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February 12, 2021

Henry Lipman  
Medicaid Director  
Office of Medicaid Business and Policy  
New Hampshire Department of Health and Human Services  
129 Pleasant Street  
Concord, NH 03301-6521

Dear Mr. Lipman:

On January 4, 2021, the Centers for Medicare & Medicaid Services (CMS) issued a letter to individual State Medicaid Directors that concerned procedural issues for states that operate a section 1115 demonstration. Specifically, an attachment to the January 4, 2021 letter proposed to delineate certain additional procedures for a preliminary hearing process, yet to be developed by CMS, that would be implemented in the event that CMS determines that it will either suspend or terminate a demonstration, in whole or in part, for material non-compliance with the terms of the demonstration project or based on a finding that the demonstration project is not likely to achieve the statutory purposes (see 42 C.F.R. § 431.420(d)(1)–(2)).

Consistent with federal regulations, the approved special terms and conditions (STCs) governing each demonstration project under section 1115 of the Social Security Act (Act) already generally specify procedures that CMS would use, in the event it suspends or terminates a demonstration project, in whole or in part, for material non-compliance or based on a finding that the demonstration project is not likely to achieve statutory purposes. As the attachment to the January 4, 2021 letter noted, the terms and conditions of the demonstrations at issue typically provide that “CMS will promptly notify the State in writing of the determination and the reasons for the amendment and withdrawal, together with the effective date, and afford the State an opportunity to request a hearing to challenge CMS’ determination prior to the effective date.” See 42 C.F.R. § 431.420(d)(3) (providing that “[t]he terms and conditions for [a] demonstration will detail any notice and appeal rights for the State for a termination, suspension, or withdrawal of waivers or expenditure authorities”).

By proposing to delineate additional procedures for the withdrawal or suspension of a demonstration approval—particularly by purporting to require that the effective date of such a withdrawal or suspension be at least nine months after CMS transmits its withdrawal determination to a State—the January 4, 2021 letter did not address CMS’s need for flexibility to make and effectuate determinations under 42 C.F.R. 431.420(d)(1)-(2). The current COVID-19 pandemic and economic environment, along with an ongoing need for general CMS oversight of section 1115 demonstrations, necessitate that CMS maintain the regulatory flexibility to respond appropriately to current or changed circumstances by adjusting, suspending, or terminating an existing demonstration and associated authorities in whole or in part.

CMS needs to remain able to exercise its authority under the Act and implementing regulations to maintain continued oversight of demonstrations in order to ensure that they remain likely to achieve the statutory purposes. (see 42 U.S.C. 1315(d)(2)(E); 42 C.F.R. 431.420(d)(2)) Therefore, CMS is rescinding the January 4, 2021 letters, along with the specific provisions in the attachments to those letters, including those signed by states, and will not accept signed attachments from states based on those letters. Instead, CMS will adhere to the regulations and STCs, which generally provide that States will receive notice and an opportunity to request a hearing before a determination to suspend, modify, or withdraw a demonstration project becomes effective.

CMS remains committed to the state and federal partnership centered on meeting the diverse healthcare needs of the millions of beneficiaries served by Medicaid. States should continue to look to the approved STCs that govern their section 1115 demonstrations and reach out to their section 1115 demonstration project officer with any questions.

Sincerely,

A solid black rectangular redaction box covering the signature of Elizabeth Richter.

Elizabeth Richter  
Acting Administrator