UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

No. 6:21-cv-00191

State of Texas et al.,
Plaintiffs,
v.
Chiquita Brooks-LaSure et al.,
Defendants.

ORDER TO CLARIFY SANCTIONS STANDARDS

Plaintiffs have called into question whether defendants' on-the-ground actions conform with defendants' representations to the court. Defendants have represented to the court that they are "acting as if the January approval [of Texas's Demonstration Project] is in force" while an administrative appeal is pending. Doc. 37 at 6; *accord* Doc. 23 at 13 ("CMS will treat the January extension of [the Project] as in effect throughout the [administrative-appeal] process."). Plaintiffs, however, have moved for a TRO on the contention that defendants' conduct does not conform with material conditions of the Project, specifically, special terms and conditions 30-34. Those paragraphs concern a procedure for CMS to review the state's request for approval of certain directed-payment programs. *See* Doc. 29-1 at 48-49 (¶¶ 30–34).

At today's hearing on the TRO motion, defendants confirmed that the special terms and conditions 30–34 are part of the Demonstration Project that defendants represent to the court are currently in force. Defendants also accepted as a general matter that a court has inherent authority to police the accuracy in fact of representations made to the court and impose sanctions to promote judicial integrity. The court therefore sets forth its interpretation of paragraph 30–34 of the special terms and conditions, so defendants are on notice that sanctions may be imposed for deviation from those terms and conditions, given their representation.

Paragraphs 30–34 operate as a cohesive whole to require a series of ongoing communications by CMS to ensure that the state receives a timely decision on its proposed directed-payment programs. Paragraph 30 requires CMS to work collaboratively with the state for programs proposed to begin on September 1, 2021, which describe the programs at issue. Doc. 29-1 at 48. That same paragraph specifically requires CMS to adhere to the milestones outlined in the special terms and conditions that follow. *Id.*

Those paragraphs contain a number of detailed timelines for responsiveness by CMS. After the state submits its request for approval, CMS has 30 days to send the state any request for further information bearing on approval. *Id.* (¶ 31). The state then has 15 days to respond to such a request for information. *Id.* (¶ 32). CMS must then evaluate that further information. *Id.* at 48–49 (¶ 33). Within 20 days of that further information, CMS has another deadline, conditioned on what it concludes:

- If the further information leads CMS to anticipate approving the program, it must give notice within that 20-day window of intent to issue a final decision. *Id.* at 49 (¶ 33).
- If the further information leads CMS to require technical or substantive modification to make a final decision, CMS must tell the state within that 20-day window what modifications the state needs to make. *Id.*

If such "further modifications to [the state's] request are required," CMS must then meet with the state by phone or other means at least every two business days to discuss them, and the state has five days to make any modifications. *Id.* (¶ 34).

Defendants conceded at today's hearing that the implicit object of paragraph 34's "are required" clause is "to approve," such that the clause refers to modifications "required to approve" the state's request. That is the most natural meaning in context, and the court agrees with that concession and reading.

Defendants wrongly argue, however, that this natural reading does not also extend to paragraph 33 and what CMS must do within 20 days of the state fully responding to a request for

information. In paragraph 33, the implied qualifier on "make a final decision" is also "to approve the state's request." Thus, the second sentence speaks of CMS issuing a "formal decision letter" when it approves a request, without needing to explicitly specify that the "decision" is to approve the request. Likewise, it would make little sense for paragraph 34 to speak of information "required" for approving a request, and to impose a strict two-day communication deadline, if CMS was not required under paragraph 33 to get back to the state within 20 days if the state's proposal needed modification to be approved in a final decision.

The open-ended gap in communication that CMS posits could last months on months (as it has here as to some programs, *see* Doc. 37-1 at 6-7) and would thus be in serious tension with a project requiring collaborative work to consider programs slated to begin less than a year after submission. Such a gap would also be in tension with the reticulated, tight timeline governing these communications. Given the recent declaration of Victoria Grady, the court also concludes that a delay of more than 20 days from the state's last complete response to a request for information until CMS tells the state what more to do does not constitute the "collaborative[]" work contemplated by paragraph 30.

The veracity of defendants' representation to the court will be judged against this reading of the special terms and conditions. The court sets a deadline of 5:00 p.m. on August 13, 2021, for defendants to either: (1) withdraw or modify their representation that CMS is treating the Demonstration Project as in effect, which may bear on plaintiffs' entitlement to a preliminary injunction, or (2) conform their conduct with the Demonstration Project's special terms and conditions as interpreted herein. Given CMS's existing delay, CMS may exercise option 2 by, no later than 5:00 p.m. on August 13, 2021, either:

- notifying the state that CMS intends to issue a formal decision within 20 days approving the relevant direct-payment programs; or

- notifying the state why CMS does not anticipate approving the programs 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.

Given this order clarifying sanctions standards, plaintiffs' motion for a TRO (Doc. 34) is held in abeyance to be considered alongside their motion for a preliminary injunction at the upcoming hearing on that motion.

So ordered by the court on August 12, 2021.

J. CAMPBELL BARKER
United States District Judge