

October 2, 2015

Mr. Darin Gordon, Director
Bureau of TennCare
Tennessee Department of Finance and Administration
310 Great Circle Road
Nashville, TN 37243

Re: TennCare II Demonstration Amendment 18: Assisted Care Living Facility (ACLF) Services
TennCare II Demonstration Amendment 24: Community Living Supports Services.

Dear Mr. Gordon,

I am the Charles Warfield Legal Fellow at the Tennessee Justice Center and I am writing on behalf of a coalition of advocates for individuals with disabilities and aging adults who represent the CHOICES population. We write to comment on the proposed regulations implementing Community-Based Residential Alternatives (CBRAs) to institutional care for CHOICES members eligible for Groups 2 and 3 services.

We believe CBRAs present an opportunity to serve those members who do currently not have safe or suitable housing situations to utilize the Home and Community-Based Services (HCBS) offered by the CHOICES program. We appreciate the Bureau of TennCare's effort to open HCBS to those who would not otherwise be able to access them. Ideally, if implemented with sufficient oversight and member participation, this program could afford some CHOICES enrollees an opportunity to remain engaged and active within their community while they receive necessary health services, rather than resort to institutionalization to obtain the care they need.

We write to highlight the areas this program could be strengthened; to ensure that adequate safety protocols are implemented and that CHOICES enrollees are empowered in their decision-making within this new care setting. We are particularly motivated to ensure there is sufficient oversight and structural support to promote the enrollees' safety and choice.

Member Choice

We appreciate the Bureau's efforts to underscore Member Choice within CBRAs including the choice to select this new care setting, an opportunity to meet and choose housemates, and to have a voice in the staff who provide the Member's services. However, the proposed regulations empower only the member or his or her legal representative to exercise those choices, without providing the member a right to consult family members or other advocates. We would recommend that the Bureau adopts a Supported Decision Making model to provide members the supports they may require to exercise their legal capacity. This model would utilize measures that safeguard abuse that are proportional and tailored to the member's capabilities and strengths, such providing decision facilitators and encouraging family involvement in decision making.

Family involvement

The current regulations provide only the member or legal representative any meaningful involvement in the selection of the CBRA provider, housemates, and staff. Because the goal of HCBS is to permit members to remain active and engaged within their community and circles of support, we

recommend the regulations encourage the involvement the member's family in decision-making, so long as it is permitted by the member him or herself. Family involvement in the decision making will ensure full consideration of the member's needs within the community is regarded.

Freedom of movement

We are concerned that the structure of this program can impede members from effectively change their minds if they determine a CBRA setting or a particular provider is not suited for them. The Member Choice section of the regulations affords members an "opportunity" to select the provider as well as meet and choose housemates prior to moving to a CBRA setting. We would also suggest that members should be afforded a window of time after moving to the CBRA setting, to change their minds and return to previous care setting. For residents transitioning from nursing facilities, this would include a bedhold for therapeutic leave while the member finalizes his or her decision to transition to CBRA. This window to change, preferably at least 7 days after admission to the CBRA, would ensure that members are afforded their full choice in selecting appropriate care settings before making a permanent transition.

Lease requirements

A member's freedom to leave the CBRA setting would be severely impinged if he or she is required to sign a lease pursuant to the Tennessee Uniform Landlord and Tenant Act (TURLTA) immediately upon beginning services at a CBRA. TURLTA lease provisions could seriously limit a member's freedom to move by requiring 30 days' notice to the CBRA provider and retaining a full month's rent. That requirement may also preclude a member for returning to a nursing facility for care if they are unable to provide the required patient liability. To fully ensure that members may leave a care setting they do not find optimal for their needs, the regulations should permit members to leave with limited notice requirements under specific circumstances, such as a window after admission, after a staffing change, or after a substantial change to the member's care plan. The regulations should also permit the member to only pay a pro-rated sum for the month they leave a CBRA provider.

We also request clarification from the Bureau for whether CLS or CLS-FM providers would be approved landlords for the purposes of accepting HUD Section 8 housing vouchers. If CLS and CLS-FM providers would not act as approved landlords for such a purpose or would only act as such on a case-by-case basis, we would request that members are advised of their rights to use their HCBS benefits in a different care setting that would also allow them full opportunity to use such vouchers.

Member Safety

CLS Ombudsman

We are pleased the Bureau has provided access to a CLS Ombudsman to members receiving care in a CLS or CLS-FM setting to provide education, advocacy, and oversight in this new care setting.. However, we would request clarification on how the CLS Ombudsman's services are advertised and made available to members. We would recommend that each provider is required to prominently post the contact information for the CLS Ombudsman, provide meaningful access to telephones, and private space to meet with the CLS Ombudsman at the provider site.

Background checks

We are also concerned that the new regulations do not specifically outline the background check requirements for CLS and CLS-FM providers, including who would be subject to such background checks and when such checks must be completed. For CLS-FM providers in particular, we request clarification for which members of the family must submit to and whether visitors or guests of the family must also submit to such checks. We would recommend that all CLS and CLS-FM staff members submit to background check prior to employment with the provider. We would further recommend all individuals who visit the CLS-FM home for business or pleasure more than once per month or stay with the CLS-FM provider as overnight guests submit to a background check prior to their visit.

Staffing change

We would also recommend the Bureau provide members notice and opportunity to change care settings or providers if there is a staffing change at a CLS or CLS-FM provider. This is particularly important if there is a change in the family dynamic within a CLS-FM provider that may change the staff that provides the member's services and supports. We want to ensure that members have access to a continuity of care at a time of household change and are afforded similar rights to choose the new staff members or change providers if they feel their current setting cannot meet their needs.

We appreciate the Bureau's consideration of these recommendations and would welcome an opportunity to further discuss them in detail. Thank you for all you have done to help the families CHOICES serves.

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

Rule Citation	Rule Language	Commenter	Comment(s)	Response
1200-13-01-.05	<p>Paragraph (8) new Subparagraph (p)</p> <p>2. Requirements for CBRAs</p> <p>(i) Member Choice</p> <p>(ii) Member Rights</p>	Tennessee Justice Center	<p>Member Choice – The proposed regulations empower only the member or his or her legal representative to exercise choice, without providing the member a right to consult family members or other advocates. We would recommend that the Bureau adopts a supported decision making model to provide members the supports they may require to exercise their legal capacity.</p>	<p>The Home and Community-Based Services (HCBS) Regulations (specifically 42 C.F.R. § 441.301(c)(1) issued by CMS establishes requirements for person-centered planning in Medicaid HCBS programs. In this final rule, CMS specifies that service planning for participants in Medicaid HCBS programs must be developed through a person-centered planning process. The federal regulations require that, “The individual will lead the person-centered planning process where possible. The individual's representative should have a participatory role, as needed and as defined by the individual, unless State law confers decision-making authority to the legal representative. All references to individuals include the role of the individual's representative. In addition to being led by the individual receiving services and supports, the person-centered planning process:</p>

					<p>(i) Includes people chosen by the individual.</p> <p>(ii) Provides necessary information and support to ensure that the individual directs the process to the maximum extent possible, and is enabled to make informed choices and decisions...”</p> <p>The TennCare rules were written to ensure compliance with the Home and Community-Based Services (HCBS) Settings Final Rule and do not preclude an individual from including others of their choosing to participate in the planning process.</p> <p>Based on your comments, we have added language in 1200-13-01-.05(8)(p)(2)(iii)(XI) and 1200-13-01-.05(8)(p)(2)(v) and (vi) to further clarify the member’s ability to include family members and others in the planning and decision making processes and to be supported by family members and others in exercising legal capacity.</p>
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1200-13-01-.05	<p>Paragraph (8) new Subparagraph (p)</p> <p>2. Requirements for CBRAs</p> <p>(i) Member Choice (ii) Member Rights</p>	Tennessee Justice Center	<p>Family Involvement – The current regulations provide only the member or legal representative any meaningful involvement in the selection of the CBRA provider, housemates, and staff.</p>	See above.
1200-13-01-.05	<p>Paragraph (8) new Subparagraph (p)</p> <p>2. Requirements for CBRAs</p> <p>(i) Member Choice</p>	Tennessee Justice Center	<p>Freedom of Movement – Members should be afforded a window of time after moving to the CBRA setting to change their minds and return to previous care setting. For residents transitioning from nursing facilities, this would include a bed hold for therapeutic leave while the member finalizes his or her decision to transition to CBRA.</p>	<p>In the CHOICES program, individuals who qualify for nursing facility level of care have the right to choose where they receive their care. So long as their needs can be safely met, they can choose to receive their care in their home, or in another place in the community (like and assisted living facility or a CLS home), or in a nursing facility. A CHOICES member that meets nursing facility level of care is free to choose their care setting (including returning to a nursing facility) at any time. No particular window of time can be applied.</p> <p>Based on your comments, additional language has been added at 1200-13-01-.05(8)(p)(2)(ii) to further clarify this choice.</p> <p>However, it would not be appropriate to reimburse a NF</p>

				for a bed hold once a member has transitioned into a CBRA. Pursuant to TennCare Rule 1200-13-01-.03(9)(a)(1), the first condition for reimbursement of a nursing facility bed hold is that the resident intends to return to the NF. Instances in which a member has chosen to transition to a CLS home do not meet this condition. As stated above, should the member choose to return to the NF, they are free to do so as long as they continue to meet NF level of care.
1200-13-01-.05	<p>Paragraph(8) new Subparagraph (p)</p> <p>5. Requirements for Community Living Supports</p> <p>(v) lease agreement</p> <p>6. Requirements for Community Living Supports Family Model (CLS-FM) Services</p> <p>(v) lease agreement</p>	Tennessee Justice Center	Lease requirements – To fully ensure that members may leave a care setting they do not find optimal for their needs, the regulations should permit members to leave with limited notice requirements under specific circumstances, such as a window after admission, after a staffing change, or after a substantial change to the member’s care plan.	The Home and Community-Based Services (HCBS) Regulations (specifically 42 C.F.R. § 441.301(c)(4)-(6)) issued by CMS also establishes requirements for home and community-based settings in Medicaid HCBS programs. Included in this rule are requirements that provider-owned or provider-controlled residential settings include provisions that: 1) the specific unit/dwelling is owned, rented, or occupied under legally enforceable agreement and 2) affords the individual the same

					<p>responsibilities/protections from eviction as all tenants under landlord tenant law of state, county, city or other designated entity OR if tenant laws do not apply, state ensures lease, residency agreement or other written agreement is in place providing protections to address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.</p> <p>The lease provisions included in the TennCare rule are required by CMS and ensure the member's legal protections are the same as other Tennesseans not receiving Medicaid reimbursed long-term services and supports. This includes a member's ability to terminate a lease.</p> <p>Further, as noted above, a CHOICES member that meets nursing facility level of care is free to choose their care setting at any time. This could include any of the specific circumstances identified. In addition, we do not want a</p>
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					<p>member to have to move as a result of a staffing change. Per the HCBS Setting and PCP final rule, members will have a say in who provides their services. Therefore, part of the purpose of requiring a lease arrangement is to help ensure continuity of the member's residence even when staff may need to change.</p>
1200-13-01-.05	<p>Paragraph(8) new Subparagraph (p)</p> <p>3. CLS Ombudsman</p>		Tennessee Justice Center	<p>CLS Ombudsman – Request clarification on how the CLS Ombudsman's services are advertised and made available to members. We recommend that each provider is required to prominently post the contact information for the CLS Ombudsman, provide meaningful access to telephones, and provide private space to meet with the CLS Ombudsman at the provider site.</p>	<p>The Bureau of TennCare has contracted with the Area Agencies on Aging and Disability (AAAD) to serve as CLS Ombudsman for members receiving the CLS and CLS-FM benefits. In their capacity as CLS Ombudsman, the AAAD will be responsible for: (1) Educating CHOICES members on CLS and CLS-FM services and the role of the CLS Ombudsman; (2) Conducting a pre-transition meeting with CHOICES members, during which the CLS Ombudsman will ensure that members are aware of their rights regarding choice and control in the CLS and CLS-FM service and that members understand how and when to contact the CLS Ombudsman; (3) Conducting</p>

					<p>CLS and CLS-FM transition surveys with CHOICES members prior to and after their transitions to CLS and CLS-FM residences; and (4) Providing ongoing assistance and advocacy for these members while receiving the service and systems level advocacy related to the CLS/CLS-FM service statewide.</p> <p>While we appreciate the importance of ensuring that individuals are aware of how to contact the CLS Ombudsman, requiring the information to be posted in individuals' homes infringes on individuals' rights to decorate their homes as they see fit and feels institutional in nature. Therefore, posting such information has been left to the discretion of the individual.</p> <p>1200-13-01-.05(8)(p)(3)(ii)(II) sets forth the responsibility of the Ombudsman to ensure that the Member knows how to contact the Ombudsman.</p> <p>In response to your comments, additional language has been added in 1200-13-01-</p>
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				<p>.05(8)(p)(3)(iii) and (iv) regarding the responsibility of the CLS or CLS-FM provider to ensure that CHOICES members receiving these services know how to contact the Ombudsman and that contact information is available in the residence in the location of the Member's preference, and which reinforces the right to privacy afforded to members under the HCBS Regulations (referenced above and elaborated in the Settings Compliance Requirement Toolkit developed by CMS), to include access to telephones and computers and to communicate in private, including while meeting with the Ombudsman.</p>
1200-13-01-.05	<p>Paragraph(8) new Subparagraph (p)</p> <p>5. Requirements for Community Living Supports</p> <p>(i) Providers of CLS services in the CHOICES program shall:</p>	Tennessee Justice Center	<p>Background Checks – The regulations do not specifically outline the background check requirements for CLS and CLS-FM providers, including who would be subject to background checks and when such checks must be completed.</p>	<p>Sections #5 and #6 of paragraph (8) subparagraph (p) of the proposed rule (referenced in the second column) include requirements that CLS and CLS-FM providers comply with background check requirements specified in T.C.A. Title 33.</p> <p>Title 33, Chapter 2, Part 12 (33-</p>

	<p>(V) Comply with background check requirements</p> <p>6. Requirements for Community Living Supports Family Model (CLS-FM) Services</p> <p>(i) Providers of CLS-FM services in the CHOICES program shall:</p> <p>(V) Comply with background check requirements</p>			<p>2-1202), each facility or service licensed under chapter 2, part 4 of this title shall have a criminal background check performed on each employee whose responsibilities include direct contact with or direct responsibility for service recipients within ten (10) days of employment or within ten (10) days of a change in responsibilities that includes direct contact with or direct responsibility for service recipients.</p>
1200-13-01-.05			Tennessee Justice Center	<p>Staffing Change – We recommend the Bureau provide members notice and opportunity to change care settings or providers if there is a staffing change at a CLS or CLS-FM provider.</p> <p>TennCare agrees that member choice in staff and consistency in provider staffing have significant impact on the quality from the member’s perspective. Unfortunately, staffing changes do not always allow time for advance notice. Additionally, there are circumstances where allowing the worker to continue working is prohibited such as allegations of abuse, neglect, and exploitation.</p> <p>In response to your comments,</p>

					language has been added at 1200-13-01-.05(8)(p)(5)(iii)(I) and (II) to provide for notification when possible, as well as opportunity to assist in selecting new staff.
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