NUHW NATIONAL UNION OF HEALTHCARE WORKERS

866-968-NUHW • nuhw.org • info@nuhw.org

September 19, 2022

Chiquita Brooks La-Sure, Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
P.O. Box 8013
Baltimore, MD 21244-8013
via email: Chiquita.Brooks-LaSure@cms.hhs.gov

RE: Urgent Request for CMS Enforcement

Dear Administrator Brooks-La-Sure:

The National Union of Healthcare Workers ("NUHW"), which represents 4,000 licensed, (non-physician) behavioral health clinicians employed by The Permanente Medical Group, Inc. and the Southern California Permanente Medical Group, Inc. (collectively "Kaiser Permanente"), asks that CMS exercise its enforcement authority over Kaiser Foundation Health Plan, Inc. ("KFHP"), which is systematically subjecting Californians covered by Medicare Advantage, Medicaid ("Medi-Cal"), and qualified health plans to unlawful and dangerous behavioral healthcare delays.[1]

Federal law requires Medicare Advantage plans operated by KFHP to provide or arrange for necessary specialty care, including behavioral healthcare, and to arrange for out-of-network specialty care when network providers are "unavailable or inadequate" to meet members' medical needs. 42 C.F.R. § 422.112(a)(3). Likewise, federal law requires Medicaid managed care organizations like KFHP to provide behavioral healthcare in a timely manner, including on an out-of-network basis, when such services are not "adequately and timely" available to members in-network. 42 C.F.R. § 438.206(a) and (b). Federal law also requires qualified health plans operated by KFHP to ensure that behavioral healthcare is "accessible without unreasonable delay." 45 C.F.R. § 156.230(a)(1)(ii).

The State of California has promulgated long-standing timely access standards for behavioral healthcare applicable to Medicaid ("Medi-Cal") and commercial (including qualified health plan) coverage. In effect since 2010, 28 C.C.R. § 1300.67.2.2(c)(5) has required KFHP to provide urgent access to behavioral healthcare providers within 48 hours and non-urgent access to licensed (non-physician) behavioral healthcare providers within 10-business days. 28 C.C.R. § 1300.67.2.2(c)(7)(C) has required KFHP to arrange for out-of-network behavioral healthcare at no greater cost-sharing when KFHP could not meet timely access standards for behavioral healthcare.

[1] Anderson, Cathie. "Kaiser patients felt trapped in a 'circle of horror:' How they fought for mental health care." Sacramento Bee, September 15, 2022.

Most recently, California codified these timely access standards at Cal. Health & Safety Code § 1367.03, and strengthened them, emphasizing their applicability to both initial and follow-up behavioral health services. These timely access standards generally mirror NCQA's accreditation standards applicable to KFHP's Medicare Advantage plans, which are required to ensure urgent access to behavioral healthcare providers within 48 hours and non-urgent access to behavioral healthcare providers within 10-business days.

Despite these statutory and NCQA timely access standards, and years of state-level investigations of KFHP which resulted in a $4 million fine in 2013, more citations for ongoing violations in 2015, still more citations and the appointment of an outside monitor for its behavioral health services in 2017, and a "non-routine survey" of its behavioral health services due to a 20% increase in year-over-year complaints announced just this past May,[2] KFHP has failed to remedy its persistent behavioral health network inadequacy and resulting gaps in care.[3] State legislative measures such as California SB 855 (greatly strengthening state behavioral health parity and access protections to commercial coverage, including qualified health plans) and SB 221 (expanding timely access standards from initial through follow-up behavioral health services under Medi-Cal and commercial coverage, including qualified health plans), similarly have failed to make KFHP meaningfully invest in its behavioral health infrastructure and improve behavioral healthcare access for its Medicare Advantage, Medi-Cal, and qualified health plan members. To the contrary, while KFHP enjoys record profits,[4] Kaiser Permanente's overextended behavioral health clinicians are departing in record numbers, and access to behavioral healthcare for these KFHP members is precipitously declining: Medicare Advantage, Medi-Cal, and qualified health plan members routinely continue to wait ***many weeks and even months*** for initial behavioral health assessments, and still longer on average for follow-up services. While waiting for behavioral healthcare, some KFHP members engage in self-harm and attempt suicide, while others take their lives.[5]

Unwilling to continue working under KFHP's clinically substandard model of behavioral healthcare that requires Medicare Advantage, Medi-Cal, and qualified health plan members to endure illegal and hazardous waits,[6] NUHW's 2,000 behavioral health clinicians who serve KFHP

---

[2] Anderson, Cathie. "Kaiser behavioral health care on the hot seat after California complaints." Sacramento Bee, May 23, 2022.

[3] *See* attached "Chronology of DMHC's Oversight of Kaiser Permanente's Mental Health Services."

[4] https://about.kaiserpermanente.org/our-story/news/announcements/kaiser-foundation-health-plan-and-hospitals-report-2021-financia, retrieved September 18, 2022.

[5] Espinoza, Martin. "Kaiser Permanente faces renewed criticism over mental health services after Santa Rosa suicide." Santa Rosa Press Democrat, August 1, 2015.

[6] *See* attached, January 27, 2020 letter to the California Department of Managed Health Care by the American Psychological Association concerning KFHP, stating that "APA's position is that follow-up therapy appointments at 4-8 week or longer intervals, as alleged by our members, fall far below what is appropriate care for most patients. Psychotherapy efficacy and comparative effectiveness studies are typically based on once a week therapy (see, e.g., APA's Clinical Practice Guidelines for the Treatment of Depression and for the Treatment of Posttraumatic Stress Disorder) . . . We have never seen such an egregious case of delayed access for follow-up appointments."

members in Northern California have been on strike since August 15, 2022. Both prior to and during the strike, NUHW has provided California regulators with voluminous evidence of KFHP's behavioral health network inadequacy,[7] yet their only recent, publicly announced measures entail a "non-routine survey" scheduled to conclude at the end of ***2023*** and expedited investigation of certain strike-related complaints that have not led to any corrective actions or sanctions to date.

Most recently, KFHP assured California regulators that it would meet its network adequacy obligations during the open-ended strike by NUHW's Northern California clinicians. Yet rather than comply with 42 C.F.R. § 422.112(a)(3) (applicable to Medicare Advantage), 42 C.F.R. § 438.206(b) (applicable to Medi-Cal), and Cal. Health & Safety Code § 1367.03(a)(7)(B) (applicable to Medi-Cal and qualified health plans) by proactively arranging for patients with behavioral health needs to be assessed and/or treated on an out-of-network basis, Kaiser Permanente indefinitely canceled thousands (if not tens of thousands) of behavioral health appointments, and in one or more service areas has curtailed the availability of intensive outpatient treatment programs and partial hospitalization programs, and suspended and downgraded the availability of emergency psychiatric care for significant portions of each day. Regrettably, California regulators have done nothing to relieve impacted KFHP members from these unlawful denials of access to care. Indeed, 42 C.F.R. § 438.400(b)(4) deems "[t]he failure to provide services in a timely manner, as defined by the State" as an "adverse benefit determination" for which KFHP is required but systematically fails to provide its Medi-Cal members with notice and due process rights.

While NUHW appreciates that California regulators are currently investigating KFHP, as noted above, their recently announced "non-routine survey" is not expected to conclude until the end of 2023 and will not extend to KFHP's Medicare Advantage members. Meanwhile, ***all*** KFHP members continue to suffer, with some having attempted suicide and others having actually died waiting for behavioral healthcare. The need for CMS's intervention in light of the current crisis conditions, the state's insufficient response, and the state's inability to regulate Medicare Advantage plans, is greater than ever.

Pursuant to 42 C.F.R. § 422.750, CMS can suspend KFHP's enrollment of new Medicare Advantage members and assess monetary penalties against KFHP for failing to ensure timely access to behavioral health services, as described by 42 C.F.R. § 422.510(a)(4)(vi). Pursuant to 42 C.F.R. § 422.510, CMS can also immediately terminate KFHP's Medicare Advantage contract if it determines that a delay in termination would pose an imminent and serious risk to KFHP Medicare Advantage members. Similarly, under 42 C.F.R. § 438.730(g), CMS retains the right to sanction KFHP for failing substantially to provide medically necessary behavioral healthcare that KFHP is required to provide to Medi-Cal members, as described by 42 C.F.R. § 438.700(b)(1). Under 42 C.F.R. § 438.702, sanctions can include suspension of KFHP's enrollment of new Medi-Cal members, appointment of temporary management for KFHP, and suspension of payment to KFHP until CMS is satisfied that Medi-Cal members can access timely behavioral healthcare. CMS can also refer KFHP to the HHS Office of the Inspector General for imposition of civil monetary penalties pursuant to 42 C.F.R. § 438.730(g)(3). Finally, pursuant to 45 C.F.R. § 156.800, CMS can assess civil money penalties against and decertify KFHP from participating in

[7] *See* attached "Chronology of NUHW's Recent Regulatory Engagement."

California's exchange ("Covered California") for failing to provide timely access to behavioral healthcare, an "essential health benefit" under 45 C.F.R. § 156.110(a)(5).

We ask CMS to review this complaint and its supporting documents with all deliberate speed, and to take appropriate remedial measures among those we have enumerated to protect KFHP members who are being denied access to care. We look forward to working with you during this time of terrible hardship for members of one of the nation's most populous health plans.

Sincerely,

Sal Rosselli
President

Enclosures

Cc: Ellen Montz, Ph.D., Deputy Administrator & Director (CCIIO)
Daniel Tsai, Deputy Administrator & Director (Center for Medicaid & CHIP Services)
Meena Seshamani, M.D., PhD, Deputy Administrator & Director (Center for Medicare)
Gavin Newsom, Governor, State of California
Rob Bonta, Attorney General, State of California
Anthony Rendon, Speaker of the Assembly, State of California
Toni Atkins, President Pro Tempore of the Senate, State of California
Jim Wood, Chair, Assembly Health Committee, State of California
Dr. Richard Pan, Chair, Senate Health Committee, State of California
Dr. Mark Ghaly, Secretary, California Health and Human Services Agency
Mary Watanabe, Director, California Department of Managed Health Care
Michelle Baass, Director, California Department of Health Care Services
Jacey Cooper, Medicaid Director, California Department of Health Care Services
U.S. Senator Dianne Feinstein
U.S. Senator Alex Padilla
Members of the California Delegation, U.S. House of Representatives