



GEORGETOWN UNIVERSITY

Health Policy Institute

March 7, 2005

**The New TennCare Waiver Proposal:  
What is the Impact on Children?**

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**Introduction**

TennCare is the name for Tennessee's expanded Medicaid program, which serves about 1.3 million Tennesseans. First created through a "section 1115" waiver approved in 1994, TennCare was a bold experiment. Through the aggressive use of managed care and by redirecting its Disproportionate Share Hospital (DSH) funds, the state was able to offer health care coverage to a broad group of Tennessee residents who are not able to obtain health insurance in the private sector. The program has undergone a number of changes over the year; currently enrollment is closed for many of the expansion groups, and managed care plans no longer assume financial risk for serving TennCare enrollees.

Even more fundamental changes are now on the table, following a contentious year of legislative action, waiver proposals, and court proceedings. On September 24, 2004, the Medicaid agency submitted a proposal to amend the TennCare waiver followed by a supplemental proposal dated February 18, 2005.<sup>1</sup> The waiver request now before the Center for Medicare and Medicaid Services (CMS) would eliminate coverage for 323,000 low-income adults—about 45 percent of all of the adults covered under TennCare and make sweeping changes in benefits, cost sharing and appeal rights for many of the adults retaining coverage. More could eventually lose their coverage under the broad authority sought by the waiver.

The impact of the new TennCare proposals on children is less apparent. Many of the proposed restrictions in TennCare benefits as well as the announced cuts in eligibility would explicitly apply to adults and not to children. In addition, the waiver maintains that as the state moves forward it intends to prioritize coverage for children. These statements, however, are coupled with requests for legal authority that would allow the state to significantly reduce children's coverage in various ways at any time in the future, at its sole discretion. In addition, children's coverage would be immediately be affected by the state's new "medical necessity" definition and its proposed new drug formulary, which could make some drugs unavailable to children who need them.

If approved, this new waiver would break new ground by giving Tennessee broad authority to depart from federal minimum standards, in some cases without even specifying what the new rules might be. Depending on how this new authority was used,

Tennessee – once a leader in providing coverage to low-income children and adults-- could have one of the weakest public coverage programs for children in the country.

### **Current TennCare Coverage of Children**

TennCare has two parts: “TennCare Medicaid” and “TennCare Standard.” TennCare Medicaid mostly covers children that states are required to cover under federal minimum eligibility standards: children under age one with family incomes up to 185 percent of the federal poverty level (FPL); children age 1 through 5 in families below 133 percent of FPL, and children age 6 to 19 in families below 100 percent of FPL.<sup>2</sup> TennCare Standard is for uninsured low-income children with incomes above these levels. About 500,000 children are enrolled in TennCare Medicaid and about 55,000 children are in TennCare Standard. Enrollment for children in TennCare Standard is closed although children who are enrolled in Medicaid and who become eligible for Standard (for example, because their parent works more hours or gets a raise) can be enrolled.<sup>3</sup>

Currently, children in TennCare Medicaid and TennCare Standard receive the same level of benefits, although the state maintains that previous federal waiver approvals permit the state to not provide Standard children Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services. EPSDT is the Medicaid program’s benefit package for children. TennCare Standard children are subject to monthly premiums and copayments, while TennCare Medicaid children are not required to pay these costs.

### **Proposed Changes Affecting All TennCare Children**

Certain changes proposed by the waiver would affect *all* TennCare children—those in TennCare Medicaid as well as those in TennCare Standard.

- **Restriction on Benefits Based on the New “Medical Necessity” Standard.** Under federal law, Medicaid appropriately pays only for services that are “medically necessary.” Last May, the Tennessee legislature adopted a new definition of “medical necessity.” The definition is substantially more restrictive than Tennessee’s current standard and would essentially give the state Medicaid agency unchecked discretion to make decisions about whether care will or will not be covered.<sup>4</sup> For example, according to the definition a service will be covered only if it is “the least costly services that is *adequate* for the medical condition of the enrollee” (emphasis supplied). The state alone decides what “adequate” means. In addition, a service will be covered only if the state finds that there is adequate “empirically-based objective clinical scientific evidence of its safety and effectiveness for the particular use in question,” but such evidence does not exist for most treatments, particularly with respect to children.<sup>5</sup> Even where such evidence does exist, difficult questions of evaluation and application inevitably arise. How will the TennCare agency staff handle these challenges? Physicians often must rely on their training, clinical experience, and prevailing practice, but these considerations would not satisfy the state’s definition.

Some confusion over whether the new definition will affect TennCare Medicaid children has arisen because waiver documents say that the new definition would

be applied in a manner “consistent with federal EPSDT requirements.” (Waiver Supplement, p. 13). The state is not saying, however, that children entitled to EPSDT will not be affected by the new definition. It appears that the state intends to apply the new definition to TennCare Medicaid children when it determines whether a service that could be covered under EPSDT is “necessary” for a particular child. Thus, if the state is permitted to rely on this definition, it will negatively affect TennCare Medicaid children as well as TennCare Standard children. There is no question that the TennCare *Standard* children would be affected since the state would drop EPSDT guarantees for this group.

- **Prescription Drug Formulary Restrictions.** The Tennessee waiver proposal would make a number of changes to the prescription drug benefit. One change, would establish a new three-tier prescription drug formulary. The new formulary would apply to all children as well as to those adults who continue to have a pharmacy benefit (some adults would no longer have any pharmacy coverage). Drug formularies, where certain drugs are subject to prior authorization, are not new or unusual in state Medicaid programs. Nor do they typically require waiver authority. The Tennessee proposal, however, would be particularly restrictive. Unlike other state Medicaid formularies, Tennessee’s proposal would allow the state to exclude some drugs altogether, except in “very rare, unique and/or novel clinical scenarios pursuant to a very stringent exceptions process.” (Waiver Supplement, pp. 5) The waiver proposal offers no criteria for how the state would assign drugs to the different tiers or operate the exceptions process.
- **Reduced Consumer Protections.** The proposed waiver seeks broad new authority to change the rules regarding notices and appeals. In general, federal Medicaid law requires that individuals affected by decisions under the program be informed in writing and given an opportunity to ask for an administrative hearing to resolve the dispute. The waiver would eliminate the guarantee that individuals, including children, would have a written notice of certain decisions, and it would limit the kinds of agency actions that could be appealed.<sup>6</sup> In addition, in contrast to current protections afforded Medicaid beneficiaries, TennCare enrollees, including children, would not receive coverage for a medical service or prescription drug that they had been receiving pending the resolution of an appeal.

#### **Additional Changes Affecting TennCare Standard Children**

As described in the waiver documents, the state plans to make a number of additional changes that would affect only the “Standard” children, including potentially far-reaching changes relating to these children’s coverage. The documents state that the Governor’s current intention is to not implement some of these changes at this time. If these waiver requests are approved, many of the key federal standards would no longer apply to children in TennCare Standard, and the outcome for these children would be left to the state’s discretion. Many of these children have incomes just above the federal poverty line, suffer from chronic illnesses, or have other serious medical problems.

- **Elimination of EPSDT, Permitting Reductions in Benefits.** Tennessee is requesting CMS to “reaffirm” that TennCare Standard children are not guaranteed EPSDT benefits. (The state’s 2002 waiver does not explicitly address EPSDT. However, a letter issued by the federal Medicaid Director subsequent to the state’s May, 2002 waiver approval, provided “clarification” that the 2002 waiver allowed the state to eliminate EPSDT benefits for the children in Standard. Currently, these children are receiving EPSDT benefits, and the issue is under review by the federal court in *John B. v. Goetz*.) The new waiver does not specify the services TennCare Standard children would lose in the absence of EPSDT, but it appears that any of the benefit limits proposed for adults could be applied to this group of children. These include a five-day per year limit on inpatient hospitalization.
- **Premium Increase.** TennCare Standard enrollees currently pay premiums, which would continue under the proposed waiver. In addition, the state is seeking authority to increase premiums for all TennCare Standard enrollees (adults and children). The timing of any such increases would be left to the state’s discretion.
- **Copayment Increases and Policy Changes.** Children in TennCare Standard with family incomes at or above the poverty line are currently required to make copayments for some services, such as pharmacy. The waiver seeks authority to increase the copayment amounts and eliminate the current cap on out-of-pocket expenses. It also requests the authority to deny medical care and prescription drugs to people (including children) who cannot make the required non-nominal copayments.<sup>7</sup> According to the proposal, the state does not intend to impose these changes on children at this time, but the proposal makes clear that the state may decide to take these steps at a later date.
- **New Asset Requirement.** The waiver also requests authority to impose “appropriate assets tests” upon individuals, including children, in the TennCare Standard population, although, again, the waiver states that there is no current intention to impose an asset test on children. An asset requirement could make some children ineligible for coverage. It could also dampen participation among eligible children; asset tests add paperwork that can create barriers to enrollment and renewal. Only a handful of states impose an asset test on children.<sup>8</sup>
- **“Pre-Approval” Authority to Allow Additional and Unspecified Benefit and Eligibility Reductions and Higher Cost Sharing.** One of the more significant aspects of the waiver is the request for authority to make additional, unspecified changes in TennCare in the future—beyond those changes described above. The stated goal is to keep TennCare spending below a set percentage of state revenues. Recommendations would be developed by an Advisory Commission, but the Governor would have ultimate authority to approve or reject the recommendations or substitute his own changes. TennCare Standard children are among the groups of people whose eligibility, benefits and cost sharing could be affected by this new waiver authority.

## Conclusion

The scope of the authority sought by the Tennessee's waiver proposal is unprecedented. The state proposes to retain its current federal matching funds (the federal government pays 64.8 percent of most program costs) but without having to follow many of the key federal minimum standards or even specify what rules it would apply instead.

Tennessee's children are poorer and sicker than children in many other parts of the country despite some measurable improvements in health status in recent years. By restricting children's access to health care and seeking authority to make additional changes in the future, the TennCare waiver puts the coverage and care for tens of thousands of low-income children and adults at risk.

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<sup>1</sup> Office of the Governor, *Supplement to September 24, 2004 Proposed Amendment to the TennCare Demonstration Project* (February 18, 2005), accessed at <http://www.state.tn.us/tenncare/New%20Updates/021805%20Final%20WaiverSupplement.pdf>.

<sup>2</sup> The 2005 federal poverty level for a family of 3 is \$1,336 per month, or \$310 per week; 133% of the FPL is \$1,783 per month, or \$412 per week; and 185% is \$2,481 per month or \$572 per week.

<sup>3</sup> While some materials indicate that "medically eligible" children with incomes below 100% of FPL can still enroll in Standard, it is not clear why these children would not be eligible for and enrolled in TennCare Medicaid. "Medically eligible" is the term used in the TennCare program to describe individuals (adults and children) who are unable to obtain health insurance due to their medical needs.

<sup>4</sup> The new standard for medical necessity is considered in, Schneider, Andy, "Tennessee's New 'Medically Necessary' Standard: Uncovering the Insured?" Kaiser Commission on Medicaid and the Uninsured, <http://www.kff.org/about/kcmu.cfm>; "Analysis of Proposed TennCare Definition of Medical Necessity," National Health Law Program, June 18, 2004. E. Steinberg and B. Luce, "Evidence Based? Caveat Emptor!" *Health Affairs* (January/February 2005), pp. 89-90.

<sup>5</sup> The Steinberg and Luce article notes: "The absence of evidence regarding the effectiveness or safety of a particular health care intervention does not mean that the intervention is not safe or effective. Unfortunately, because many medical practices have not been rigorously evaluated, we do not really know what their impacts on effectiveness and safety are. Michael Millenson, citing work by John Williamson, claimed that more than half of all medical treatments, and perhaps as many as 85 percent, have never been validated by clinical trials. According to an expert committee of the Institute of Medicine (IOM), only about 4 percent of all services have strong strength of evidence, and more than half have very weak or no evidence." *Ibid*, page 85.

<sup>6</sup> The language of the waiver authority sought by the state of Tennessee is very broad. If approved it would grant the state the authority "to implement an appropriate notice, appeals and continuation of benefits process for TennCare enrollees who would seek to challenge the implementation of benefit limits, co-payments, and prior authorization authority." Waiver Supplement, p. 20.

<sup>7</sup> Under regular federal Medicaid rules (without a waiver), if an individual cannot afford a copayment, he or she remains liable for the payment but the service cannot be denied. Medicaid regulations, 45CFR §447.53(e).

<sup>8</sup> As of July 2004, 46 states (including the District of Columbia) had no asset test for children in their Medicaid program. Cohen Ross, D. and Coz L., Center on Budget and Policy Practices, "Beneath the Surface: Barriers Threaten to Slow Progress in Expanding Health Coverage of Children and Families," Kaiser Commission in Medicaid and the Uninsured, October 2004.