



August 26, 2022

Catherine Awakuni-Colón, Director
Colin M. Hayashida, Insurance Commissioner
Hawaii Department of Commerce and Consumer Affairs
P.O. Box 3614
Honolulu, Hawaii 96811-3614

VIA EMAIL: cawakuni@dcca.hawaii.gov; catherine.p.awakuni@dcca.hawaii.gov;
colin.m.hayashida@dcca.hawaii.gov

Re: Kaiser Foundation Health Plan, Inc.

Dear Director Awakuni-Colón and Commissioner Hayashida:

On behalf of the National Union of Healthcare Workers (“NUHW”), I am writing to request that the Department of Commerce and Consumer Affairs take immediate action to address Kaiser Foundation Health Plan’s (Kaiser) violations of state law.

In response to an impending strike by Kaiser’s licensed non-physician behavioral health clinicians beginning August 29, 2022, Kaiser has initiated mass-cancellations of Kaiser enrollees’ behavioral health appointments during the week beginning August 29, 2022 without arranging for enrollees to receive replacement care from either in-network or nonparticipating providers, according to internal records from Kaiser.

Such cancellations violate multiple provisions of Hawai’i law including Hawai’i Insurance Code § 431:26-103(c), which specifies that if a health carrier “does not have a participating provider available” or “has an insufficient number or type of participating provider available to provide the covered benefit to the covered person without unreasonable travel or delay,” the health carrier “shall have a process to ensure that a covered person obtains a covered benefit at an in-network level of benefits, including an in-network level of cost-sharing, from a nonparticipating provider, or shall make other arrangements acceptable to the commissioner...”

Prior to the impending work stoppage, clinicians provided Kaiser with proper advance notice of the work stoppage in accordance with federal law in order to permit Kaiser to take appropriate steps to ensure its provision of timely and appropriate behavioral health services to its enrollees consistent with state and federal laws. Nonetheless, yesterday Kaiser began cancelling hundreds of its enrollees’ behavioral health appointments without arranging for the affected enrollees to obtain care from nonparticipating providers if care from in-network providers is unavailable. NUHW requests that the Department of Commerce and Consumer Affairs take immediate action to protect the health, safety, and rights of Kaiser enrollees.

I. Evidence

Exhibit A is an internal message authored and exchanged by Sharoness A. Gier, Supervisor of Kaiser’s Integrated Behavioral Health Department (IBH Department). The message was sent August 25, 2022 to Kaiser staffers under the direction of Ms. Gier. Kaiser’s IBH Department provides behavioral health services to child, adolescent, and adult with mental health and substance use disorders (MH/SUDs) across

Hawai'i. Kaiser employs more than 50 licensed non-physician behavioral health clinicians (e.g., psychologists, licensed clinical social workers, and licensed mental health counselors) who deliver outpatient treatment to Kaiser's approximately 260,000 enrollees at seven clinics and a call center on Oahu, Maui, and the Big Island.

Ms. Gier's message states in part the following:

Urgent!

hi, i have a partial green light to begin canceling Mon-Wed 8/2-8/31 (sic) patients for NUHW providers. Unless appt note says "high risk", please cancel patients for NUHW providers EXCEPT for those you've been informed of plan to cross...

In addition to canceling enrollees' individual treatment appointments, Ms. Gier reports that Kaiser will also cancel its psychotherapeutic groups. She states:

In addition, please hold off on cancelling for groups right now, until I can confirm final list of groups to preserve. I'm getting word of changes.

According to subsequent reports received today, Kaiser has canceled multiple psychotherapeutic groups for the week beginning August 29, 2022.

Ms. Gier also appears to indicate that Kaiser will reduce the number of staff assigned to respond to enrollees' calls to Kaiser's "crisis line," a telephone line operated by Kaiser for enrollees experiencing psychiatric crises who need urgent care from their health plan. The crisis line is staffed by licensed clinicians.

Exhibit B: Exhibit B is a "Labor Update" published by Kaiser on its website. It offers figures that can be used to estimate the numbers of appointments that Kaiser is canceling for its enrollees. It states that "approximately 60 of our mental health clinicians in Hawaii" will be involved in the strike. In the section entitled "Workload and Burnout," Kaiser states: "Our therapists are scheduled for an average of 6 to 7 appointments per day." In total, then, Kaiser is canceling an estimated 360-420 individual appointments per day or 1,800-2,100 individual appointments per week. In addition, Kaiser is canceling an unknown number of psychotherapeutic groups.

II. Laws and Regulations

Hawai'i's Insurance Code (HI Rev Stat § 431:26-103) establishes standards that health insurers and HMOs ("health carriers")¹ are required to meet. The Insurance Code states the following:

A health carrier providing a network plan shall maintain a network that is sufficient in numbers and appropriate types of providers, including those that serve predominantly low-

¹ The insurance code's network adequacy requirements apply to HMOs. Hawaii law states: "'Health carrier' or 'carrier' means an entity subject to the insurance laws and regulations of this State, or subject to the jurisdiction of the commissioner, that contracts or offers to contract, or enters into an agreement to provide, deliver, arrange for, pay for, or reimburse any of the costs of health care services, including a health insurance company, a health maintenance organization, a hospital and health service corporation, or any other entity providing a plan of health insurance, health benefits, or health care services." (Haw. Rev. Stat. § 431:26-101)

income, medically underserved individuals, **to assure that all covered benefits will be accessible without unreasonable travel or delay.** (§ 431:26-103(a)(1)) (emphasis added)

Section 431:26-103(c) specifies that if a health carrier “does not have a participating provider available” or “has an insufficient number or type of participating provider available to provide the covered benefit to the covered person without unreasonable travel or delay,” the health carrier “shall have a process to ensure that a covered person obtains a covered benefit at an in-network level of benefits, including an in-network level of cost-sharing, from a nonparticipating provider, or shall make other arrangements acceptable to the commissioner...”

When a health carrier’s provider network “cannot provide reasonable access,” it must “inform covered persons of the process a covered person may use to request access to obtain a covered benefit from a nonparticipating provider” (§ 431:26-103(c)(2)). Furthermore, health carriers must “ensure that requests to obtain a covered benefit from a nonparticipating provider are addressed in a timely fashion appropriate to the covered person’s condition” (§ 431:26-103(c)(4)).

“The health carrier shall establish and maintain a system that documents all requests to obtain a covered benefit from a nonparticipating provider pursuant to this subsection and shall provide this information to the commissioner upon request” (§ 431:26-103(c)(5)).

III. Request

NUHW requests that DCCA take urgent action to ensure that Kaiser fulfills its obligations under state law to arrange for enrollees to receive care from a nonparticipating providers if it does not have sufficient numbers of participating providers to provide timely and appropriate care. Specifically, NUHW requests that DCCA take the following actions:

1. DCCA should put Kaiser on formal, written notice that it is obligated to comply with all provisions of Hawai’i law during the upcoming strike, including the aforementioned laws. DCCA also should clearly indicate that it would be unlawful for Kaiser to cancel or otherwise suspend behavioral health care services without arranging for enrollees to receive care from nonparticipating providers at no additional cost to enrollees.
2. DCCA should require Kaiser to present a detailed services-replacement plan indicating how it intends to arrange for both in-network and out-of-network care for its enrollees during the strike. DCCA should evaluate the viability of the plan, which must specify the numbers of enrollees who will require out-of-network care, the scope and intensity of those enrollees’ clinical needs, the financial and organizational capacity to successfully execute the plan, and other factors. If, upon assessment of the plan, or as a function of monitoring Kaiser’s performance during a strike, DCCA determines Kaiser is unable to arrange sufficient in-network and out-of-network care for enrollees, beyond levying fines and penalties as detailed below, it should issue an order empowering these enrollees to secure care from nonparticipating providers at Kaiser’s expense.
3. DCCA should communicate directly to all of Kaiser’s enrollees regarding their rights through its website, press releases, and other viable means, including direct email communications to each enrollee.
4. DCCA should require Kaiser to communicate, including by email and patient portals, with its enrollees regarding their rights to receive ongoing care during the strike and the steps Kaiser will

undertake to arrange and deliver out-of-network care, as well as the electronic and telephonic contact information for and the basic procedural details of the Kaiser and DCCA complaint processes available to them if they encounter problems. Kaiser also should be required to establish rapid-response complaint processes to remedy problems experienced by enrollees during the strike, as detailed below.

5. DCCA should assign its staff to perform on-site, real-time monitoring of Kaiser's performance via site-by-site inspections as well as daily data reporting from each Kaiser clinical site. The site inspections should include reviews of patient visit schedules, medical charts, clinical staffing levels, referrals to out-of-network providers, patients' elapsed wait times for services, patient waitlists, and other matters.
6. DCCA should establish and publicize enhanced methods by which enrollees can complain to Kaiser and DCCA during the course of the strike, and provide for an expedited process that does not require enrollees, for example, to wait 30 days for resolution of their complaints.
7. Prior to the commencement of the strike, DCCA should establish and publicly announce a regime of immediate penalties and fines it will impose on a per-violation basis for each of the various classes of violations of state law that can be anticipated. Given that Kaiser recorded \$8.1 billion in profits last year, such penalties must be sufficiently large to disincentivize violations of patient rights and Hawai'i law.
8. DCCA should immediately disclose to the public the contingency plans that Kaiser submits to it detailing its organizational and operational plans to ensure the delivery of services to enrollees during a strike. Such transparency is especially important in this case given that Kaiser is the second largest health plan in Hawai'i.
9. DCCA should also immediately disclose to the public its correspondence with Kaiser regarding the aforementioned matters rather than requiring the public to undergo the typical waits associated with public record act requests. Such immediate disclosure to the public is necessary given the timeframe of the strike.

Please contact me should you have any questions or concerns.

Sincerely,



Fred Seavey

cc: Hon. Josh Green, Lieutenant Governor
Clare E. Connors, State of Hawaii Attorney General
Dr. Ellen Montz, Deputy Administrator and Director, Center for Consumer Information
and Insurance Oversight, CMS
Matthew Lynch, Executive Director, State Exchanges and Insurance Programs, CMS
Roderick Becker, Chair, Board of Trustees, EUTF
Derek Mizuno, Administrator, EUTF
Meiram Bendat, Psych-Appeal, Inc.

Hawaii Psychological Association
National Association of Social Workers-Hawaii Chapter
Hawai'i Mental Health Counselors Association, Hawaii Counseling Association
Hawaii Islands Association of Marriage & Family Therapists
Mental Health America of Hawaii
National Association on Mental Illness of Hawaii
The Kennedy Forum

Exhibit A

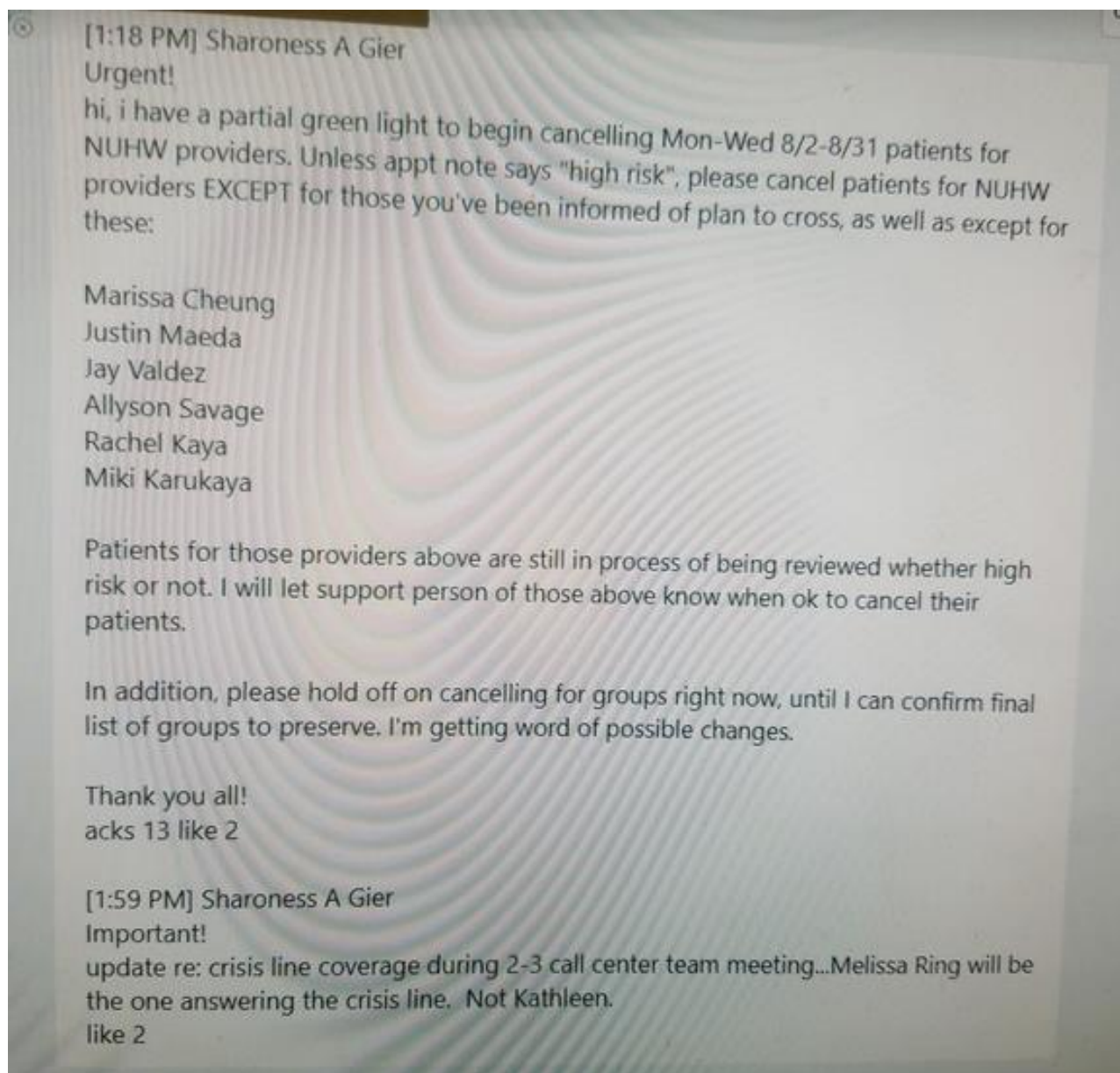


Exhibit B

<https://kpinhawaii.org/laborupdate>



KAISER PERMANENTE

Labor Update

Kaiser Permanente and the National Union of Healthcare Workers (NUHW), which represents approximately 60 of our mental health professionals in Hawaii, are negotiating an initial collective bargaining agreement. Unfortunately, NUHW leadership has taken the unproductive action of calling for a strike that will begin Monday August 29th.

Only behavioral health appointments will be affected, and Kaiser Permanente facilities will be open for normal operations. Please consider arriving early for scheduled appointments as there may be additional traffic at the following locations due to planned picketing activities:

- **Monday, Aug. 29** - Honolulu Medical Office: 6:00 a.m. - 4:00 p.m.
- **Tuesdays - starting Aug. 30** - Moanalua Medical Center: 8:00 a.m. - 2:00 p.m.
- **Wednesdays - starting Aug. 31** - Maui Lani Medical Office: 8:00 a.m. - 2:00 p.m.
- **Thursdays - starting Sept. 1** - Hilo Clinic: 8:00 a.m. - 2:00 p.m.
- **Fridays - starting Sept. 2** - Waipio Medical Office: 8:00 a.m. - 2:00 p.m.
- **Mondays - starting Sept. 5 (Labor Day)** - Honolulu Medical Office: 8:00 a.m. - 2:00 p.m.

We take any potential disruption of services very seriously and have plans in place to help our members and patients continue to receive safe, high-quality care.

NUHW leadership continues its corporate campaign tactic of using complaints to media and regulators to create pressure at the bargaining table. Although we disagree with this bargaining approach, we continue to negotiate with NUHW in good faith and are committed to reaching a fair and equitable agreement.

Setting the record straight

Addressing NUHW's false claims about Kaiser Permanente contract bargaining.

Staffing and Hiring



NUHW Claim

Kaiser Permanente is not doing enough to solve the Behavioral Health understaffing issue.



Fact

The national shortage of mental health clinicians was a crisis before the pandemic and has further strained an already stressed mental health care system and its limited number of caregivers.

Kaiser Permanente Hawaii has been on a multi-year journey to increase the number of Behavioral Health clinicians to meet the needs of our members and patients.

We have added 11 new Behavioral Health clinical positions to be filled in 2022, along with additional support staff, and plan to add the same type and number of positions each year through 2025.

Despite a national mental health workforce crisis amid a global pandemic, **we have hired 28 clinicians in Hawaii since the start of 2021**, eight of whom will be starting work in the next two months.

We've also been focused on significantly expanding our ability to provide virtual care to patients who want it, embedding mental health professionals in clinics and other convenient locations and continuing to expand our collaborative care programs that have proven to effectively treat patients with anxiety and depression diagnoses.

Turnover Rate



NUHW Claim

Kaiser Permanente has a high turnover rate as clinicians leave due to worsening working conditions.



Fact

In 2021, the voluntary turnover rate for our represented mental health employees was 11.5% in the Hawaii Market. While this is higher than we would like, it is far below the national health care worker attrition rate of 18.9%*. Retaining our talented employees is critical to meeting the growing demand for mental health care, and we are focused on working with our clinicians to address this challenge.

*Source Saratoga Benchmarking Data <https://www.pwc.com/us/en/products/saratoga.html>

Drawn Out Contract Negotiations



NUHW Claim

Kaiser Permanente has been dragging out the process of negotiating a new contract with NUHW.



Fact

Behavioral Health workers at Kaiser Permanente Hawaii first organized under NUHW in September 2018. NUHW declined all earlier attempts to schedule bargaining sessions. Negotiations finally started in January of 2020.

We are committed to continue bargaining in good faith to reach a mutually beneficial agreement.

Timely Access



NUHW Claim

Kaiser Permanente forces patients to wait weeks, even months for appointments.



Fact

Fact. Recognizing every person's needs are unique, our clinicians work with each patient to independently develop a care plan that is clinically appropriate and tailored specifically for them.

When appointments are not readily available, we have an escalation process in place to support and triage patients with urgent needs to the appropriate care.

Kaiser Permanente's integrated system provides a safety net for patients, offering added support to help members in crisis navigate to the care they need. Patients outside of an integrated system must frequently call multiple individual providers when seeking care.

Accreditation



NUHW Claim

Kaiser Permanente is at risk of losing accreditation from the National Committee on Quality Assurance (NCQA)



Fact

Kaiser Permanente Hawaii performed well on its recent routine NCQA accreditation survey (completed May 2022), and successfully achieved full 3-year NCQA accreditation status through May 11, 2025 for all applicable services.

Number Of Patients Per Provider



NUHW Claim

Kaiser Permanente Behavioral Health clinicians have 5,000 – 6,000 patients each.



Fact

The simplistic math of dividing Kaiser Permanente Hawaii’s total membership by the number of NUHW represented staff results in inflated caseload counts that are inaccurate and misleading for several reasons.

- The **approximately 60 Behavioral Health clinicians represented by NUHW** are just one part of our Kaiser Permanente Hawaii mental health care team, along with 15 psychiatrists and additional behavioral healthcare staff.
 - Not every Kaiser Permanente member seeks mental health services.
 - We continue to hire more clinical staff and are currently recruiting for 14 open positions for psychologists, LCSWs, and LMHP.
-

Workload And Burnout



NUHW Claim

Therapists maintain unsustainable workloads under tremendous circumstances, which has led to employee burnout and clinicians leaving for other jobs.



Fact

The pandemic has challenged our front-line care teams, including nurses, health care workers, physicians, and of course our mental health clinicians. We have the greatest respect and gratitude for our mental health professionals, and we are dedicated to supporting them in their important work.

Our therapists are scheduled for an average of 6 to 7 appointments per day. Our model provides our full-time therapists room to focus almost solely on their patients. In addition, we have an administrative structure in place to ensure an appropriate amount of preparation time and time to support ongoing education.

Financial Issues On The Table



NUHW Claim

Kaiser Permanente Hawaii's current offer on the table proposes a wage freeze for 60% of employees and benefit cuts.



Fact

Kaiser Permanente provides market competitive wages and benefits to attract and retain top-quality employees.

Wages and benefits for represented employees are negotiated at the bargaining table. We are committed to continuing bargaining in good faith to reach a mutually beneficial contract and we ask NUHW to join us to resolve our differences.

KP Finance



NUHW Claim

Kaiser Permanente only cares about profits



Fact

Despite these challenging times, we are committed to remaining an employer of choice for mental health professionals by continuing to offer our employees market-leading wages and benefits. However we, like every other health care provider, cannot continue to allow costs to grow beyond what our members can afford.