

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

October 18, 2019

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Submitted via e-mail: public.notice.tennCare@tn.gov

Re: Amendment 42 to TennCare II Demonstration

Justice in Aging appreciates the opportunity to comment on the state's proposed Amendment 42 to the TennCare II Demonstration under section 1115 of the Social Security Act. For the reasons discussed below, we strongly oppose the proposal which would convert "the bulk of TennCare's federal funding to a block grant" and urge the state to withdraw it.

Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older Tennesseans and older adults nationwide. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources, particularly populations that have traditionally lacked legal protection such as women, people of color, LGBTQ individuals, and people with limited English proficiency. We have decades of experience with Medicare and Medicaid and have worked extensively with advocates who represent low-income older Tennesseans. Justice in Aging conducts trainings and engages in advocacy regarding Medicare and Medicaid, provides technical assistance to attorneys in Tennessee and across the country on how to address problems that arise under these programs, and advocates for strong consumer protections at both the state and federal level.

We urge the state to withdraw this proposal because of the harms it would cause to Tennesseans who rely on Medicaid to access health care and long-term services and supports. Capping funding fundamentally alters the Medicaid program and does not allow it to fulfill its objective of providing health coverage to those who cannot otherwise afford it. Cutting or artificially limiting the "bulk" of federal funding (or funding for any part of the program) will directly harm the populations the state intends to include under the block grant, most especially people with disabilities and older adults who have higher health care needs. It will also inhibit TennCare's capacity to serve older adults and people

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with disabilities not included in the block grant, especially as needs increase with the unprecedented growth of the older adult population¹ and the simultaneous increases in senior poverty.²

Our comments address our opposition to the waiver amendment as not promoting the objectives of the Medicaid program and harming older adults, as well as specific concerns we have with how the proposed amendment is designed.

The Proposed Waiver Amendment Would Fail to Promote the Medicaid Program’s Objectives.

Under federal law, Medicaid demonstration waivers cannot be used to alter the basic funding structure.³ Implementing a block grant would radically change the funding structure and therefore the program. “Reconceiving the partnership between the state and federal government” as the draft proposal states is simply not permissible.

Furthermore, federal law provides that such waivers are allowed only if they are “likely to assist in promoting the objectives” of the Medicaid program.⁴ The Amendment 42 proposal fails to meet this standard. Medicaid’s primary objective is to furnish medical assistance to low-income persons.⁵ Yet the draft does not address how block granting the bulk of the program will advance providing coverage to Tennesseans who cannot otherwise afford coverage. In fact, as discussed more fully below, capping funding would actually lead to cuts in coverage and therefore undermine Medicaid’s main objective.

Much of the draft’s discussion of the purpose of the Amendment is around saving the state money, which is not an objective of the Medicaid program. Moreover, there are no guardrails to ensure that any potential “savings” from cutting federal funding through a block grant would be used to provide coverage to low-income Tennesseans.

Capping Federal Medicaid Funding will Harm Older Adults

Capping federal Medicaid funding to the state cannot be accomplished without harming Tennesseans who rely on TennCare currently or may one day need TennCare. Unlike the existing funding structure that responds to need by guaranteeing a federal match for every dollar the state spends, a block grant will artificially limit the federal contribution and make it impossible for TennCare to fully respond to future needs, both those that are expected and unexpected. Because the state cannot go into debt to cover growing needs of its TennCare population, it will be forced to cut services, restrict eligibility, or

¹ By 2030, nearly 1 in 5 Tennesseans will be age 65 or older. Univ. of Virginia Weldon Cooper Ctr. for Public Service, Observed & Projected Population Proportion at 65+ for the U.S. and the States, 2010-2040, <https://demographics.coopercenter.org/national-population-projections>.

² Justice in Aging, Senior Poverty, <https://www.justiceinaging.org/senior-poverty/>

³ 42 U.S.C. 1315(a) specifies which requirements can be waived. The list does not include 42 U.S.C. 1392b, which governs financing of Medicaid.

⁴ 42 U.S.C. 1315(a)

⁵ See 42 U.S.C. § 1396-1; Memorandum Opinion, *Stewart v. Azar*, Civil Action No. 1:18-cv-152 (JEB), filed June 29, 2018.

both.⁶ So while the state may be attempting to carve out individuals dually eligible for Medicare and Medicaid, and therefore the vast majority of seniors and many people with disabilities, from the capped funding, these populations cannot be carved out from the harm that will result when TennCare can no longer afford to provide coverage and services to its entire Medicaid population.

We disagree with the state's assertion that the block grant is not expected to have a material impact on enrollment. While the proposal itself may have few provisions directly addressing eligibility, capped funding and growing needs will necessitate limiting eligibility in the future across the program. There is no guarantee that these inevitable restrictions on eligibility will not impact populations the state is asserting are exempt from the proposed block grant. In fact, because dually eligible populations utilize more care and require higher spending, restricting eligibility for these populations would be the easiest way to make up for funding shortfalls from the block grant.

In addition, even if the state chooses to make cuts not directly aimed at older adults and people with disabilities, such cuts will affect both access and quality of care for all TennCare enrollees. For example, if the state decreases provider payment rates or is unable to increase them, fewer providers will accept TennCare, which means decreased access for all enrollees.⁷

Concerns about the Block Grant's Design and Its Impact on People Dually Eligible for Medicare & Medicaid

We have serious concerns about how the waiver is designed and how both the state intends it to impact older adults and people dually eligible for Medicare and Medicaid, as well as how it will actually impact this population. The proposal says that "Expenditures 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" are not included in the block grant. This language does not make clear whether all people who are dually eligible for Medicaid and Medicare, including those who are eligible for full Medicaid benefits, are excluded. It could be read to only exclude so-called "partial duals" who are eligible for the Medicare Savings Programs but not for any other Medicaid benefits.

Adding to the confusion is the fact that the block grant is calculated using 64,679 "elderly" member months for the base period enrollment. While the proposal says this number excludes "Medicare members," we question that it excludes all dually eligible adults age 65 and older. Multiple data sources show both nationwide and in Tennessee specifically, nearly all seniors are enrolled in Medicare as are an even higher percentage of seniors who are enrolled in Medicaid. For example, the Census Bureau's American Community Survey data shows that in 2018, there were 138,000 individuals dually in Medicare and Medicaid in Tennessee who were age 65+. There were also 138,000 Medicaid

⁶ 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?eType=EmailBlastContent&eld=443776c8-cb7a-4c89-991a-85ede6f99509>.

⁷ *Id.*

enrollees age 65+ in Tennessee. This aligns with the Kaiser Family Foundation’s data for 2013: 99% of Tennessee Medicaid enrollees age 65+ that year were dually enrolled in Medicare.⁸ In other words, it is not clear who is included in this “elderly” number being used to calculate the base block grant amount. It seems unlikely that it truly excludes all 65+ persons who are also enrolled in Medicare. Furthermore, the enrollment number the state provides for the “disabled” category does not indicate that it excludes “Medicare members,” which it should if the state is intending to exclude all persons dually eligible for Medicare and Medicaid. In fact, the majority of people dually eligible are under age 65.

We have similar questions about whether all individuals enrolled in any of the state’s 1915(c) waivers or only individuals with intellectual disabilities are excluded. The draft amendment uses different language at various points to describe the 1915(c) populations that it is intending to carve out.

Given these apparent inconsistencies and lack of clarity as to which populations are included in the block grant and which are carved out, we are fearful that the state has not fully thought through the impacts of its proposal. We question how excluding all duals would work given that some categories such as home and community based services are delivered to both dually eligible and non-dually eligible populations. It seems impractical if not impossible to have different funding mechanisms for the same Medicaid eligibility pathway based on whether someone is dually eligible for Medicare.

We are concerned that the state does not fully understand the probable impact of capped funding on every single TennCare population. This alone is reason that the state should withdraw the proposal. However, if the state does choose to move forward, it must clarify whether it is excluding all dually eligible beneficiaries, regardless of age or type of Medicaid coverage and ensure that the numbers it is using for its base calculation are accurate.

Conclusion

For these reasons, we urge the state to withdraw this proposal and focus on improving and expanding coverage for low-income Tennesseans, including older adults and people with disabilities. If any questions arise concerning this submission, please contact Natalie Kean, Senior Staff Attorney, at nkean@justiceinaging.org.

Sincerely,



Jennifer Goldberg
Deputy Director

⁸ Aged and Disabled Dual Eligibles as a Percent of Total Medicaid Beneficiaries, <https://www.kff.org/medicaid/state-indicator/ageddisabled-medicaid-beneficiaries/?currentTimeframe=0&sortModel=%7B%22colld%22:%22Location%22,%22sort%22:%22asc%22%7D>