



August 10, 2018

Judith Cash, Director
State Demonstrations Group
Centers for Medicare & Medicaid Services
Center for Medicaid and CHIP Services
Mail Stop: S2-26-06
7500 Security Boulevard
Baltimore, Maryland 21244-1850

RE: TennCare II Demonstration (No. 11-W-00151/4), Amendment 36

Dear Ms. Cash,

The purpose of this letter is to request a change to the TennCare Demonstration. This change will be Demonstration Amendment 36.

In 2018, the Tennessee General Assembly enacted Public Chapter No. 682, establishing that it is the policy of the state of Tennessee to favor childbirth and family planning services that do not include elective abortions within the continuum of care or services. This state law directs the Division of TennCare to submit a demonstration amendment to CMS that limits the participation of elective abortion providers in the TennCare demonstration. Amendment 36 implements this state law. Under this amendment, TennCare enrollees will continue to have access to family planning services from other providers within the TennCare demonstration.

We will be glad to work with you and your team as you review Amendment 36. If you have questions about this amendment, please contact Aaron Butler at 615.507.6448, or aaron.c.butler@tn.gov.

Thank you for your attention to this important matter.

Sincerely,



Wendy Long, M.D., M.P.H.
Director

cc: Annie Hollis, TennCare Project Officer, CMS Baltimore
Tandra Hodges, Tennessee Coordinator, CMS Atlanta
Shantrina Roberts, Associate Regional Administrator, CMS Atlanta



Division of TennCare

TennCare II Demonstration

Project No. 11-W-00151/4

Amendment 36

August 10, 2018

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Amendment 36 to the TennCare II Demonstration

I. Description of the Amendment

TennCare is a comprehensive managed care program that provides the full range of Medicaid benefits to approximately 1.4 million Medicaid and demonstration eligibles in Tennessee. This includes family planning services, which are a mandatory Medicaid benefit.¹

On April 12, 2018, the Tennessee General Assembly enacted Public Chapter No. 682, establishing that it is the policy of the state of Tennessee to favor childbirth and family planning services that do not include elective abortions within the continuum of care or services, and to avoid the direct or indirect use of state funds to promote or support elective abortions.²

The objective of Amendment 36 is to implement this state policy. In this amendment, Tennessee proposes to establish state-specific criteria for providers of family planning services that reflect this policy, and to limit participation in the TennCare demonstration to providers that meet these state criteria.

Specifically, Tennessee intends to exclude any entity that performed, or operated or maintained a facility that performed, more than 50 abortions in the previous year, including any affiliate of such an entity. This amendment is broadly consistent with states' existing authority to set reasonable standards relating to the qualifications of providers³, as well as with TennCare's longstanding waiver of freedom of provider choice requirements for other types of healthcare providers.

TennCare enrollees will continue to have access to family planning services from other providers within the TennCare demonstration that meet the state's proposed criteria.

II. Description of the Proposed Health Care Delivery System, Eligibility Requirements, Benefit Coverage, and Cost Sharing

Amendment 36 will not entail any changes to TennCare's benefits coverage. Under this amendment, family planning services will continue to be covered for TennCare enrollees, and these services will continue to be part of the benefits package administered by the state's managed care contractors.

The demonstration's eligibility and cost sharing requirements are unaffected by this amendment. There is no cost sharing for family planning services in the TennCare demonstration.

¹ See Section 1905(a)(4) of the Social Security Act.

² Codified at Tennessee Code Annotated § 71-5-157. See Attachment A.

³ See 42 CFR § 431.51(c)(2).

III. Expected Impact on Enrollment and Expenditures

Amendment 36 will not result in any increase or decrease in enrollment in the TennCare demonstration.

Amendment 36 is not expected to have a material impact on expenditures under the demonstration, or to materially affect the state's overall budget neutrality demonstration. All services currently covered under the demonstration will continue to be covered.

IV. Waiver and Expenditure Authorities Requested

All waiver and expenditure authorities currently approved for the TennCare demonstration will continue to be in effect. To implement Amendment 36, the state requests to modify its existing waiver authority as illustrated below, pursuant to Section 1115(a)(1) of the Social Security Act.

6) Freedom of Choice

**Section 1902(a)(23)
42 CFR 431.51**

To enable the state to restrict freedom of choice of provider, through the use of mandatory enrollment in managed care plans or TennCare Select for the receipt of TennCare II, TennCare CHOICES and ECF CHOICES covered services, including for individuals specified at Section 1932(a)(2) of the Social Security Act (the Act). ~~No waiver of freedom of choice is authorized for family planning services.~~

To the extent necessary to enable the state to establish provider participation criteria for providers of family planning services and supplies who furnish services under the TennCare demonstration.

V. Research Hypotheses and Evaluation

The state will work with CMS to identify or develop appropriate evaluation measures for this demonstration amendment. The evaluation will focus on beneficiary access to family planning services. The state intends to demonstrate that establishing reasonable provider participation criteria for providers of family planning services will not have a negative impact on the state's ability to ensure an adequate network of providers.

VI. Documentation of Public Notice and Input

Summary of Public Notice Processes

The state used multiple mechanisms for notifying interested parties about Amendment 36 and for soliciting public input on Amendment 36. These public notice and input procedures are informed by—and comply with—the requirements specified at 42 CFR § 431.408.

The state's public notice and comment period began on June 13, 2018, and lasted through July 13, 2018. During this time, a comprehensive description of the amendment to be submitted to CMS was made available for public review and comment on an amendment-specific webpage on the TennCare website. An abbreviated public notice—which included a summary description of Amendment 36; the locations, dates, and times of two public hearings; and a link to the full public notice on the state's amendment-specific webpage—was published in the newspapers of widest circulation in Tennessee cities with a population of 50,000 or more. TennCare disseminated information about the proposed amendment, including a link to the relevant webpage, via its social media. TennCare also notified the members of the Tennessee General Assembly of Amendment 36 via an electronically transmitted letter.

The state held two public hearings to seek public comment on Amendment 36. The first hearing took place on June 22, 2018, at 3:00 p.m. Central Time in the Large Meeting Room of the Green Hills branch of the Nashville Public Library, 3701 Benham Avenue in Nashville. The second hearing took place on June 25, 2018, at 2:00 p.m. Central Time in House Hearing Room II on the first floor of the Cordell Hull State Office Building, 425 5th Avenue North in Nashville. Telephonic access to the June 25 hearing was offered to individuals who were unable to attend in person and who notified the state of their desire to participate by telephone.

The state notes that—in addition to the public notice mechanisms described above—Amendment 36 implements Tennessee Code Annotated § 71-5-157, which was enacted by the 110th General Assembly of the state of Tennessee in 2018, and was the product of a public legislative process.

Summary of Public Input

Tennessee received approximately 6,300 written comments from various individuals or organizations in response to its public notice. In addition, approximately 90 individuals attended the public hearings held by the state on June 22, 2018, and June 25, 2018. All comments were reviewed and considered by the state in the development of the final amendment application. The comments received, along with the state's responses, are summarized below.

The comments received by the state are also included as Attachment B.

The most frequently voiced concern was that Amendment 36 will reduce access to family planning services, reproductive health services, preventive care, and other healthcare services, particularly in traditionally underserved communities. These commenters expressed skepticism that there will be enough TennCare providers to meet the needs of enrollees if the state excludes certain providers from the TennCare program for failure to meet its proposed provider participation criteria.

The state is committed to ensuring that all TennCare enrollees have access to medically necessary covered services. The state monitors the adequacy of its provider networks on an ongoing basis to ensure sufficient availability of primary and specialty care services to meet the needs of TennCare's enrollee population, and this ongoing monitoring will continue under Amendment 36. The exclusion of certain providers under Amendment 36 is not anticipated to impact the adequacy of TennCare's overall provider network. No changes were made as a result of these comments.

Many commenters expressed support for specific healthcare providers and opposed Amendment 36 on the grounds that it would result in the exclusion of these providers from the TennCare program. These commenters praised the high quality of care furnished by these healthcare providers, their

accessibility, and their demonstrated history of forming relationships of trust with individuals seeking care. A number of commenters attested to the quality and value of these healthcare providers based on their own personal experiences or the experiences of their loved ones.

The state acknowledges the commenters' support for healthcare providers potentially affected by Amendment 36. Amendment 36 does not reflect any comment on the part of TennCare regarding the quality of care furnished by these healthcare providers. Under state law, it is the policy of the state of Tennessee to favor family planning services that do not include elective abortions within the continuum of care or services offered by the provider. See Tennessee Code Annotated § 71-5-157. Accordingly, TennCare is seeking authority via Amendment 36 to limit its provider networks to healthcare providers that reflect this policy, as required by state law. No changes were made as a result of these comments.

Many commenters objected to the state's proposal to waive freedom of provider choice provisions for providers of family planning services. These commenters expressed the view that individuals should be able to seek care from the qualified provider(s) of their choice without restriction, and that freedom of provider choice is an especially salient concern in matters pertaining to family planning and reproductive health.

The state acknowledges the commenters' views concerning the value of receiving care from the provider of one's choice. The state does not believe that establishing reasonable standards for provider participation in the TennCare program will result in a significant loss of provider choice. Among qualified providers who meet the state's proposed participation criteria, TennCare enrollees will continue to have access to family planning services from the provider of their choice. TennCare already has a longstanding waiver of the freedom of provider choice provisions in federal law for virtually all other types of healthcare providers, and there is no evidence that the waiver of these provisions has had a negative impact on TennCare enrollees or on their experience of care. No changes were made as a result of these comments.

A number of commenters expressed concern that Amendment 36 will result in worse health outcomes and/or increased costs for the state over time. These commenters believe that limiting individuals' choice of providers will result in individuals choosing to forego care entirely, resulting in higher rates of unintended pregnancy, delayed diagnosis and treatment of cancer, STIs, and other health problems, and other negative health impacts.

Under Amendment 36, TennCare enrollees will continue to have access to the same array of covered benefits, and while certain healthcare providers will be excluded under Amendment 36, TennCare enrollees will continue to have access to a network of providers qualified to provide family planning services, reproductive health services, preventative care, and other healthcare services. TennCare already has a longstanding waiver of freedom of choice for virtually all other types of healthcare providers, and it has not been the state's experience that individuals generally forego care due to these limitations. No changes were made as a result of these comments.

Several commenters objected to Amendment 36 on the grounds that the amendment does not promote the mission of the TennCare program and/or the objectives of the Medicaid program generally.

Amendment 36 will ensure that the TennCare program reflects the state's policy, as articulated in Tennessee Code Annotated § 71-5-157, of favoring family planning services that do not include elective

abortions within the continuum of care or services offered by the provider, and of avoiding the direct or indirect use of state funds to promote or support elective abortions. The state does not believe that establishing reasonable provider participation criteria that reflect this policy is inconsistent with the objectives of the Medicaid program. Amendment 36 will be submitted to CMS, which will make its own determination regarding the extent to which the amendment advances the objectives of the Medicaid program. No changes were made as a result of these comments.

A few commenters suggested that Amendment 36 was illegal and/or unconstitutional. These commenters speculated that Amendment 36 will result in costly legal challenges for the state.

The submission of Amendment 36 implements—and is in fact required by—state law. See Tennessee Code Annotated § 71-5-157. Amendment 36 will be submitted to CMS, which will conduct its own assessment of the legality of the proposed waiver provisions. No changes were made as a result of these comments.

A number of commenters expressed concern that Amendment 36 and/or the state law requiring the submission of Amendment 36 were motivated by exogenous religious, political, or ideological considerations. These commenters opposed the amendment on the grounds that these factors should not be the basis of Tennessee’s Medicaid or state health policies.

The submission of Amendment 36 implements state law. See Tennessee Code Annotated § 71-5-157. The purpose of Amendment 36 is to ensure that the TennCare program reflects the state of Tennessee’s policy, as articulated in Tennessee Code Annotated § 71-5-157, of favoring family planning services that do not include elective abortions within the continuum of care or services offered by the provider. As the state Medicaid agency, TennCare is unable to speak to the considerations that motivated the enactment of Tennessee Code Annotated § 71-5-157, nor do such considerations relieve TennCare of its obligation under state law to submit Amendment 36. No changes were made as a result of these comments.

Several commenters objected to Amendment 36, claiming that the amendment targets certain providers for exclusion from the TennCare program based on the specific services these providers perform. These commenters noted that the services in question (abortion services) are legal, and that TennCare dollars are not used to pay for abortion services. These commenters did not believe providers should be excluded from participating in the TennCare program on the basis of providing legal healthcare services, particularly when these services are paid for with non-public dollars.

The state acknowledges the commenters’ objections. Amendment 36 does not affect the legality of abortion services or affect the ability of healthcare providers in Tennessee to provide abortion services. Per Tennessee Code Annotated § 71-5-157, it is the state of Tennessee’s policy to favor family planning services that do not include elective abortions within the continuum of care or services offered by the provider. Accordingly, TennCare is seeking authority via Amendment 36 to limit its provider networks to healthcare providers that reflect this policy, as required by state law. No changes were made as a result of these comments.

Some commenters expressed concern that, if Amendment 36 were approved, uninsured Tennesseans would have fewer options for accessing healthcare services. Some commenters also opposed the amendment because they believe it will restrict access to abortion services in Tennessee.

Both of these comments are outside the scope of the amendment. Amendment 36 will affect only the network of providers available to individuals who have insurance coverage through TennCare. The care options available to individuals without insurance are not the subject of Amendment 36, and are outside the scope of the TennCare demonstration generally.

Likewise, the general availability of abortion services in Tennessee is not the subject of Amendment 36. As the state of Tennessee's Medicaid program, TennCare does not pay for abortion services, except in a small number of narrowly defined circumstances specified in federal law. Amendment 36 does not propose any changes to TennCare's policies regarding coverage of abortion services.

No changes were made as a result of these comments.

A few commenters suggested that Amendment 36 will damage the state's reputation or economic interests, because it will deter businesses from investing in or locating in Tennessee.

Amendment 36 implements Tennessee Code Annotated § 71-5-157. The potential willingness of businesses to invest in or locate in Tennessee is not within the scope of the amendment. No changes were made as a result of these comments.

One commenter noted that the state is proposing to exclude entities that performed more than 50 abortions in the previous year, including any affiliate of such an entity; however, the amendment does not define the term "affiliate." This commenter expressed concern that, if broadly defined, this term could negatively impact the ability of federally qualified health centers (FQHCs) to provide care for Medicaid enrollees, and urged the state to define "affiliates of entities" in a clear and narrow fashion.

The state appreciates the commenter's suggestion. The proposed amendment language is consistent with Tennessee Code Annotated § 71-5-157, and upon consideration the state determined that additional clarification is not needed. Under Tennessee state law, an "affiliate" is generally defined as an entity that is directly or indirectly controlled by, or is under common control with, another entity. See for example Tennessee Code Annotated § 68-11-205(e)(1). Accordingly, the state's use of the term "affiliate" in the proposed amendment refers to an entity that is directly or indirectly controlled by, or under common control with, an elective abortion provider, as defined in Tennessee Code Annotated § 71-5-157.⁴ No changes were made as a result of this comment.

A few commenters were critical of the state's public notice process for Amendment 36. These commenters variously suggested that the notice of Amendment 36 on the state's web site was not sufficiently prominent; that the state's sharing of information about Amendment 36 via its social media accounts was an ineffective communication strategy; that the state should individually notify all current TennCare enrollees about Amendment 36; that the state should hold additional public hearings about Amendment 36 and/or hold public hearings in different parts of the state; that the state should hold its public hearings outside of normal business hours; and that the state should have provided more advance notice of its public hearings prior to the hearing dates.

⁴ Per Tennessee Code Annotated § 71-5-157, an elective abortion provider is any entity that performed, operated or maintained a facility that performed, more than 50 abortions in the previous year.

The state thanks the commenters for their input. The state notes that its public notice processes for Amendment 36 complied with the relevant requirements of 42 CFR § 431.408 and the terms and conditions of the TennCare demonstration, and that in fact, the state received more than 6,300 comments in response to its public notice. The state will take the commenters' suggestions into consideration when planning the public notice processes for future demonstration amendments. No changes were made as a result of these comments.

Some commenters expressed support of Amendment 36 citing opposition to abortion and highlighting that the amendment will limit the tax dollars that are paid to organizations that provide abortion services. These commenters also noted that the state law that Amendment 36 implements garnered support from large majorities in both chambers of the state legislature.

The state thanks the commenters for their input. As noted elsewhere, the purpose of Amendment 36 is to ensure that the TennCare program reflects the state of Tennessee's policy, as articulated in Tennessee Code Annotated § 71-5-157, of favoring family planning services that do not include elective abortions within the continuum of care or services offered by the provider. No changes were made as a result of these comments.

Attachment A

Public Chapter No. 682



State of Tennessee

PUBLIC CHAPTER NO. 682

HOUSE BILL NO. 2251

By Representatives Matlock, Madam Speaker Harwell, Gant, Timothy Hill, Moody, Crawford, Byrd, Carr, Rogers, Keisling, Jerry Sexton, Boyd, Tillis, Zachary, Lynn, Eldridge, Rudd, Terry, Weaver, Whitson, Vaughan, Dawn White, Lamberth, Powers, Calfee, Goins, Alexander, Gravitt, Cameron Sexton, Travis, Sherrell, Dunn, Littleton, Matheny, Kumar, Holt, Johnson, Hulsey, Windle, Hicks, Kane, Howell, Ragan, Sanderson, Lollar, Doss, Coley, Halford, Van Huss, Matthew Hill, Forgety, Faison

Substituted for: Senate Bill No. 2148

By Senators Bell, Gardenhire, Bowling, Hensley, Haile, Bailey, Southerland, Jackson, Pody, Niceley, Yager, Ketron, Stevens, Swann, Watson, Gresham, Crowe, Green, Johnson, Roberts, Lundberg, Massey

AN ACT to amend Tennessee Code Annotated, Title 68 and Title 71, relative to medical assistance.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 71, Chapter 5, Part 1, is amended by adding the following as a new section:

(a) It is the policy of the state to favor childbirth as integral to the health and welfare of the citizens of the state and therefore to favor family planning services that do not include elective abortions or the promotion of elective abortions within the continuum of care or services offered by the provider and to avoid the direct or indirect use of state funds to promote or support elective abortions.

(b) In furtherance of this state policy, a waiver amendment to the existing TennCare II waiver that requires elective abortion providers be excluded from participation as providers in the TennCare program shall be submitted to the federal centers for medicare and medicaid services for approval. The waiver amendment shall be implemented within ten (10) business days of approval.

(c) For purposes of this section, an "elective abortion provider" means any entity that performed, or operated or maintained a facility that performed, more than fifty (50) abortions in the previous year, or any affiliate of such an entity.

(d) This section does not affect compliance with § 9-4-5116.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

HOUSE BILL NO. 2251

PASSED: March 29, 2018



BETH HARWELL, SPEAKER
HOUSE OF REPRESENTATIVES



RANDY MCNALLY
SPEAKER OF THE SENATE

APPROVED this 12th day of April 2018



BILL HASLAM, GOVERNOR

Attachment B

Public Comments

Public Input on Amendment 36

The state received approximately 6,300 written comments from various individuals or organizations in response to its public notice for Amendment 36. These comments are available for review at <https://tenncloud.tn.gov/owncloud/index.php/s/kYK9pZbHhCRofZL>. (If prompted for a password, enter 'comments'.)