

Lawsuit History

National Health Law Program

Medicaid Managed Care Docket

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Tennessee

John B. v. Menke, No. 3-98-0168 (M.D. Tenn. Aug. 28, 1998) (Order). Counsel: Gordon Bonnyman and Michelle Johnson, Tennessee Justice Center (615) 255-0331; Mary Giliberti, Bazelon Center for Mental Health Law (Washington, DC); Jane Perkins, National Health Law Program.

Settlement, in a case challenging failure of managed care program to provide **EPSDT** services, included: improving outreach and informing (including targeted informing of at risk groups), updating and implementing statewide periodic screening requirements to identify both physical and mental health problems; clear definition of **medical necessity**, and enhanced measurements of performance.

Grier v. Wadley, No. 79-3107 (M.D. Tenn.). Counsel: Gordon Bonnyman, Lenny Croce, Michele Johnson, Russell J. Overby, Tennessee Justice Center (615) 255-0331

Revised consent decree, following motion for contempt in Daniels v. Wadley (see below), includes numerous provisions to improve and protect **due process** rights of individuals enrolled in the TennCare managed care program.

Daniels v. Wadley, No. 3:79-3107-NA-CV (M.D.Tenn., May 15, 1996). Counsel: Lenny L. Croce, Rural Legal Services of Tennessee (615) 483-8454.

The court held that actions taken by MCOs to deny or terminate eligible Medicaid recipients' covered health plan services constituted state actions that triggered federal **due process** notice and hearing requirements, 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 431.200 et seq.

Brandie Hinds v. Blue Cross and Blue Shield of Tennessee, No. 3:95-0508 (Dec. 28, 1995). Counsel: Lenny L. Croce, Rural Legal Services of Tennessee (615) 483-8454.

The court found a bowel or bowel and liver transplant service (including all pre- and post-transplant care and services and transportation for Brandie and her legal guardian to the University of Pittsburgh) to be medically necessary and ordered the BC/BS Managed Care Organization to provide the service. The Court relied upon the federal **EPSDT** requirements, 42 U.S.C. § 1396d(r)(5), and also found plaintiff had standing as a **third party beneficiary** to enforce specific contract provisions between BC/BS and TennCare regarding covered services.

Tennessee Medical Association v. Manning, No. 93-3839-I, *reprinted in* 1995 WL 228681 (Tenn. App. 1995).

The court dismissed this suit by TMA to halt implementation of TennCare. TMA alleged violations of federal laws regarding **payment** methodology, 42 U.S.C. § 1396b(m), and state **Administrative Procedure Act** violations regarding the adoption of MCO payment rates. However, the Court found that TMA lacked standing to bring a private cause of action because the case involved payments from the state to MCOs, not to providers.

Daniels v. White, No. 79-3107-NA-CV (M.D.Tenn, June 16, 1994). Counsel: Lenny L. Croce, Rural Legal Services of Tennessee (615) 483-8454.

The court refused to apply traditional Medicaid rules to newly eligible uninsured individuals under the state's waiver program. Specifically, the court held that the state did not have to undertake automatic **redetermination of eligibility** for plaintiffs eligible for coverage under the expansion program. In so doing, the court noted its "skepticism" that the TennCare waiver project was subject to the statutes relied on by plaintiffs, 42 U.S.C. §§ 1396a(a)(8) and 1396a(a)(19).

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- Federal Judge Orders Kids Out Of TennCare. Medicine & Health, Jan 14, 2002 v56 i2 p5(1).
 - A federal district judge Dec. 18 ordered Tennessee to set up separate coverage for 550,000 child TennCare enrollees, after determining that they were not receiving Medicaid's mandated periodic screening, diagnosis, and treatment services under the state's managed care coverage program. Under the ruling in the suit filed in 1998 by the Tennessee Justice Center, a special master, as yet unappointed, will oversee development of the separate coverage.
 - "TennCare, as it relates to the under 21 population, has proven to be unworkable," Judge John Nixon wrote in his opinion. State officials aren't sure whether child coverage utilizing managed care would be acceptable to Nixon. "The ruling could spell the end of ... TennCare ... if it means that managed care no longer can be used to provide services," TennCare Director Mark Reynolds told The Tennessean Jan. 9.
 - Nixon's ruling followed from the state's violation of an agreement it made with the federal government in 1998 "to provide well-child check-ups to 80 percent" of enrolled children," an over-ambitious promise that was doomed from the start, said The Tennessean Jan 11. The state has too few pediatricians to provide the screenings, "even if every one participated," state Rep. Gene Caldwell (D), MD, told the paper.
 - Judge gives TennCare go-ahead to trim rolls. Medicine & Health, Nov 19, 2001 v55 i42 p6(1).

- A U.S. district court judge approved procedures Nov. 14 for Tennessee state officials to immediately cut 52,000 people who have not paid their premiums or have invalid addresses from the rolls of TennCare, the state's big coverage program for Medicaid-eligible, low-income, and hard-to-insure people, the Tennessean reports. The court also approved procedures for reverifying the eligibility of all 635,000 TennCare enrollees who are covered by virtue of having been previously uninsured or being medically uninsurable; Medicaid-eligible enrollees are not subject to reverification.
- "TennCare is growing by 10,000 enrollees a month," says the paper. Federal matching funds pay two-thirds of TennCare's \$3.7 billion budget, but the state must pay in full for all enrollees in excess of a 1.5 million cap. On its current pace, enrollment is expected to hit that cap in February. The court stopped an earlier enrollment reverification effort in May on the grounds that enrollees hadn't been given a right to appeal their terminations.
- TennCare says it plans to seek major design changes. State Health Watch, Nov 2001 v8 i11 p3(2)
- When TennCare, Tennessee's innovative managed care program, submits a new federal waiver request in mid-December, it will seek significant changes to the program's design that will divide it into three parts and drop an estimated 180,000 people from coverage.
- In a Sept. 29 speech to the state, Gov. Don Sundquist said, "TennCare in its present form costs more than we can afford. It has more enrollees than we can pay for, and it covers more benefits than we can support."
- Although state officials have said that Tennessee would be spending \$40 million a year more to cover fewer people for health care had it not created TennCare seven years ago, there have been calls for radical changes to the program that is suffering more and more from budget problems.
- The waiver will seek permission to divide the program into three parts as of Jan. 1, 2003. TennCare Medicaid would be for the 820,000 residents who are eligible for Medicaid. TennCare Standard would be a traditional HMO for adults under the federal poverty level, children under 200% of the poverty level, and those that an independent underwriting firm designate as uninsurable. And TennCare Assist would be a subsidy program to help low-income families buy employer-sponsored health insurance.
- The level of state funding for TennCare Standard and TennCare Assist would dictate benefit levels and the number of people who would be covered.

- Insurance industry representatives had urged that the program be divided into two parts, one for beneficiaries who are categorically eligible under Medicaid and one for beneficiaries eligible through the state's expansion waiver.
- Tom Wildsmith, a representative for Health Insurance Association of America in Washington, DC, testified at a legislative oversight committee hearing that the state should reduce benefits to uninsured and uninsurable TennCare beneficiaries to ensure that the program doesn't compete with private insurers.
- During that hearing, state Rep. Gene Caldwell pointed out that waiver-eligible uninsured and uninsurable TennCare beneficiaries are required to pay premiums that bring additional federal matching funds to the program, and cautioned that the federal government might not provide matching funds for a redesigned TennCare program that has slashed benefits.
- Also at the hearing, TennCare Commissioner John Tighe said the number of uninsurable TennCare enrollees has jumped from 21,031 in 1994 to 163,040 this year, raising a concern that the innovative program has made it too easy for insurance companies to avoid writing coverage for sick individuals. "The 800% growth in uninsurables is a symbol of something going on," Mr. Tighe said. "We believe that TennCare has taken up 75% of the riskiest population, and the insurance companies have the remainder."
- Following the governor's announcement, advocates warned that the state's health care safety net would be stretched thin and clients would be adversely affected. And an editorial in the Memphis Commercial Appeal said that any TennCare "cure should not add to misery." The paper said people, including the governor, appear to be using the program as a scapegoat rather than address the state's "obsolete and unfair tax structure."
- The editorial said that for those who are dropped from TennCare, the "alternatives would be to do without health care or to seek expensive, uncompensated emergency department treatment. The latter option would place huge financial pressure on hospitals [privately insured patients] and the local governments [taxpayers] that support those hospitals. The lack of balance in the revamped program is troubling."
- The suggestion that TennCare be divided does not sit well with Tony Garr, executive director of the Tennessee Health Care Campaign in Nashville, an advocacy group.
- "The problem we're facing is a revenue problem," Mr. Garr tells State Health Watch. "Our state doesn't have an income tax and relies almost exclusively on a very high sales tax. Neighboring states have an income tax and thus lower sales taxes, and sales taxes that don't apply to food or clothing. Many of our people live

near those other states and can shop there. We were having problems even before the current economic slowdown, and now we're really in trouble."

- TennCare simply needs more money to keep up with the cost of medical inflation and has "become a whipping boy for the state's economic problems," Mr. Garr says. What's the problem? Given that state officials say the state is paying less than it would have paid, even when covering more people, Mr. Garr says he sees no reason to divide the population and slash benefits for one group, especially when even proponents of the move say they don't expect it to save any money. "We believe that TennCare is not the problem. TennCare actually has delayed the necessary discussions of tax reform because it has been able to control risk in health care."
- At public hearings on the proposed changes to TennCare recommended by a blue-ribbon panel, consumers expressed apprehension about the program being broken up, and providers said they could live with reduced payments if there were less administrative hassles with pre-approvals and other elements in the program design, Mr. Garr says.
- He adds that he'd rather see those changes pursued, instead of following the call of the insurers. "There's a bias that the private sector can take care of this better than government, but that's just not true. The state of Tennessee is our largest purchaser of health care services. We need to be the Wal-Mart of health care, insisting on the lowest possible prices. If the program is divided, the state will lose some of that bargaining power.
- "Another concern is that we got a really good deal in the terms in our federal waiver, but the agency might not be as willing to give those good terms if we change the program that way. I don't know what the motives are of those who say to divide the program since they don't expect it to save any money," Mr. Garr says.
- The financial analysis showing the benefit of TennCare was developed by comptroller assistant director Doug Wright, who compared Medicaid spending in 1993, the year before TennCare, with current TennCare spending.
- He inflated the 1993 figure by the medical consumer price index of 33%, resulting in \$921 million, and compared that figure to the state's 2001 TennCare spending, taking into account inflation and other factors, resulting in \$881 million. He made the same comparison between FY 1995 spending, the first full year of TennCare, and current spending. That analysis showed current spending is about \$20 million more than 1995 spending when inflated by the medical consumer price index.
- Mr. Wright's analysis also indicated that in 1999, the average Medicaid spending in other southern states was \$3,218 per enrollee, while Tennessee spent on average \$2,611 per Medicaid enrollee on TennCare. Had the state had a traditional

Medicaid program like other southern states, it would have spent \$485 million more for its 800,000 enrollees, Mr. Wright claims.

- Meanwhile, some hospitals, particularly in rural areas, have said that unless they receive additional funding from TennCare, they are in danger of closing and sending patients longer distances for care at larger safety-net hospitals. In 2000, the state provided \$90 million to hospitals with a disproportionately high number of TennCare and charity patients, but this current state budget allocates \$14 million in state funds (\$40 million with the federal match). The Tennessee Hospital Association has said that many hospitals, most of them rural and psychiatric facilities, won't get the funds they need to balance their budgets. In response, TennCare spokeswoman Lola Potter says the fate of rural hospitals is not decided by the program. "TennCare may help, but we can funnel only so much money to them. Cuts in Medicare reimbursement -- not inadequate TennCare funding -- are responsible" for the hospitals' financial problems.
- And as if there weren't enough problems, at the end of September, TennCare officials notified Access MedPlus, the largest managed care organization in TennCare, that it would be dropped from the program unless it demonstrated that its finances were in order. The threat came after Access failed to file a number of mandated financial documents. Although this would be the first time that TennCare has dropped a plan, there have been years of tension between Access and TennCare.
- The best solution
- Company officials have said they were underpaid \$20 million last year and also had been given a disproportionate number of costly and severely ill patients. They said Access had given state officials an independent analysis showing the level of underpayments and had been in lengthy negotiations over the plan's financial status.
- Mr. Garr says he thinks the best solution would be for Access to pull back from its statewide coverage and consolidate its offerings in the western part of the state, where it has its greatest strength.
- He also suggested that if Access were to consolidate in the western region, that areas Methodist Hospital might be willing to develop some sort of partnership that could help save Access.
- TennCare finally finds an answer. Memphis Business Journal, June 15, 2001 v23 i7 p62
- After eight years, it looks like Tennessee government will finally do what the state's business community has been seeking for many years: operate TennCare like a business. We've chronicled the troubles and misadventures of Medicaid and then

TennCare for more than 10 years in these pages. As a social issue, Medicaid is important, and as a business issue, we're concerned about any tax-funded program that overwhelms the rest of the state's budget. In all that time, and through two administrations, business leaders have said that for TennCare to survive as a social program it must be actuarially sound, and operated with sound business principles.

- It's at least gratifying that The Commission on the Future of TennCare, assembled by the governor and deliberating for a year, has suggested the same thing. Unlike the sculptors of TennCare, that commission had representatives from the provider industry, and was also able to come up with other solutions that have long seemed like common sense in the business world.
- That includes separating TennCare into three separate programs, each reflecting the particular needs of a group of people. Placing the uninsured and the uninsurable into the same pool with the Medicaid population only hid them from view for a while, but their unique concerns kept percolating to the surface.
- Just one case in point is TLC FamilyCare Health-plan, the only Memphis-based TennCare plan. Because of its affiliation with UT Medical Group, Inc., and all those specialists, TLC got a huge share of the chronically, seriously ill, yet was reimbursed using the same formulas for a healthy young person in East Tennessee.
- Instead, the new TennCare will keep the traditional Medicaid population in one plan but create a separate plan, TennCare Standard, specifically for those who are uninsurable, or cannot buy coverage through their employer.
- Another plan, TennCare Assist, will counter a perverse incentive for some businesses to shift their sick workers to TennCare, in order to keep their group health rates lower. This shifting will be much more difficult, and TennCare Assist will help those high-dollar employees buy into their private coverage.
- Both of these approaches may need special consideration from the federal government. They could be viewed as bold, innovative ways of dealing with a serious problem. They could also be viewed as inappropriate insurance subsidies for private businesses.
- Those with long memories already know that Tennessee has been a bellwether state when it comes to Medicaid funding schemes. We were the first to charge the bed tax, a scheme if there ever was one, in which taxes on hospitals were used to draw federal matching funds, and then returned to the hospitals. 37 other states copied this shell game before it was banned.

- Tennessee was also the first to leap into the icy water of Medicaid managed care in the form of TennCare, and now most states have followed suit, and many are having similar structural problems.
- The proposals to correct TennCare are thoughtful, creative, responsible and make good business sense, and should be implemented. With \$4 billion covering 1.3 million people, there's enough money in TennCare, if it's handled responsibly. The wild ride of TennCare has become wearisome, and it's time for TennCare to become a non-issue. It's time for the state to restructure this program.
- TENNCARE PROMISES IMPROVEMENTS. (Brief Article) Jennifer Silverman; Joyce Frieden. Family Practice News, March 1, 2001 v31 i5 p40. TennCare, Tennessee's beleaguered Medicaid managed care program, is trying to make amends with its providers. The plan recently paid out nearly \$110 million to some of its doctors and hospitals, with the lion's share--\$99.4 million--going to hospitals and clinics. The remaining \$10 million went to pediatric primary care providers and to providers in AIDS care, orthopedics, neurology, and dentistry. TennCare has made similar payments before, but this one was particularly large; last year's total was \$50 million. The Tennessee Medical Association applauded the payments but expressed disappointment at the string attached by HCFA: Doctors could cash the checks only if they agreed to sign up for TennCare for another
- Tennessee reform tempest: doctors are suing, and bolting from managed care plan. (TennCare the state's Medicaid reform plan) Laurie Jones. American Medical News, Jan 24, 1994 v37 n4 p2(3)

Abstract: TennCare, Tennessee's Medicaid privatization plan, is facing a number of obstacles. Two thousand two hundred physicians have dropped out of the state's Blue Cross/Blue Shield preferred provider organization because they would have to treat TennCare patients. In addition, the Tennessee Medical Assn is suing the program, charging that TennCare will add 500,000 new uninsured patients to the state's Medicaid program without providing adequate funding to treat them. Additional developments in the implementation of the program are also described.

- Regional news: South. Modern Healthcare, Jan 24, 2000 v30 p22
- NASHVILLE-Vanderbilt University Medical Center, which includes 576-bed Vanderbilt University Hospital, is blaming payment shortfalls from the state's Medicaid managed-care program, TennCare, and Medicare for a decision to cut 51 jobs. The jobs, which represent less than 1% of the medical center's total workforce, ar