

Notice of

Rulemaking Hearing

Tennessee Department of Finance and Administration

Bureau of TennCare

There will be a hearing before the Commissioner to consider the promulgation of amendments of rules pursuant to Tennessee Code Annotated, 71-5-105 and 71-5-109. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act Tennessee Code Annotated, Section 4-5-204 and will take place in the Ellington Agricultural Center, Ed Jones Auditorium, 440 Hogan Road, Nashville, TN 37220 at 9:00 a.m. C.S.T. on the 18<sup>th</sup> day November 2008.

Any individuals with disabilities who wish to participate in these proceedings (to review these filings) should contact the Department of Finance and Administration, Bureau of TennCare, to discuss any auxiliary aids or services needed to facilitate such participation. Such initial contact may be made no less than ten (10) days prior to the scheduled meeting date (the date the party intends to review such filings) to allow time for the Bureau of TennCare to determine how it may reasonably provide such aid or service. Initial contact may be made with the Bureau of TennCare's ADA Coordinator by mail at the Bureau of -TennCare, 310 Great Circle Road, Nashville, Tennessee 37243 or by telephone at (615) 507-6474 or 1-800-342-3145.

For a copy of this notice of rulemaking hearing, contact George Woods at the Bureau of TennCare, 310 Great Circle Road, Nashville, Tennessee 37243 or call (615) 507-6446.

Substance of Proposed Rules

Paragraph (52) of rule 1200-13-13-.01 Definitions is deleted in its entirety and replaced with a new paragraph (52) which shall read as follows:

(52) Home Health Services shall mean:

(a) Any of the services identified in 42 CFR 440.70 and delivered in accordance with the provisions of 42 CFR 440.70. "Part-time or intermittent nursing services" and "home health aide services" are covered only as defined specifically in these rules.

1. Part-time or intermittent nursing services.

(i) To be considered "part-time or intermittent," nursing services must be provided as no more than one visit per day, with each visit lasting less than eight (8) hours, AND no more than 27 total hours of nursing care may be provided per week. In addition, nursing services and home health aide services combined must total less than or equal to eight (8) hours per day and 35 or fewer hours per week. On a case-by-case basis, the weekly total for nursing services may be increased to 30 hours and the weekly total for nursing services and home health aide services combined may be increased to 40 hours for patients qualifying for Level 2 skilled nursing care.

(ii) Part-time or intermittent nursing services are not covered if the only skilled nursing function needed is administration of medications on a prn (as needed) basis. Nursing services may include medication administration; however, a nursing visit will not be extended in order to administer medication or perform other skilled nursing functions at more than one point during the

day, unless skilled nursing services are medically necessary throughout the intervening period.

- (iii) The above limits may be exceeded when medically necessary for children under the age of 21.

2. Home health aide services.

- (i) Home health aide services must be provided as no more than two visits per day with care provided less than or equal to eight (8) hours per day. Nursing services and home health aide services combined must total less than or equal to eight (8) hours per day and 35 or fewer hours per week. On a case-by-case basis, the weekly total may be increased to 40 hours for patients qualifying for Level 2 skilled nursing care.
- (ii) The above limits may be exceeded when medically necessary for children under the age of 21.

- (b) Home health providers shall only provide services to the recipient that have been ordered by the treating physician and are pursuant to a plan of care and shall not provide other services such as general child care services, cleaning services, preparation of meals, or services to other household members. Because children typically have non-medical care needs which must be met, to the extent that home health services are provided to a person under 18 years of age, a responsible adult (other than the home health care provider) must be present at all times in the home during the provision of home health services unless all of the following criteria are met:

- 1. The child is non-ambulatory; and
- 2. The child has no or extremely limited ability to interact with caregivers; and
- 3. The child shall not reasonably be expected to have needs that fall outside the scope of medically necessary TennCare covered benefits (e.g. the child has no need for general supervision or meal preparation) during the time the home health provider is present in the home without the presence of another responsible adult; and
- 4. No other children shall be present in the home during the time the home health provider is present in the home without the presence of another responsible adult.

Paragraph (88) of rule 1200-13-13-.01 Definitions is deleted in its entirety and replaced with a new paragraph (88) which shall read as follows:

- (88) Private Duty Nursing Services shall mean nursing services for recipients who require eight (8) or more hours of continuous skilled nursing care during a 24-hour period.

- (a) A person who needs intermittent skilled nursing functions at specified intervals, but who does not require continuous skilled nursing care throughout the period between each interval, shall not be determined to need continuous skilled nursing care. Skilled nursing care is provided by a registered nurse or licensed practical nurse under the direction of the recipient's physician to the recipient and not to other household members.

- (b) If it is determined by the MCO to be cost-effective, non-skilled services may be provided by a nurse rather than a home health aide. However, it is the total number of hours of skilled nursing services, not the number of hours that the nurse is in the home, that determines whether the nursing services are continuous or intermittent.
- (c) Private duty nursing services are covered for adults aged 21 and older only when medically necessary to support the use of ventilator equipment or other life-sustaining medical technology when constant nursing supervision, visual assessment, and monitoring of both equipment and patient are required. For purposes of this rule, an adult is considered to be using ventilator equipment or other life-sustaining medical technology if he:
  - 1. Is ventilator dependent for at least 12 hours each day with an invasive patient end of the circuit (i.e., tracheostomy cannula); or
  - 2. Has a functioning tracheostomy
    - (i) Requiring suctioning; and
    - (ii) Oxygen supplementation; and
    - (iii) Receiving nebulizer treatments or requiring the use of Cough Assist/in-exsufflator devices; and
    - (iv) In addition, for persons with a functioning tracheostomy, at least one from each of the following (I and II) must be met:
      - (I) Medication:
        - I. Receiving medication via a gastrostomy tube (G-tube); or
        - II. Receiving medication via a Peripherally Inserted Central Catheter (PICC) line or central port; and
      - (II) Nutrition:
        - I. Receiving bolus or continuous feedings via a permanent access such as a G-tube, Mickey Button, or Gastrojejunostomy tube (G-J tube); or
        - II. Receiving total parenteral nutrition.
- (d) Private duty nursing services are covered as medically necessary for children under the age of 21 in accordance with EPSDT requirements. As a general rule, only a child who is dependent upon technology-based medical equipment requiring constant nursing supervision, visual assessment, and monitoring of both equipment and child will be determined to need private duty nursing services. However, determinations of medical necessity will continue to be made on an individualized basis.
- (e) A child who needs less than eight (8) hours of continuous skilled nursing care during a 24-hour period, or an adult who needs nursing care but does not qualify for private duty nursing care per the requirements of these rules may receive medically necessary nursing care as an intermittent service under home health.

- (f) General childcare services and other non-hands-on assistance such as cleaning and meal preparation shall not be provided by a private duty nurse. Because children typically have non-medical care needs which must be met, to the extent that private duty nursing services are provided to a person under 18 years of age, a responsible adult (other than the private duty nurse) must be present at all times in the home during the provision of private duty nursing services unless all of the following criteria are met:
1. The child is non-ambulatory; and
  2. The child has no or extremely limited ability to interact with caregivers; and
  3. The child shall not reasonably be expected to have needs that fall outside the scope of medically necessary TennCare covered benefits (e.g., the child has no need for general supervision or meal preparation) during the time the private duty nurse is present in the home without the presence of another responsible adult; and
  4. No other children shall be present in the home during the time the private duty nurse is present in the home without the presence of another responsible adult.

Parts 10. and 30. of subparagraph (b) of paragraph (1) of rule 1200-13-13-.04 COVERED SERVICES are deleted in their entirety and replaced with new parts 10. and 30. which shall read as follows:

	<b>BENEFIT FOR PERSONS UNDER AGE 21</b>	<b>BENEFIT FOR PERSONS AGED 21 AND OLDER</b>
10. Home Health Care [defined at 42 CFR §440.70(a), (b), (c), and (e) and at Rule 1200-13-13-.01].	Covered as medically necessary in accordance with the definition of Home Health Care at Rule 1200-13-13-.01. Prior authorization required for home health nurse and home health aide services, as described in Paragraph (7) of this rule.  All home health care must be delivered by a licensed Home Health Agency, as defined by 42 CFR § 440.70.	Covered as medically necessary in accordance with the definition of Home Health Care at Rule 1200-13-13-.01. Prior authorization required for home health nurse and home health aide services, as described in Paragraph (7) of this rule.  All home health care must be delivered by a licensed Home Health Agency, as defined by 42 CFR § 440.70.

	<b>BENEFIT FOR PERSONS UNDER AGE 21</b>	<b>BENEFIT FOR PERSONS AGED 21 AND OLDER</b>
30. Private Duty Nursing [defined at 42 CFR §440.80 and at Rule 1200-13-13-.01].	Covered as medically necessary in accordance with the definition of Private Duty Nursing at Rule 1200-13-13-.01, when prescribed by an attending physician for treatment and services rendered by a Registered Nurse (R.N.) or a licensed practical nurse (L.P.N.) who is not an immediate relative. Prior authorization required, as described in Paragraph (7) of this rule.	Covered as medically necessary in accordance with the definition of Private Duty Nursing at Rule 1200-13-13-.01, when prescribed by an attending physician for treatment and services rendered by a Registered Nurse (R.N.) or a licensed practical nurse (L.P.N.) who is not an immediate relative. Private duty nursing services are limited to services that support the use of ventilator equipment or other life-sustaining technology when constant nursing supervision, visual assessment, and monitoring of both equipment and patient are required. Prior authorization required, as described in Paragraph (7) of this rule.

Paragraph (7) of rule 1200-13-13-.04 Covered Services is deleted in its entirety and replaced with a new paragraph (7) which shall read as follows:

- (7) Prior Authorization for Home Health Nurse, Home Health Aide, and Private Duty Nursing Services.

Prior authorization by the MCC must be obtained in order to establish the medical necessity of all requested home health nurse, home health aide, and private duty nursing services.

- (a) The following information must be provided when seeking prior authorization for home health nurse, home health aide, and private duty nursing services:
1. Name of physician prescribing the service(s);
  2. Specific information regarding the patient's medical condition and any associated disability that creates the need for the requested service(s); and
  3. Specific information regarding the service(s) the nurse or aide is expected to perform, including the frequency with which each service must be performed (e.g., tube feeding patient 7:00 a.m., 12:00 p.m., and 5:00 p.m. daily; bathe patient once per day; administer medications three (3) times per day; catheterize patient as needed from 8:00 a.m. to 5:00 p.m. Monday through Friday; change dressing on wound three (3) times per week). Such information should also include the total period of time that the services are anticipated to be medically necessary by the treating physician (e.g., total number of weeks or months).
- (b) Home health nurses and aides and private duty nurses will never be authorized to personally transport a TennCare enrollee. Home health nurses will never be authorized to accompany an enrollee outside the home. Home health aides will never be authorized to accompany an enrollee twenty-one (21) years of age or older outside the home.

- (c) Private duty nursing services are limited to services provided in the recipient's own home, with the following two exceptions:
1. A recipient age twenty-one (21) or older who requires eight (8) or more hours of skilled nursing care in a 24-hour period and is authorized to receive private duty nursing services in the home setting may make use of the approved hours outside of that setting in order for the nurse to accompany the recipient to:
    - (i) Outpatient health care services (including services delivered through a TennCare home and community based services waiver program);
    - (ii) Public or private secondary school or credit classes at an accredited vocational or technical school or institute of higher education; or,
    - (iii) Work at his place of employment.
  2. A recipient under the age of twenty-one (21) who requires eight (8) or more hours of continuous skilled nursing care in a 24-hour period and is authorized to receive those services in the home setting may make use of the approved hours outside of that setting when normal life activities temporarily take him outside of that setting. Normal life activity for a child under the age of twenty-one (21) means routine work (including work in supported or sheltered work settings); licensed child care; school and school-related activities; religious services and related activities; and outpatient health care services (including services delivered through a TennCare home and community based services waiver program). Normal life activities do not include non-routine or extended home absences.
- (d) A private duty nurse may accompany a recipient in the circumstances outlined in Subparagraphs (c)1. and (c)2. immediately above, but may not drive.
- (e) Private duty nursing services will only be authorized when there are competent family members or caregivers as indicated below.
1. Private duty nursing services include services to teach and train the recipient and the recipient's family or other caregivers how to manage the treatment regimen. Having a caregiver willing to learn the tasks necessary to provide a safe environment and quality in home care is essential to assuring the recipient is properly attended to when a nurse or other paid caregiver is not present, including those times when the recipient chooses to attend community activities to which these rules do not specifically permit the private duty nurse or other paid caregiver to accompany the patient.
  2. To ensure the health, safety, and welfare of the individual, in order to receive private duty nursing services, the recipient must have family or caregivers who:
    - (i) Have a demonstrated understanding, ability, and commitment in the care of the individual related to ventilator management, support of other life-sustaining technology, medication administration, and feeding, or in the case of children, other medically necessary skilled nursing functions, as applicable; and
    - (ii) Are trained and willing to meet the recipient's nursing needs during the hours when paid nursing care is not provided, and to provide backup in the event of an emergency; and

- (iii) Are willing and available as needed to meet the recipient's non-nursing support needs.
- (iv) In the case of children under the age of 18, the parent or guardian will be expected to fill this role. In the case of an adult age 18 and older, if the health, safety, and welfare of the individual cannot be assured because the recipient does not have such family or caregiver, private duty nursing services may be denied, subject to (I) and (II) below. However, it shall be the responsibility of the MCO to:
  - (I) Arrange for the appropriate level of care, which may include nursing facility care, if applicable; and
  - (II) In the case of a person currently receiving private duty nursing services, facilitate transition to such appropriate level of care prior to termination of the private duty nursing service.
- (f) Nursing services (provided as part of home health services or by a private duty nurse) will be approved only if the requested service(s) is of the type that must be provided by a nurse as opposed to an aide, except that the MCO may elect to have a nurse perform home health aide services in addition to nursing services if the MCO determines that this is a less costly alternative than providing the services of both a nurse and an aide. Examples of appropriate nursing services include, but are not limited to, management of ventilator equipment or other life-sustaining medical technology, medication management, and tube feedings.
- (g) Home health aide services will only be approved if the requested service(s) meet all medical necessity requirements including the requirements of 1200-13-16-.05(4)(d). Thus, home health aide services will not be approved to provide child care services, prepare meals, perform housework, or generally supervise patients. Examples of appropriate home health aide services include, but are not limited to, patient transfers and bathing

Paragraph (5) of rule 1200-13-13-.08 Providers is deleted in its entirety and replaced with a new paragraph (5) which shall read as follows:

- (5) Providers may seek payment from a TennCare enrollee only under the following circumstances:
  - (a) If the services are not covered by the TennCare program and, prior to providing the services, the provider informed the enrollee that the services were not covered; or
  - (b) If the services are not covered because they are in excess of an enrollee's benefit limit and one of the following circumstances applies:
    - 1. The provider determines effective on the date of service that the enrollee has reached his/her benefit limit for the particular service being requested and, prior to providing the service, informs the enrollee that the service is not covered and the service will not be paid for by TennCare. The source of the provider's information must be a database listed on the TennCare website as approved by TennCare on the date of the provider's inquiry.
    - 2. The provider has information in his/her own records to support the fact that the enrollee has reached his/her benefit limit for the particular service being requested and, prior to providing the service, informs the enrollee that the service is not covered and will not be paid for by TennCare. This information may include:

- (i) A previous written denial of a claim on the basis that the service was in excess of the enrollee's benefit limit for a service within the same benefit category as the service being requested, if the time period applicable to the benefit limit is still in effect:
  - (ii) That the provider had previously examined the database referenced in part 1. above and determined that the enrollee had reached his/her benefit limit for the particular service being requested, if the time period applicable to that benefit limit is still in effect; or
  - (iii) That the provider had personally provided services to the enrollee in excess of his/her benefit limit within the same benefit category as the service being requested, if the time period applicable to that benefit period is still in effect, or
  - (iv) The enrollee's MCO has provided confirmation to the provider that the enrollee has reached his/her benefit limit for the applicable service.
3. The provider submits a claim for service to the appropriate managed care contractor (MCC) and receives a written denial of that claim on the basis that the service exceeds the enrollee's benefit limit. Thereafter, following informing the enrollee and within the remainder of the period applicable to that benefit limit, the provider may bill the enrollee for services within that same exhausted benefit category without having to submit, for repeated MCC denial, claims for those subsequent services. If the provider informed the enrollee prior to providing the service for which the claim was denied that the service would exceed the enrollee's benefit limit and would not be paid for by TennCare, the provider may bill the enrollee for that service.
4. The provider had previously taken the steps in parts 1., 2., 3. or 4. above and determined that the enrollee had reached his/her benefit limit for the particular service being requested, if the time period applicable to the benefit limit is still in effect, and informs the enrollee, prior to providing the service, that the service is not covered and will not be paid for by TennCare.
- (b) If the services are covered only with prior authorization and prior authorization has been requested but denied, or is requested and a specified lesser level of care is approved, and the provider has given prior notice to the enrollee that the services are not covered, the enrollee may elect to receive those services for which prior authorization has been denied or which exceed the authorized level of care and be billed by the provider for such services.

Statutory Authority: T.C.A. 4-5-202, 4-5-203, 71-5-105, 71-5-109.

The notice of rulemaking set out herein was properly filed in the Department of State on the 8th day of September, 2008. (FS 09-06-08; DBID 909)