



DAVID CHIU
City Attorney

July 15, 2022

Via Email and U.S. Mail

Paula R. Lee, Chief Counsel, Region IX
U.S. Department of Health and Human Services
Office of the General Counsel, Region IX
90 7th Street, Suite 4-500
San Francisco, California 94103-6705

Re: Due Process Issues with Laguna Honda Closure

Dear Ms. Lee:

We write to bring a serious problem to your attention, with the hope that we can find an amicable solution. We ask that the Centers for Medicare & Medicaid Services (“CMS”) exercise its discretion to continue funding to Laguna Honda Hospital & Rehabilitation Center D/P SNF, Provider Number 555020 (“Laguna Honda”) until all patients are safely discharged or transferred. That funding extension is necessary in light of the extreme difficulty in transferring or discharging so many patients with complex needs—especially due to the well-documented lack of beds across the region for these kinds of patients. At a bare minimum, we ask CMS to continue funding at least through completion of the appeal process described below.

Laguna Honda provides care to San Francisco’s most vulnerable patients.

Throughout its 150-year history, Laguna Honda has provided skilled nursing and rehabilitation services to San Francisco’s most vulnerable patients, including seniors, adults with disabilities, and others cannot care for themselves. For many, Laguna Honda provides the last safety net for patients who must, or wish to, receive care in the Bay Area near friends, family and their communities. For instance, Laguna Honda provides the only dedicated skilled nursing facility for HIV/AIDS in the San Francisco Bay Area. Because of its commitment to serve the underserved, Laguna Honda often provides a last resort for patients who have nowhere else to go, and serves a critical need for San Francisco’s most vulnerable.

There is no doubt that Laguna Honda has faced challenges in recent months. But those challenges do not diminish Laguna Honda’s history of success. Laguna Honda provides a nationally-recognized program for people with Alzheimer’s and other dementias. Through its award-winning restorative care program that assists patients to retain and reclaim physical competency, every year as many as 240 people complete rehabilitative therapy at Laguna Honda and move to a lower level of care or independent living. While other facilities faced COVID-19 outbreaks that caused great suffering and loss of life, Laguna Honda distinguished itself through its successful response to the pandemic. Starting in early March 2020, the facility implemented cutting-edge infection prevention and control systems to protect its patients, and in 2020, Laguna Honda received the top honor from the California Association of Public Hospitals and Health Systems for its response to the COVID-19 pandemic.

Every day, Laguna Honda clinicians and staff dedicate themselves to high-quality, individualized care for the center’s over 600 patients, including by providing group living

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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. Laguna Honda seeks the opportunity to continue to serve the underserved, and the time needed to continue to act in the best interest of its patients.

If CMS were to terminate funding or require Laguna Honda to complete closure of the facility before the appeals process is complete, Laguna Honda's due process rights would be violated.

As you know, CMS recently terminated the Medicare provider agreement of Laguna Honda. Under the terms of a Closure and Patient Transfer and Relocation Plan ("Closure Plan"), CMS has agreed to extend federal reimbursement for Laguna Honda through September 13, 2022, with the possibility of extending reimbursement through November 13, 2022.

Meanwhile, our Office, on behalf of Laguna Honda, has filed three successive administrative appeals, including most recently on May 28, 2022, challenging CMS's March 30, 2022 Notice of Termination. CMS's prehearing brief is due by August 31, 2022, and our response brief is due by October 5, 2022. While the administrative law judge will schedule a hearing soon after we file our brief, the administrative appeals process almost certainly will not conclude before September 13, 2022, and likely will not conclude before November 13, 2022.

If CMS terminates funding and requires Laguna Honda to complete the transfer or discharge of its affected patients before Laguna Honda has the opportunity to be heard, Laguna Honda's due process rights will be violated. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal punctuation omitted). Here, for the administrative appeals process to be meaningful, the process must conclude before CMS terminates funding and requires Laguna Honda to transfer its patients. Otherwise, Laguna Honda and its patients would suffer irreparable harm that cannot be remedied even if Laguna Honda ultimately prevails on its appeals.

As in *International Long Term Care, Inc. v. Shalala*, Laguna Honda is facing what is essentially a "scheduling mismatch" between the date CMS has said funding will terminate and date when Laguna Honda's administrative appeals process will conclude. 947 F. Supp. 15, 18–19 (D.D.C. 1996). As a result, if CMS does not agree to extend funding until at least the end of the administrative appeals process, Laguna Honda "might well be forced to close its doors, and the residents might have to be transferred during the very period when the hearing and post-hearing briefing . . . are taking place." *Id.* at 18. And if the ALJ eventually concludes that Laguna Honda should not be terminated from the Medicare program, "it may be too late for [Laguna Honda] to recover." *Id.* at 19. Federal courts have repeatedly issued injunctive relief to prevent exactly that sort of "irreparable and unnecessary harm." *Id.*; see also *New Orleans Home for Incurables, Inc. v. Greenstein*, 911 F. Supp. 2d 386, 413 (E.D. La. 2012); *Pathfinder Healthcare, Inc. v. Thompson*, 177 F. Supp. 2d 895, 896 (E.D. Ark. 2001); *Frontier Health Inc. v. Shalala*, 113 F. Supp. 2d 1192, 1193 (E.D. Tenn. 2000); *Mediplex of Mass., Inc. v. Shalala*, 39 F. Supp. 2d 88, 94 (D. Mass. 1999); *Libbie Rehab. Ctr., Inc. v. Shalala*, 26 F. Supp. 2d 128, 130 (D.D.C. 1998); *Niskayuna Operating Co., LLC v. Sebelius*, 2010 WL 4248852, at *5 (N.D.N.Y. Oct. 26, 2010); *Intensiva Hosp. of Greater St. Louis, Inc. v. Johnson*, 2009 WL 10704985, at *5 (W.D. Mo. Apr. 15, 2009); *Oak Park Health Care Ctr., LLC v. Johnson*, 2009 WL 331563, at *3 (W.D. La. Feb. 10, 2009); *Ridgeview Manor of Midlands, L.P. v. Leavitt*, 2007 WL 1110915, at *9 (D.S.C. Apr. 9, 2007).

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Laguna Honda shares CMS’s paramount goal of ensuring patient health, safety, and welfare, but implementation of the schedule under the current Closure Plan conflicts with that goal.

The violation of Laguna Honda’s due process rights will also cause unnecessary and irreparable harm to patients. If Laguna Honda is forced to transfer its patients and close its doors before the administrative appeal process concludes, Laguna Honda’s eventual success in the administrative appeals will come too late to protect patients. By that time, Laguna Honda’s “residents will have already undergone an unnecessary and potentially destructive transfer from which many of them may sustain significant physical or psychological trauma.” *Int’l Long Term Care, Inc.*, 947 F. Supp. at 19.

Laguna Honda’s overriding concern, which we know CMS shares, is to ensure patient health, safety, and welfare, even when executing the clinically appropriate transfer or discharge of patients. Laguna Honda must take reasonable steps to transfer affected patients safely and minimize possible transfer trauma. (Cal. Health & Safety Code § 1336.2(a).) Laguna Honda has met the various requirements of section 1336.2(a) including, as of July 11, 2022, conducting 482 patient assessments, meeting with 284 patients and their representatives, discharging 13 patients, and transferring 35 patients.¹

While Laguna Honda has proceeded in conducting patient assessments, meeting with patients, and transferring or discharging patients, Laguna Honda has repeatedly faced the lack of available skilled nursing beds to which it could transfer Medicare and Medicaid patients. Every week, Laguna Honda staff calls over a thousand skilled nursing facilities in the San Francisco Bay Area, across California, and even neighboring states, but is unable to identify suitable placements for most patients. For example, during the week of July 4–10, 2022, Laguna Honda called 1,400 unique out-of-county skilled nursing facilities, and identified no vacant beds eligible for Medicare or Medicaid reimbursement and that can provide a sufficient skilled nursing level of care for such patients. Discharging patients also often leaves them without adequate support. Indeed, three of the 13 patients who have been discharged now live in homeless shelters because they lack any other place to go, and three patients are receiving medical and case management services in temporary housing. Given the challenges Laguna Honda has had in trying to identify and transfer its patients, it is likely these extremely vulnerable individuals will end up homeless if CMS does not extend payment through when the last patient is transferred.

The population Laguna Honda 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. Requiring transfers and discharges to facilities inadequate to a patient’s level of care or to facilities that are hundreds of miles away from patients’ homes and family support structures would not only be cruel, but it would also be unnecessary if Laguna Honda prevails in its administrative appeal. The “Medicare statute is designed to protect the interests” of patients in facilities such as Laguna Honda, but “it is these very residents who will suffer the most if they are unnecessarily transferred” because of a gap in Laguna Honda’s funding before the administrative appeals process concludes. *Int’l Long Term Care*, 947 F. Supp. at 19. And, because Laguna Honda faces an imminent loss of funding, it is already losing employees who are needed to provide care to patients.

¹ Laguna Honda provided the 60-day notice required by California Health and Safety Code section 1336.2(c) on May 15, 2022 and could not involuntarily transfer patients before July 15, 2022.

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CMS is effectively requiring Laguna Honda to abandon its administrative rights and remedies in order for a short-term continuation of funding to serve the patients it is committed to serving. There is no real opportunity to be heard when process is delayed and deferred; unfortunately, that renders administrative due process illusory. We hope we can find an amicable solution to this problem given that both Laguna Honda and CMS intend to provide patients with a stable environment while Laguna Honda safely carries out its Closure Plan. Indeed, federal regulations contemplate CMS providing continued federal reimbursements “during the period beginning on the date such notification [of closure] is submitted and ending on the date on which the residents are successfully relocated.” (42 C.F.R. § 489.55(b); *see also* 42 C.F.R. § 488.450(c)(2).) And, in its 2013 final rule regarding Requirements for Long-Term Care Facilities, CMS agreed with “the need to provide continued funding until all of the residents are successfully relocated.” (Medicare and Medicaid Programs; Requirements for Long-Term Care (LTC) Facilities; Notice of Facility Closure, 78 Fed. Reg. 16,795-01, 16,801 (Mar. 19, 2013) (emphasis added).)

CMS should exercise its statutory discretion to extend payments to Laguna Honda.

Our Office, on behalf of Laguna Honda, requests that CMS exercise its discretion under Section 1128I(h)(2) of the Social Security Act and title 42 Code of Federal Regulations sections 489.55(b) and 488.450(c)(2) to extend payments to Laguna Honda. Those provisions allow CMS to extend funding until the last patient leaves Laguna Honda. Exercising that discretion would be appropriate in this case given the critical services provided by Laguna Honda, the lack of other facilities for patients, and the trauma patients are currently experiencing because of CMS’s threats to prematurely terminate funding. In its draft Closure Plan, Laguna Honda reasonably estimated that it would take 18 months to find suitable facilities who can accept Laguna Honda’s patients and satisfy their particular needs. CMS and CDPH imposed a four-month timeline instead. Allowing Laguna Honda only four months to complete that process is not reasonable, and is causing unnecessary trauma for patients.

At a minimum, Laguna Honda requests that CMS continue funding until a reasonable time after the Secretary of Health and Human Services reaches a final decision regarding Laguna Honda’s administrative appeal. Due process requires no less. Our Office previously requested an expedited hearing for Laguna Honda’s administrative appeals and remains willing to expedite the administrative appeals process so it can be resolved in a timely manner to reduce due process concerns.

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We request a response to our letter by Monday July 25, 2022, and we are available to discuss this matter further. Please direct any questions to Deputy City Attorneys Tara Steeley (Tara.Steeley@sfcityatty.org) and Henry Lifton (Henry.Lifton@sfcityatty.org).

Very truly yours,



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City Attorney

cc: Femi M. Johnson, Acting Deputy Chief Counsel
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