



July 31, 2022

Mary Watanabe, Director
Dan Southard, Chief Deputy Director
Sarah Ream, General Counsel
Sonia Fernandes, Deputy Director, Office of Enforcement
Jennifer E. Marsh, Attorney III—Office of Enforcement
Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725

Dear Ms. Watanabe, Mr. Southard, Ms. Ream, Ms. Fernandes and Ms. Marsh:

I write to alert you of a planned strike by Kaiser's behavioral health clinicians so DMHC can take prompt action to protect Kaiser enrollees during the impending work stoppage.

The approximately 2,000 licensed non-physician behavioral health clinicians who comprise Kaiser Foundation Health Plan's internal provider network in Northern California intend to strike for an indefinite duration starting August 15, 2022. These clinicians work at more than 50 outpatient Kaiser clinics, emergency rooms, call centers, crisis clinics, intensive outpatient treatment programs, and other sites across a geographic area stretching from Fresno and the Central Valley to the Greater San Francisco Bay Area and the Greater Sacramento area. They provide triage services, diagnostic evaluations, psychological testing, individual and group treatment, emergency care, crisis care, and other behavioral health services for child, adolescent, and adult enrollees with a broad range of mental health and substance use disorders (MH/SUDs). Each week, they staff approximately 50,000 triage, diagnostic, and therapy appointments as well as other patient encounters with Kaiser enrollees. Under Kaiser's current system of care, enrollees assessed to have the most serious MH/SUDs generally are treated by its internal provider network (*i.e.*, the non-physician behavioral health clinicians who will be striking as of August 15), while enrollees assessed to have mild-to-moderate MH/SUDs often are treated by Kaiser's external provider network (consisting of contractors such as Beacon and AbleTo).

NUHW's clinician members do not take lightly their decision to strike. They have voted to strike only after having exhausted every other avenue to address Kaiser's chronic and systemic understaffing that subjects their patients to massive treatment delays and substandard care in blatant disregard of California law. For more than a year, NUHW members have negotiated with Kaiser and presented sensible and affordable solutions that would improve patient access to care. Kaiser has rejected these proposals. NUHW also has made multiple written complaints and furnished hundreds of internal records to DMHC documenting in detail Kaiser's failure to provide its enrollees access to behavioral health care within the timelines required by state law. While DMHC recently announced a non-routine survey of Kaiser's behavioral health services after determining good cause to believe that Kaiser has or is violating state law, DMHC's investigation is not scheduled to be completed until the end of 2023. Meanwhile, NUHW members and their patients experience countless crises and care failures on a daily basis due to

Kaiser's unmitigated understaffing. NUHW members have therefore concluded that only an indefinite work stoppage can prompt Kaiser to address its chronic deficiencies.

Historically, Kaiser has responded to behavioral health work stoppages by punishing patients. Specifically, Kaiser has canceled tens of thousands of enrollees' diagnostic and treatment appointments, as well as other services. In recent years, however, California has enacted laws that clearly prohibit Kaiser from responding to work stoppages in such a fashion. Specifically, SB 221 and SB 855 require Kaiser to provide timely and appropriate care for both initial and ongoing treatment of the full range of MH/SUDs across the entire continuum of care. If Kaiser is unable to provide timely and geographically accessible care through its provider network, then Kaiser must arrange for enrollees to receive timely and geographically accessible care from out-of-network providers at no additional expense.

Despite these laws, we understand that Kaiser intends to respond to the upcoming strike by the same unlawful method it has used during previous work stoppages—namely, by canceling and withholding MH/SUD services from tens of thousands of enrollees. Such an action would jeopardize the health and safety of Kaiser's enrollees with MH/SUDs, many of whom are diagnosed with disorders that can have life-threatening consequences. For enrollees with less acute conditions, delayed care can lead to delayed recovery rates, increased morbidity rates, decompensation, reliance on more intensive and costlier levels of care, and treatment drop-out.

In addition to neglecting enrollees' treatment needs, Kaiser's suspension of services would perversely enhance Kaiser's profitability at its enrollees' expense. That is, Kaiser would continue to collect premiums during the work stoppage, even as it reduces its expenses by canceling and suspending benefits owed to its enrollees.

Such conduct and outcomes are clearly proscribed by California's consumer protection laws. As a public safety and consumer protection agency, DMHC must take pre-emptive measures to ensure Kaiser enrollees receive needed care. We recommend that these measures be centered on five programmatic activities, each of which is further delineated below:

(1) Plan Engagement

- DMHC should put Kaiser on formal, written notice that it is obligated to comply with all provisions of California law during the upcoming strike, including the provisions of SB 855 and SB 221 that require it to arrange for enrollees to receive care from out-of-network providers at no additional expense. Under SB 855 and SB 221, the burden is on *Kaiser*—not its enrollees—to proactively arrange and cover timely and geographically accessible care, whether in or out-of-network. DMHC also should clearly indicate that it would be unlawful for Kaiser to cancel or otherwise suspend behavioral health care services as it has done during previous work stoppages.
- DMHC should require Kaiser to present a detailed replacement-services plan indicating how it intends to arrange for both in-network and out-of-network care for its enrollees during the strike. DMHC 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, DMHC 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 out-of-network care for themselves at Kaiser's expense.

(2) Enrollee Engagement

- DMHC should communicate directly to all of Kaiser's Northern California enrollees regarding their rights (including Section 1367, and specifically their rights to timely care and out-of-network care at no additional cost if Kaiser fails to make care available to them within the required timelines) through its website, press releases, and other viable means, including direct email communications to each enrollee.
- DMHC should require Kaiser to communicate, including by email and patient portals, with its Northern California 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. Furthermore, DMHC should require Kaiser to equip enrollees with the electronic and telephonic contact information for and the basic procedural details of the Kaiser and DMHC 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.

(3) Aggressive Monitoring of Plan Performance

- DMHC 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. DMHC has already determined it has good cause to believe that Kaiser has or is violating state law, which prompted it to initiate a non-routine survey, and also has in its possession evidence of many of Kaiser's appointment management mechanisms designed to cover up its denials of timely access to care and to skirt the requirements of the law. The circumstances of the strike require DMHC to implement an aggressive monitoring regime.
- DMHC should establish and publicize enhanced methods by which enrollees can complain to Kaiser and DMHC 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, or even 60 days in the event a complaint is prosecuted first inside Kaiser and only afterward under the auspices of the department.

(4) Aggressive and Rapid Enforcement

- Prior to the commencement of the strike, DMHC 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 California law.

(5) Public Transparency

- DMHC 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 largest health plan in Northern California with millions of members.
- DMHC 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. Immediate public disclosure is necessary given the rapid timeframe associated with the strike.

NUHW looks forward to your response. We stand ready to assist in whatever way may be helpful. Please contact me with any questions or requests.

Sincerely,



Fred Seavey

cc: Secretary Mark Ghaly, MD, California Health and Human Services Agency
Anthony Rendon, Speaker, California Assembly
Toni Atkins, President Pro Tempore, California Senate
Jim Wood, DDS, Chair, Assembly Health Committee
Richard Pan, MD, Chair, Senate Health Committee
Sen. Scott Wiener, Chair, Senate Select Committee on Mental Health and Addiction