NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE
275 Seventh Avenue, Suite 1506
New York, NY 10001-6860
Tel: (212) 633-6967 Fax: (212) 633-6371

December 27, 2019

VIA ELECTRONIC SUBMISSION

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

Re: TennCare II Demonstration – Amendment 42

Dear Secretary Azar:

The National Center for Law and Economic Justice ("NCLEJ") provides comments in response to Tennessee's "TennCare II Demonstration – Amendment 42" (the "waiver" or "proposal"). We have carefully reviewed the state's proposal and, as explained more fully below, we urge the Department of Health & Human Services ("HHS") to return the application to Tennessee and reject it as incompatible with the requirements of Section 1115.

NCLEJ provides legal representation, policy advocacy, impact litigation, and grassroots organizing support for low-income families, individuals, communities, and organizations to advance economic justice and preserve fundamental rights. Our healthcare advocacy and litigation work ensure that state health care programs operate efficiently and do not violate the rights of low-income communities and persons with disabilities.

Tennessee's proposal is vague, incomplete, and cannot be approved by HHS.

First, HHS should return the waiver application to Tennessee because it is woefully incomplete. The application's description of Tennessee's proposed demonstration is so vague that it deprives the public of the opportunity to meaningfully comment on the waiver, as required by 42 U.S.C. § 1315(d)(2)(C). For example, the proposal fails to fully explain why the state needs to waive regulations that cover state Medicaid programs delivering services through a managed care environment. Currently, virtually all Medicaid participants in Tennessee access Medicaid services through a managed care plan. Yet the proposal fails to explain specifically how this change will affect current and future beneficiaries as well as ensure that managed care organizations will otherwise afford the comprehensive protections determined necessary by CMS in promulgating the managed care regulations. Similarly, the state fails to explain why it seeks to

change the federal oversight structure and state accountability requirements for funding and how such a change will affect beneficiaries. Instead, the state summarily reasons that the current managed care rules are unnecessary and that federal oversight and accountability requirements must change to allow Tennessee "flexibilities" in operating its Medicaid program within a capped financing structure. This is patently insufficient to permit the public to adequately assess Tennessee's proposal.

Second, the proposal is a *de facto* new demonstration request, which CMS should subject to a rigorous public comment and review process. Although Tennessee calls the waiver an "Amendment," the proposal goes well beyond amendments that CMS has approved elsewhere by drastically and irreparably changing the nature of the state's Medicaid partnership with the federal government.

Currently, the federal government pays 65 percent of the cost of TennCare services while the state covers 35 percent. In return for federal assistance, Tennessee and its managed care contractors must meet federal standards and respect federal patient safeguards. But the waiver seeks to transform this arrangement by minimizing federal oversight of TennCare, drastically modifying the extent of services provided by Medicaid, and converting federal funding for TennCare into a "block grant." Tennessee is the first state to request such a radical waiver in the history of Medicaid. If approved, HHS would allow Tennessee to receive a lump sum of federal dollars and significantly reduced oversight and accountability requirements for the protection of Medicaid beneficiaries.

Specifically, the state is proposing to receive a lump sum of federal funds based on the state's projected costs of Medicaid without its waiver ("without waiver cost"), set at the current level of 65 percent currently covered by the federal government. If Medicaid enrollment exceeds projections, Tennessee will receive additional funds to cover the cost of additional enrollees and beneficiaries, but will continue receiving the same amount if enrollment decreases.

This funding structure affords almost no protections to Medicaid beneficiaries, and strongly incentivizes reduced services by the state because the waiver proposes for Tennessee to share equally with the federal government any "savings" that result from it. For example, if Tennessee spends less than the capped lump sum, it would retain half of the "savings," or the remaining federal funds. But if Tennessee spends more than the capped lump sum by providing additional health services to existing beneficiaries without increasing enrollment, it would be responsible for the overage expenses. Tennessee's application provides insufficient detail or justification for these radical modifications to the structure of its Medicaid program.

For all of these reasons, Tennessee's waiver is vague and cannot be approved at this time as a complete application under Section 1115. We urge HHS to return the waiver to the state so that it can be revised and submitted as new demonstration that will be subject to rigorous federal review.

Approving Tennessee's proposal contravenes HHS' authority and the purpose of Section 1115 Waivers.

In addition to the above application deficiencies, Tennessee's proposal is not approvable on its face under Section 1115. Under Section 1115 of the Social Security Act, the Secretary of HHS can waive provisions in Section 1902 of the Social Security Act, which sets forth various requirements as to how states must operate their Medicaid programs, including mandatory populations (who must receive coverage from the state) and services (what benefits must be provided), eligibility determination requirements, and other protections for beneficiaries, including requirements for the delivery of health care services.

Tennessee's "block grant" application would require HHS to waive provisions not under Section 1902 of the Social Security Act, but Section 1903, which governs the financial structure of Medicaid, including the formula used to determine the rates at which states receive federal Medicaid funds. Section 1115 does not grant the Secretary authority to waive requirements under Section 1903. Therefore, granting Tennessee's waiver is beyond the scope of the Secretary's Section 1115 authority.

Moreover, Tennessee has historically and consistently spent less than its "without waiver cost" projections, so if the proposal is approved and the state is allowed to keep half of the unspent federal lump sum, the state will be effectively increasing its federal matching rate. However, CMS recently admitted to its lack of authority to change a state's federal Medicaid matching rate in a recent letter to North Carolina, stating that the Secretary's Section 1115 waiver authority "extends only to provisions of section 1902 of the Act . . . [n]or is CMS able to grant the state's request by providing expenditure authority . . . . Section 1115(a)(2)(A) only permits state expenditures to be regarded as federally matchable. It does not allow applicable federal match rates to be altered."[1]

Furthermore, the purpose of the Medicaid Act is (1) to enable states to furnish medical assistance to individuals who do not have the means to pay for necessary medical care and (2) to furnish such assistance and services to help these individuals attain or retain the capacity for independence and self-care.[2] Under Section 1115 of the Social Security Act, the Secretary may only approve a Medicaid waiver application that meets certain strict requirements. In order for the Secretary to approve a project under Section 1115, the project must:

(1) Propose an "experiment[], pilot, or demonstration;"
(2) Request waiver of compliance with only with the requirements in 42 U.S.C. § 1396a;
(3) Be likely to promote the objectives of the Medicaid Act; and
(4) Be approved only "to the extent and for the period necessary" to carry out the experiment.[3]

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[1] Centers for Medicare & Medicaid Services, North Carolina Medicaid Reform Demonstration Approval, October 19, 2018, https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/nc/Medicaid-Reform/nc-medicaid-reform-demo-demo-appvl-20181019.pdf.

[2] 42 U.S.C. § 1396-1.

[3] 42 U.S.C. § 1315(a).

Waivers are to be granted only sparingly. Medicaid's primary objective is to provide health care coverage to people who otherwise would not have it. For this reason, the U.S. District Court for the District of Columbia vacated similar proposals in Arkansas, Kentucky, and New Hampshire earlier this year.[4] These states' programs sought to condition receipt of Medicaid benefits on an individual's ability to meet a monthly minimum of work hours or community engagement activities. In each of these cases, the Court found HHS' approval of the work requirement waivers to be arbitrary and capricious for its failure to adequately consider whether the projects would promote the objectives of the Medicaid Act, specifically the work requirement's effect on potential coverage losses.

As explained above, Tennessee's proposal will incentivize it to reduce, rather than expand, the medical assistance it makes available by curtailing coverage and limiting benefits. These reductions will naturally cause an increase in the number of uninsured people in the state. Thus, the waiver simply cannot be justified as a proper use of Section 1115 waiver authority as it is inconsistent with the objective of furnishing medical assistance to eligible individuals.

Tennessee's proposal could strip coverage from and limit benefits received by the people who need it the most.

If approved, the waiver will jeopardize Medicaid coverage for 1.4 million vulnerable Tennesseans, including children, low-income parents, and people with disabilities. Tennessee cannot reduce Medicaid costs and increase its "savings" under its proposal without detrimentally impacting the health coverage of individuals who currently rely on Medicaid benefits to access critical health care services.

The waiver seeks to allow Tennessee several "flexibilities," including authority for Tennessee to spend at least some of its federal lump sum on anything it deems to be beneficial toward achieving improvements in overall health, which could include social services or public health initiatives already funded by state dollars. This type of unchecked "flexibility" of the state could lead to the use of federal Medicaid funds for measures that are not related to health coverage or access to health services. In fact, this type of authority could be used to undermine coverage for low-income Tennesseeans.

Specifically, the state very broadly requests authority to "modify enrollment processes, service delivery systems, and comparable program elements without the need for a demonstration amendment."[5] The waiver provides no other additional information, which makes it (1) impossible for the public to comment on such an unclear proposal and its impact on beneficiaries and (2) difficult for stakeholders and advocates, and certainly for HHS as well, to

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[4] *See Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) (Arkansas); *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019); *Philbrick v. Azar*, No. 19-773 (JEB), 2019 U.S. Dist. LEXIS 125675 (D.D.C. July 29, 2019) (New Hampshire).

[5] TennCare II Demonstration (No. 11-W-00151/4), Amendment 42, Page 25, *available at* https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/tn/tn-tenncare-ii-pa10.pdf.

assess the adequacy and legality of the waiver as a whole. Each of these proposed areas of modification are essential to the successful operation of Medicaid in any state. Each area also has clear federal requirements that each state must adhere to in order to protect Medicaid beneficiaries and ensure that federal Medicaid funds are actually used to furnish medical assistance to those who need it. For example, federal Medicaid requirements ensure that the enrollment process is accessible and not overly burdensome and determine the extent of delivery of health services. Federal Medicaid requirements also ensure that health coverage is made available to all who are eligible and in need by guaranteeing that services are delivered appropriately according to each individual's health status. Sidestepping these requirements could thus result in discriminatory practices and/or arbitrary limits on benefits. Granting Tennessee broad authority to make changes in any of these areas of program administration, without first seeking federal approval, could threaten access of health care for TennCare beneficiaries.

For instance, the proposal seeks a waiver of prior federal approval of (1) state contracts of managed care organizations ("MCOs"), (2) directed payments by MCOs to health care providers, and (3) "actuarially certified capitation rates" paid to MCOs.[6] The waiver also proposes to do away with limits on Medicaid payments to "Institutions for Mental Diseases," which has been a longstanding limitation in federal law designed to discourage institutional placement of people with mental disabilities.[7] The waiver also seeks to eliminate required reports to CMS that include information about MCOs' performance, including financial information, sanctions, grievances (including appeals and hearings) from beneficiaries, accessibility standards, and benefits network adequacy.[8] However, these requirements are in place specifically to ensure oversight and accountability of MCOs. Without federal approval and oversight of state MCO contracts, payment rates to MCOs and IMDs, and review of MCO reports, Tennessee could easily allow for the restriction of access to benefits, limit providers to specific geographic areas, increase the likelihood of institutionalization of individuals with mental disabilities, and force MCOs to allocate care based on inaccurate payment rates. Furthermore, Tennessee's Medicaid program could be overrun by procedural issues made possible by a total lack of transparency, harming the integrity of the program as a whole and undercutting its purpose to ensure access to quality, affordable health care services for Medicaid enrollees.

And if Tennessee's track record of administering its managed care programs thus far is any indication of the degree of harm that could result from a waiver of these federal requirements, HHS should unequivocally deny this waiver application.[9] Tennessee's use of the

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[6] *Id.* at Page 20.

[7] *Id.* at Page 14.

[8] *Id.* at Page 21.

[9] From as early as 1999 to as recently as 2008, Tennessee's administration of its manage care organization contracts, payments, and network adequacy have been called into question multiple times and is adequately documented and publicized by the media. *See* Tennessee State Government, Division of TennCare, "TennCare Timeline," https://www.tn.gov/tenncare/information-statistics/tenncare-timeline.html; Bill Carey, "Taxpayers May Dish Out $20 Million More for Xantus Creditors," Nashville Post, June 9, 2000, https://www.nashvillepost.com/home/article/20446965/taxpayers-may-dish-out-20-million-more-for-xantus-creditors; John Commins, "Access MedPlus Put Under Supervision," Nashville Bureau, May 11, 2000, https://web.archive.org/web/20000620001532/http:/www.timesfreepress.com/2000/MAY/11MAY00/NEWSACC01

federal block grant for the Temporary Assistance for Needy Families ("TANF") program should also raise serious concerns about how a "block granted" TennCare would be administered. TANF funds, granted to all states, are intended to assist families with children living in poverty. Despite the fact that Tennessee's child poverty rate is at 22.3 percent, one of the highest in the nation,[10] the state has amassed $732 million of unspent TANF allotments.[11] Furthermore, Tennessee passed a state law in 2018 diverting these funds to implement its proposed Medicaid work requirements,[12] a measure that is estimated to result in 68,000 parents being disenrolled from TennCare.[13]

Although the waiver lists five "policy priorities" to advance and improve health outcomes, it does not actually commit to pursuing these priorities. The proposal lists as "priorities" (1) expanding post-partum coverage for new mothers, (2) providing prenatal and post-partum dental benefits for pregnant women, (3) extending coverage for "additional needy individuals," (4) eliminating the waitlist for services for people with intellectual and developmental disabilities, and (5) "addressing other state-specific health crisis," including decreasing tobacco use.[14]

However, the proposal does not lay out how the state will achieve these "priorities," merely stating that it will do so if the waiver is approved and if Medicaid savings or federal funding is available.[15] In addition to these priorities, Tennessee faces numerous other health-related challenges, none of which will be solved, or even ameliorated, by this "block grant"

.html; *Grier v. Neel,* United States District Court for the Middle District of Tennessee, Nashville Division, June 20, 2001, https://www.tnjustice.org/wp-content/uploads/2019/12/760-Memorandum-and-Order-6-21-01.pdf; Tennessee Justice Center 2019, *op cit.* The Associated Press, "Testimony Ends in Ford Corruption Trial," WMC5 Action News, July 16, 2008, https://www.wmcactionnews5.com/story/8685046/testimony-ends-in-ford-corruption-trial/; The Associated Press, "Tennessee: Ex-Lawmaker Guilty," New York Times, July 19, 2008, https://www.nytimes.com/2008/07/19/us/19brfs-003.html?partner=rssnyt&emc=rss

[10] Children's Defense Fund, "Child Poverty in America 2018: State Analysis," September 26, 2019, *available at*, https://www.childrensdefense.org/wp-content/uploads/2019/09/Child-Poverty-in-America-2018-State-Factsheet.pdf.

[11] Lulu Garcia-Navarro, "Tennessee Leaves Hundreds of Millions for Needy Families Unspent," NPR, Weekend Edition Sunday (Nov. 24, 2019), *available at*, https://www.npr.org/2019/11/24/782403573/tennessee-leaves-hundreds-of-millions-for-needy-families-unspent.

[12] Tenn. Code. Ann. § 71-5-158 (2018).

[13] Joan Alker, Olivia Pham, "Work Reporting Requirement for Tennessee Parents Would Harm Low-Income Families with Children," January 30, 2019, *available at*, https://ccf.georgetown.edu/2019/01/30/work-reporting-requirement-for-tennessee-parents-would-harm-low-income-families-with-children/.

[14] TennCare II Demonstration (No. 11-W-00151/4), Amendment 42, Page 24, *available at* https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/tn/tn-tenncare-ii-pa10.pdf.

[15] *Id.*

proposal: the state is losing rural hospitals at a faster rate than any other state;[16] it has among the worst health coverage loss statistics for children in the nation;[17] hundreds of its uninsured residents with substance use disorder are dying because they cannot afford treatment;[18] and one in three Tennessee adults have pre-existing conditions and could lose their affordable coverage,[19] a reality that could be brought about with the help of the state's own Attorney General.[20]

Tennessee's proposal will harm people with costly health care costs due to their medical conditions, such as individuals with chronic illnesses and/or disabilities.

Particularly vulnerable to the negative impacts of Tennessee's waiver are Medicaid enrollees with disabilities and chronic illnesses. The waiver proposes to eliminate federal Medicaid rules that prohibit discrimination based on a patient's medical condition and guarantee "parity" between medical and mental health conditions. Approving this waiver would effectively authorize TennCare to "target benefits to certain populations" and provide fewer treatment options or inadequate services to patients with mental illness or substance use disorders.

Furthermore, the waiver seeks to make unprecedented cuts to prescription drug coverage, which would enable the state to deny access to the most effective drugs for serious and costly illnesses like cancer and hepatitis. Specifically, the proposal requests a waiver of the requirements under Section 1927 of the Social Security Act, yet another section beyond the scope of the Secretary's Section 1115 waiving authority.[21] Section 1927 governs the Medicaid coverage of federally approved drugs if the drug manufacturer agrees to pay rebates. Currently, Tennessee can impose a preferred drug list that requires prior authorization before a prescription can be covered under Medicaid, but is barred from imposing a "closed" list whereby some drugs cannot be covered under any circumstance. The proposal would allow Tennessee to exclude entirely drugs that have been approved by the Food and Drug Administration "until market prices are consistent with prudent fiscal administration or the state determines that sufficient data exist regarding the cost effectiveness of the drug." CMS has previously rejected a similar

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[16] Alex Kent and Anna Walton, "Mckenzie Regional Hospital Closure And Tennessee's Silent Epidemic," Tennessee Justice Center (Dec. 6, 2018), *available at*, https://www.tnjustice.org/mckenzie-regional-hospital-closure-rural-tennessee/.

[17] Children's Health Care Report Card, "Children's Health Coverage in Tennessee," Georgetown Center for Children and Families (2018), *available at*, https://kidshealthcarereport.ccf.georgetown.edu/states/tennessee/.

[18] Adrian Mojica, "Tennessee drug and opioid overdose rates hit five-year high in 2018," FOX17 Nashville (Oct. 22, 2019), *available at*, https://fox17.com/news/local/tennessee-drug-and-opioid-overdose-rates-hit-five-year-high-in-2018.

[19] Kristi L. Nelson, "Report: Nearly one-third of Tennesseeans have pre-existing conditions 'declinable' for health insurance before ACA," KNOX News (Sept. 12, 2018), *available at*, https://www.knoxnews.com/story/news/health/2018/09/12/tennessee-aca-obamacare-health-insurance-preexisting-condition/1265333002/.

[20] Herbert H. Slattery II, Attorney General & Reporter, "Attorney General Asks the Affordable Care Act Be Held Unconstitutional," February 26, 2018, *available at*, https://www.tn.gov/attorneygeneral/news/2018/2/26/pr18-06.html.

[21] *See PhRMA .v. Thompson*, 251 F.3d 219, 222 (D.C. Cir. 2001).

proposal submitted by Massachusetts in 2018, and should do the same here.[22]

For these reasons, Tennessee's proposal fails to meet the standards for approval under Section 1115. It will impair rather than promote access to health care coverage in Tennessee.

NCLEJ's comment includes numerous citations to supporting research, including direct links to relevant studies and other data. We direct HHS to each of these cited studies and the links that we have provided, and we request that the full text of each of the documents, data, research, or studies cited, along with the text of this comment, be considered part of the formal administrative record on Tennessee's TennCare Demonstration for the purposes of the Administrative Procedure Act.

If you have any questions regarding NCLEJ's comments, you may contact NCLEJ Senior Attorney Travis England (england@nclej.org) and Equal Justice Works Fellow Jen Rasay (rasay@nclej.org).

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[22] Centers for Medicare & Medicaid Services, MassHealth Demonstration Amendment Approval, June 27, 2018, https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ma/MassHealth/ma-masshealth-demo-amndmnt-appvl-jun-2018.pdf.