THCA

TENNESSEE HEALTH CARE ASSOCIATION

Comments of the Tennessee Health Care Association/
Tennessee Center for Assisted Living
on
Rulemaking Hearing of the
Tennessee Department of Finance and Administration, Bureau of TennCare

Regarding amendments to replace the CHOICES Community Based Residential Alternative Emergency Rules filed on July 27, 2015

Revisions to Rules 1200-13-01-.02 and .05

Sequence # 08-07-17; Notice I.D. # 2344, File Date 8/11/2015

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Via Hand Delivery and Electronic Submission

The Tennessee Health Care Association (THCA) appreciates the opportunity to comment on Proposed TennCare rules promulgated to make assisted care living facility (ACLF) services available to persons in CHOICES 3 and to add Community Living Supports (CLS) and Community Living Supports – Family Model (CLS-FM) to the array of services available as community-based residential alternatives (CBRAs) within the TennCare benefit and service package.

I. General Comments Regarding the Legislative and Legal Authority for CLS Rules

The proposed rules flow from the submission and implementation of a Centers for Medicare and Medicaid Services (CMS) State Plan Amendment (SPA) to TennCare, identified as TennCare Amendment #24. THCA provided comments regarding the proposed Amendment #24 in writing on August 29, 2014. As noted in THCA's comments and the comments of other stakeholders, while TennCare did provide the opportunity to comment on Amendment #24, that opportunity was limited because the amendment failed to outline how the newly proposed services would be licensed, whether any new provider licensure would be created under state law, and how any oversight and/or licensure standards will be provided for these new services.

A. Authority for Rulemaking and Oversight of CLS Homes

During 2014 and early 2015, TennCare and its managed care organizations (MCOs) were providing CLS services without approval of Amendment #24, and prior to any public notice regarding the services even though the emergency rules published in July 2015. During the September Government Operations Committee hearing, TennCare stated, "Prior to the implementation allowed health plans to provide those services."

As noted in TennCare's February 10, 2015 letter responding to THCA's August 29, 2014 comments regarding Amendment #24, TennCare sought to expand the scope of Adult Care Home licensure in the 107th General Assembly. SB3158/HB3442 was introduced to "expand the facilities in which services can be provided thus increasing the alternatives available to individuals who would receive care in nursing homes..." by utilizing adult care homes that were intended to offer a lower cost residential alternative to persons who can no longer live alone and who do not have family or other caregivers to assist them. However, that legislation was not enacted. The only arguable policy enactment by the Legislature on this issue came in the form of the 2012 Tennessee Laws Pub. Ch. 1010 (S.B. 2225) which, in pertinent part, was codified in 2012 at T.C.A. §33-2-418(c).

T.C.A. §33-2-418(c) states, "Notwithstanding any law or rule to the contrary, a residential facility or provider licensed by the department of intellectual and developmental disabilities to provide residential services to persons with intellectual or developmental disabilities shall not be prohibited from providing *residential services to the elderly or adults with physical disabilities* (Emphasis added), so long as the services are adequate to ensure the health, safety and welfare of each resident." It is important to note the primary intent of this legislation was to transfer responsibility for licensing services, facilities, and personal support services operated for individuals with intellectual and developmental disabilities from the Department of Mental Health (DMH) to the Department of Intellectual and Developmental Disabilities (DIDD). The legislation was not intended to and did not purport to create a new set of licensed providers that would provide services under the CHOICES program. There is no mention in the legislation about the CHOICES program. The actual text of the authority in the legislation applies only to "residential services," it does not provide the authority of any DIDD provider to otherwise provide health care services to individuals other than those with intellectual or developmental disabilities. As explained below in THCA's comment, the scope of CLS services therefore creates contradictions with the rulemaking. The rulemaking notice cites no legislative authority flowing from the Long Term Care Community Choices Act (LTCCA), codified in Title 71, Chapter 5, Part 14. THCA notes, as well, that while TennCare relies on the LTCCA for the impetus for these changes, the act itself specifically expresses the legislature's intent that licensure requirement for "cost-effective residential alternatives to nursing facility care" be done through and in conjunction with the Board for Licensing Health Care Facilities.[1] We do not believe the legislature contemplated the comprehensive overhaul of standards and services pertaining to elderly disabled individuals as TennCare has proposed based on the language of the 2008 LTCCA and the opaque changes to Title 33 in 2012.

B. Use of Emergency Rule Processes

THCA also believes TennCare's implementation of CLS services through emergency rule is not consistent with T.C.A. §4-5-208. At the Government Operations Committee meeting held on

[1] T.C.A. §71-5-1411(b) states, "The commissioner and the board for licensing health care facilities shall work to develop or modify, or both, licensure requirements for such facilities to support a nursing facility substitute framework for members who want to age in place in residences that offer increasing levels of cost-effective home and community-based care as an alternative to institutionalization as members' needs change".

September 16, 2015, TennCare explained that it had the authority to implement CLS services by emergency rule because the approval of Amendment #24 without immediate delivery of those services "would potentially jeopardize the receipt of federal funds." Though not comprehensive, THCA is unable to cite any instance where CMS has threatened the loss of federal funds for not implementing services changes through a normal rulemaking process. Additionally, taken to an extreme, because nearly all changes in the TennCare program involve some type of SPA or approval from CMS, it could argue nearly universally that TennCare could act to change the program through emergency rules. It is, therefore, ironic that the initial change to the CHOICES program itself from fee-for service Medicaid, was able to be accomplished through normal rulemaking. While THCA expects TennCare's disagreement with the above position, THCA feels using the normal rulemaking process is critical because non-emergency rulemaking promotes important values including public deliberation, reasoned agency decision-making, and agency accountability to both the public and to the legislative branch who wish to call attention to policy changes before they are made.

II. Comments Regarding Specific Aspects of the Proposed Rules

A. The Scope of Services Allowed in the Identified DIDD Licensure Regulations Are Not Sufficient to Provide for the Needs of the CLS Target Population and, specifically, CLS3 recipients.

As THCA has repeatedly expressed, there is a pressing need for clearly articulated and robust licensure standards for the CLS and CLS-FM services, given TennCare's expressed intent to target these services on individuals who at a high level of acuity, and in some cases are close to or above the current TennCare medical eligibility standards for an individual who resides in a TennCare certified nursing facility. TennCare's Amendment #24 at Attachment D specifically identifies this class of TennCare beneficiary as the "target" by defining CBRA as follows:

> *Community-based residential alternatives to institutional care (Community-based residential alternatives). Residential services which offer a cost-effective, community-based alternative to nursing facility care for persons who are elderly and/or adults with physical disabilities. This includes, but is not limited to, assisted care living facilities, adult care homes, community living supports, community living supports – family model, and companion care. (Emphasis added)*

The inclusion of very high acuity individuals in TennCare's targeting of CLS services is further reinforced by TennCare's service descriptions of CLS, particularly CLS3, which is explained as:

> *…CHOICES members with higher acuity of need who are likely to require supports and or supervision twenty four (24) hours per day due to the following reasons* ***advanced dementia or significant cognitive disability*** *that impacts the member's ability to make decisions, perform activities of daily living, or instrumental activities of daily living,* ***including behaviors which places the member or others at risk; significant physical disabilities that require frequent intermittent hands-on assistance*** *with activities of daily living including toileting, transfers, and mobility complex health conditions and compromised health status requiring medication assistance and* ***daily nurse oversight and monitoring and/or daily skilled nursing services*** *as needed for routine ongoing health care tasks such as blood sugar monitoring and management, oral suctioning, tube feeding, bowel care, etc. (Emphasis added)*

The intent of the regulation and TennCare's public statements regarding CLS services have been clear that these services are targeted to provide an alternative to nursing facilities for individuals with significant physical impairments and disabilities who already would meet the very high acuity level of care for a nursing facility as established by TennCare and most recently increased in July 2012. It is also clear TennCare intends these services to be delivered by CLS providers to beneficiaries whose disabilities from both intellectual and developmental disabilities, as well as medical and psychosocial impairments that are not considered with the traditional DIDD population. Therefore, given those assumptions, the arrangements for CLS services must be arranged in a way to ensure CLS service recipients receive both residential services, as well as all of the services *medically* necessary for their care. The proposed rules state this very point –"A CLS or CLS-FM provider shall not admit a Member and CLS or CLS-FM services shall not be authorized for a CHOICES Member unless the CLS or CLS-FM provider is *able to safely meet the Member's needs and ensure the Member's health, safety and well-being.*" (emphasis added).[2]

In additional to the arguments regarding the legal authority for CLS services, THCA also questions how the DIDD licensure contemplates and adequately provides for the provision of those medically necessary services. While not specifically addressed within the proposed rule,[3] TennCare has previously publicly stated that CLS providers must be licensed by DIDD as follows:

- *For CLS1, CLS2, CLS-FM1, CLS-FM2 - Mental Retardation Semi-Independent Living Services*
- *For CLS3 and CLS-FM3 - Mental Retardation Supported Living Facility and/or Mental Retardation Residential Habilitation Facility Provider*

It should be noted that DIDD rules for these providers as identified in the title of the facilities themselves, only contemplate providing services to individuals with mental retardation. When one reviews how DIDD licensure rules define each of the three noted CLS provider types, it is clear those licensure rules do not contemplate the provision of any health care services by those providers.[4] Those entities are not contemplated to provide the list of health care services outlined by TennCare for CLS3; most notably because within the applicable general rules specifically define "personal care services" as "services provided to a service recipient *who does not require chronic or convalescent medical or nursing care.* (emphasis added)"[5] Even an arguably higher level of licensed facility (Mental Retardation Institutional Habilitation Facility) is an entity contemplated to provide "to individuals with mental retardation *who do not require the degree of care and treatment which a hospital or skilled nursing facility* is designed to provide (emphasis added)"[6] Therefore, the licensure rules under which CLS is intended to operate appear to directly conflict with the proposed TennCare CLS rules.[7] For example, the "Requirements for Community Living Supports (CLS) require the CLS to "be responsible for the provision of all

[2] T.R.R. §1200-13-01-.05(p)(2)(i)(III).
[3] While TennCare has publically identified three (3) levels of CLS services prior to issuing its emergency and proposed rules, neither rulemaking proposal provides any distinctions for these levels of services.
[4] See T.R.R. §0940-05-01.05(7), (9) and (10)
[5] See T.R.R. §0940-05-01-.01(38)
[6] T.R.R. §0940-05-01-.05(4)
[7] Notably, the rules at 1200-13-01-.05(p)state that the proposed standards "supplement" requirements set forth in the licensure requirements set forth in the licensure rules applicable to the specific CBRA provider.

assistance and supervision required by program participants," which the rules propose may legally include "managing acute or chronic health conditions, including nurse oversight and monitoring, administration of medications, and skilled nursing services as needed for routine, ongoing health care tasks such as blood sugar monitoring and management, oral suctioning, tube feeding, bowel care, etc., by appropriately licensed nurses practicing within the scope of their licenses."[8] 1200-13-01-.05(p). THCA finds it impossible to reconcile how a provider entity can be in compliance with this provision when it is not licensed to provide services to elderly and disabled individuals and its licensure rules do not authorize the provision of any health care services.

B. Proposed Life Safety Regulations May Not Adequately Protect CLS Recipients

THCA has concerns that when taking into account the impairments described in the target population, the proposed rules and the incorporated licensure requirements may not adequately protect CLS recipients, particularly CLS3 populations. The service definitions above identify CLS3 residents as having "advanced dementia or significant cognitive disability that impacts the member's ability to make decisions" and "significant physical disabilities that require frequent intermittent hands-on assistance." Based on these descriptions, it is reasonable to presume that some, if not many CLS3 residents will not meet the "mobile non-ambulatory individual" definition in the DIDD rules.[9] Additionally, some, if not many CLS3 recipients will not be capable of self-preservation.[10]

The fire safety and life safety features required for proposed CLS providers do not appear tailored to individuals with this level of disability and impairment. The proposed rules appear to require CLS provider residences to have only "an operable smoke detector and a second means of egress."[11] The incorporated licensure requirements do provide some additional life safety requirements, including the requirement that some provider must generally meet health care occupancy standards. However, the rule provides no differentiation between CLS providers and allows any type of CLS provider to accept any individual regardless of their level of impairment. This creates a situation where a purely residential occupancy, with only smoke detection could accept an individual with severe dementia who cannot make decisions for themselves. Additionally, the construction of the DIDDS rules are divided into multiple chapters, some applicable to some providers and some not, and even conditionally applicable to providers based on patient abilities. Both aspects create a situation where the safeguards against a provider accepting CLS residents beyond their ability to provide care are likely to be inadequate.

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[8] See proposed rule §1200-13-01-.05(p)(5)(vii)(IV).

[9] T.R.R. §0940-05-01-.019((35) - "Mobile Non-ambulatory Individual" means an individual who is able, without other assistance, to transfer to and move about only with the aid of a wheelchair, walker, crutch, wheeled platform, or similar device.

[10] T.R.R. §0940-05-01-.01(5) - "Capable of Self-Preservation" means that a service recipient is capable of responding to an approved emergency signal, including prompting by voice, by following a pre-taught evacuation procedure within a reasonable time limitation whether or not the service recipient is fully aware of the reasons for the action. A service recipient is capable of self-preservation if the service recipient is able to transfer unassisted from the bed or another fixed position to an individualized means of mobility, which is continuously available, and able to demonstrate the ability to transverse a pre-defined means of egress from the facility within a reasonable time limitation. Service recipients who have imposed upon them security measures beyond their control, which prevent their egress from the facility, are not capable of self-preservation.

[11] See proposed rule §1200-13-01-.05(p)(5)(vi).

THCA suggests the proposed rules should be amended to require all CLS provider residences to be equipped with automatic sprinkler systems and, most specifically, if those settings are provider owned or controlled.[12] Tennessee has enacted this requirement for all other long term care providers, such as nursing home and assisted living facilities, because of the recognition that individuals with this level of impairment require that level of life safety protection. THCA believes those protections should not be less robust for individuals who are in the "nursing home alternative" setting of CLS. THCA also suggests the requirements for the varied "levels" of CLS and CLS-FM services (1-3) be established and clearly stated in the rule. THCA believes that, at a minimum, any CLS3 provider must meet health care occupancy standards, and these standards should be consistent with the protection provided in the settings where those individuals might otherwise reside.

C. CLS Ombudsman

THCA believes the independence of the proposed ombudsman is essential to ensuring that patient choice of services is preserved and any conflicts of interest between beneficiaries, MCOs, case coordinators, and TennCare are appropriately resolved. THCA recommends that proposed rule 1200-13-01-.05(p)(3) include language specifically recognizing that independence of that ombudsman, such as, "The CLS Ombudsman shall be employed and/or contracted with an agency that is separate and distinct from the TennCare Bureau."

D. Delineation of CLS Requirements

Proposed Rule 1200-13-01-.05(p)(1) explains the requirements for CLS services set forth are in addition to licensure rules, as well as "requirements for Managed Care Organizations who administer CBRAs in the CHOICES program, requirements set forth in MCO provider agreements with CBRA providers, and other applicable state laws and regulations, and program policies and protocols applicable to these services and/or providers of these services." THCA recommends either the rule specifically outline these requirements, or that a readily available listing and citation to the incorporated requirements be provided. Doing so will provide more transparency for entities wishing to become CLS providers as well as TennCare recipients wanting to understand the CLS requirements.

E. Protections for Beneficiaries Choosing to Reverse Election of CLS

THCA is in agreement and supportive of the provisions in the proposed rule that make efforts to ensure CLS is a freely elected choice of the beneficiary. However, given the relative newness of the service and potential variability in the skills and quality of CLS providers, THCA suggests TennCare adopt a provision allowing a beneficiary to subsequently reverse their election of CLS without penalty. As currently set forth in TennCare rules, an individual electing CLS who chose to reverse their decision could be subject to revised criteria for eligibility for CHOICES 1, 2, or 3. This would come about if that individual had either 1) been receiving nursing facility services under PAE criteria in effect prior to July 1, 2012, or 2) if that individual was a non-SSI CHOICES Group 3 beneficiary (prior to July 1, 2015). In either instance, THCA suggest TennCare adopt a provision in the rules allowing that if a

[12] Amendment of the CLS rules is appropriate given that this level of service is a creation of TennCare reimbursement, rather than any process to establish a new type of licensed provider.

beneficiary reverses their election for CLS services, they would return to the eligibility status they were at prior to their election of CLS services.

Given the variability of the criteria and standards for CLS providers, THCA members have raised questions about their responsibility and liability if they are asked to discharge an individual to a CLS provider, but the facility does not feel the setting provides a safe discharge as required by federal regulations. THCA requests TennCare respond to those concerns by explaining whether for other regulatory purposes the facility can rely upon the determination of TennCare and the MCO that the movement of the individual constitutes a "safe discharge." THCA would also suggest the inclusion of language in the rule at (p)(2)(III) stating, "Any provider of services to a CHOICES beneficiary may accept the determination under this rule that the setting is appropriate for the individual to be sufficient to ensure the individual's placement is a safe and appropriate discharge."

F. Nursing Facility "Safe Discharge" Issues

Given the variability of the criteria and standards for CLS providers, THCA members have raised questions about their responsibility and liability if they are asked to discharge an individual to a CLS provider, but the facility does not feel the setting provides a safe discharge as required by federal regulations. THCA requests TennCare respond to those concerns by explaining whether for other regulatory purposes the facility can rely upon the determination of TennCare and the MCO that the movement of the individual constitutes a "safe discharge." THCA would also suggest the inclusion of language in the rule at (p)(2)(III) stating, "Any provider of services to a CHOICES beneficiary may accept the determination under this rule that the setting is appropriate for the individual to be sufficient to ensure the individual's placement is a safe and appropriate discharge."

III. Conclusion

THCA appreciates the opportunity to comment on this proposed rule and looks forward to working with TennCare on the provisions.

TennCare Response to Comments on Rule 1200-13-01-.02 and .05

Rule Citation	Commenter	Comment(s)	Response
1200-13-01-.02 and .05	Tennessee Health Care Association / Tennessee Center for Assisted Living	General comments regarding the legislative and legal authority for CLS Rules. A. Authority for Rulemaking and Oversight of CLS Homes B. Use of Emergency Rule Process	T.C.A. § 33-2-418(c), passed by the General Assembly in 2012, provides authority for a residential facility or provider licensed by the department of intellectual and developmental disabilities to also provide residential services to the elderly or adults with physical disabilities. The practice of nursing, including nurses who might perform skilled nursing services for individuals receiving CLS or CLS-FM services is regulated by the board of nursing as set forth in T.C.A. Title 63, Chapter 7. This is not an Emergency Rule. As described in the Emergency Rule Filing Form, T.C.A. § 4-5-208(4) permits an agency to adopt an emergency rule when it is required by an agency of the federal government and the adoption of the rule through ordinary rulemaking procedure might jeopardize the loss of federal funds.
1200-13-01-.02 and .05	Tennessee Health Care Association / Tennessee Center for Assisted Living	The scope of services allowed in the identified DIDD licensure regulations are not sufficient to provide for the needs of the CLS target population and, specifically CLS 3 recipients.	Providers licensed under the applicable licensure requirements currently serve residents enrolled in Section 1915(c) waivers with needs that are commensurate with the CLS target population, including individuals who may qualify for CLS-3 reimbursement. Individuals who require health care services in addition to assistance with personal care are entitled pursuant to the Americans with Disabilities Act to receive services in the most integrated setting

			appropriate, and cannot be restricted, on the basis of their disability, only to services in an institution, i.e., nursing facility.
1200-13-01-.02 and .05	Tennessee Health Care Association / Tennessee Center for Assisted Living	Proposed life safety regulations may not adequately protect CLS recipients.	See comment above. Providers licensed under the applicable licensure requirements currently serve residents enrolled in Section 1915(c) waivers with mobility needs and cognitive limitations at least as significant as the CLS target population, including individuals who may qualify for CLS-3 reimbursement. As with health care services, individuals who need assistance with mobility or cognitive limitations cannot be restricted, on the basis of their disability, only to services in an institution, i.e., nursing facility.
1200-13-01-.05 Paragraph (8) new Subparagraph (p) 3. CLS Ombudsman	Tennessee Health Care Association / Tennessee Center for Assisted Living	CLS Ombudsman – THCA believes that the independence of the proposed ombudsman is essential to ensuring that patient choices of services is preserved and any conflicts of interest between beneficiaries, MCOs, case coordinators, and TennCare are appropriately resolved. THCA recommends that the rule include language specifically recognizing that independence of that ombudsman such as, "The CLS Ombudsman shall be employed and/or contracted with an agency that is separate and distinct from the TennCare Bureau."	Based on your comments, recommended language has been added in 1200-13-01-.05(8)(p)(3)(i).

1200-13-01-.05 Paragraph (8) new Subparagraph (p) 1. Intent	Tennessee Health Care Association / Tennessee Center for Assisted Living	Delineation of CLS requirements – THCA recommends either the rule specifically outline the requirements referenced in Paragraph (8), new Subparagraph (p), (1) or that a readily available listing and citation to the incorporated requirements be provided.	The Contractor Risk Agreement (CRA) between TennCare and the Managed Care Organizations is posted on TennCare's website. TennCare Provider Agreement requirements are also delineated in the CRA. All state laws and regulations are publicly available.
1200-13-01-.02 and .05	Tennessee Health Care Association / Tennessee Center for Assisted Living	Protections for beneficiaries choosing to reverse election of CLS – THCA recommends that TennCare adopt a provision that allows members to subsequently reverse their election of CLS without penalty.	In the CHOICES program, individuals have the right to choose where they receive their care. They can choose to receive their care in their home or in another place in the community like an assisted living facility or a CLS home. And, for individuals that meet nursing facility level of care, they can choose to receive their care in a nursing facility. A CHOICES member can request a change in their plan of care (and care setting) at any time. Members are never penalized for changing care settings. The TennCare waiver already permits TennCare to grant an exception for a person in the community seeking NF admission who continues to meet the NF LOC in place at the time of enrollment into CHOICES 1 when such person has transitioned to the community and requires readmission to the NF. In response to your comment, this will also be added to TennCare Rule 1200-13-01-.05(3)(b)4. Further, based on your comments, additional language has been added at 1200-13-01-.05(8)(p)(2)(ii) to clarify this choice.
1200-13-01-.02 and .05	Tennessee Health Care Association / Tennessee	Nursing Facility "safe discharge" issues – In instances	As THCA is aware, TennCare is not the State Survey Agency as specified in the State Medicaid Plan.

	Center for Assisted Living	where THCA member providers do not feel that the CLS setting provides a safe discharge as required by federal regulations, THCA requests TennCare respond to those concerns by explaining whether for other regulatory purposes the facility can rely on the determination of TennCare and the MCO that the movement of the individual constitutes a "safe discharge." THCA recommends the inclusion of language in the rule at (p) (2) (III) stating,, "Any provider of services to a CHOICES beneficiary may accept the determination under this rule that the setting is appropriate for the individual to be sufficient to ensure the individual's placement is a safe and appropriate discharge."	TennCare cannot therefore provide interpretation of federal regulations which are carried out by the State Survey Agency in accordance with the State Operations Manual and other federal guidance documents pertaining to federal survey requirements and processes. Nonetheless, the proposed rule makes clear that *"A Member shall transition into a specific CBRA setting and receive CBRA services only when...[t]he setting has been determined to be appropriate for the Member based on the Member's needs, interests, and preferences. A CLS or CLS-FM provider shall not admit a Member and CLS or CLS-FM services shall not be authorized for a CHOICES Member unless the CLS or CLS-FM provider is able to safely meet the Member's needs and ensure the Member's health, safety and well-being."* In addition, transition to CLS or CLS-FM does not relieve the NF of its responsibilities under the law to provide for other aspects of an appropriate discharge plan that are critical to the member's health and safety. For example, the NF might fail to ensure that the resident's clinical record is appropriately documented by the resident's physician. This could result in the CLS provider not being fully informed of the person's needs in order to properly evaluate the provider's ability to deliver appropriate supports. Further, notwithstanding the appropriateness of the CLS or CLS-FM provider and setting, the NF might also fail to provide proper orientation for transfer or discharge, for example, by failing to ensure that written discharge instructions are provided.