

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

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|--|---|------------------|
| JANE DOE; CHRISSY MILLER, |) | |
| |) | |
| Plaintiffs/Petitioners, |) | |
| |) | |
| vs. |) | No. 24-0503-III |
| |) | CHANCELLOR MYLES |
| TENNESSEE DEPARTMENT OF |) | |
| SAFETY AND HOMELAND |) | |
| SECURITY; JEFF LONG, in his |) | |
| official capacity as the Commissioner |) | |
| of Tennessee’s Department of Safety |) | |
| and Homeland Security; and MICHAEL |) | |
| HOGAN, in his official capacity as the |) | |
| Assistant Commissioner of the Driver |) | |
| Services Division for Tennessee’s |) | |
| Department of Safety and Homeland |) | |
| Security, |) | |
| |) | |
| Defendants/Respondents. |) | |

**PLAINTIFF-PETITIONERS’ RESPONSE TO
DEFENDANTS’ MOTION TO DISSOLVE THE TEMPORARY INJUNCTION AND
REPLY IN SUPPORT OF
PLAINTIFF-PETITIONERS’ MOTION FOR STAY OF AGENCY DECISION**

Plaintiff-Petitioners’ Motion for Stay of Agency Decision should be granted, and Defendants’ Motion to Dissolve the Temporary Injunction should be denied for the reasons stated below.

BACKGROUND

For nearly thirty years, transgender Tennesseans have been able to obtain driver licenses from the Tennessee Department of Safety and Homeland Security (“Department”) that reflect their lived sex rather than the sex they were assigned at birth. *See* Decl. Order ¶ 10. In 2023, the Tennessee General Assembly passed a law defining “sex” for the purposes of the Tennessee code

as “a person’s immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person’s biological sex,” further defined as “includ[ing] but not limited to, a government-issued identification document that accurately reflects a person’s sex listed on the person’s original birth certificate”—“unless the context otherwise requires.” Tenn. Code Ann. § 1-3-105(c). Despite the statute having no language to direct agency action,¹ with no other statute authorizing the agency to deny applications, and without any public comment or statement about a change of regulations,² the Department began denying gender marker changes on state identification for transgender people in Tennessee on July 3, 2023.

Plaintiff Jane Doe’s request to change her gender marker on her driver license was subsequently denied by the Department. *See* Decl. Order ¶ 26. Petitioner Chrissy Miller’s request to change her gender marker on her driver license was initially approved. However, three months afterwards, the Assistant Commissioner of the Department sent Ms. Miller a letter demanding that she surrender the accurate license or face cancellation of her driving privileges. *See* Decl. Order ¶¶ 21-23. Counsel for Petitioners emailed the Department to inform them that Jane Doe had been denied a gender marker change although she had a letter from her doctor and a government identification document—a passport—that correctly listed her sex as female. *See* Sec. Amd. Compl Ex. B. Counsel asked the Department to confirm their denial and asked whether an appeal of the

¹ The facts of this case are detailed in the following filings, which are incorporated herein by reference: Plaintiff-Petitioners’ Renewed Petition for Judicial Review and Declaratory Judgment (filed May 12, 2025); Motion for Stay of Agency Decision (filed May 12, 2025); Second Amended Verified Complaint for Declaratory Judgment and Injunctive Relief and Petition for Judicial Review (filed August 13, 2024); Emergency Motion for a Temporary Restraining Order (filed May 1, 2024); Motion for Temporary Injunction (filed May 13, 2024); and responses to Defendants’ motions to dismiss.

² A copy of the document issued by the Department to their employees is titled DLP-302(E)(3). A copy of the document was obtained by a public records request.

decision was available to Jane Doe. *Id.* An email from counsel for the Department stated that the denial of Jane Doe’s request to change her gender marker was a “determination” of the agency and that there was “no administrative appeal” available through the Department. *Id.* Likewise, the Assistant Commissioner’s letter to Ms. Miller left no avenues to appeal their decision to cancel her driving privileges if she didn’t surrender her license within thirty days.

Ms. Doe and Ms. Miller sought preliminary injunctive relief from this Court. *See* Mot. for TRO; Mot. for TI. The Court enjoined the Department from requiring Ms. Miller to surrender her driver license or from cancelling her driving privileges because her driver license listed her sex as female. *See* May 14, 2024 Order Granting TRO; and June 24, 2024 Order Granting in Part and Denying in Part TI.

ARGUMENT

I. THE TEMPORARY INJUNCTION WAS PROPERLY GRANTED AND SHOULD REMAIN IN EFFECT

This Court has, and always had, jurisdiction to issue its Temporary Injunction.

Plaintiffs raise two claims. Count I alleges that the Department of Safety engaged in illegal rulemaking because DLP-302 is a rule under the Uniform Administrative Procedures Act and not a policy. (Pls.’ Sec. Amd. Compl. ¶¶ 108-122; Renewed Pet. ¶¶ 90-101.) Count II alleges that the agency acted arbitrarily and capriciously when, pursuant to DLP-302, it denied Plaintiff Jane Doe’s request to change the sex designator on her driver license and attempted to claw back Plaintiff Chrissy Miller’s driver license that displays the correct sex designator. (Pls.’ Sec. Am. Compl. ¶¶ 123-127; Renewed Pet. ¶¶ 101-116.) Administrative exhaustion was never required for either claim, meaning that the Court properly maintained and exercised jurisdiction to issue injunctive relief. Even so, Plaintiffs have now administratively exhausted both claims and have also sought

review under a common law writ of certiorari. (Pls.’ Sec. Amd. Compl. ¶¶ 99-104.) Defendants’ objections to the Court’s pre-exhaustion jurisdiction are therefore incorrect and untimely.

Exhaustion Not Required for Count I

Tenn Code. Ann. § 4-5-225(b) requires that an agency issue a declaratory order about the validity of a “**a statute, rule or order**” (or refuse to issue an order at all) before a Chancery Court can weigh in. (Emphasis added). But the threshold inquiry before this Court, and the ongoing source of this Court’s jurisdiction, has always been the question of whether DLP-302 is a rule at all. Defendants at times argue that DLP-302 is a rule—for the purposes of making Plaintiffs jump through the exhaustion hoops—but then argue strenuously that DLP-302 is merely a policy for purpose of evading the UAPA’s requirements (and the merits of Plaintiffs’ illegal rulemaking claims). *See* Defs.’ Mot. to Dissolve at pg. 7, 9.

The Tennessee Supreme Court recently decided that a challenged “policy” promulgated by TennCare, a state agency, was actually a rule under the UAPA. *See Emergency Med. Care Facilities, P.C. v. Div. of TennCare*, 671 S.W.3d 507 (Tenn. 2023). It reached this decision without TennCare ever issuing a declaratory order pursuant to Tenn. Code Ann. § 4-5-223(a) (which Defendants claim is required for administrative exhaustion under § 225(b)). In fact, TennCare *refused* to issue a declaratory order under § 223(a) in that case *because* it claimed Plaintiffs sought to invalidate a “policy” and TennCare could only issue a “declaratory order as to the validity or applicability of any statute, rule or order,” which it interpreted as *not including a policy*. Therefore, TennCare refused to issue a declaratory order under § 223(a) about what it viewed to be a policy—and never did. *Emergency Med. Care Facilities, P.C. v. Div. of TennCare*, Case No. 18-1017-IV at *8 (Ex. E to Compl. (Davidson County Chancery Court, Sept. 20, 2018) (attached hereto as Exhibit B). This issue never stopped the Chancery Court, Court of Appeals, or Supreme Court from

addressing the plaintiffs’ UAPA claims on their merits—and ruling in plaintiffs’ favor. *See Emergency Med. Care Facilities, P.C. v. Div. of TennCare*, 671 S.W.3d 507, 512 (Tenn. 2023) (explaining procedural history of the case).

Like the plaintiffs in *Emergency Med. Care Facilities*, Plaintiffs Doe and Miller have always posited that DLP-302 is a rule poorly (and illegally) disguised as a policy—and an illegal overreach of agency authority. As TennCare’s interpretation of § 223(a) shows, seeking a declaratory order from an agency that refuses to recognize DLP-302 as a rule would go against the plain reading of Tenn. Code Ann. §§ 4-5-223, 225 and would be futile and not required under *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 845 (Tenn. 2008). Pls.’ Sec. Amd. Compl. ¶¶ 112-115.

Plaintiffs, now, as ever, ask the Court to weigh in. Because determining whether DLP-302 is a rule or a policy has always been a threshold issue to determining whether exhaustion is required (*yes*, for a rule; *no*, for a policy), and because the Court has never reached this issue, this issue is as live now as it ever has been in the thirteen months this case has been pending. It certainly was a live issue when the Court issued its Temporary Injunction and when the Court kept the Injunction in place while staying the case. (Chancellor’s Order Staying Case ¶ 5)³. In staying the case, the Court never specified which issues Plaintiffs were required to seek a declaratory order on, if any, or whether Plaintiffs were required to seek such a declaratory order at all: “This case is stayed for 60 days, until November 12, 2024, to allow Plaintiffs to attempt to exhaust their administrative remedies and the Defendant to respond to Plaintiffs’ attempts, *if any*.” *Id.* at ¶ 1 (emphasis added).

³ Alternatively, as of June 24, 2024, when the Court issued its Temporary Injunction, Plaintiffs had also petitioned this Court under a writ of certiorari to grant relief—another source of this Court’s jurisdiction. (Pls.’ Sec. Amd. Compl. ¶¶ 99-104.)

Plaintiffs nonetheless sought a declaratory order from the Department, received it, and now renew their claim under the UAPA.

Exhaustion Not Required for Count II

“Exhaustion of administrative remedies is not an absolute prerequisite for relief, however, unless a statute “ ‘by its plain words’ ” requires exhaustion.” *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 839 (Tenn. 2008) (citing *Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 566 (Tenn.1997)) and (quoting *Reeves v. Olsen*, 691 S.W.2d 527, 530 (Tenn.1985)). Individual licensing decisions, much less requests to change names or sex designators, are not subject to the administrative review procedures of the UAPA under Title 55.

UAPA procedures explicitly apply to suspension and revocation hearings under Tenn. Code Ann. § 55-50-509 and -510. *See* Tenn. Code Ann. § 55-50-511. And, a person whose driving privileges are suspended for providing false information in their application is also entitled to a contested case hearing under the UAPA. *See* Tenn. Code Ann. § 55-50-321(e). But no provision in Title 55 provides for contested case hearings (much less declaratory orders, which only apply to challenges to the “validity or applicability of a statute, rule or order”) for the refusal to issue a driver license to an applicant or the denial of a request to change an applicant’s sex designator. Unlike the statutes regulating revocation and suspension decisions, the statute that Defendants cite for the Department’s authority to “regulate the designation of sex on driver licenses,” Tenn. Code Ann. § 55-50-331(b)(1), does not specify that the UAPA applies or mention contested case hearings under the UAPA at all. *Cf. Mandela v. Campbell*, 978 S.W.2d 531, 534 (Tenn. 1998) (conducting similar statutory comparison).

Expressio unius est exclusio alterius is “one of most important rules of [the] construction of statutes,” *Richards v. Vanderbilt Univ. Med. Ctr.*, 706 S.W.3d 319, 324 (Tenn. 2025), and it

applies where statutes, when read in *pari materia*, mention one subject but glaringly omit it in others. *See Carver v. Citizen Utilities Co.*, 954 S.W.2d 34, 35 (Tenn. 1997) (“Omissions are significant when statutes are express in certain categories but not others.”). As stated, certain sections of Title 55 clearly state where contested hearings under the UAPA are available (Tenn. Code Ann. § 55-50-511, §55-50-321(e)). In contrast, the sections that apply to the “brief description” of a person on their driver license (Tenn. Code Ann. § 55-50-331(b)(1)), and the issuance of driver licenses to applicants generally (§ 55-50-331), glaringly do not.⁴ This is probably why counsel for the Department of Safety verified via email that there were no further actions Ms. Doe or Ms. Miller could take to challenge the agency’s actions. Ex. B to Pls.’ Sec. Amd. Compl. (“There is no administrative appeal of the Department’s decision.”). Defendants do not specify which claims Plaintiffs must exhaust (Defs.’ Mot. to Dissolve at pg. 6-7), leaving the Court to speculate, what claims “if any” Plaintiffs should administratively exhaust. Plaintiffs nonetheless sought a declaratory order from the Department regarding the agency’s denial decisions, received it, and now renew their claim under Count II.

Defendants’ Arguments Are Untimely

Even assuming the Court lacked jurisdiction (which Plaintiffs contest) when issuing its Temporary Injunction, it has jurisdiction now—without doubt. So, Defendants’ arguments about jurisdiction are untimely (and moot). The Court issued its Temporary Injunction on June 24, 2024.

⁴ Notably, Tenn. Code Ann. § 55-50-331(b)(1) does not even require the Department of Safety to include a person’s sex on their driver license. It only requires “the type or general class of vehicles the licensee may drive, which license shall bear thereon a distinguishing number assigned to the licensee, the full legal name, date of birth, current residence address including the street address and number or route and box number (or post office box number if the applicant has no bona fide residential street address), a brief description, a visible full face photograph of the licensee, and either a facsimile of the signature of the licensee or a space upon which the licensee shall write the licensee's usual signature with pen and ink.”

(Temp. Inj. Order). Defendants did not seek interlocutory appellate review of the Court’s order. Under Rule 9 of the Tennessee Rules of Appellate Procedure, Defendants could have sought interlocutory appellate review of the temporary injunction within 30 days of its issuance—but they did not. Defendants could have simultaneously sought to stay the temporary injunction during an appeal under Rules 62.03 and 62.06 of the Tennessee Rules of Civil Procedure. *See also Fisher v. Hargett*, 604 S.W.3d 381, 392 (Tenn. 2020) (conducting interlocutory appellate review of chancery court’s grant of temporary injunction). But they did not.

In September 2024, the Court stayed this case to allow for Plaintiffs to administratively exhaust their claims, if any, with the Tennessee Department of Safety and Homeland Security. (Chancellor’s Order Staying Case). Notably, the Court kept the Temporary Injunction in place during the stay. *Id.* at ¶ 5. Again, Defendants could have raised jurisdictional issues regarding the Temporary Injunction under Rule 9—or filed a motion to dissolve the stay then. But they did not. Now, over a year has passed since the Temporary Injunction was issued—and 10 months have passed since the case was stayed. No appeal or motion to resolve the stay was sought during this time. The only thing that has changed is that now Plaintiffs have clearly and demonstrably met every exhaustion requirement Defendants could have placed in their way, making the Court’s jurisdiction stronger than ever.

Defendants’ arguments about injunctions not being appropriate in agency review cases (Defs.’ Mot. to Dissolve at pg. 7) are also to no avail since even the Defendants recognize that a Court could issue a stay in those circumstances, which is exactly what Plaintiffs have timely sought. Having cleared administrative exhaustion hurdles that Plaintiffs likely never needed to, Plaintiffs renew their claims and assert that this Court has jurisdiction over the determination of Plaintiffs’ claims under the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101, et seq.,

and the power to issue injunctive relief as a chancery court subject to Tenn. Code Ann. § 16-11-101 and § 29-1-106.

II. CHRISSY MILLER FACES IRREPARABLE HARM IF THE TEMPORARY INJUNCTION IS DISSOLVED

It is common-sense knowledge that transgender individuals face hostility and discrimination in our society. *Brocksmith v. U.S.*, 99 A.3d 690, 698 (D.C. 2014). “[O]ne would be hard-pressed to identify a class of people more discriminated against historically ... than transgender people.” *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610–11 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (quoting *Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp.3d 931, 953 (W.D. Wis. 2018)). “There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.” *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *and see Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (finding “no reason to doubt that where disclosure of this [transgender status] information may fall into the hands of persons harboring such negative feelings, the [Michigan driver license ban] creates a very real threat to Plaintiffs' personal security and bodily integrity”) (internal citations omitted). Thirty-seven percent of transgender men and transgender women have experienced at least one physical attack due to the perception of others that they are transgender.⁵

Defendants argue that Chrissy Miller will not be “forced” to carry a driver license with an inaccurate sex marker because there is no one “forcing” her to carry a driver license. Def’s Mot.

⁵ Gia Elise Barboza, Silvia Dominguez, Elena Chace, *Physical victimization, gender identity and suicide risk among transgender men and women*, Preventive Medicine Reports, Volume 4 (2016), <https://www.sciencedirect.com/science/article/pii/S2211335516300882#bb0020> (last accessed July 8, 2025).

to Dissolve p. 16. However, it blinks reality to suggest that Ms. Miller can simply choose to operate without a driver license. The United States Supreme Court has recognized for forty-seven years that “driving an automobile [is] a virtual necessity for most Americans.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Driving is “a basic, pervasive, and often necessary mode of transportation to and from one’s home, workplace, and leisure activities.” *Delaware v. Prouse*, 440 U.S. 648, 662 (1979). “Once [driver] licenses are issued...their continued possession may become essential in the pursuit of a livelihood.” *Bell v. Burson*, 402 U.S. 535, 539 (1971).

Ms. Miller lives and works in a rural county. Miller Supp. Dec. ¶ 3 (attached hereto as Exhibit A). Without a driver license, Ms. Miller will be unable to access the necessities of daily life. Miller Supp. Dec. ¶¶ 7-21. On average, she must drive nearly a thousand miles each month for her job. *See* Miller Supp. Dec. ¶ 9. Ms. Miller must provide a Tennessee identification document as part of her work duties. Miller Supp. Dec. ¶¶ 7-8. Showing state identification is a huge requirement of her work. *Id.* Further, she must routinely travel to see her seriously ill mother. Miller Supp. Dec. ¶ 20. Her experience shows that she is harmed when she is forced to submit identification to strangers that conflicts with her appearance. Miller Decl. ¶ 50. Ms. Miller reasonably believes that if her driver license has a gender marker that does not reflect her lived sex and appearance she will be exposed to possible discrimination, harassment or violence if she is pulled over or needs to use her driver license if her car breaks down. Miller Supp. Dec. ¶ 20-21.

Defendants assert that Ms. Miller is “creating the harm and then blaming the Department for it.” Def’s Mot. to Dissolve p. 18. This is entirely without support in the record. Ms. Miller has had a driver license that accurately classifies her as female since January 23, 2024—nearly one and a half years. Miller Supp. Dec. ¶ 10. She has already used her driver license to update her personal accounts. Miller Decl. ¶ 52. Ms. Miller rightfully fears physical and violent altercations

at otherwise seemingly inconsequential moments of her life if she is forced to use a driver license with the wrong sex designator that conflicts with her other government identification. Miller Decl. ¶ 51.

Ms. Miller knows beyond speculation that her professional relationships would suffer if her transgender identity was disclosed through her driver license. Miller Supp. Dec. ¶ 10-18. Ms. Miller shows her driver license to many clients who openly support Donald Trump and have Trump flags and signs on their property. Miller Supp. Dec. ¶ 15. President Trump has issued multiple executive orders aimed at restricting the rights of transgender people, such as banning them from military service and limiting their access to healthcare and legal recognition. *Id.* The President's executive order banning transgender people from the military states that being transgender "conflicts with...an honorable, truthful, and disciplined lifestyle," and that transgender peoples' identities are "false." *Id.* He has restricted transgender people from updating their gender markers on passports. *Id.* Trump's executive orders use demeaning and hostile language towards transgender people, using terms like "gender ideology extremism," "radical gender ideology," and references to transgender healthcare as "mutilation." *Id.* Within days of taking office President Trump directed that government websites must be wiped of any reference to transgender people. *Id.* Some of Ms. Miller's clients and coworkers have told her that they do not support transgender people or even believe transgender people should exist. Miller Supp. Dec. ¶ 16.

In their Motion, Defendants suggest that it is "implausible" and "sensationalized" that Ms. Miller fears that if stopped by law enforcement, she might face harassment or physical assault. Defs' Mot. to Dissolve p. 16. However, there is a history in Tennessee of law enforcement beating transgender women. Duanna Johnson, a transgender woman, was beaten by a police officer who

repeatedly struck her with a gloved fist with handcuffs slipped over his knuckles and pepper-sprayed her in the face while another officer held her down during the assault.⁶ Further, in the current political climate, the President of the United States is directing federal law enforcement to deny transgender prisoners gender-affirming medical treatment and recognition of their lived sex.⁷ A recent study shows that more than one in four (26.8 percent) of transgender people report experiencing physical force by police.⁸ It is neither “implausible” or “sensationalized” for Ms. Miller to fear that she would face violence, discrimination, or harassment from law enforcement if her driver license does not accurately reflect her lived sex and appearance.

The threat of physical harm does not end with potential violence. Transgender people who experience higher transgender-related stigma have a significantly increased prevalence of hypertension, myocardial infarction, stroke, hypercholesteremia, and poor or fair general health.⁹

⁶ United States Department of Justice, *Former Memphis Police Officer Pleads Guilty to Using Excessive Force on an Arrestee* (August 26, 2010), <https://www.justice.gov/archives/opa/pr/former-memphis-police-officer-pleads-guilty-using-excessive-force-arrestee> (last accessed July 8, 2025); Robbie Brown, *Murder of Transgender Woman Revives Scrutiny*, New York Times (Nov. 17, 2008), <https://www.nytimes.com/2008/11/18/us/18memphis.html> (last accessed July 8, 2025).

⁷ Exec. Order 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, 90 Fed. Reg. 8615 (Jan. 20, 2025).

⁸ Grasso, Jordan, Stefan Vogler, Emily Greytak, Casey Kindall, & Valerie Jenness. (2024). *Policing Progress: Findings from a National Survey of LGBTQ+ People's Experiences with Law Enforcement*. ACLU, New York, NY, <https://www.aclu.org/publications/policing-progress-findings-from-a-national-survey-of-lgbtq-peoples-experiences-with-law-enforcement> (last accessed July 8, 2025).

⁹ Veale, Jaimie F., *Transgender-related stigma and gender minority stress-related health disparities in Aotearoa New Zealand: hypercholesterolemia, hypertension, myocardial infarction, stroke, diabetes, and general health*, The Lancet Regional Health – Western Pacific, Volume 39, 100816 (2023), [https://www.thelancet.com/journals/lanwpc/article/PIIS2666-6065\(23\)00134-7/fulltext](https://www.thelancet.com/journals/lanwpc/article/PIIS2666-6065(23)00134-7/fulltext) (last accessed July 8, 2025).

Discrimination causes transgender people to experience higher levels of anxiety and depression than non-transgender people.¹⁰ The risk of harm to Ms. Miller from discrimination she will face because of the Defendants' refusal to issue her an accurate driver license is real and irreparable.

This Court correctly granted Ms. Miller preliminary injunctive relief in the first instance, and to dissolve it now would expose Ms. Miller to immediate irreparable harm.

III. A STAY IS WARRANTED AS PLAINTIFF-PETITIONERS ARE LIKELY TO PREVAIL ON THEIR CLAIMS

DLP 302(E)(3) cannot be a policy because it misstates its alleged legislative grant, a fact that Defendants repeatedly ignore except for when it benefits their debunked jurisdictional arguments. Defendants argue that DLP-302(E)(3) is a policy, as opposed to a rule, promulgated with express and implied authority from the legislature. But the arguments are threadbare and improvident, and the Court should reject them. The Department has never received a specific legislative command that would allow them to act by implication to determine legal sex based solely on an original birth certificate. And Tenn. Code Ann. § 1-3-105(c) certainly did not provide them with the express authority to do so. To the contrary, the statute plainly says evidence of legal sex “is not limited” to an original birth certificate—a fact that Defendants attempt to outrun by circularly referring to DLP-302(E)(3) as a policy that merely restates the statute. Plaintiffs can show that DLP-302(E)(3) is what it has always been: a rule that targets the private rights of a class of people.

¹⁰ Hajek, A., König, H. H., Buczak-Stec, E., Blessmann, M., & Grupp, K., *Prevalence and Determinants of Depressive and Anxiety Symptoms among Transgender People: Results of a Survey*, Healthcare (Basel, Switzerland), 11(5), 705 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10000997/#:~:text=For%20transgender%20people%2C%20health%20inequities,in%20transgender%20people%20%5B17%5D>. (last accessed July 8, 2025).

A. Defendants Lacked Express Authority to Act by Implication When They Drafted DLP-302(E)(3)'s Prohibition on Gender Marker Changes for Transgender People

Defendants argue that the Department did not *need* an express grant of legislative authority to base legal sex solely on an original birth certificate, because it *already had* an “affirmative statutory obligation” to regulate sex designations on driver licenses. *See* Defs’ Mem. in Suppt. of Mot. to Dissolve p. 10. Defendants’ argument then follows that when the Department promulgated DLP-302(E)(3), it acted with implicit authority “to do whatever was reasonably necessary” to effectuate an alleged pre-existing “express” legislative command. *McFarland v. Pemberton*, 530 S.W.3d 76, 101 (Tenn. 2017). Were it only so simple for Defendants.

As creatures of statute, administrative bodies must conform their actions to their enabling legislation. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022); *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 680 (Tenn. Ct. App. 1997) (citing *Tennessee Pub. Serv. Comm'n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn. 1977); *Pharr v. Nashville, C. & St. L. Ry.*, 208 S.W.2d 1013, 1016 (Tenn. 1948)). Although their authority can arise by necessary implication from an expressed statutory grant of power, that grant of power must contain a “specifically defined objective,” *McFarland*, 530 S.W.3d at 101, and it is strictly construed, *Tennessee Pub. Serv. Comm'n v. S. Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977) (citing *Pharr*, 208 S.W.2d at 1016).

But none of the statutes Defendants cite give the Department the power to deny sex designator changes on driver licenses. Yes, Tenn. Code Ann. § 55-50-201 empowers the Department to regulate the “licensing of persons to operate motor vehicles.” And Tenn. Code Ann. § 55-50- 331(b)(1) says every driver license must include a “brief description” of the applicant in the application. And Tenn. Comp. R. & Regs. 1340-01-13-.18(2) regulates each driver license to

include a “brief physical description of the applicant, including sex.” None of these authorities *specifically direct the* Department to reject sex marker changes based on documents that differ from the sex listed on an original birth certificate. And, when it comes to an agency’s authority, the law requires “specifically defined purposes and objectives” from the legislature. *See McFarland*, 530 S.W.3d at 94-95 (collecting numerous authorities for the proposition that the text of a statute must contain the specific power for an administrative agency to act by necessary implication).

Though Defendants rely on *McFarland*, it does not help them. That case involved a judicial candidate’s argument that a county elections commission lacked the authority to hold a public hearing on a citizen complaint that questioned his opponent’s eligibility to be on the ballot for lack of residency requirements. The judicial candidate lost, in part, because the law at issue contained a “specifically defined objective” that directed county election commissions to “prohibit any person from becoming qualified to have such person’s name placed on any ballot wherein such person is seeking to be nominated to an office for which such person is ineligible.” Tenn. Code Ann. § 2-11-202(a)(12). It made sense, then, for the Court to conclude that the county election commission acted by necessary implication to hold a hearing. The statute (expressly) commanded them to keep unqualified candidates off the ballot. They (implicitly) accomplished that command by holding a hearing on the residency eligibility of a candidate. There is not a similar one-to-one here: the Department received no legislative command to prohibit certain sexual minorities from amending their sex markers. Neither Tenn. Code Ann. § 55-50-201 nor Tenn. Code Ann. § 55-50-331(b)(1) require the Department to display the sex of the driver on a driver license—much less require an unamended birth certificate to do so. The Department cannot, then, claim power by implication where none was given.

B. Nor does Tenn. Code Ann. § 1-3-105(c) Provide an Express Grant of Authority: The Plain Language Demands the Opposite of What DLP-302(E)(3) Does

Defendants also argue that Tenn. Code Ann. § 1-3-105(c) provides the Department with express authority to issue DLP-302(E)(3), and because DLP-302(E)(3) supposedly restates that statute, it is a policy, not a rule. But Defendants ignore that DLP-302(E)(3) goes far beyond the plain text of a statute it purports to merely restate.

Every word in a statute is presumed to have meaning and purpose. *Keen v. State*, 398 S.W.3d 594, 610 (Tenn. 2012) (quoting *U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co.*, 277 S.W.3d 381, 386 (Tenn. 2009)). No word is “inoperative, superfluous, void or insignificant.” *State v. Deberry*, 651 S.W.3d 918, 925 (Tenn. 2022). Accordingly, Tenn. Code Ann. § 1-3-105(c) provides:

As used in this code, unless the context otherwise requires, “sex” means a person’s immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person’s biological sex. As used in this subsection (c), “evidence of a person’s biological sex” includes, but is not limited to, a government-issued identification document that accurately reflects a person’s sex listed on the person’s original birth certificate.

Even though Tenn. Code Ann. § 1-3-105(c) is a definitional statute, it purports to describe certain evidence that may prove a person’s sex in some unspecified instances but not all. *See* Tenn. Code Ann. § 1-3-105(c) (“evidence of a person’s biological sex’ includes, but is not limited to [...]”). And it gives exceptions to those evidential considerations. *See* Tenn. Code Ann. § 1-3-105(c) (“unless the context otherwise requires [...]”). What it expressly **does not do** is delegate authority to the Department to ban all sex designator changes for transgender people. A court must give weight to this absent language and “be circumspect about adding words to a statute that the General Assembly did not place there.” *See Coleman v. State*, 341 S.W.3d 221, 241 (Tenn. 2011)

(declining to read in an IQ *test score* of 70 or below when the open-ended language of the statute at issue required nothing more than a “functional intelligence quotient of seventy (70) or below.”).

Defendants claim DLP-302(E)(3) is merely a restatement of Tenn. Code Ann. § 1-3-105(c) because the “prohibition on *amended* birth certificates is just another way of saying that ‘original birth certificates constitute evidence of ‘sex.’” Defs’ Mem. in Suppt. of Mot. to Dissolve 8. This argument ignores, however, that DLP-302 transforms the conditional language of the statute (“includes but is not limited to”) into an imperative. Indeed, DLP-302(E)(3)(a) states the Department “does not accept requests for gender marker changes that are inconsistent with someone’s designated sex on their original birth certificate.” In other words: a person cannot submit *any* documents that differ from the sex listed on their original birth certificate to change the sex marker on their identification. The problem is, Tenn. Code Ann. § 1-3-105(c) has no express language that categorically requires a sex marker on a driver license to match someone’s sex as assigned on their birth certificate. Instead, the law explicitly states that evidence of a person’s biological sex “is not limited to ... a government-issued identification document that accurately reflects a person’s sex listed on the person’s birth certificate.” But DLP-302(E)(3) transmutes this plain text “includes but is not limited to” into “is exclusively limited to.” This is not a restatement. *Keen*, 398 S.W.3d 594 (finding every word in a statute is to be given meaning). This is a new rule.

Defendants also attempt to knock down the other caveat in Tenn. Code Ann. § 1-3-105(c): that sex means “immutable biological sex” “unless context requires otherwise.” Defendants claim it would be absurd for the legislature to “attempt to limit the definition of ‘sex’ to biological sex while in fact doing the exact opposite ... by codifying the Department’s ability to codify sex in ways that are not biological.” Defs’ Mem. in Suppt. of Mot. to Dissolve 12. This argument is

circular: whether Defendants like it or not, the legislature drafted a definition with these qualifiers. Defendants cannot wriggle out of that reality by claiming the legislature did not mean to do what it did. *Lee Medical, Inc. v. Beecher*, 312 S.W. 3d 515, 526 (Tenn. 2010) (“Because the legislative purpose is reflected in a statute’s language, the courts must always begin with the words that the General Assembly has chosen.”). There is simply no support for Defendants’ contention that the express clause chosen by the legislature abrogates legislative intent.

Continuing to conjure meaning from thin air, Defendants suggest that “unless the context otherwise requires” can only refer to statutes that include the word “sex,” but that do not distinguish between a man and a woman, such as the criminal statute prohibiting certain commercial sex acts, Tenn. Code Ann. § 39-13-309, where it would make no sense to define sex as “immutable biological sex.” But Defendants fail to explain why an open-ended qualifier like “unless the context otherwise requires” would not apply to these statutes **and** to real-world scenarios such as driver licenses. The purpose of having a “brief description” of the driver on the license is to help the viewer ensure that the possessor of the license is indeed the person described on the license. Driver licenses are specifically designed for regular public display and use as proof of identity in everyday life.

Ultimately, DLP-302(E)(3) goes beyond the plain language of Tenn. Code Ann. § 1-3-105(c). This, then, is not merely a restatement and thereby a policy. Accordingly, DLP-302(E)(3) is a rule that exceeds its authority and requires notice-and-comment procedures.

C. DLP-302(E)(3) Clearly Targets a Class of People and Affects Private Rights that Existed Under the Department’s Previous Policy, Making it a Rule, not a Policy

Having hinged their entire argument on DLP-302(E)(3) being a policy because it merely restates its supposed enabling legislation, Defendants provide no analysis for the glaringly

obvious: that DLP-302(E)(3) meets the definition of a “rule” under the UAPA. Tennessee law defines a rule as a statement of general applicability that affects the “private rights, privileges, or procedures available to the public.” Tenn. Code Ann. § 4-5-102. DLP-302(E)(3) meets this definition in two ways.

First, it is a statement of general applicability that it is “capable of being applied or is relevant to an entire class or category.” *Emergency Medical Care Facilities, P.C. v. Division of TennCare*, 671 S.W.3d 507, 514 (Tenn. 2023). The DLP-302(E)(3) ban on changes of sex designators applies to all people who wish to update the sex designator on their driver licenses—that is, transgender license applicants in Tennessee. Second, it affects the “private rights, privileges, or procedures available to the public.” The “procedures available to the public” were clear in Rule 1340-01-13-.12(6), which allowed a sex designator change on a driver license if an applicant submitted “a statement from the attending physician that necessary medical procedures to accomplish the change in gender are complete.”

Defendants have no contrary analysis. However, DLP-302(E)(3) was never promulgated through the rulemaking process even though it abrogated the procedures available to the public in Rule 1340-01-13-.12(6). “An agency statement ‘concerns only the internal management of state government,’ [] when it relates only to the management or control of the State itself rather than to external parties or relationships with external parties.” *Emergency Med. Care Facilities*, 671 S.W.3d at 515. Here, DLP-302(E)(3) very clearly applies to (external) transgender driver license applicants. Accordingly, under the UAPA, DLP-302(E)(3) operates as a rule and is thus “void and of no effect” as it did not go through proper rulemaking procedures. Tenn. Code Ann. § 4-5-216.

IV. THE REMAINING FACTORS WEIGH DECISIVELY IN FAVOR OF A STAY AND TEMPORARY INJUNCTION

A reviewing court may order a stay of an agency's decision. Tenn. Code Ann. § 4-5-322(c). The decision to stay an agency order rests on the same factors as a temporary injunction: (1) the probability that plaintiff[s] will succeed on the merits; (2) the threat of irreparable harm to the plaintiff[s] if the injunction is not granted; (3) the balance between this harm and the injury that granting the injunction would inflict on [the] defendant[s]; and (4) the public interest. *See Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020). Here, the factors clearly warrant a stay and continued injunctive relief.

A. Jane Doe and Chrissy Miller Will Suffer Irreparable Harm Absent a Stay

Without the Court's intervention, Plaintiffs will suffer irreparable harm. If not stayed, the Department's Declaratory Order will cause immediate and concrete harm to Jane Doe and Chrissy Miller. No money damages can compensate Ms. Doe and Ms. Miller for their injuries. *See Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Ms. Doe and Ms. Miller face discrimination, harassment, and violence as they go about their everyday lives if their transgender status is disclosed through display of their driver licenses. Further, both women must drive for work, medical care, and to shop for daily necessities such as food.

The irreparable harms Ms. Miller faces are covered in detail *supra* at II.

Ms. Doe is subject to the same dangers of discrimination, harassment, and violence every time she must use her driver license. These harms are not speculative. Ms. Doe has had to live through harassing and deeply harmful conduct when forced to disclose her transgender status. Doe Decl. ¶¶ 19-23. She is rightly afraid of violence in Tennessee if her transgender status is known. *Id.* ¶ 8. Ms. Doe has been denied job opportunities, *id.* ¶ 19, called slurs, *id.* ¶ 20, and been refused service, *id.* ¶ 21, when she's been required to use her driver license. Ms. Doe reasonably fears

harassment when she must show her driver license because the sex marker it contains conflicts with her lived sex, appearance, and status in the community. *Id.* ¶ 9, 16. These harms are likely to continue.

B. The Balance of Harms and Public Interest Favor a Stay and Temporary Injunction

Defendants will not be harmed should the Court continue the long-standing status quo of this case. Moreover, Defendants cannot properly assert that they will suffer harm by injunctive relief that merely prohibits them from unlawful conduct. Ms. Miller has had her driver license for thirteen months—without any harm to the Department. Indeed, it is difficult to see how one person having a driver license that says “female” instead of “male,” as the Department would prefer, could amount to any harm whatsoever to Defendants. In contrast to the immense, irreparable, and immediate harm Plaintiffs will face (and currently face in Ms. Doe’s case) without a Temporary Injunction, Defendants’ alleged harm of not being able to “compl[y] with duly enacted state laws”—in the case of one single person—seems miniscule at best. (Defs.’ Mot. to Dissolve at pg. 18.)

Moreover, as argued above, Defendants are not bound to comply with any “duly enacted state laws” in the manner that they argue they must—that is, denying sex designator changes for people who do not meet the requirements of DLP-302. That burden of compliance is placed on Defendants solely by Defendants themselves in the form of their own illegally promulgated rule. Again, Defendants are not required by Tenn. Code. Ann. § 55-50-321 to even display a person’s sex at all on a driver license, much less comply with Tenn. Code Ann. § 1-3-1-5(c) in the manner in which they say they must. The balance of harms tips overwhelmingly in Plaintiffs’ favor.

The public interest favors a continued stay. Contrary to what Defendants claim, the current preliminary injunction does not prevent the Department from “complying with state law that

defines ‘sex’” in derogation of the public interest. Defs.’ Mot. to Dissolve p. 19. It only stops the Department from applying an unlawful administrative *rule* that exceeds its statutory authority and that *should have* undergone public comment and notice. If anything, the Court will uphold the public interest and the will of the people “by enforcing the laws they and their representatives enact,” *Lichenstein v. Hargett*, No. 3:20-CV-00736, 2021 WL 5826246, at *48 (M.D. Dec. 7, 2021), in this case, the UAPA.

The UAPA “established important guardrails for administrative agencies” in the public interest, *Emergency Med. Care Facilities, P.C. v. Div. of TennCare*, 671 S.W.3d 507, 509 (Tenn. 2023), including mandatory notice-and-comment rulemaking to encourage public input and transparency. *Id.* As demonstrated above, the Department ran through this guardrail with DLP-302(E)(3). In this situation, the UAPA empowers courts to reverse or modify an agency decision if the rights of the petitioner have been prejudiced. As demonstrated above, they very clearly have. Ms. Doe, Ms. Miller, and all Tennessee individuals have a paramount interest in government agencies acting within their prescribed authority.¹¹ Allowing transgender individuals to have identification documents that accurately reflect their lived sex enhances public safety by reducing the potential for confusion, suspicion, harassment, or violence when identification documents are presented. Thus, a stay is in the public interest.

¹¹ For nearly thirty years, transgender Tennesseans have been allowed to change the gender markers on their driver licenses. It costs Defendants nothing to maintain the status quo. Chrissy Miller has held her current license for nearly a year and a half. Furthermore, Plaintiffs have already provided a bond for the temporary injunction. Thus, Plaintiffs request that this Court impose no further security bond. *See* Tenn. Code Ann. § 4-5-322(c).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for a stay of the Departments' declaratory order; and deny Defendants' motion to dissolve the temporary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been sent by U.S. Mail, postage pre-paid, or via electronic mail to the following:

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DATE: July 9, 2025

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Lucas Cameron-Vaughn

EXHIBIT A

SUPPLEMENTAL DECLARATION OF CHRISSY MILLER

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

| | | |
|--|---|------------------|
| JANE DOE; CHRISSY MILLER, |) | |
| |) | |
| Plaintiffs/Petitioners, |) | |
| |) | |
| vs. |) | No. 24-0503-III |
| |) | CHANCELLOR MYLES |
| TENNESSEE DEPARTMENT OF |) | |
| SAFETY AND HOMELAND |) | |
| SECURITY; JEFF LONG, in his |) | |
| official capacity as the Commissioner |) | |
| of Tennessee's Department of Safety |) | |
| and Homeland Security; and MICHAEL |) | |
| HOGAN, in his official capacity as the |) | |
| Assistant Commissioner of the Driver |) | |
| Services Division for Tennessee's |) | |
| Department of Safety and Homeland |) | |
| Security, |) | |
| |) | |
| Defendants/Respondents. |) | |

SUPPLEMENTAL DECLARATION OF CHRISSY MILLER

I, Chrissy Lee Miller, pursuant to Tenn. R. Civ. P. 72, declare as follows:

1. I offer this Supplemental Declaration in support of my Motion for a Stay of Agency Decision and in response to the Defendants' Motion to Dissolve the Temporary Injunction. I have personal knowledge of the facts set forth in this Supplemental Declaration and can testify competently to those facts if called as a witness.

2. I've now had a driver license that accurately lists my sex as female since January 23, 2024—nearly one and a half years.

3. I am currently employed as a Disaster Case Manager with Holston Conference with United Methodist Community (UMCOR). We partner with Cocke County Long Term Recovery Group to assist survivors of the Hurricane Helene disaster in East Tennessee.

4. I assist individuals who are trying to rebuild their homes and lives by identifying, securing, and coordinating resources to assist them.

5. For instance, I support long-term recovery from the devastation of the storm through organizing and distributing grant awards and supervising efforts such as debris removal, home rebuilding and repairs, topsoil and gravel replacement, and planting grass seeds for yards. I even assist in identifying if they have unmet health, mental health, or financial needs. Below, I am assisting in clearing debris for a survivor client.



6. I love my job because I am able to help so many people in my community improve their lives after such significant devastation. My volunteer work after the flood led me to this position.

7. Photo identification is huge in my line of work. A lot of my job is door-knocking, saying, “This is who I am, how I can help you?” I show clients my Tennessee driver license and my work badge so they can verify who I am and feel comfortable allowing me onto their property to discuss very personal issues with them.

8. Most clients feel more comfortable if I show them a Tennessee state identification document rather than a federal identification document such as a passport.

9. Furthermore, I have to drive a lot for my job. Between May 12, 2025 and June 29, 2025, I drove 1,416 miles for work.

10. I am only able to have the job I have today because of the Court’s injunction that protects me from having to surrender my driver license with an accurate sex classification. It is imperative to my job and my personal safety that I am not forced to disclose my transgender status when I am first meeting a client. My driver license has given me confidence to live my life as Chrissy and not face discrimination, ridicule, or violence, and that’s huge to me. I was terrified going into this job that I would be outed. The fact that my documents all say Chrissy, female, on them means I was not outed, and that has allowed me to just be myself and thrive at my job.

11. I wouldn’t be able to have the trusted relationships I have if my status was disclosed to my clients through my Tennessee driver license due to bias and prejudice against transgender people like me. I would not be welcomed around the clients or their families. It would insert a huge wall that would prevent me from successfully doing my job. And it would also make me scared to go to these houses and worry about what danger I may face. I don’t have to worry about that right now: they just see me as Chrissy, as female, and that’s me. And I don’t have to have these agonizing conversations every time a door opens.

12. Similarly, I advocate for my clients' unmet needs every few weeks at board meetings attended by a lot of important people in our county, including the mayor, church pastors, and the director of all regional hospitals. They have no idea that I am transgender. If it did come out, what would change now that they know that? That's where the recognition comes in that if I am outed without my consent, I will not get the basic respect I need to get things done. I would have to battle over my dignity with people, and I don't need that in this job.

13. This is a tension in my life: being outed. Every time Knoxville news media reaches out to us, it's about my work, but I avoid that publicity. I don't want to be outed. Being in this lawsuit, I do understand that the filings are public. But I would not have this ever-present fear if the state didn't threaten to take my license away. We filed the case over a year ago, and a few of my close friends know. But that's it. So far, no one I work with has found out about this case. I don't talk about it with folks. Ultimately, I'm okay with my name being on the case because it is on behalf of other people, too, and I have taken some precautions. But I am scared that it's going to change my life if it becomes very public. The most important thing is autonomy, that it's my choice to tell people, and the stakes are high.

14. Many people in the rural community I serve are hostile to transgender people, and I fear violence, discrimination, and harassment if my status as a transgender woman is forcibly disclosed.

15. This is because many people in my community openly support Donald Trump and have Trump flags and signs on their property. President Trump has issued multiple executive orders aimed at restricting the rights of transgender people, such as banning us from military service and limiting our access to healthcare and legal recognition. The President's executive order banning transgender people from the military states that being transgender "conflicts with...an honorable,

truthful, and disciplined lifestyle,” and that our identities are “false.” He has restricted transgender people from updating our gender markers on passports. Trump’s executive orders use demeaning and hostile language towards transgender people, using terms like “gender ideology extremism,” “radical gender ideology,” and refers to our healthcare as “mutilation.” Within days of taking office President Trump directed that government websites must be wiped of any reference to transgender people.

16. Also, some of my coworkers and clients, who do not know I am transgender, have expressed to me that they do not support transgender people, and they think that we should not exist. One person said that they don’t think trans people should exist or get medical help with transitioning. While I am confident in who I am, I prefer to blend in and just be Chrissy. The opposite, being known as and discriminated against as a trans person, is too painful and dangerous, and my trauma response is to block it out.

17. At my last job as a whitewater rafting guide, where I began my transition and my coworkers knew that I was transgender, many coworkers said hurtful things to me and put me in situations with customers where I felt my safety was endangered. For example, my old coworkers would call me by the wrong pronoun or use the wrong name for me when introducing me to people I was going to guide down the river. I noticed that when this happened, people in the boats would treat me differently, stop talking to me, and ignore my instructions. It was dangerous.

18. I had a very negative experience recently when trying to find a place to rent. I suspect that the landlord discovered I was trans based on a background check or my application materials. I had barely seen the property when he started throwing up his hands, yelling at me and cursing me out. I jumped back into my car as quickly as I could and drove away. I was so shaken

after this and scared he was going to hurt me. I would hate to have to experience something like this every time I have to show my driver license.

19. I routinely have to drive my car nearly four hours for medical care in Nashville because there are few providers in the area that I live in.

20. My mother still lives in Ohio. She has multiple sclerosis, and her health has been declining. This means I must also drive long distances more often to help my family care for my mother. I fear discrimination, harassment or violence if I am pulled over or my car breaks down.

21. Every day I live as a woman, in the body of a woman. I know that having a driver license with a gender marker that does not reflect my lived sex and appearance will expose me to discrimination, harassment or violence any time I have to use my driver license in my daily life.

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'Chrissy Miller', written over a horizontal line.

CHRISSY MILLER

Dated: July 9, 2025

EXHIBIT B

EMERGENCY MEDICAL CARE FACILITIES

v.

DIVISION OF TENNCARE, ET AL.

COMPLAINT

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Emergency Medical Care Facilities, P.C.,)

Plaintiff,)

v.)

Division of TennCare,)

Department of Finance and)
Administration;)

Dr. Wendy Long, in her official capacity)
as Director of TennCare; and)
Larry B. Martin, in his official capacity)
as Commissioner of the Department of)
Finance and Administration,)

Defendants.)

Case No. 18-1017 IV

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COMPLAINT

Plaintiff, Emergency Medical Care Facilities, P.C. ("EMCF"), for its complaint for declaratory judgment and injunctive relief against Defendants Division of TennCare, Tennessee Department of Finance and Administration; Dr. Wendy Long, in her official capacity as Director of TennCare; and Larry B. Martin, in his official capacity as Commissioner of the Department of Finance and Administration (collectively, "TennCare" or the "Division") states:

Introduction

This complaint seeks declaratory and injunctive relief that a new rule implemented by TennCare on July 1, 2011, which (1) imposed a \$50 cap on payment for emergency room physician services that were determined to be "non-emergent," and (2) required the determination of whether a claim is "non-emergent" be based solely on the patient's final diagnosis (the "ER Rule"), is invalid.

The ER Rule is invalid on its face as TennCare implemented it without complying with the rulemaking procedures of Tennessee's Uniform Administrative Procedure Act ("TUAPA"). This

is all the more inexplicable as TennCare's notices regarding the implementation of the new ER Rule clearly stated that the ER Rule would be effective only *upon its adoption as an emergency rule*. Yet, no formal rulemaking process ever occurred, emergency or not.

Further, while TennCare's failure to comply with the TUAPA is sufficient to cause the ER Rule to be invalid, even if it had been properly adopted, the ER Rule would still be invalid as it conflicts with both State and federal law. Both State and federal law require TennCare to determine whether a patient has an emergency medical condition based upon the prudent layperson standard. A determination based upon final diagnosis is inconsistent with the prudent layperson standard. To this point, federal law specifically prohibits the determination of whether a patient has an emergency medical condition to be made based upon final diagnosis. As such, the ER Rule is also invalid as it conflicts with State and federal law.

As TennCare's implementation of the ER Rule was unlawful, EMCF sought a declaration from TennCare that the ER Rule is (1) void and of no effect because it was not adopted in accordance with TUAPA, and (2) had the ER Rule been adopted in accordance with the TUAPA, it still would have been invalid, as it conflicts with both State and federal law. TennCare refused to review the case on jurisdictional grounds, apparently concluding that an unpromulgated rule is not subject to review under the TUAPA. Accordingly, EMCF brings this action.

Jurisdiction and Venue

1. The Court has jurisdiction and venue over this matter pursuant to Tenn. Code Ann. §§ 4-5-225, 29-14-102, and 1-3-121.

Facts

2. EMCF is a professional corporation located in Jackson, Tennessee that is comprised of physicians and other health care professionals licensed to practice medicine in the State of

Tennessee. EMCF provides physician services to TennCare recipients in the emergency departments of various hospitals.

3. The Division is a government agency under the control of the Tennessee Department of Finance and Administration. The Division oversees Tennessee's Medicaid program, known as "TennCare." Dr. Wendy Long is the Director of TennCare, and Larry B. Martin is the Commissioner of the Tennessee Department of Finance and Administration. EMCF adds Dr. Long and Mr. Martin as parties only in their official capacities.

The TennCare Program

4. Medicaid is a joint federal and state program that helps with medical costs for some people with limited income and resources. TennCare is the single state agency that administers the Medicaid program in Tennessee. TennCare contracts out the operation of the Medicaid program to various Managed Care Organizations ("MCO"). For example, TennCare granted Volunteer State Health Plan, Inc. ("VSHP") a certificate of authority to operate as a TennCare HMO.

5. Effective October 1, 2008, EMCF executed a Group Practice Agreement with VSHP to participate under both BlueCare and TennCare Select and provide emergency room services to TennCare recipients. Because of TennCare's invalid implementation of the ER Rule, effective July 1, 2011, EMCF's payments from VSHP under the Group Practice Agreement have been reduced by over \$200,000. As such, TennCare's invalid implementation of the ER Rule has substantially and negatively impacted EMCF.

TennCare's Implementation of the ER Rule Without Engaging in Rulemaking

6. Following the passage of the Fiscal Year 2012 Appropriations Act ("2012 Act"), TennCare implemented the ER Rule. The 2012 Act did not enact any requirement regarding

reimbursement of emergency room physicians for non-emergency services.¹ More specifically, the Fiscal Year 2012 Appropriations Act did not mandate that TennCare implement a \$50 cap on payment for non-emergent ER physician services rendered in the emergency department.

7. Nevertheless, following the passage of the 2012 Act, TennCare implemented the new ER Rule, which (i) imposed a \$50 cap² on ER physician services that were determined to be “non-emergent,” and (ii) required that the determination of whether a claim is “non-emergent” be based solely on the patient’s final diagnosis.

8. When TennCare announced the implementation of the new ER Rule, it correctly stated that the ER Rule would be effective only *upon its adoption as an emergency rule*. Yet, TennCare never promulgated an emergency rule or any other rule to this effect. (See attached **Exhibit A**.) TennCare did not follow the requirements of the Tennessee Uniform Administrative Procedure Act (“TUAPA”), Tenn. Code Ann. §4-5-101 *et seq.*, for agency rulemaking with respect to the ER Rule.

TennCare’s ER Rule Violates State and Federal Law

9. TennCare’s ER Rule applies the \$50 cap only to “non-emergency” services. Under existing federal and State law, the determination of whether an individual has an emergency medical condition (“EMC”) *must* be based upon the prudent layperson standard. 42 U.S.C.

¹ Indeed, it could not. The Tennessee Constitution, Article II § 17, provides that “[n]o bill shall become a law which embraces more than one subject.” Pursuant to this limitation, an Appropriations Act appropriates money—that is all. See also Tenn. Code Ann. § 9-4-5018(c) (stating an “appropriations bill shall not contain any provisions of general legislation”).

² TennCare’s initial formulation of the ER Rule would have required MCOs to limit payment to ED physicians to their average reimbursement amount for CPT code 99281 for non-emergency visits. (See attached **Exhibit A**.) However, TennCare subsequently abandoned its initial formulation, and, effective July 1, 2011, implemented a new formulation wherein the MCO’s were required to impose a \$50 cap on the payments made to ER physicians for non-emergency services rendered in the emergency room. (See attached **Exhibit B**.)

§ 1396u-2(b)(2)(C); Tenn. Code. Ann. § 56-7-2355; *see also*, 42 U.S.C. § 1395dd. Consistent with these laws, TennCare has repeatedly adopted rules that define an EMC based upon the prudent layperson standard. Tenn. Comp. R & Regs, 1200-13-21-.02(7), 1200-13-13-.01(105), 1200-13-14-.01(112). Further, federal law expressly prohibits Medicaid MCOs from limiting what constitutes an EMC on the “basis of lists of diagnoses or symptoms.” 42 C.F.R. § 438.114(d)(1)(i). However, instead of relying upon the existing State and federal law that requires application of the prudent layperson standard, TennCare’s ER Rule requires that the determination of whether a service is non-emergent be based *solely* upon the patient’s final diagnosis, which is specifically prohibited by federal law.³

The ER Rule Is Invalid as It Violates the TUAPA

10. TennCare clearly acknowledged that the ER Rule would be effective only *upon its adoption as an emergency rule*. As such, TennCare recognized its obligation under State law to adopt the ER Rule through formal rulemaking procedures. However, it is undisputed that TennCare did not adopt the ER Rule through the TUAPA-rulemaking process. Nevertheless, TennCare implemented and enforced the ER Rule as if it had been properly adopted pursuant to the TUAPA.

11. While TennCare has authority to “promulgate rules and regulations to effectuate the purposes of the [Medical Assistance Act],” State law clearly mandates that “[a]ll such rules and regulations shall be promulgated in accordance with the Uniform Administrative Procedures Act [TUAPA].” Tenn. Code Ann § 71-5-134. Accordingly, to implement any government action that meets the definition of a rule, TennCare must adopt it through rulemaking in accordance with

³ Each MCO used its own list of final diagnoses for determining which services are emergent or non-emergent. Thus, it was not uniform across the State.

the TUAPA. Indeed, § 71-5-134 merely reiterates the basic requirement of Tennessee law that rules must be adopted in accordance with the rulemaking requirements of the TUAPA, and failure to do so renders the government action “void and of no effect.” *see* Tenn. Code Ann § 4-5-216. TennCare’s ER Rule is a rule that had to be adopted in accordance with the TUAPA.

12. The TUAPA defines a “rule” as an “agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency.” Tenn. Code Ann. § 4-5-102(12).

13. TennCare’s ER Rule unquestionably meets this statutory definition. TennCare has instructed all of its contracting MCOs to impose a \$50 limit on all payments made to all ER physicians for services rendered to Medicaid recipients that are determined to be non-emergent based upon final diagnosis. TennCare’s ER Rule is a statement of general applicability that purports to implement law or prescribe policy. *See* Tenn. Code Ann. § 4-5-102(12).

14. Because TennCare’s ER Rule is a “rule” as defined by statute, and TennCare implemented the ER Rule without complying with the TUAPA’s rulemaking requirements, the ER Rule is “void and of no effect.” *See* Tenn. Code Ann § 4-5-216.

15. As TennCare’s new ER Rule is void and of no effect based solely upon TennCare’s failure to comply with the TUAPA’s rulemaking requirements, no further basis for invalidating it is necessary. However, the ER Rule is also invalid because it is contrary to both State and federal law. *See* Tenn. Code Ann § 4-5-225(c).

The ER Rule Violates State and Federal Law

16. Both State and federal law require TennCare to determine whether a patient has an emergency medical condition based upon the prudent layperson standard. 42 U.S.C. §1396u-2(b)(2)(C); Tenn. Code. Ann. § 56-7-2355; Tenn. Comp. R & Regs. 1200-13-21-.02(7), 1200-13-

13-.01(105), 1200-13-14-.01(112). In direct conflict with these laws, however, TennCare's ER Rule requires that this determination be based on the patient's final diagnosis. The ER Rule therefore is invalid because it "violates state and federal law." Tenn. Code Ann § 4-5-225(c).

17. Additionally, federal law specifically prohibits a Medicaid MCO from making the determination of whether a recipient has an emergency medical condition based upon final diagnosis. 42 C.F.R. § 438.114(d)(1)(i). CMS recently affirmed this prohibition. (See attached **Exhibit C.**) TennCare's ER Rule therefore further violates this federal law. See Tenn. Code Ann § 4-5-225(c).

18. The ER Rule also violates the State and federal requirement that Medicaid rules be applied uniformly across the state. Federal law requires each state's medical assistance program to "provide that it shall be in effect in all political subdivisions of the State." 42 USC § 1396a(a)(1). Consistent with federal law, State law specifically mandates that "[t]he department shall . . . [m]ake *uniform* rules and regulations, not inconsistent with the law, for implementing, administering and enforcing this part in an efficient, economical and impartial manner." Tenn. Code Ann § 71-5-105 (emphasis added). Because the ER Rule permits MCOs under contract with TennCare to use different final diagnosis codes to determine whether a claim is emergent, the ER Rule is not uniform and is arbitrary and capricious. For this additional reason, the ER Rule violates both state and federal law and is therefore invalid. See Tenn. Code Ann § 4-5-225(c).

19. Lastly, under State law, TennCare only has "authority to develop and implement initiatives or program modifications to control the costs of the TennCare program to the extent permitted under federal law and the TennCare waiver." Tenn. Code Ann § 71-5-102(d), *see also* § 71-5-105. As the ER Rule violates various State and federal laws as set forth herein, TennCare also did not have statutory authority to implement and adopt the ER Rule.

The TennCare Proceeding

20. On July 19, 2018, EMCF filed a petition before the Division seeking a declaratory order under Tenn. Code Ann. §§ 4-5-223 & 4-5-225(b) that (1) the ER Rule implemented by TennCare on July 1, 2011 was void and of no effect because it was not adopted in accordance with TUAPA, and (2) had the ER Rule been adopted in accordance with the TUAPA, it still would have been invalid, as it conflicts with both State and federal law. (See attached **Exhibit D**, Pet. for Decl. Order p. 2.)

21. By letter dated September 7, 2018, TennCare took the position that it is without jurisdiction under the TUAPA to issue the requested declaratory order because the challenged ER Rule was never adopted in accordance with the TUAPA, and, as such, is not a rule within the scope of the Tenn. Code Ann. § 4-5-223(a). (See attached **Exhibit E**, TennCare Letter).

22. Even more egregious, TennCare further asserted that “this letter does not constitute action or lack of action taken pursuant to Tenn. Code Ann. § 4-5-223(c).” Under the plain language of Tenn. Code Ann. § 4-5-223(c), however, “[i]f an agency has not set a petition for declaratory order for a contested case hearing within sixty days after the receipt of the petition, the agency *shall be deemed* to have denied the petition and to have refused to issue a declaratory order. (emphasis supplied).” TennCare did not schedule a contested case hearing within sixty days. Thus, as a matter of law, TennCare has refused to issue a declaratory order.

23. This Court has jurisdiction to issue a declaratory order that the ER Rule is invalid pursuant to Tenn. Code Ann. § 4-5-225(b), which authorizes a suit for declaratory judgment in chancery court where “the complainant has petitioned the agency for a declaratory order and the

agency has refused to issue a declaratory order.” EMCF petitioned TennCare for a declaratory order, and TennCare refused to issue a declaratory order.

24. EMCF has exhausted its administrative remedies.

25. In the alternative, this Court has jurisdiction to issue a declaratory judgment pursuant to Tenn. Code Ann. § 29-14-101 *et seq.*

Count One

(Declaratory Relief – ER Rule is invalid as TennCare did not comply with rulemaking procedures of TUAPA)

26. EMCF incorporates the previous allegations, as if recopied herein.

27. The ER Rule violates the TUAPA and is invalid. Specifically, the ER Rule is a rule as defined under Tenn. Code Ann. § 4-5-102(12). It is undisputed that the TennCare did not adopt the ER Rule in accordance with the TUAPA. Tennessee law clearly mandates that TennCare promulgate its rules and regulation in accordance with the TUAPA. Tenn. Code Ann §§ 71-5-134 & 4-5-101, *et. seq.* TennCare’s failure to comply with the rulemaking procedures of the TUAPA in implementing the ER Rule, renders the ER Rule “void and of no effect.” Tenn. Code Ann § 4-5-216.

28. The ER Rule was implemented without “compliance with the rulemaking procedures of [the TUAPA]” and, as such, is invalid. Tenn. Code Ann § 4-5-225(c).

WHEREFORE, EMCF requests that the Court declare the ER Rule invalid, unenforceable, void and of no effect.

Count Two

(Declaratory Judgment Act – ER Rule is invalid as TennCare did not comply with rulemaking procedures of TUAPA)

29. EMCF incorporates the previous allegations, as if recopied herein.

30. A genuine dispute exists between the parties regarding whether the ER Rule is invalid because TennCare failed to comply with the rulemaking procedures of the TUAPA when implementing the ER Rule.

31. Pursuant to Tenn. Code Ann. §§ 29-14-101 *et seq.*, EMCF seeks a declaratory judgment that the ER Rule is invalid, and therefore has no effect on the rights of EMCF, because TennCare failed to comply with the rulemaking procedures of the TUAPA when implementing the ER Rule.

Count Three

(Declaratory Relief – ER Rule is invalid as it is contrary to State and federal law)

32. EMCF incorporates the previous allegations, as if recopied herein.

33. The ER Rule also violates State and federal law and is invalid for this additional reason. Specifically, the ER Rule requires that the determination of whether a patient's condition was an emergency medical condition be based on the patient's final diagnosis in conflict with the requirements of State and federal law that it use the prudent layperson standard. *See* 42 U.S.C. §1396u-2(b)(2)(C); 42 C.F.R. § 438.114(d)(1)(i); Tenn. Code. Ann. § 56-7-2355; Tenn. Comp. R & Regs, 1200-13-21-.02(7), 1200-13-13-.01(105), 1200-13-14-.01(112). Further, the ER Rule also violates the State and federal requirement that Medicaid rules be applied uniformly across the state. *See* 42 USC § 1396a(a)(1); Tenn. Code Ann § 71-5-105.

34. As the ER Rule "violates state and federal law," it is invalid. *See* Tenn. Code Ann § 4-5-225(c).

WHEREFORE, EMCF requests the Court to declare that the ER Rule is invalid, unenforceable, unlawful, and unconstitutional.

Count Four
(Declaratory Judgment Act – ER Rule is invalid as it is contrary to State and federal law)

35. EMCF incorporates the previous allegations, as if recopied herein.

36. A genuine dispute exists between the parties regarding whether the ER Rule is invalid because the ER Rule requires that the determination of whether a patient's condition was an emergency medical condition be based on the patient's final diagnosis, in conflict with the requirements of State and federal law that it use the prudent layperson standard. *See* 42 U.S.C. §1396u-2(b)(2)(C); 42 C.F.R. § 438.114(d)(1)(i); Tenn. Code. Ann. § 56-7-2355; Tenn. Comp. R & Regs, 1200-13-21-.02(7), 1200-13-13-.01(105), 1200-13-14-.01(112). A genuine dispute also exists between the parties regarding whether the ER Rule violates the State and federal requirement that Medicaid rules be applied uniformly across the state. *See* 42 USC § 1396a(a)(1); Tenn. Code Ann § 71-5-105.

37. Pursuant to Tenn. Code Ann. §§ 29-14-101 *et seq.*, EMCF seeks a declaratory judgment that the ER Rule is invalid, and therefore has no effect on the rights of EMCF, because the ER Rule is contrary to State and federal law.

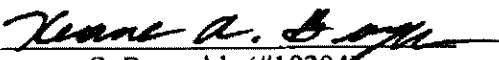
Count Five
(Injunctive Relief)

38. EMCF incorporates the previous allegations, as if recopied herein.

39. EMCF is an affected person who seeks injunctive relief in this action regarding the legality of a governmental action.

40. EMCF seeks injunctive relief compelling the Division to cease any reliance upon the ER Rule as it is invalid and of no force and effect.

Respectfully submitted,


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(305) 960-2218
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Attorneys for Petitioner



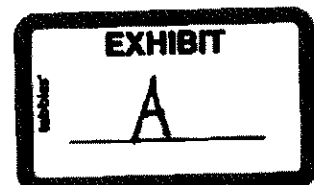
STATE OF TENNESSEE
BUREAU OF TENNCARE

DEPARTMENT OF FINANCE & ADMINISTRATION
310 Great Circle Road
NASHVILLE, TENNESSEE 37243

2018 SEP 20 PM 2:47
RECEIVED
OFFICE OF THE ATTORNEY GENERAL
CCAH

This letter serves as official notice of programmatic changes to be made by the MCOs as a result of the proposed state fiscal year 2012 budget. As you are aware, all State Departments were required to submit proposed budgets that included spending reductions. These reductions are due to the expiration of one time federal funding and the continued impact of the national economic downturn on Tennessee state revenues. TennCare's proposed budget included a variety of benefit changes and provider and plan reimbursement reductions of 8.5%. It is possible that the hospital assessment fee will be renewed this year and is therefore contemplated in the Governor's Recommended Budget. However, even if the fee is ultimately approved, some reductions will still be necessary. As a result, there are three categories of budget reduction items to be implemented by the MCOs: An 8.5% reimbursement reduction for some services/providers, changes to vaginal and cesarean deliveries reimbursement, and changes to reimbursement for non-emergency professional services in an ED. Below are the details:

- **8.5% Reimbursement Reduction** - The reimbursement level for services/providers not "bought back" by the hospital fee will be reduced by 8.5%. This reduction will be applied to services performed on or after July 1, 2011. Attachment A to this letter is a list of affected services and related coding methodology.
- **Cesarean and Vaginal Delivery Reimbursement** - Cesarean and vaginal deliveries will be reimbursed at the same rate effective July 1, 2011. MCOs are directed to increase their vaginal delivery rates by 5%. Additionally, MCOs are to pay the vaginal delivery rate for corresponding C-Section deliveries. Attachment C provides a proposed approach to linking vaginal codes with C-section codes for the purposes of implementing this requirement. Please advise TennCare by March 21, 2011 regarding any questions or concerns you may have pertaining to this proposed linkage.
- **Emergency Department Professional Fees** - Most of you have implemented a reimbursement policy for facilities whereby they are only paid an EMTALA screening fee for non-emergency ED visits. The budget directs MCOS to pay ED physicians their average reimbursement amount associated with CPT 99281 for non-emergency visits.



TennCare will promulgate emergency rules before July 1 requiring that these cuts be made thereby making it State law and regulation. To the extent that your provider agreements specify that they will conform to state laws and regulations, these changes will be effective in the provider agreements on July 1. Please take the steps necessary to communicate these changes and make necessary changes to your payment systems and provider agreements. It is possible as the legislative session progresses that changes could be made to the budget. We will communicate those to you as soon as possible. We will be monitoring the progress of implementation to determine if policy changes are needed to implement this effectively and timely. If you have any questions, please contact Keith Galtner at (615) 507-6414.

Attachment A

- All pathology, lab, and radiological services. This includes all professional, inpatient and outpatient services. This includes the codes in Attachment B.
- All outpatient and professional behavioral health services. This is defined as any HCPCS or CPT codes billed by provider type 11 or 45 and taxonomy 323P00000X (Psy. Residential Treatment Providers) which should capture all services provided in a non-hospital setting.
- All emergency and non emergency transportation. Defined as HCPCS Codes A0000 – A0999.
- All home health services except respite, hospice, and Home and Community Based Services. This includes the codes listed in Attachment D
- Nursing Home services. TennCare will provide updated rates to the MCOs with a July 1, 2011 effective date.

Attachment B

Radiology Procedure Codes

| From | To | Modifiers Included | From | To | Modifiers Included |
|-------|-------|--------------------|-------|-------|--------------------|
| 70000 | 78266 | All | A9535 | A9567 | All |
| 78269 | 79999 | All | A9600 | A9699 | All |
| 92132 | 92134 | All | C1080 | C1083 | All |
| 92227 | 92228 | All | C1122 | C1122 | All |
| 0042T | 0042T | All | C9013 | C9013 | All |
| 0234T | 0238T | All | G0106 | G0106 | All |
| A4641 | A4642 | All | G0120 | G0122 | All |
| A9500 | A9505 | All | G0130 | G0130 | All |
| A9510 | A9512 | All | G0202 | G0236 | All |
| A9516 | A9516 | All | G0252 | G0252 | All |
| A9517 | A9517 | All | G0389 | G0389 | All |
| A9521 | A9521 | All | Q0035 | Q0035 | All |
| A9524 | A9524 | All | Q9945 | Q9946 | All |
| A9526 | A9526 | All | Q9947 | Q9957 | All |
| A9528 | A9532 | All | Q9958 | Q9964 | All |

Radiology Revenue Codes

| Revenue Code | Description | Revenue Code | Description |
|--------------|---|--------------|---|
| 320 | Radiology Diagnostic - General | 351 | CT Scan - Head Scan |
| 321 | Radiology Diagnostic - Angiocardiology | 352 | CT Scan - Body Scan |
| 322 | Radiology Diagnostic - Arthrography | 359 | CT Scan - Other |
| 323 | Radiology Diagnostic - Arteriography | 400 | Other Imaging Services - General |
| 324 | Radiology Diagnostic - Chest X-Ray | 401 | Other Imaging Services - Diagnostic Mammography |
| 329 | Radiology Diagnostic - Other | 402 | Other Imaging Services - Ultrasound |
| 330 | Radiology Therapeutic - General | 403 | Other Imaging Services - Screening Mammography |
| 331 | Radiology Therapeutic - Chemotherapy - Injected | 404 | Other Imaging Services - Positron Emission Tomography |
| 332 | Radiology Therapeutic - Chemotherapy - Oral | 409 | Other Imaging Services - Other |
| 333 | Radiology Therapeutic - Radiation Therapy | 610 | Magnetic Resonance Technology - General |
| 335 | Radiology Therapeutic - Chemotherapy | 611 | Magnetic Resonance Technology - Brain |
| 339 | Radiology Therapeutic - Other | 612 | Magnetic Resonance Technology - Spinal Cord |

**Attachment B
Continued**

| Revenue Code | Description | Revenue Code | Description |
|--------------|--------------------------------|--------------|--|
| 340 | Nuclear Medicine - General | 614 | Magnetic Resonance Technology - Other |
| 341 | Nuclear Medicine - Diagnostic | 615 | Magnetic Resonance Angiography - Head and Neck |
| 342 | Nuclear Medicine - Therapeutic | 616 | Magnetic Resonance Angiography - Lower Extremities |
| 349 | Nuclear Medicine - Other | 618 | Magnetic Resonance Angiography - Other |
| 350 | CT Scan - General | 619 | Magnetic Resonance Imaging - Other |

Laboratory/Pathology Code Ranges

| From | To | Modifiers |
|-------|-------|-----------|
| 78267 | 78268 | All |
| 80000 | 89999 | All |
| ATP02 | ATP23 | All |
| G0027 | G0027 | All |
| G0101 | G0107 | All |
| G0120 | G0124 | All |
| G0141 | G0148 | All |
| G0235 | G0235 | All |
| G0265 | G0266 | All |
| G0306 | G0307 | All |
| G0328 | G0328 | All |
| G0430 | G0431 | All |
| P2028 | P7001 | All |
| P9612 | P9612 | All |
| P9615 | P9615 | All |
| Q0111 | Q0115 | All |
| R0070 | R0076 | All |

Laboratory/Pathology Individual Code

| Code | Description | Code | Description |
|------|--|------|--|
| 300 | Laboratory - General | 309 | Laboratory - Other |
| 301 | Laboratory - Chemistry | 310 | Laboratory Pathological - General |
| 302 | Laboratory - Immunology | 311 | Laboratory Pathological - Cytology |
| 303 | Laboratory - Renal Patient (Home) | 312 | Laboratory Pathological - Histology |
| 304 | Laboratory - Nonroutine Dialysis | 314 | Laboratory Pathological - Biopsy |
| 305 | Laboratory - Hematology | 319 | Laboratory Pathological - Other |
| 306 | Laboratory - Bacteriology & Microbiology | 923 | Other Diagnostic Services - Rap Smear |
| 307 | Laboratory - Urology | 925 | Other Diagnostic Services - Pregnancy Test |

Attachment C

Vaginal to Cesarean CPT Crosswalk

| Description | Vaginal CPT Code | Cesarean CPT Code |
|------------------------------|------------------|-------------------|
| Global OB Care | 59400 | 59510 |
| Delivery Only | 59409 | 59514 |
| Delivery and Postpartum | 59410 | 59515 |
| VBAC | 59610 | N/A |
| VBAC Delivery Only | 59612 | 59620 |
| VBAC Delivery and Postpartum | 59614 | 59622 |
| Routine OB Care | 59400 | 59618 |

Vaginal to Cesarean DRG Crosswalk

| Vaginal Code | Description | Corresponding Cesarean Code | Description |
|--------------|---|-----------------------------|----------------------|
| 774 | Vaginal Delivery w Complicating Diagnosis | 765 | Cesarean with CC/MCC |
| 775 | Vaginal Delivery w/o Complicating Diagnosis | 766 | Cesarean w/o CC/MCC |

Attachment D

Home Health Codes

| From | To |
|--------------------------------|-----------|
| T1000 | T1003 |
| T1020 | T1022 |
| T1030 | T1031 |
| T2042 | T2043 |
| 90963 | 90970 |
| 99500 | 99607 |
| 99500 | 99607 |
| G0151 | G0162 |
| G0320 | G0327 |
| S5035 | S5036 |
| S5180 | S5181 |
| S5108 | S5116 |
| S5497 | S5502 |
| S5517 | S5523 |
| S9122 | S9131 |
| S9208 | S9209 |
| S9211 | S9214 |
| S9490 | S9504 |
| S9529 | |
| S9535 | S9590 |
| S9800 | S9810 |
| | |
| Revenue Codes | |
| From | To |
| 560 | 609 |
| 55X with Home Health Bill Type | |
| 64X | |
| 651 | 652 |
| 66X with Home Health Bill Type | |
| 82X with Home Health Bill Type | |
| 84X with Home Health Bill Type | |
| 85X with Home Health Bill Type | |
| 88X with Home Health Bill Type | |
| | |
| Bill Types | |
| From | To |
| 320 | 349 |

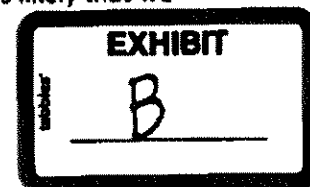
From: Stephanie Anderson [mailto:Stephanie.Anderson@tn.gov]
Sent: Wednesday, May 25, 2011 5:34 PM
To: aking01@amerigroup.com; Edna Willingham; Michael Drescher; Scott Bowers; Winnie Toler; Cambron, Amber; Hickey, JD; Hickey, JD
Cc: Andrea Thaler; Darin J Gordon; Emmaliz Evo; Floyd N Price; Harriet M Hickson; Keith Galthier; Mary C Shelton; Michele Napier; Omar Winbush; Scott Pierce; Stephanie Anderson; Tammy Mihm; Wendy Long
Subject: Budget Decisions for July 1, 2011

Below are the final decisions regarding the reductions addressed in the 2012 Budget that will affect your organization.

The following reductions will be effective July 1, 2011:

- **4.25% Reduction to the MCO administrative portion of the CAP rate**
- **4.25% Reduction for the following provider services:** (as identified in the applicable Attachments to the April 28, 2011 MCO Notice Re: Rate Changes)
 - Emergency and Non-Emergency Transportation (Defined as HCPCS Codes A0000-A0999)
 - Lab and X-Ray (see Attachment B/April 28, 2011 Notice)
 - Home Health (see Attachment D/April 28, 2011 Notice)
- **Nursing Facility Rate Reductions** - Be prepared to implement NF Rates that will be provided to MCOs by the Bureau of TennCare
 - The Bureau will provide notice to the Nursing Facilities and copy MCOs
- **Cesarean and Vaginal Delivery Reimbursement** - Cesarean and vaginal deliveries will be reimbursed at the same rate effective July 1, 2011. MCOs are directed to increase their vaginal delivery rates by 17%. Additionally, MCOs are to pay the vaginal delivery rate for corresponding C-Section deliveries. (See Attachment C/April 28, 2011 Notice)
- **Emergency Department Professional Fees** - For non-emergent ED visits, professional claims that would otherwise have been reimbursed at rates higher than \$50 will be paid at a rate of \$50.
 - Each MCO must provide ED providers with the MCOs policy describing your process for determining Emergent vs. Non-Emergent claims. In addition to your MCOs process for a provider to appeal claims reimbursement, the policy must offer a front end process whereby the provider may submit documentation for review upon consideration of an initial claim.

NOTE: The State is still anticipating the possibility of a settlement with CMS that could result in additional one-time funding. If we do not receive additional funding it is likely that we



will implement an additional 4.25% reduction for a total of 8.5% effective January 1, 2012.

Effective July 1, 2011, we will not implement a copay for non-emergency transportation; however, pending the outcome of the settlement with CMS this may change as well.

The Bureau will provide notice to MCOs prior to any changes that will become effective for January 1, 2012.

Thanks, Steph

Stephanie Anderson
Assistant Director
Managed Care Operations
TennCare
310 Great Circle Road
Nashville, TN 37243
Phone: (615) 507-6692
Fax: (615) 248-4381

Notice: This message (including attachments) is covered by the Electronic Communication Privacy Act of 1986 (18 U.S.C. sections 2510-21) and may contain information protected by the federal regulations under the Health Insurance Portability and Accountability Act of 1996 (45 C. F. R. Parts 160-64) or other confidential information. If you are not the intended recipient, any retention, dissemination, or copying of this message is strictly prohibited; please call the sender to tell them that you have received the message in error, then delete it.



DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

MAR 15 2018

Administrator
Washington, DC 20201

Andrea Brault, M.D.
Chair of the Board
Emergency Department Practice Management Association
8400 Westpark Drive, 2nd Floor
McLean, VA 22102

2018 SEP 20 PM 2:47
RECEIVED
EMERGENCY CT
DOAH

Dear Dr. Brault:

Thank you for your letter to former Acting Secretary Eric Hargan, Chief Medical Officer Vanila Singh and myself regarding enforcement of the prudent layperson standard to prevent unreasonable denials of emergency care for Medicaid beneficiaries and the use of 1115(a) demonstration authority to waive the prudent layperson standard. They have asked that I respond to you directly on their behalf.

As discussed in the January 16, 2014, informational bulletin regarding hospital emergency department usage, Medicare-participating hospitals are bound by the Emergency Medical Treatment and Labor Act (EMTALA), which requires such hospitals to provide medical screening examination to every individual who "comes to the emergency department" seeking examination or treatment. State Medicaid programs must take care to ensure that strategies intended to affect provider or beneficiary behavior in the emergency department do not create issues in complying with EMTALA.

For Medicaid managed care, the regulation at 42 CFR 438.114(d)(1)(i) specifies that managed care organizations (MCOs) may not "(i) Limit what constitutes an emergency medical condition...on the basis of lists of diagnoses or symptoms;..." This position was explained in greater detail in a State Medicaid Director letter issued April 18, 2000:

The determination of whether the prudent layperson standard is met must be made on a case-by-case basis. The only exceptions to this general rule are that payers may approve coverage on the basis of an ICD-9 code, and payers may set reasonable claim payment deadlines (taking into account delays resulting from missing documents from the initial claim).

Note that payers may not deny coverage solely on the basis of ICD-9 codes. Payers are also barred from denying coverage on the basis of ICD-9 codes and then requiring resubmission of the claim as part of an appeals process. This bar applies even if the process is not labeled as an appeal. Whenever a payer (whether an MCO or a State) denies coverage or modifies a claim for payment, the determination of whether the prudent layperson standard has been met must



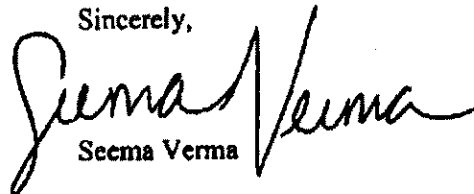
be based on all pertinent documentation, must be focused on the presenting symptoms (and not on the final diagnosis), and must take into account that the decision to seek emergency services was made by a prudent layperson (rather than a medical professional).

This State Medicaid Director letter is still in effect and can be found at:
<https://www.medicaid.gov/federal-policy-guidance/federal-policy-guidance.html>.

We contacted KanCare regarding your assertion that KanCare MCOs have been down-coding emergency department claims based on a list of diagnosis codes. KanCare officials advised us that they have developed a policy that prohibits down-coding of emergency room claims and that all three MCOs were scheduled to implement this policy on January 19, 2018, retroactive to July 1, 2017, dates of service.

We hope the information provided in this letter is helpful. Should you have any questions, please contact Juliet Kuhn, Division of Managed Care Plans, at 410-786-2480. I also will provide this response to Janice Wachtler.

Sincerely,


Secma Verma

Received

JUL 19 2018

**BEFORE THE DIVISION OF TENNCARE, DEPARTMENT OF FINANCE AND
ADMINISTRATION**

Bureau of Tenn Care

Emergency Medical Care Facilities, P.C.,)
)
 Petitioner,)
)
 v.)
)
 Division of TennCare,)
 Department of Finance and Administration,)
)
 Respondent.)

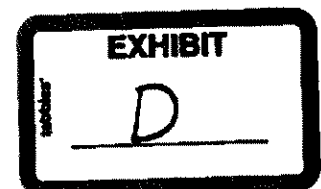
Case No. _____

PETITION FOR DECLARATORY ORDER

1. Pursuant to Tenn. Code Ann. §§ 4-5-223 and 4-5-225(b), Emergency Medical Care Facilities, P.C. ("EMCF") submits this Petition for Declaratory Order before the Division of TennCare, Department of Finance and Administration ("TennCare").

2. On or about July 1, 2011, after the passage of the Fiscal Year 2012 Appropriations Act, TennCare implemented a new policy (the "Policy") that: (a) imposed a \$50 limit on payments for all non-emergent emergency room ("ER") physician services, and (b) required that the determination of whether a claim is "non-emergent" be based solely on the patient's final diagnosis. As required by law, TennCare announced that the Policy would be effective only upon its adoption as an emergency rule. See TennCare's official notice to MCOs of programmatic changes, attached hereto as Exhibit A. TennCare, however, never promulgated any such rule. Nevertheless, TennCare implemented the Policy, effective July 1, 2011. See May 25, 2011, email of Stephanie Anderson, attached hereto as Exhibit B.

3. TennCare's implementation of the Policy was unlawful. EMCF therefore seeks a declaration that:



- a. TennCare's Policy is void and of no effect because it was not adopted in accordance with Tennessee's Uniform Administrative Procedure Act ("TUAPA"), *see* Tenn. Code Ann § 4-5-216;
- b. Had TennCare adopted the Policy in accordance with the TUAPA, the Policy would still be invalid and unenforceable because it conflicts with State and federal law by requiring the determination of whether a service was "non-emergent " to be based solely on the patient's final diagnosis, and because it is non-uniform in application.

BACKGROUND

4. TennCare is the single state agency that administers the Medicaid program in Tennessee. TennCare contracts out the operation of the Medicaid program to various Managed Care Organizations ("MCO"). For example, TennCare has granted Volunteer State Health Plan, Inc. ("VSHP") a certificate of authority to operate as a TennCare MCO.

5. EMCF is a professional corporation located in Jackson, Tennessee that is comprised of physicians and other health care professionals licensed to practice medicine in the State of Tennessee. EMCF provides physician services to TennCare recipients in the emergency departments of various hospitals.

6. Effective October 1, 2008, EMCF executed a Group Practice Agreement to participate under both BlueCare and TennCare Select and provide emergency room services to TennCare recipients. Because of TennCare's invalid implementation of the Policy, effective July 1, 2011, EMCF's payments from VSHP under the Group Practice Agreement have been reduced by over \$200,000. As such, TennCare's invalid implementation of the Policy has substantially and negatively impacted EMCF.

FISCAL YEAR 2012 APPROPRIATIONS ACT

7. The Tennessee General Assembly passed the Fiscal Year 2012 Appropriations Act on May 21, 2011, which was signed by the Governor on June 16, 2011. As part of the legislative process, the Governor provided the Tennessee General Assembly with his proposed budget, which

included a proposed reduction of approximately \$25 million described as: "Reduced reimbursement to emergency room (ER) physicians for non-emergency services to a triage fee." See Base Budget Reduction Detail, Vol. II, attached hereto as Exhibit C.

8. The Fiscal Year 2012 Appropriations Act did not enact any requirement regarding reimbursement of emergency room physicians for non-emergency services. See Fiscal Year 2012 Appropriations Act, § III-26, attached hereto as exhibit D. Indeed, in accordance with Tennessee Constitution, Article II § 17, no Appropriations Act, including the Fiscal Year 2012 Appropriations Act, can do anything other than appropriate money ("[n]o bill shall become a law which embraces more than one subject."). Pursuant to this limitation, an Appropriations Act appropriates money—that is all. See also Tenn. Code Ann. § 9-4-5018(c) (stating an "appropriations bill shall not contain any provisions of general legislation").

9. Accordingly, the Fiscal Year 2012 Appropriations Act did not mandate that TennCare implement a \$50 cap on payment for non-emergent ER physician services rendered in the emergency department. While TennCare might have authority to impose such a limit under general State Law,¹ it would have to do so by adopting a rule to implement such a limitation.

TENNCARE'S IMPLEMENTATION OF THE POLICY

10. Following passage of the Fiscal Year 2012 Appropriations Act, TennCare implemented the Policy, which (i) imposed a \$50 cap on ER physician services that are determined to be "non-emergent," and (ii) required that the determination of whether a claim is "non-emergent" be based solely on the patient's final diagnosis. When TennCare announced this new

¹ As set forth below, it does not have the authority to determine whether a recipient has an emergency medical condition based upon final diagnosis, as that is specifically prohibited by federal law. 42 C.F.R. § 438.114(d)(1)(i).

policy, it stated that the Policy would be effective only *upon its adoption as an emergency rule*, yet TennCare never promulgated an emergency rule or any other rule to this effect. (Ex. A.)

11. TennCare's initial formulation of the Policy would have required MCOs to limit payment to ED physicians to their average reimbursement amount for CPT code 99281 for non-emergency visits. (Ex. A.) However, TennCare subsequently abandoned its initial formulation, and, effective July 1, 2011, implemented a new formulation wherein the MCOs were required to impose a \$50 cap on payments made to ER physicians for non-emergency services rendered in the emergency room. (Ex. B.)

12. TennCare's Policy applies the \$50 cap only to "non-emergency" services. Under existing federal and State law, the determination of whether an individual has an emergency medical condition ("EMC") *must* be based upon the prudent layperson standard. 42 U.S.C. § 1396u-2(b)(2)(C); Tenn. Code. Ann. § 56-7-2355; *see also*, 42 U.S.C. § 1395dd. Consistent with these laws, TennCare has repeatedly adopted rules that define an EMC based upon the prudent layperson standard. Tenn. Comp. R & Regs, 1200-13-21-.02(7), 1200-13-13-.01(105), 1200-13-14-.01(112). Further, federal law expressly prohibits Medicaid MCOs from limiting what constitutes an EMC on the "basis of lists of diagnoses or symptoms." 42 C.F.R. § 438.114(d)(1)(i). However, instead of relying upon existing State and federal law that requires application of the prudent layperson standard, TennCare's Policy requires that the determination of whether a service is non-emergent be based *solely* upon the patient's final diagnosis, which is specifically prohibited by federal law.²

² Each MCO used its own list of final diagnoses for determining which services are emergent or non-emergent. Thus, implementation of the Policy was not uniform across the State.

13. In sum, following passage of the Fiscal Year 2012 Appropriations Act, TennCare implemented the Policy, effective July 1, 2011, which (i) imposes a \$50 cap on payment for all non-emergent ER physician services, and (ii) requires that the determination of whether a service is non-emergent be based *solely* upon the patient's final diagnosis. This Policy was carried out by TennCare's MCOs effective July 1, 2011, and that Policy remains in place today.

THE POLICY IS INVALID AS IT VIOLATES THE TUAPA

14. TennCare clearly acknowledged that the Policy would be effective only *upon its adoption as an emergency rule*. (Ex. A.) As such, TennCare recognized its obligation under State law to adopt the Policy as a rule. However, it is undisputed that TennCare did not adopt the Policy as an emergency rule—nor any other type of rule or regulation. Nevertheless, TennCare implemented and enforced the Policy as if it had been properly adopted pursuant to the TUAPA.

15. While TennCare has authority to “promulgate rules and regulations to effectuate the purposes of the [Medical Assistance Act],” State law clearly mandates that “[a]ll such rules and regulations shall be promulgated in accordance with the Uniform Administrative Procedures Act [TUAPA].” Tenn. Code Ann § 71-5-134. Accordingly, to implement any new policy that meets the definition of a rule, TennCare must adopt the new policy through rulemaking in accordance with the TUAPA. Indeed, § 71-5-134 merely reiterates the basic requirement of Tennessee law that rules must be adopted in accordance with the rulemaking requirements of the TUAPA, and failure to do so renders the policy “void and of no effect,” *see* Tenn. Code Ann § 4-5-216. TennCare's Policy regarding ER physician payment is a rule that had to be adopted in accordance with the TUAPA.

16. The TUAPA defines a "rule" as an "agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency." Tenn. Code Ann. § 4-5-102(12).

17. TennCare's Policy unquestionably meets this statutory definition. TennCare has instructed all of its contracting MCOs to impose a \$50 limit on all payments made to all ER physicians for services rendered to Medicaid recipients that are determined to be non-emergent based upon final diagnosis. TennCare's Policy is a statement of general applicability that purports to implement law and prescribe policy. *See* Tenn. Code Ann. § 4-5-102(12).

18. Because TennCare's Policy is a "rule," as defined by statute, and TennCare implemented the Policy without complying with the TUAPA's rulemaking requirements, the Policy is "void and of no effect." *See* Tenn. Code Ann § 4-5-216.

19. As TennCare's new policy is void and of no effect based solely upon TennCare's failure to comply with the TUAPA's rulemaking requirements, no further discussion is necessary. However, the Policy is also invalid because it is contrary to both State and federal law. *See* Tenn. Code Ann § 4-5-225(c).

THE POLICY VIOLATES STATE AND FEDERAL LAW

20. Both State and federal law require TennCare to determine whether a patient has an emergency medical condition based upon the prudent layperson standard. 42 U.S.C. §1396u-2(b)(2)(C); Tenn. Code. Ann. § 56-7-2355; Tenn. Comp. R & Regs, 1200-13-21-.02(7), 1200-13-13-.01(105), 1200-13-14-.01(112). In direct conflict with these laws, however, TennCare's Policy requires that this determination be based on the patient's final diagnosis. The Policy therefore is invalid because it "violates state and federal law." Tenn. Code Ann § 4-5-225(c).

21. Additionally, federal law specifically prohibits a Medicaid MCO from making the determination of whether a recipient has an emergency medical condition based upon final diagnosis. 42 C.F.R. § 438.114(d)(1)(i). CMS recently affirmed this prohibition. *See* March 15, 2018, letter from CMS Administrator to Andrea Brault, M.D., attached hereto as Exhibit E. TennCare's Policy therefore further violates this federal law. *See* Tenn. Code Ann § 4-5-225(c).

22. The Policy also violates the State and federal requirement that Medicaid rules be applied uniformly across the state. Federal law requires each state's medical assistance program "provide that it shall be in effect in all political subdivisions of the State." 42 USC § 1396a(a)(1). Consistent with federal law, State law specifically mandates that " [t]he department shall . . . [m]ake *uniform* rules and regulations, not inconsistent with the law, for implementing, administering and enforcing this part in an efficient, economical and impartial manner." Tenn. Code Ann § 71-5-105 (emphasis added). Because the Policy permits MCOs under contract with TennCare to use different final diagnosis codes to determine whether a claim is emergent, the Policy is not uniform. For this additional reason, the Policy violates both state and federal law and is therefore invalid. *See* Tenn. Code Ann § 4-5-225(c).

23. Lastly, under State law, TennCare only has "authority to develop and implement initiatives or program modifications to control the costs of the TennCare program to the extent permitted under federal law and the TennCare waiver." Tenn. Code Ann § 71-5-102(d), *see also* § 71-5-105. As the Policy violates various State and federal laws as set forth herein, TennCare also did not have statutory authority to implement and adopt the Policy.

WHEREFORE, Petitioner prays for the following relief:

A. A declaratory order that TennCare's Policy is void and of no effect because the Policy was not adopted in accordance with the requirements of the TUAPA;

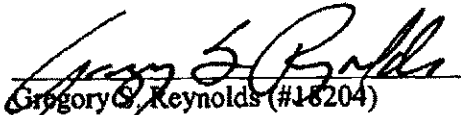
B. A declaratory order that TennCare's Policy is also void and of no effect because the Policy violates State and federal law:

1. by basing the determination of whether a condition is non-emergent solely on the patient's final diagnosis, and
2. by permitting MCOs to individually determine which diagnosis codes to apply in determining whether a patient's condition is non-emergent, resulting in a rule that is not uniform;

C. Such other and general relief as would be warranted by the evidence and the law.

D. EMCF hereby demands an Administrative Law Judge from the Administrative Procedures Division of the Office of the Secretary of State to preside alone over this proceeding.
See Tenn. Code Ann. § 4-5-301(c).

Respectfully submitted,


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Attorneys for Petitioner



September 7, 2018

Via Email

Greg Reynolds
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Nashville, TN 37203
greynolds@rwjplc.com

RE: Emergency Medical Care Facilities, P.C.

Dear Greg:

This letter is provided in regard to the Petition for Declaratory Order that you served upon TennCare on behalf of Emergency Medical Care Facilities, P.C. ("EMCF") on July 19, 2018. In that Petition, EMCF seeks the following relief:

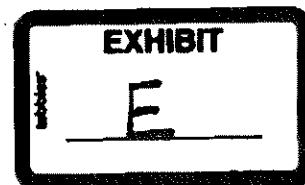
- A. A declaratory order that TennCare's Policy is void and of no effect because the Policy was not adopted in accordance with the requirements of the [Tennessee Uniform Administrative Procedures Act];
- B. A declaratory order that TennCare's Policy is also void and of no effect because the Policy violates State and federal law:
 1. by basing the determination of whether a condition is non-emergent solely on the patient's final diagnosis, and
 2. by permitting MCOs to individually determine which diagnosis codes to apply in determining whether a patient's condition is non-emergent, resulting in a rule that is not uniform

EMCF's Petition fails to present a valid request under the Tennessee Uniform Administrative Procedures Act ("TUAPA"). The TUAPA provides that an affected person "may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency." Tenn. Code Ann. § 4-5-223(a). Through its Petition, EMCF, by its own admission, seeks to invalidate a policy and does not seek a declaratory order as to the validity or applicability of any statute, rule or order. EMCF's Petition is therefore not within the permissible scope of a TUAPA declaratory order action. Because EMCF's Petition does not present a valid request for declaratory order under the TUAPA, this letter does not constitute action or lack of action taken pursuant to Tenn. Code Ann. § 4-5-223(a) or Tenn. Code Ann. § 4-5-223(c). Furthermore, by issuing this letter, TennCare does not agree to the allegations or characterizations in EMCF's Petition and is not waiving any defenses that would be available in the event that the Petition had been properly brought under the TUAPA.

Sincerely,

Drew Staniewski
General Counsel
Tennessee Department of Finance & Administration
Division of TennCare

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