and harmful benefit changes would not occur as a result of the state shifting funds to more generalized public health initiatives and several elements of its proposal, in fact, appear to be designed to allow the state to provide less medical assistance and fewer services to its Medicaid population.

Several of these elements would disproportionately harm disabled beneficiaries. For example, Tennessee’s proposal seeks to allow TennCare to adopt a commercial-style closed formulary for its prescription drugs. Such a formulary would allow the state to cover as little as one drug “per therapeutic class.” While Tennessee rationalizes this as a cost-saving measure, it is likely to have limited effect and could seriously harm many disabled beneficiaries who may not be able to tolerate or benefit from the drug covered in a particular therapeutic class. The state proposes an exceptions process to ensure such harms would not occur, but the bureaucratic barrier to accessing necessary medications that would create is likely to lead to confusion and in many cases, lack of access to those necessary treatments, which can lead to serious health consequences. One survey across ten states found that nearly half of Medicaid-enrolled people with psychiatric disabilities had difficulty accessing clinically-indicated medication in the

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8 Tennessee Application 10-11.
9 Id. at 11.
10 Id. at 14.
11 Id. at 15.
previous year, and those enrollees were 3.6 times more likely to experience an adverse event than enrollees who did not have problems accessing their medication.13

Tennessee also requests authority to exclude new medications from its formulary “until market prices are consistent with prudent fiscal administration.”14 This would allow the state to limit access to life-saving or life-changing medications until it deems them cost-effective, which would disproportionately impact people with relatively rare health conditions, for whom new treatments are often very expensive. For example, the Food and Drug Administration (FDA) recently approved a new treatment for cystic fibrosis called Trikafta that could prove life-changing for the many people with cystic fibrosis who are ineligible for other treatments on the market,15 but it costs over $300,000 per year.16 Of the 30,000 people with cystic fibrosis in the United States, almost 45 percent are enrolled in Medicaid,17 which offers broad prescription drug coverage to ensure states cover new treatments, like Trikafta, that would likely be excluded from coverage in Tennessee if it were granted the authority it is requesting.

Tennessee’s wide-ranging requested waiver of federal managed care regulations also threatens the provision of care to disabled beneficiaries, contrary to Medicaid’s explicit objectives. The regulations the state seeks to waive include limits on Medicaid payments to IMDs, which were put in place to deter unnecessary institutionalization, federal approval of state contracts with managed care organizations (MCOs), network adequacy standards, federal oversight to ensure that Tennessee provides MCOs with payment rates sufficient to provides enrollees with the care they need, and reporting requirements regarding long term services and supports (LTSS), among others.18 These protections were put in place in large part to protect a population that has historically been poorly served by the state and Tennessee should not be allowed exemptions in the name of convenience that will threaten the healthcare and civil rights of beneficiaries with disabilities.

In a similar vein, the state also seeks as part of its proposal undefined, seemingly sweeping authority “to make changes to enrollment processes, service delivery systems, and comparable program elements without seeking additional CMS approvals via State Plan Amendments or

13 Id. at 608.
14 Tennessee Application 15.
18 Tennessee Application 20-21.

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demonstration amendments.”19 There is next to no detail from the state that would help TennCare beneficiaries and other stakeholders determine how it plans to use that authority, why it believes such authority to be necessary, and how it may impact beneficiaries. This could mean additional administrative burdens, making it more difficult for beneficiaries, especially those with disabilities, to enroll in and maintain their health coverage, changes in provider networks, and more could be altered without the assurances provided to stakeholders through federal oversight.

The state also requests blanket authority to waive comparability requirements20 and the requirement to obtain CMS approval to add optional benefits or adjust “the amount, duration, and scope of covered benefits.”21 This lack of federal oversight and lack of clarity surrounding what the state may be considering could lead to discriminatory benefit design or benefits being provided with inappropriate restrictions on amount, duration, and scope. While the state complains that comparability requirements mean it cannot provide targeted benefits,22 that is categorically untrue, as targeted benefits are regularly approved by the Secretary. Those targeted benefits the state seeks merely need to be specific so they can be evaluated for compliance with waiver requirements and to ensure they are not discriminatory in nature. If the state has any targeted benefits in mind it would like to propose, it should do so in a way that allows for proper evaluation and stakeholder input.

Tennessee’s proposal represents a dangerous restructuring of the state’s Medicaid program that would place its 1.4 million TennCare beneficiaries, and particularly its beneficiaries with disabilities, at risk. The requested lack of federal oversight and reporting requirements and the corresponding limitations on public comment place alarming restrictions on the opportunities beneficiaries and other stakeholders, including people with disabilities, their families, and service providers, will have to address issues and few assurances that TennCare will continue to meet their needs. We ask that you reject this proposal.

Sincerely,

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19 Id. at 20-21.
20 Id. at 16-17.
21 Id. at 21.
22 Id. at 17.