

Major Texas 1115 developments from the week of August 9.

Last week, there were major developments regarding Texas' 1115 waiver, particularly the state's proposed Directed Payment Programs (DPPs).

On Thursday, the United States District Court in Tyler issued an "Order to Clarify Sanctions Standards" in which the court put CMS on notice that sanctions may be imposed for deviations from the terms and conditions of the Trump-administration approved 1115 extension, which CMS previously represented to the court that they are following. (See links to court order and CMS response at: <https://thotonline.org/thot-initiatives/transformation/>)

Specifically, the court asserted that CMS had not provided the state with an anticipated approval, nor did CMS provide the state with information required to make technical or substantive modifications to the proposed DPPs within the timeframes prescribed by CMS' agreement with the state.

The court gave CMS, 24 hours to respond to HHSC and the court (5 PM Friday), or face possible sanctions as well as injunctive relief for the state.

CMS responded shortly before 5 PM on Friday to HHSC and the court with two options for the state.

Option 1. Essentially the status quo from 2021, including reinstatement of DSRIP, with UHRIP and QIPP amounts at 2021 levels. None of the new DPPs are included in this option.

Option 2. Allows the state to withdraw and resubmit the proposed DPPs, including CHIRP, TIPPS and RAPPS. This would mean that Texas would start FY 2022 without having any of these programs, or even programs from 2021, in place. Also, there is little indication as to CMS' intent with either the size or composition of the proposed/resubmitted programs.

While Option 1 appears to be the most obvious option for the state in the short term, it carries potential downside for the state, long-term. As you may recall, one of the primary factors for the state to seek extension of its 1115 waiver, prior to the end of January, was to preserve the reasonable budget neutrality calculation guidance in place at the time. It also allowed Texas to count anticipated DPPs as part of baseline budget neutrality: a

position favorable to Texas. The waiver approved in January also allows the state to “rebase” at intervals in order for the waiver to keep pace with the growing needs of the state. There is nothing in Option 1 which indicates that the state will receive reasonable budget neutrality terms for future years in the 1115 waiver.

HHSC leadership is concerned about the risks associated with Option 1, as a waiver without reasonable budget neutrality provisions may become unviable at some point over the course of the waiver. However, Option 1 may be their best option at this time given the uncertainties associated with Option 2. And, certainly a better option for Texas’ hospitals for FY 2022 than no directed programs at all.

HHSC (and likely the court) will respond to CMS as soon as Tuesday of this week (August 17). At that point, we should know which Option the state will chose for the short term. For the long term, HHSC and CMS have many issues to resolve with regards to budget neutrality, DPPs and the long term viability of the waiver. It seems likely that the court also will remain actively involved until these issues are finally resolved.