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Sequence Number: 09-38-15
Rule ID(s): 6050
File Date: 9/23/15
Effective Date: 12/22/15

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
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Revision Type (check all that apply):

X Amendments
___ 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**
1200-13-01	TennCare Long-Term Care Programs
Rule Number	**Rule Title**
1200-13-01-.02	Definitions
1200-13-01-.10	Medical (Level of Care) Eligibility Criteria for TennCare Reimbursement of Care in Nursing Facilities, CHOICES HCBS and PACE

(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)

Subparagraph (a) of Paragraph (109) Physical Disabilities of Rule 1200-13-01-.02 Definitions is amended by adding a sentence at the end of the subparagraph so as amended Subparagraph (a) shall read as follows:

(a) One or more medically diagnosed chronic, physical impairments, either congenital or acquired, that limit independent, purposeful physical movement of the body or of one or more extremities, as evidenced by substantial functional limitations in one or more ADLs that require such movement—primarily mobility or transfer—and that are primarily attributable to the physical impairments and not to cognitive impairments or mental health conditions. For purposes of eligibility for enrollment in CHOICES Group 2, includes any adult age 21 or older who meets level of care criteria for Medicaid Level 1 reimbursement of care in a nursing facility, CHOICES HCBS and PACE, including requirements set forth in TennCare Rule 1200-13-01-.10(4)(b)2.(ii) and, based upon review of evidence by TennCare, will be institutionalized but for the availability of these services.

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

Item (II) of Subpart (i) of Part 2. of Subparagraph (b) of Paragraph (4) of Rule 1200-13-01-.10 Medical (Level of Care) Eligibility Criteria for TennCare Reimbursement of Care in Nursing Facilities, CHOICES HCBS and PACE is deleted in its entirety and replaced with a new Item (II) which shall read as follows:

(II) Meet one (1) or more of the ADL or related criteria specified in 1200-13-01-.10(4)(b)2.(iii) on an ongoing basis and be determined by TennCare through approval of a Safety Determination Request to not qualify for enrollment in CHOICES Group 3. An applicant who could be safely served in CHOICES Group 3 except that he does not meet Medicaid categorical and financial eligibility criteria for CHOICES Group 3 (i.e. is not an SSI recipient) shall not be eligible for CHOICES Group 1 or Group 2 as a result of a Safety Determination.

Item (II) of Subpart (ii) of Part 2. of Subparagraph (b) of Paragraph (4) of Rule 1200-13-01-.10 Medical (Level of Care) Eligibility Criteria for TennCare Reimbursement of Care in Nursing Facilities, CHOICES HCBS and PACE is deleted in its entirety and replaced with a new Item (II) which shall read as follows:

(II) Meet one (1) or more of the ADL or related criteria specified in 1200-13-01-.10(4)(b)2.(iii) on an ongoing basis and be determined by TennCare through approval of a Safety Determination Request to not qualify for enrollment in CHOICES Group 3. An applicant who could be safely served in CHOICES Group 3 except that he does not meet Medicaid categorical and financial eligibility criteria for CHOICES Group 3 (i.e. is not an SSI recipient) shall not be eligible for CHOICES Group 1 or Group 2 as a result of a Safety Determination.

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 09/17/2015 (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: 07/02/15

Rulemaking Hearing(s) Conducted on: (add more dates). 08/26/15

Date: 9/17/2015

Signature:

Name of Officer: Darin J. Gordon

Title of Officer: Director, Bureau of TennCare
Tennessee Department of Finance and Administration

ROBIN A. PAGE
STATE OF TENNESSEE NOTARY PUBLIC
WILLIAMSON COUNTY

Subscribed and sworn to before me on: 9/17/2015

Notary Public Signature: Robin A Page

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.

Herbert H. Slatery III
Attorney General and Reporter

9/22/2015
Date

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Filed with the Department of State on: 9/23/15

Effective on: 12/22/15

Tre Hargett
Secretary of State

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.

Comments: A commenter expressed concern that the Emergency Rule does not mention the authority of a PA (Physician Assistant) to order and supervise care in a nursing facility and requested that the rule be amended to include this information.

Response: By definition, Emergency Rules are temporary and do not provide the time required for a comment period, but the same amendments have been filed as a Notice of Rulemaking Hearing. The comments are being treated as a submission to the Notice of Hearing. Please note that the Emergency and Rulemaking Hearing Rule amendments are to rule part 200-13-01-.10(4)(b)2, having to do with applicant's physical need for inpatient nursing care, and do not contain any proposed changes to the ordering or supervision of care. Inclusion of the requested authorization language is beyond the scope of the Rulemaking Hearing Notice.

However, authorization for ordering and supervising care is included in other areas in the rule chapter. Performance of tasks such as certification of a PAE (PreAdmission Evaluation), assessment, and nursing facility visits may be performed by a physician or by a nurse practitioner, clinical nurse specialist, or physician assistant, working in collaboration with a physician. See Rules 1200-13-01-.02(16) and (119), 1200-13-01-.06(4)(b) and 1200-13-01-.10(2)(g). In addition, federal regulation 42 CFR § 483.40 authorizes utilization of PAs to perform physician tasks in nursing facilities and Tennessee follows that regulation.

Comments: Tennessee Health Care Association (THCA) and Response from the Bureau of TennCare

Thank you for your comments on TennCare Rule Chapter 1200-13-01 pertaining to medical eligibility criteria for long-term services and supports. As you note, the proposed rule operationalizes changes for enrollment into CHOICES Group 3, consistent with the terms of the State's approved 1115 waiver. Effective July 1, 2015, new enrollment into CHOICES Group 3 is limited to SSI recipients.

As you also note, Group 3 was originally established in July 2012, upon changing nursing facility level of care criteria. The initial rules for those changes were promulgated as Emergency Rules in order to meet the State's obligations under the FY 2013 Appropriations Act. However, prior to filing the Emergency Rules the State held a public hearing on May 7, 2012, as required by Chapter 971 of the Public Acts of 2012 (T.C.A. § 71-5-1407(a)), in advance of the changes, as well as a rulemaking hearing on September 7, 2012, following the rule's implementation as part of the rulemaking process.

With respect to your concerns regarding 1200-13-01-.10 and "its effect on the entire safety determination process," we do not think these rules affect the process for reviewing and approving safety determination requests. The explicit intent of this rule is to make clear that a safety determination will not be approved on the basis of a person's failure to meet Medicaid financial eligibility criteria for CHOICES Group 3. The safety process has always been about ensuring an appropriate medical eligibility decision. That has not changed. As you know medical eligibility and financial eligibility are distinct determinations. Prior to the program change limiting new enrollment into Group 3 to SSI eligible individuals, Medicaid categorical and financial eligibility had no impact on safety determinations, and that remains the same. As you note, a safety determination may be appropriate "when a patient does not, or may not, meet the standard set forth in the Pre-admission Evaluation (PAE) process which utilizes the aforementioned LOC criteria" (and not financial eligibility criteria).

Further, we respectfully disagree that this rule renders the safety determination process "totally inadequate to meet patient needs and misleading to the public". THCA had previously expressed its support for and agreement with the safety determination process, which helps to ensure an appropriate and more efficient medical eligibility decision. As indicated above, the safety determination process is not changing. We will continue to look carefully

at safety concerns during the PAE process, and when a person cannot be safely served if enrolled in group 3, approve a higher level of care in accordance with the safety determination rule we worked closely with you to improve. When the person's needs can be met in group 3, we will approve at risk level of care, and the person must then qualify financially—which as stated above is a separate eligibility determination process.

Moreover, in regard to your recommendations to "redefine the benchmark for obtaining a safety determination," lower LOC criteria to "a PAE score of 7", and not require "onerous, expensive paperwork needed for a safety determination," we believe the time we have invested in working with you and other stakeholders on developing and refining the safety determination process has resulted in meaningful benefit for both high acuity patients and those with other safety concerns. It allows us to identify those patients for whom NF care is truly appropriate, without casting the net too broadly, which would have significant financial impact to the State, and also result in unnecessary placement in more restrictive settings, in violation of the ADA. We also believe the supporting documentation required by the safety determination process is readily available to nursing homes and necessary in making a level of care decision. We do not believe that simply lowering the score will help to ensure that NF services are available to persons who require that level of care. A person's functional and medical needs as well as other safety concerns should be taken into account when determining whether NF services are the most appropriate placement for a person.

Finally, in reference to your recommendation "TennCare should also consider reinstating the CHOICES 3 program," the CHOICES 3 program is still an operational component of the CHOICES program. It continues to serve the more than 4,000 people enrolled in the group on July 1, 2015, and will continue to enroll new individuals who meet both the medical and new financial eligibility criteria. Because State resources are limited and the population who is aging and who has disabilities is expected to grow exponentially, it is important for the sustainability of the program that we target limited resources to people who need it the most—both from a functional and a financial perspective. This is how the CHOICES program was originally designed in 2008 and approved by CMS in 2009. The expiration of institutional income standards for the Group 3 population has been part of TennCare's approved waiver since 2013 (when federal maintenance of effort provisions expired). Of course, should appropriations become available in order to re-open CHOICES Group 3 to a broader population, we are happy to work with you and with others to determine the most appropriate financial eligibility criteria to apply, and to then seek approval from our federal partners in order to make those changes going forward.

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 rules are 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 rules are 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 rules replace emergency rules that were promulgated to limit enrollment in CHOICES Group 3 to individuals eligible in an SSI eligibility category, consistent with waiver authority granted to the State in its approved 1115 demonstration.

(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 rules are 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 these Rules are the TennCare enrollees, providers, and managed care contractors. The governmental entity most directly affected by these Rules 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 Rules were 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 these rules is anticipated to decrease state government expenditures by $3,846,100, as reported in the Health Care Finance and Administration Fiscal Year 2016 Budget Reduction Plan and incorporated in the Appropriations Act.

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

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