December 22, 2019

The Honorable Alex Azar, Secretary
United States Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201

Submitted electronically via Medicaid.gov

RE: TennCare II - Amendment 42: Block Grant

Dear Secretary Azar:

Thank you for the opportunity to comment on *TennCare II - Amendment 42: Block Grant*. We are scholars in health law and policy who study Medicaid and the role it plays in the health of vulnerable populations through the lens of various disciplines including law, policy, public health, and economics. We write to comment on legal obstacles for Tennessee's request to modify Medicaid so that the state receives capped federal funding rather than the unlimited funds that the Medicaid Act requires.

Tennessee is a Medicaid non-expansion state that proposes to amend an existing Medicaid waiver so that the Department of Health and Human Services (HHS) would fund the Medicaid program in Tennessee with a "modified block grant." Tennessee requests that the federal share of Medicaid funding become a limited sum that allows the state to avoid federal laws that specify eligibility, benefits covered, enrollment safeguards, delivery protections, and other core features of Medicaid. The TennCare II proposal proposes an aggregate amount of funding that cannot be reduced below a baseline amount, even if spending falls below baseline levels. In such an event, Tennessee envisions that the state could keep half of the profit and use it for "health." The baseline is historical, rooted in an aggregate of average expenditures for eligible populations over the 2016–2018 time period. Any new categories of beneficiaries would be introduced into TennCare II through separate funding.

No federal law permits the TennCare II arrangement. Even if law permitted such an arrangement, no federal law or policy guides the state's radical proposal. Tennessee appears to assume that any alteration of Medicaid law is within the Secretary's power, but this is simply not the case. We explain below that (1) the Secretary does not have authority to waive section 1903, which delineates federal funding obligations for Medicaid; (2) a block grant does not serve the legal purpose of Medicaid, to furnish medical assistance to the poor; and (3) the proposal appears to be an attempt to circumvent legal requirements. We also briefly address foreseeable harms that would result from a block grant payment structure.

1. HHS Does Not Have Authority to Waive Section 1903

The Medicaid program is part of the Public Law known as the Social Security Act (SSA). The Medicaid Act obligates the federal government to provide unlimited matching funds for all state

spending that complies with federal rules.[1] SSA section 1903 states that the federal government must match states' Medicaid spending at a set rate that is determined in part by the per capita income of a state. For every dollar a state spends on Medicaid, it receives a matching amount of federal funds – without limit – making Medicaid a statutory entitlement for states participating in the program as well as for eligible beneficiaries. This statutory promise of unlimited federal funding responds to a long history (dating back to the Great Depression) of states being unable to adequately fund care for the poor. Also, the federal match is required by law so as to encourage states to implement Medicaid's mandatory elements and its optional benefits (which include necessary medical care such as prescription drugs). This unlimited federal funding also produces unique flexibility that helps states respond to economic shocks such as recessions and natural disasters.

SSA section 1115 gives the Secretary of HHS power to allow states to advance the purposes of the Medicaid Act in a fashion that would not comply with federal law but for the Secretary's authorization. Two aspects of section 1115 are important for Tennessee's application to amend its waiver. First, the preliminary problem facing TennCare II is that section 1115 permits "demonstration waivers" only for certain sections of the Medicaid Act; specifically, SSA section 1902. Second, even if the payment provision of the SSA (section 1903) could be waived, demonstration waivers must further the objectives of the Medicaid program (such as improving coverage, access, and/or care).

As noted above, federal Medicaid payment is detailed in SSA section 1903, which states that the HHS Secretary "shall pay to each State … the [federal match] of the total amount expended … as medical assistance under the State plan... ." This statutory requirement is not waivable under section 1115, which explicitly permits waivers of section 1902 but not section 1903 of the SSA. As a result, HHS cannot cap or partially cap the Medicaid funds it disburses to states, whether per person, programmatically, or otherwise, because HHS must pay the federal match for the "total amount" of a state's spending. Simply put, the Secretary of HHS does not have authority to waive section 1903, which sets forth how HHS pays states in Medicaid.

Curiously, the TennCare II application does not cite *any* statutory provision when describing the authority that the Secretary would need to exercise to waive Tennessee's obligation to abide by the Medicaid Act.[2] Any kind of block grant structure is very different from Medicaid's statutorily required, open-ended funding. The Medicaid Act does not permit spending limitations, so a section 1115 demonstration waiver would be not be a possible path forward for TennCare II, and yet Tennessee has submitted a waiver amendment application.

2. The Modified Block Grant Proposal Does Not Further the Purpose of Medicaid

The Secretary may exercise authority granted by SSA section 1115 to waive section 1902 if a state's proposal will "assist in promoting the objectives" of the Medicaid program.[3] Section 1115 waivers allow states to work with particular aspects of the Medicaid program to improve

[1] 42 U.S.C. § 1396b.
[2] Tennessee Division of TennCare, TennCare II Demonstration, Project No. 11-W-00151/4, Amendment 42, Modified Block Grant and Accountability, Nov. 20, 2019, at page 25.
[3] 42 U.S.C. § 1315(a).

beneficiary coverage, access, delivery, or care. In other words, section 1115 demonstration waivers may be granted only for certain provisions of the Medicaid Act and only to further the purposes of the Medicaid program.

Even if authority somehow existed to waive section 1903, block grants (or capped spending) do not meet the section 1115 statutory standard that a demonstration project must "assist in promoting the objectives" of Medicaid. This legal standard is further informed by the Medicaid Act's stated purpose.

Medicaid's central statutory purpose always has been to "furnish medical assistance" to all eligible beneficiaries, language found at the opening of the Medicaid Act, where federal funds are appropriated for states participating in the program.[4] This phrase has been examined carefully in the context of HHS's authorization of 1115 waivers for work reporting requirements as a condition of eligibility. The federal judge hearing these challenges has interpreted Medicaid's central statutory purpose to mean that Medicaid must pay for medical care, not to promote a generalized idea of "health" or to decrease cost.[5] The court wrote:

> So what does "furnish[ing] ... medical assistance" mean? The Medicaid statute "defines 'medical assistance' as 'payment of part or all of the cost' of medical 'care and services' for a defined set of individuals." [Citations omitted.] Plugging that definition into the statute, Congress evinced a clear interest in "enabling each State, as far as practicable," to provide "payment of part or all of the cost of medical care and services." In other words, "[t]he Medicaid program was created ... for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons."[6]

Spending caps such as those proposed by Tennessee would create barriers to enrollment, which are barriers to care. The rollout of work requirements in Arkansas offers a recent example of how quickly these barriers to furnishing medical assistance can take effect (more than 18,000 beneficiaries were disenrolled in the first three months). Block grants would predictably limit payment for care across all categories of Medicaid beneficiaries and for all types of benefit coverage. This point is further underscored by Tennessee's request for HHS to waive core requirements of Medicaid that ensure eligibility, access to care, and benefits are provided equitably across the state. Disenrollment and the resulting corollary – nonpayment – are the opposite of furnishing medical assistance and do not meet the second requirement for granting an 1115 waiver request.

<u>3. Additional Legal Hurdles</u>

A third hurdle exists due to the method by which this new policy is proposed to be implemented. Administrative agencies must act in accordance with the specific laws giving them authority and the Administrative Procedure Act (APA), a longstanding federal law that sets forth processes for

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[4] 42 U.S.C. § 1396-1.
[5] Stewart v. Azar I, 313 F. Supp. 3d 237 (D.D.C. 2018); Stewart v. Azar II, 366 F. Supp. 3d 125 (D.D.C. 2019); Gresham v Azar, 363 F. Supp. 3d 165 (D.D.C. 2019); Philbrick v. Azar, 397 F.Supp.3d 11 (D.D.C. 2019).
[6] Stewart v. Azar I at 260-61.

agencies to develop and issue regulations and policies.[7] Such processes include publishing notice of proposed rules in the Federal Register and inviting the public to comment.[8] The APA also requires agencies to take public comments into account before finalizing a new rule, and agencies must publically develop an evidentiary record sufficient to support a reasoned judgment when a new rule is issued. While interpretive policies can be issued without the required notice and comment, a new policy that is *substantive* (rather than interpretive) is a different matter.

Block grants would be a profoundly different and new substantive approach to the Medicaid program. Such a substantive alteration is solely within the power of Congress and cannot be implemented through a state waiver amendment application. Remarkably, Medicaid's statutory promise of uncapped federal funding was acknowledged to be a barrier to block grants in the President's Fiscal Year 2020 Budget for HHS. The 2020 Budget emphasized the administration's desire for *new legislation* modeled after bills introduced in 2017 to replace the Patient Protection and Affordable Care Act.[9] These bills called for block grants in Medicaid, a feature of the bills that by many accounts contributed to backlash against repeal and replace efforts. Congress did not repeal the ACA and did not amend Medicaid, so Medicaid requires an unlimited federal match for Medicaid spending.

4. Predictable Harms Resulting From Capped Spending

No state could serve the purposes of Medicaid, *i.e.* furnish medical assistance, through capped spending, because no matter the structure or assurances from state officials in their application, such a cap foreseeably would result in disenrollment. The Congressional Budget Office wrote that block grants encourage states to take actions that include restricting enrollment for legally eligible beneficiaries, limiting mandatory and optional benefits, decreasing already low reimbursement rates (which may lead providers to abandon the program), a combination of all three, and more.

Capped spending would prompt states to make dangerous choices for patients. Only if a state severely restricts the benefits it will cover, or significantly reduces the amount it pays to health care providers – either of which would restrict patients' access to care – could cost savings occur. States could make other choices that are harmful to patients. For example, nearly half of states impose limits on the number of prescriptions Medicaid beneficiaries are able to fill at one time. States that do not have such policies might adopt them, and states that have already implemented such limitations may seek to tighten them – even though research suggests that such limits are harmful to patients.

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States always have had significant flexibility within Medicaid, but the federal rules exist for a reason – to protect both states and beneficiaries. Tennessee's proposed policy change attempts to bypass federal law. Section 1115 demonstration waivers cannot be granted for SSA section 1903. But even if they could be, demonstration waivers must be supported by rational decision-making that is supported by credible evidence that the proposal will promote Medicaid's objectives.

[7] 5 U.S.C. § 551 et seq.
[8] 5 U.S.C. § 553.
[9] Department of Health and Human Services, *Fiscal Year 2020 Budget in Brief* at 69, https://www.hhs.gov/sites/default/files/fy-2020-budget-in-brief.pdf.

Capped spending like Tennessee proposes, whether a modified block grant or otherwise structured, fails both of these legal requirements. Tennessee's application for a waiver amendment also cannot drive sweeping policy change in a federal program. The foreseeable outcome is that capped spending would very likely lead to disenrollment and other cost cutting measures that endanger the lives of the most vulnerable.

Sincerely,

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