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Sequence Number: 06-26-16
 Rule ID(s): 6211
 File Date: 6/30/16
 Effective Date: 9/28/16

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Tennessee Department of Finance and Administration
Division:	Bureau of TennCare
Contact Person:	George Woods
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Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only ONE Rule Number/Rule Title per row)

Chapter Number	Chapter Title
1200-13-13	TennCare Medicaid
Rule Number	Rule Title
1200-13-13-.01	Definitions

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

Paragraph (39) Durable Medical Equipment (DME) of Rule 1200-13-13-.01 Definitions is deleted in its entirety and replaced with a new paragraph (39) which shall read as follows:

- (39) DURABLE MEDICAL EQUIPMENT (DME) shall mean equipment that can stand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of an illness or injury, is suitable for use in any non-institutional setting in which everyday life activities take place, and is related to the patient's physical disorder. Orthotics and prosthetic devices, and artificial limbs and eyes are considered DME. Non-institutional settings do not include a hospital or nursing facility (NF). Routine DME items, including but not limited to wheelchairs (except as defined below), walkers, hospital beds, canes, commodes, traction equipment, suction machines, patient lifts, weight scales, and other items provided to a member receiving services in a NF that are within the scope of per diem reimbursement for NF services shall not be covered or reimbursable under the Medicaid program separate and apart from payment for the NF service. Customized orthotics, prosthetics, wheelchairs, wheelchair seating systems, and other items that are beyond the scope of Medicaid reimbursement for NF services shall be covered by the member's managed care organization, so long as such items:
- (a) are medically necessary for the continuous care of a member; and
 - (b) must be custom-made or modified or may be commercially available, but must be individually measured and selected to address the member's unique and permanent medical need for positioning, support or mobility; and
 - (c) are solely for the use of that member and not for other NF residents.

Statutory Authority: T.C.A. §§ 4-5-202, 71-5-105 and 71-5-109.

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Department of Finance and Administration (board/commission/ other authority) on 05/17/2016 (mm/dd/yyyy), and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 12/09/15

Rulemaking Hearing(s) Conducted on: (add more dates). 02/03/16



Date: 5/17/2016

Signature: [Handwritten Signature]

Name of Officer: Darin J. Gordon
Director, Bureau of TennCare

Title of Officer: Tennessee Department of Finance and Administration

Subscribed and sworn to before me on: 5/17/2016

Notary Public Signature: [Handwritten Signature]

My commission expires on: 10/18/2016

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

[Handwritten Signature]
Herbert H. Slatery III
Attorney General and Reporter
6/28/2016
Date

Department of State Use Only

Filed with the Department of State on: 6/30/16

Effective on: 9/28/14

[Handwritten Signature]
Tre Hargett
Secretary of State

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PUBLICATIONS

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

Comment: Commenter with the Opens Arms Care Corporation stated in a handout at the hearing and an e-mail that the revision is of concern to the private ICF/IID providers because it essentially rules out the utilization of DME services paid by the individual's TennCare MCO, except where there is customization and instead shifts the burden to the private ICF/IID. Individuals served by ICF/IID providers typically have co-occurring health and physical challenges which require the use of durable medical equipment. It is not uncommon for many of the individuals utilizing ICF/IID services to require wheelchairs (power, manual and all seating components) and repairs, oxygen concentrators, CPAP machines, hospital beds, enteral feeding, infusion pumps, glucose monitors, communication devices, walkers, canes, crutches, non custom orthotics/prosthetics (including knee immobilizers, AFO's back braces, compression stockings, hand splints, walking boots, cervical collars, etc), shower chairs, and mechanical lifts; which could cost an agency tens of thousands per person in any given year.

The commenter also stated that it was difficult to surmise what specific financial impact ICF/IID providers will assume as a result of this alteration in State Policy, it is clear that additional cash flow challenges will be created. The ICF/IID cost reimbursement rate structure is designed to provide allowable reimbursements for expenses; which providers have incurred in provision of services. However, there is an intrinsic lag time in formulation of rates which can cause significant cash flow challenges for providers who assume sizeable cost increases in any given year.

Response: Thank you for your comments of February 3, 2016, and February 5, 2016, on the above-referenced rules pertaining to the definition of durable medical equipment in the TennCare program. After reviewing and considering comments received from you and others, we have revised the language in the proposed rule. We hope this revision clarifies the intent of the rule, and its applicability in various types of settings. We appreciate the services your organization provides to Tennesseans with disabilities, and we appreciate your participation in the rulemaking process.

Comment: A commenter with the Department of Intellectual & Developmental Disabilities requested that additional language "wheelchair seating systems" be inserted in the rule to clarify that both wheelchairs (i.e., the frame, support components, and power controls) and wheelchair seating systems can both be customized to meet individual needs.

The commenter also requested that additional language "are individually measured and selected" be added to Subparagraph (b) to account for DME items that are recommended for a member based on an evaluation of his/her individual or unique positioning, support or mobility needs, but may be commercially available as opposed to custom-made.

Response: Thank you for your comments of February 5, 2016, on the rule pertaining to the definition of durable medical equipment in the TennCare program. After reviewing and considering comments received from you and others, we have revised the language in the proposed rule to incorporate your input. We hope this revision clarifies the intent and applicability of the rule. We appreciate our partnership with the Department of Intellectual & Developmental Disabilities as we seek to provide high-quality care to Tennesseans with disabilities.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

The rule is not anticipated to have an effect on small businesses.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The rule is not anticipated to have an impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The Rule is being promulgated to amend the definition of Durable Medical Equipment (DME). The amendment clarifies the existing definition of DME by deleting the restrictive language that DME is used in the person's home and specifying that DME is suitable for any non-institutional setting where everyday life activities occur.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

The Rule is lawfully adopted by the Bureau of TennCare in accordance with §§ 4-5-202, 71-5-105 and 71-5-109.

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The persons and entities most directly affected by this Rule are the TennCare enrollees, providers, and managed care contractors. The governmental entity most directly affected by this Rule is the Bureau of TennCare, Tennessee Department of Finance and Administration.

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

The Rule was approved by the Tennessee Attorney General. No additional opinion was given or requested.

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

The promulgation of this rule is not anticipated to have an effect on state and local government revenues and expenditures.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

John G. (Gabe) Roberts
General Counsel

- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

John G. (Gabe) Roberts
General Counsel

- (H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

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RULES
OF
TENNESSEE DEPARTMENT OF FINANCE AND ADMINISTRATION
BUREAU OF TENNCARE

CHAPTER 1200-13-13
TENNCARE MEDICAID

1200-13-13-.01 DEFINITIONS.

(39) DURABLE MEDICAL EQUIPMENT (DME) shall mean equipment that can stand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of an illness or injury, is suitable for use in any non-institutional setting in which everyday life activities take place appropriate for and used in the patient's home, and is related to the patient's physical disorder. An institution is not considered a patient's or member's home if it meets the definition of a hospital or skilled facility; Orthotics and prosthetic devices, and artificial limbs and eyes are considered DME. Non-institutional settings do not include a hospital or nursing facility (NF). Routine DME items, including but not limited to wheelchairs (except as defined below), walkers, hospital beds, canes, commodes, traction equipment, suction machines, patient lifts, weight scales, and other items provided to a member receiving services in a NF that are within the scope of per diem reimbursement for NF services shall not be covered or reimbursable under the Medicaid program separate and apart from payment for the NF service. Customized orthotics, prosthetics, wheelchairs, wheelchair seating systems, and other items that are beyond the scope of Medicaid reimbursement for NF services shall be covered by the member's managed care organization, so long as such items:

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