

CITY AND COUNTY OF SAN FRANCISCO



DAVID CHIU
City Attorney

OFFICE OF THE CITY ATTORNEY

TARA M. STEELEY
Deputy City Attorney

Direct Dial: (415) 554-4655
Email: tara.steeley@sfcityattty.org

May 3, 2023

VIA EMAIL

jacob.rossman@hhs.gov
jacob.richards@hhs.gov

Jacob Rossman
Assistant Regional Counsel, Region IX
Office of the General Counsel
Department of Health & Human Services
90 Seventh Street, Suite 4-500
San Francisco, CA 94103-6705

Jacob Richards
Assistant Regional Counsel, Region IX
Office of the General Counsel
Department of Health and Human Services
90 Seventh Street, Suite 4-500
San Francisco, CA 94103-6705

Re: *CCSF v. United States Department of Health and Human Services, et al*
United States District Court Case No. 3:22-cv-04500-WHA
Request to Continue the Pause on Transfers and Discharges of Residents at
Laguna Honda Hospital and Rehabilitation Center

Dear Counsel:

Under paragraphs 7 and 14 of the Settlement Agreement, we write as counsel for the City and County of San Francisco to request that the Centers for Medicare and Medicaid Services (CMS) exercise its discretion to continue the pause on involuntary transfers and discharges at Laguna Honda Hospital & Rehabilitation Center D/P SNF, Provider number 555020 (LHH). This request is consistent with discussions our client LHH has been having with representatives from CMS and the California Department of Public Health (CDPH). As you know, involuntary transfers and discharges are currently paused until May 19, 2023 unless CMS further extends the pause.

Specifically, on behalf of LHH we request that CMS continue the pause on involuntary transfers and discharges while LHH continues its progress towards recertification in the Medicare and Medicaid programs. To facilitate LHH showing its progress, LHH requests that CMS conduct a third monitoring survey in a timely manner based on mutual consultation and for CMS to provide LHH with the completed survey results as soon as possible after that. LHH expects the survey to show substantial progress in meeting the Medicare conditions of participation. If so, LHH anticipates it would be ready to submit a successful recertification

CITY HALL • 1 DR. CARLTON B. GOODLETT PLACE • ROOM 234 • SAN FRANCISCO, CALIFORNIA 94102
RECEPTION: (415) 554-4700 • FACSIMILE: (415) 554-4699

Letter to Jacob Rossman and Jacob Richards

May 3, 2023

Page 2

application with sufficient time for LHH to obtain recertification before November 13, 2023, which is the deadline for continued federal funding under the Settlement Agreement.

As we mention at the end of this letter, we request a formal written response to this request by May 9, 2023. If CMS is not prepared now to extend the pause on transfers and discharges as LHH asks, then LHH requests that CMS participate as soon as possible in the meet-and-confer and dispute escalation procedures as set forth in Paragraph 5 of the Settlement Agreement, so that the parties can discuss extending the pause on transfers and discharges.

Laguna Honda has successfully implemented its initial Action Plan, satisfied all Settlement Agreement provisions, and is responding to CMS's priorities.

The Settlement Agreement states that CMS will upon LHH's written request consider a pause on transfers and discharges if LHH is complying with its obligations under the Settlement Agreement. LHH has timely met its obligations under the Settlement Agreement, including by:

- Entering into a Revised Closure Plan approved by CDPH;
- Directing the Quality Improvement Expert (QIE) to perform a new Root Cause Analysis and submitting a new Action Plan after monitoring surveys; and
- Fully implementing the initial Action Plan.

In particular, LHH has made significant, facility-wide improvements by meeting all Action Plan milestones in January, February, March, and April. Overall, as of May 1, LHH has submitted 471 out of 500 milestones to the QIE. The initial CMS-approved Action Plan had 345 milestones, which LHH has now completed. After the first monitoring survey, LHH added 109 new milestones, which LHH has also completed. In response to the second monitoring survey, LHH added 46 new Action Plan milestones, bringing the total number of milestones to 500. LHH is on track to complete those milestones by May 13, 2023.

Also, now that LHH has an approved Revised Closure Plan, consistent with CMS's guidance, LHH has restarted discharges of residents who no longer require skilled nursing care, and residents who cannot have their needs met at LHH and require transfer to a more appropriate setting for the residents' welfare and/or other residents' safety.

We understand CMS's focus on compliance at the resident bedside and in ensuring that LHH sustains its progress over the long-term. LHH acknowledges that completing the Action Plan milestones will only be effective if the facility maintains the changes implemented in the plan. To that end, LHH will use the new unit-based quality assurance program initiative (QAPI) program and subcommittees, described below, to monitor and correct issues. And, the QIE will continue rounding over the next several months as LHH prepares for recertification. Because the Action Plan milestones are nearing completion, LHH's priority over the next weeks and months will be sustaining its improvements, which will lead to successful recertification.

Laguna Honda has made progress towards installing permanent leadership with appropriate nursing home experience and intends to begin extending offers for new leadership positions soon.

Consistent with CMS's directive, LHH has shown tangible progress toward installing new permanent leadership with appropriate nursing home experience. Specifically, LHH has prioritized efforts to hire its next Licensed Nursing Home Administrator (NHA) and Director of Nursing Services since those two roles will work closely together as the facility's leadership team. LHH received 29 applicants for the NHA role and, during the week of April 17, LHH leadership interviewed ten candidates. This week, LHH started second (and final) round

Letter to Jacob Rossman and Jacob Richards
May 3, 2023
Page 3

interviews for six applicants selected for advancement. By mid-May, LHH intends to extend an offer to the top-ranked applicant. If the NHA accepts an offer in time, LHH also intends for the incoming NHA to participate in the final Director of Nursing Services interviews given the importance of close collaboration between those two individuals.

Nine candidates applied for the Director of Nursing Services role. During the week of April 24, LHH leadership interviewed three candidates. During the week of May 8, LHH will schedule second round interviews for two candidates and intends to extend an offer in mid-May. LHH has also made progress on hiring assistant NHA positions. LHH posted the remaining positions and are currently receiving applications. LHH engaged an outside expert search firm to help with the search process for these roles.

Laguna Honda has demonstrated substantial improvement in safety and quality of care since the first monitoring survey.

In the letter Jean Ay sent to Roland Pickens granting LHH's prior request for an extension of the pause on transfers on February 1, 2023, Ms. Ay stated that "Laguna Honda must demonstrate substantial improvement in safety and quality of care in subsequent monitoring surveys." Specifically, Ms. Ay explained:

In all future monitoring surveys, Laguna Honda, at a minimum, should have no immediate jeopardy findings and reduced actual harm findings. The facility should show steady progress toward full compliance necessary for initial certification. In particular, Laguna Honda should demonstrate improvement in individualized care planning and readiness to transfer and discharge residents safely and appropriately. This includes demonstrating continued improvement in upcoming CMS monitoring surveys.

Consistent with Ms. Ay's direction, LHH has shown steady progress from the first to second monitoring surveys. The first Life Safety Code survey assessed 21 separate deficiencies compared to five deficiencies in the second survey. The first Emergency Preparedness survey assessed three deficiencies compared to none on the second survey. And, the first Health survey assessed 42 deficiencies compared to seven deficiencies received to date in the second survey. Most importantly, surveyors did not declare any immediate jeopardy or actual harm findings during the second monitoring survey, while surveyors assessed four isolated actual harm findings on the first monitoring survey.

LHH has also implemented numerous improvements in addition to those already mentioned in our letter dated January 13, 2023. Examples of LHH's progress include:

- **Restraint Reduction Initiative:** Since January 2023, LHH has embarked on a restraint free-initiative intended to identify restraint devices, determine the appropriateness of the restraints, educate staff and residents on decreasing the use of restraints, and review medical records documenting the need for restraints. In that time, LHH has reviewed 1,023 restraints previously in use, determined 156 devices to be an acceptable restraint, and removed the remaining 867 devices, a reduction in restraint use by nearly 85%. Because the restraint reduction initiative remains ongoing, that reduction represents substantial progress and not the end goal of the initiative.
- **Recertification Education Fair:** Because in-person training is generally more effective than online programs, LHH instituted a Recertification Education Fair where staff attend four-hour programs covering fire life safety, emergency

response, QAPI, and huddle boards. LHH's goal was 95% compliance across all departments and LHH surpassed its goal by achieving 98% compliance by educating 1,242 available staff across the entire facility.

- **Unit-based QAPI:** LHH has instituted four unit-based QAPI subcommittees (*i.e.*, wound & nutrition, psychotropic & behaviors, infection control & antibiotic stewardship, and restraint & falls) that brings frontline staff and other supporting disciplines to involve them directly in the QAPI process, bringing that process closer to the individual resident. A unit-based QAPI process will enable frontline staff to provide direct feedback on the high-risk, high-volume, or recurrent concerns for the facility. These subcommittees will allow LHH to sustain the changes it is putting into place through the Action Plan after the plan ends.
- **Hiring Behavioral Emergency Response Team staff:** LHH serves a population representative of San Francisco, which includes individuals with behavioral health and substance use disorder needs. To help address such issues, the Action Plan tasked LHH to hire additional Behavioral Emergency Response Team (BERT) staff to visit residents, train frontline staff, and audit medical record documentation. Since our last letter, LHH has hired four new BERT staff (three licensed vocational nurses and one registered nurse) and started integrating them into resident care conferences, reviewing medical records, and training frontline staff on de-escalation and crisis intervention techniques. And, LHH is recruiting two additional BERT members.
- **Wound Care Champions:** During the first monitoring survey, surveyors identified concerns regarding LHH's wound care practices, which LHH promptly remedied through in-service training led by the Chief Nursing Officer. Since the first monitoring survey, LHH has also implemented a wound and nutrition QAPI subcommittee and designated wound care champions on every unit. Wound care champions are a unit-based resource to advise staff on skin integrity, wound concerns, and early detection of skin breakdown to prevent advanced wound development. Each unit has its own primary and secondary wound care champions, a total of 28 champions, each trained by a certified wound, ostomy, and continence nurse (WOCN). LHH has also posted for hire two full-time WOCN positions.
- **Capital Improvement Projects:** During the first monitoring survey, surveyors identified findings related to capital improvement work. LHH has already corrected some of those findings, including on April 30, 2023, by re-surfacing the courtyard pavement where LHH stores its portable freezer containers. In April 2023, LHH has also met with CDPH to seek CDPH approval on updating the kitchen floor, a significant undertaking. At CDPH's direction, LHH will seek Department of Health Care Access and Information approval for the kitchen floor project drawings.
- **Overhaul of the Complaint Investigation Process:** Together with the QIE, LHH implemented a significant restructuring of how the facility investigates complaints. LHH transferred the internal investigation process from nursing staff to the centralized quality management program. LHH also instituted a leadership accountability process by creating a weekly dashboard reviewed by LHH executives, including the CEO.

Letter to Jacob Rossman and Jacob Richards

May 3, 2023

Page 5

Since our last letter, LHH has continued assessing each unit's survey readiness. LHH leadership and consultants have observed all LHH units during multiple rounds across all shifts based on a deliberate internal review. To complete the assessment, LHH and the QIE conduct approximately 6,000 weekly observations focused on hand hygiene (HH), infection prevention and control (IPC), and environment of care (EOC), as well as observing for severe non-regulatory compliance issues (defined as any individual finding that could jeopardize recertification independent of the rate of compliance in HH, IPC, and EOC). Using these metrics, LHH and the QIE review each unit's progress and implement mitigation actions to address the observations.

LHH has also made progress on reviewing each resident's care plan and modifying those plans to make them more individualized and tailored to the resident's needs. Individualized care plans are a critical tool in developing and accomplishing individualized care goals, healthier outcomes, and overall quality of life for residents. Since the week of February 20, 2023, LHH and the QIE have completed 103 care plans, started revising 257 care plans, and are reviewing an additional 172 care plans.

Finally, CDPH has dedicated one of its top leaders to provide technical assistance to LHH, which is invaluable to identifying and averting potential deficiencies before they become issues when CDPH surveys the facility.

Laguna Honda intends to apply for recertification following the third monitoring survey.

Although LHH has made significant progress since the beginning of the Action Plan, some issues that do not rise to the immediate jeopardy and actual harm threshold remain. LHH is addressing those issues through a combination of Action Plan milestones, QIE rounding and monthly reports, unit-based QAPI, and LHH leadership rounding and dashboards. For example, during their February 8, 2023 unit rounding, the QIE team identified several outdated and incorrect grievance forms, which the QIE immediately escalated to LHH leadership. Leadership implemented corrections and the following day, the QIE team confirmed that LHH updated all grievance forms. Each additional week of rounding and quality assurance review will better position LHH for a successful recertification survey.

As mentioned above, to allow LHH to show its progress, LHH requests a third monitoring survey within a timely manner. LHH fully expects the survey to show substantial progress in meeting the Medicare conditions of participation. After obtaining the results of that survey, LHH anticipates seeking recertification with sufficient time to obtain recertification before November 13, 2023.

Because of its size, history, amenities, and patient population, LHH is a unique facility in the country, providing critical care for many of San Francisco's most vulnerable residents, and its residents would be best served by avoiding unnecessary transfer trauma and remaining at LHH through the recertification process.

As we explained before in our prior letter, LHH provides skilled nursing and rehabilitation services to San Francisco's most vulnerable residents, including seniors, adults with disabilities, and others who cannot care for themselves. LHH provides the last safety net for many residents who must, or wish to, receive care in the Bay Area near friends, family, and their communities. For instance, LHH provides the only dedicated skilled nursing facility for HIV/AIDS patients in the San Francisco Bay Area and offers monolingual care in Spanish and Chinese. LHH is committed to aiding the underserved, fulfilling a critical need for San Francisco's most vulnerable. As demonstrated most recently through the second monitoring survey and the hundreds of Action Plan milestones, LHH's nearly 1,800 clinicians and staff

Letter to Jacob Rossman and Jacob Richards

May 3, 2023

Page 6

members dedicate themselves to high-quality, individualized care for the facility's residents, including by providing group living facilities for people with developmental disabilities, treatment for multiple sclerosis, Parkinson's and other degenerative diseases, therapeutic services for traumatic brain injuries, services for people with psychosocial difficulties, end-of-life care emphasizing comfort and dignity, and the complex system of care required for people with multiple diagnoses.

LHH's overriding concern, which we know CMS shares, is to ensure resident health, safety, and welfare. In this case, LHH's residents would be best served by remaining at LHH, particularly given that there are no immediate jeopardy or actual harm conditions currently at the facility. Transferring residents inevitably disrupts a resident's daily routines and care, which can cause significant health complications and can trigger psychological distress. If transfers resume, elderly residents with dementia will face the confusion, disruption, and ordeal of being transferred away from their long-term caregivers for reasons they might not understand. For elderly residents, maintaining familiarity with people, place, and surroundings is important for their orientation and stability. For all residents, a forced move against their wishes is disruptive and distressing.

Many residents at LHH are proud to consider the facility their home. Creation of a "home-like" environment is built on relationships, person-centered care, and a psychosocial setting that welcomes each resident and makes the resident comfortable. A majority of LHH's residents have been at the facility for over a decade and the staff serve as their surrogate family. That nurturing environment is one that cannot be replicated. Transferring residents from a stable environment to an unknown environment disrupts their physical health and emotional well-being. This causes stress and anxiety for residents, their loved ones, and staff at LHH.

The California Legislature has declared that "the transfer trauma which accompanies the abrupt and involuntary transfer of patients from one nursing home to another should be avoided when reasonable alternatives exist." Cal. Health & Safety Code § 1325. Here, a reasonable alternative exists because residents can obtain quality care at LHH. Given that LHH has made considerable progress since our last letter and expects to obtain recertification in the coming months, it is unreasonable to require LHH to transfer residents now, only to have LHH bring those same residents back to their homes at LHH following recertification.

The harm that residents could face from being unnecessarily transferred from LHH is compounded by the fact that there are few skilled nursing beds available for LHH's residents in the Bay Area, or surrounding communities. Therefore, it is likely that LHH would be forced to transfer patients to counties outside of the Bay Area or even out of state. Transferring patients hundreds of miles from their home would uproot them from their family and friends, as well as removing them from the only caregivers they know.

Finally, LHH provides specialized care for patients with complex needs and includes services and amenities that are not available elsewhere. The population LHH serves is primarily either low-income or extremely low-income with diverse issues, including elderly patients and those with behavioral health issues, substance use and addiction disorders, and other complex conditions. The quality of care these patients with specialized needs require is unlikely to be replicated at another facility. For instance, other facilities do not have primary care physicians who are assigned to, and rounding at, the facility on a daily basis, a psychiatry department that provides substance use disorder and behavioral health treatment, and a dedicated physical therapy unit. Since LHH is part of the San Francisco Health Network, residents also receive care from providers within the network.

Letter to Jacob Rossman and Jacob Richards

May 3, 2023

Page 7

Extending the pause of transfers and discharges is consistent with federal law.

Extending the pause on involuntary transfers and discharges is not only consistent with the Settlement Agreement, but it is also consistent with 42 C.F.R. § 489.55(b). Section 489.55(b) provides:

The Secretary may, as the Secretary determines is appropriate, continue to make payments with respect to residents of a long-term care facility that has submitted a notification of closure as required at § 483.70(l) of this chapter during the period beginning on the date such notification is submitted and ending on the date on which the residents are successfully relocated.

Federal regulations do not mandate that closure occur within any set period and allow the Secretary of Health and Human Services discretion to continue funding until the last resident is safely transferred or discharged from the facility. Here, LHH is not asking CMS to change the date on which federal funding will end or change the closure date for LHH under the Settlement Agreement. Rather, consistent with the letter and spirit of the Settlement Agreement, LHH is again asking CMS to continue to protect LHH residents from involuntary transfers as LHH makes the improvements necessary to obtain recertification.

Thank you for considering this request. We ask that you provide a written response to our letter as soon as possible but in any event by close of business Pacific Daylight Time on Tuesday, May 9, 2023, to provide residents, families, and staff sufficient time to process your response. We are available to discuss this matter further. Please direct any questions to Deputy City Attorneys Tara Steeley (Tara.Steeley@sfcityatty.org), Sara Eisenberg (Sara.Eisenberg@sfcityatty.org), and Henry Lifton (Henry.Lifton@sfcityatty.org).

Very truly yours,

DAVID CHIU
City AttorneyTARA M. STEELEY
Deputy City Attorneycc: **VIA EMAIL**
HHS/CMS:

Stacey Sanders, Jonathan Blum, Jean Ay, Rufus Arther, Stephanie Magill, Sonia Swancy, Jackeline Rodriguez, and Femi Johnson

CDPH:

Cassie Dunham, Susan Fanelli, and Heather Chamizo

SFDPH:

Grant Colfax, MD, Naveena Bobba, MD, and Roland Pickens

San Francisco City Attorney's Office:

Henry Lifton, Sara Eisenberg