



August 16, 2021

Dan Tsai
Deputy Administrator and Director
Center for Medicaid & CHIP Services (CMCS)
7500 Security Blvd
Baltimore, MD 21244

Dear Mr. Tsai,

The Texas Health and Human Services Commission has received your letter dated August 13, 2021. We understand this letter is intended to comply with the court's August 12, 2021, Order to Clarify Sanctions Standards in *State of Texas v. Brooks-LaSure*.

In its August 12 order, the court gave the Centers for Medicare & Medicaid Services (CMS) two options:

- (1) withdraw or modify the representations by Judith Cash and others that CMS is treating the Demonstration Project as in effect, or
- (2) conform its conduct to the Demonstration Project's special terms and conditions (STCs) by either:
 - a. notifying the state that CMS intends to issue a formal decision within 20 days approving the relevant state-directed payment programs (SDPs); or
 - b. notifying the state why CMS does not anticipate approving the SDPs and notifying the state of specific further modifications required for approval, with that notice triggering the timing requirements of paragraph 34 for meeting to discuss those further modifications.

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We also understand CMS filed notice with the court claiming compliance with the court's order, specifically with option 2.

The state is pleased to begin the dialogue required by the STCs in the January 15 waiver extension. However, your letter does not provide enough information for HHSC to choose between the two options it contains. Specifically, you state that "CMS cannot approve Texas's proposed SDPs in their current form." But the letter does not, as the court required, describe the "specific further modifications required for approval" as required by the court's order.

Your letter provides two options for "modifications." In the first, CMS offers approval of two programs, one of which the state did not propose for state fiscal year 2022 and is inconsistent with the structure of the January 15 waiver extension. This is not a "modification" of the SDP proposals that have been existing since March. It appears, instead, to ask the state to agree to revert to the version of the section 1115 waiver that is currently set to expire in September 2022.

Under your second option, CMS seems to suggest that it will continue the January 15 waiver extension, but the state must "modify" the proposed SDPs by withdrawing them completely and starting over in a manner that is inconsistent with that waiver extension. The only concrete problem that the letter cites is the size of the SDPs. But the size of the SDPs has been known to CMS for months and is fully integrated into the January 15 waiver extension itself because it drives the budget neutrality baseline around which the waiver is built. If these were problems all along, the January 15 STCs obligated CMS to forthrightly state as much and to suggest potential solutions in good faith. CMS's failure to do so until now has seriously impeded HHSC's ability to implement the programs envisioned by the January 15 waiver extension.

Texas wants to work with CMS toward approval of our SDPs and is committed to finding an approach that is consistent with all applicable regulatory and statutory requirements. But we lack sufficient information to do so at the present time. In the appendix to your letter, Option 2 would require the state to submit new proposals that address five issues. However, CMS does not provide an explanation of how each program fails to meet each requirement of law. To ensure productive conversations, we ask CMS to specify which issues apply to which programs and to

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be prepared to discuss the specific modifications to each program that are required for approval.

We look forward to beginning regular meetings, by phone or in person, to resolve CMS's concerns. Texas staff are available to begin our regular meetings immediately. Please confirm CMS's availability and the CMS staff that will attend the meeting.

If you have any questions, please contact me at (512) 538-5335.

Sincerely,



Stephanie Stephens
State Medicaid Director