

1 LEXINGTON LAW GROUP  
Howard Hirsch (State Bar No. 213209)  
2 Joseph Mann (State Bar No. 207968)  
503 Divisadero Street  
3 San Francisco, CA 94117  
Telephone: (415) 913-7800  
4 Facsimile: (415) 759-4112  
hhirsch@lexlawgroup.com  
5 jmann@lexlawgroup.com

6 Attorneys for Plaintiff and Petitioner  
FOUNDATION AIDING THE ELDERLY  
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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO  
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13 FOUNDATION AIDING THE  
ELDERLY, a non-profit corporation,

14 Plaintiff and Petitioner,

15 v.

16 CALIFORNIA DEPARTMENT OF  
17 PUBLIC HEALTH; DR. TOMÁS  
ARAGÓN, M.D., D.P.H., in his official  
18 capacity as Director of the California  
Department of Public Health; CASSIE  
19 DUNHAM, in her official capacity as  
Acting Deputy Director of the California  
20 Department of Public Health; and DOES 1-  
10,

21 Defendants and Respondents.  
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Case No. CPF-20-517278

**NOTICE OF ENTRY OF ORDER  
GRANTING PLAINTIFF'S MOTION FOR  
WRIT OF MANDATE**

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 Please take notice that on November 15, 2021, the Court entered the following  
3 document:

- 4 1. Order Granting Plaintiff's Motion For Writ Of Mandate, a true and correct copy  
5 of which is attached hereto as Exhibit 1.

6

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8 Dated: November 16, 2021

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Respectfully submitted,

LEXINGTON LAW GROUP

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Howard Hirsch  
Attorney for Plaintiff  
Foundation Aiding The Elderly

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# **Exhibit 1**

1 LEXINGTON LAW GROUP  
2 Howard Hirsch (State Bar No. 213209)  
3 Joseph Mann (State Bar No. 207968)  
4 503 Divisadero Street  
5 San Francisco, CA 94117  
6 Telephone: (415) 913-7800  
7 Facsimile: (415) 759-4112  
8 hhirsch@lexlawgroup.com  
9 jmann@lexlawgroup.com

10 Attorneys for Plaintiff and Petitioner  
11 FOUNDATION AIDING THE ELDERLY

**FILED**  
San Francisco County Superior Court

NOV 15 2021

CLERK OF THE COURT

BY: [Signature]  
Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

FOUNDATION AIDING THE  
ELDERLY, a non-profit corporation,

Plaintiff and Petitioner,

v.

CALIFORNIA DEPARTMENT OF  
PUBLIC HEALTH; DR. TOMÁS  
ARAGÓN, M.D., D.P.H., in his official  
capacity as Director of the California  
Department of Public Health; CASSIE  
DUNHAM, in her official capacity as  
Acting Deputy Director of the California  
Department of Public Health; and DOES 1-  
10,

Defendants and Respondents.

Case No. CPF-20-517278

~~PROPOSED~~ ORDER GRANTING  
PLAINTIFF'S MOTION FOR WRIT OF  
MANDATE

Date: November 15, 2021  
Time: 9:30 a.m.  
Dept.: 302

1 Petitioner Foundation Aiding the Elderly’s petition for writ of mandate is granted.

2 “A traditional writ of mandate brought under Code of Civil Procedure section 1085 lies  
3 ‘to compel the performance of an act which the law specifically enjoins, as a duty resulting from  
4 an office, trust, or station.’ Under this section, mandate will lie to compel performance of a clear,  
5 present, and usually ministerial duty in cases where a petitioner has a clear, present and beneficial  
6 right to performance of that duty. Mandamus has long been recognized as the appropriate means  
7 by which to challenge a government official’s refusal to implement a duly enacted legislative  
8 measure.” (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 58 (citations omitted.))

9 Petitioner is a non-profit organization that advocates on behalf of the elderly, including  
10 nursing home patients. (Amended Herman Decl., ¶ 2.) Petitioner has aided numerous clients in  
11 submitting complaints to respondent regarding the conditions of nursing homes and long-term  
12 health care facilities, as well as representing those clients in further administrative appeals. (*Id.* ¶  
13 3.) As such, petitioner has associational standing and is “beneficially interested” in the relief  
14 sought, i.e., one that has a protectable interest “over and above the interest held in common with  
15 the public at large.” (*Associated Builders & Contractors, Inc. v. San Francisco Airports Comm’n*  
16 (1999) 21 Cal.4th 352, 362.) Petitioner may also maintain this action to vindicate an important  
17 “public right.” (*Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100–101 [“where the  
18 question is one of public right and the object of the mandamus is to procure the enforcement of a  
19 public duty, the [petitioner] need not show that he has any legal or special interest in the result,  
20 since it is sufficient that he is interested as a citizen in having the laws executed and the duty in  
21 question enforced.”].)

22 Petitioner contends that respondent has and continues to flout the timing requirements of  
23 Health & Safety Code § 1420. The provision sets forth the scheme for respondent to review and  
24 process complaints pertaining to nursing home facilities. Section 1420 sets forth *mandatory*  
25 deadlines regarding commencing an inspection/investigation and completing it. (See, e.g., Health  
26 & Safety Code § 1420, subd. (a)(1) [respondent “shall” commence the investigation within 10  
27 working days of the receipt of the complaint]; *id.*, subd. (a)(3) [investigation “shall” be  
28 completed within 90 days of receipt of the complaint]; see generally *Common Cause v. Board of*

1 *Supervisors* (1989) 49 Cal.3d 432, 433 [“it is a well-settled principle of statutory construction that  
2 the word ‘may’ is ordinarily construed as permissive, whereas ‘shall’ is ordinarily construed as  
3 mandatory”].)

4 Here, the record is clear that respondent has not complied with the statutory deadlines in  
5 numerous respects. Petitioner demonstrates that numerous violations of the timing requirements  
6 have occurred as to the processing of its clients’ complaints. (See Amended Herman Decl. ¶¶ 6-  
7 10.) Herman’s failure to attach each and every complaint and all respective paperwork with  
8 regard to these violations does not render her declaration inadmissible. (See Evid. Code §  
9 1523(d) [“Oral testimony of the content of a writing is not made inadmissible by subdivision (a)  
10 if the writing consists of numerous accounts or other writings that cannot be examined in court  
11 without great loss of time, and the evidence sought from them is only the general result of the  
12 whole.”].)

13 In any event, respondent’s own reports establish a consistent pattern of non-compliance.  
14 For example, for complaints received after 7/1/18, the investigations based on those complaints  
15 must be completed within 60 days of receipt but can be extended another 60 days due to  
16 “extenuating circumstances.” (Health & Safety Code § 1420(a)(5).) From fiscal year 2018 –  
17 2019, respondent had 5,286 investigations open and 2,351 of those had been open for more than a  
18 year. (Mann Decl., Ex. 6, pg. 16 of 54.) Similar numbers exist for fiscal year 2019 – 2020: of  
19 the 5,663 open investigations, 2,053 had been open for more than a year. (Mann Decl. Ex. 7, pg.  
20 16 of 56.) Other data generated by respondent similarly shows that for the last several years, it  
21 has consistently had a high number of open cases with an average age far above the 60-day and  
22 120-day outside statutory deadlines. (Mann Decl., Exs 9, 10.) In short, the record demonstrates  
23 respondent’s endemic inability to meet the statutory deadlines. Based on respondent’s reports, it  
24 is apparent that petitioner’s experiences are not isolated incidents and respondent’s inability to  
25 meet the statutory deadlines is institutional and long-standing. Respondent’s historic failure to  
26 meet the statutory deadlines also belies its assertion that COVID-19 is to blame for the delays.  
27 Indeed, in August 2021, the State Auditor found that respondent had not implemented relevant  
28 recommendations from a report it issued in 2014, “and for the period immediately before the

1 pandemic, between January 2019 and March 2020, the average age of pending investigations  
2 nearly doubled.” (Mann Decl., Ex. 12, pg. 22.)

3         There can be no doubt as to the gravity of this problem. The Long-Term Care, Health,  
4 Safety, and Security Act of 1973, in which section 1420 is found, is “designed to protect one of  
5 the most vulnerable segments of our population, nursing care patients . . . who are already  
6 disabled by age and[/or] infirmity, and hence in need of the safeguards provided by state  
7 enforcement of patient care standards.” (*State Dept. of Public Health v. Superior Court* (2015) 60  
8 Cal.4th 940, 951 (citations and quotations omitted). Further, a substantial number of the  
9 complaints respondent is failing timely to investigate involve “a threat of imminent danger of  
10 death or serious bodily harm.” (Health & Safety Code § 1420(a)(3)(A); see also Mann Decl., Ex.  
11 12 at pg. 22 [“Until Public Health has fully implemented key recommendations necessary to  
12 protect patients in health care facilities and to improve its handling of critical complaints and  
13 investigations, it remains a high-risk agency.”].) Given the statewide problem and systematic  
14 failures, statewide relief is appropriate. (See *Stiavetti v. Clendenin* (2021) 65 Cal.App.5th 691  
15 [five family members of defendants found incompetent to stand trial (“IST”) obtained writ  
16 granting statewide relief regarding delays in transferring IST defendants].)

17         Petitioner’s suggestion that the parties meet and confer regarding what steps can be taken  
18 to insure substantial compliance with the deadlines of Health & Safety Code § 1420 is reasonable,  
19 appropriate, and sanctioned by law. (See *Morris v. Harper* (2001) 94 Cal.App.4th 52, 58.) This  
20 Court’s order does not seek to control respondent’s discretion in precisely how it will comply  
21 with the mandates of Health & Safety Code § 1420. The Court orders respondent to develop a  
22 written plan describing how it will prospectively comply with the statutory deadlines, submit this  
23 plan to petitioner’s counsel, and to meet and confer with petitioner’s counsel regarding the terms  
24 of this plan. The Court understands that certain investigations will pose exceptional  
25 circumstances and absolute compliance is not realistic. The Court therefore retains jurisdiction to  
26 make amendments as warranted by the facts after a concrete remedial plan is ordered.

27         Petitioner further contends that respondent has not responded to its request for documents  
28 under the California Public Records Request Act. Respondent contends that this aspect of the

1 petition is moot as it recently served numerous documents in response to the request. The Court  
2 orders the parties to meet and confer regarding which requests are actually still outstanding.

3 The declaratory relief cause of action is denied as moot.

4 This matter is continued to January 21, 2022. The parties are to prepare a joint statement  
5 setting forth a proposal to ensure substantial compliance with Health & Safety Code § 1420. If  
6 there are areas of disagreement, then the joint statement shall outline those areas of disagreement.  
7 The joint statement shall also set forth what CPRA disputes still exist. The parties shall file the  
8 joint statement by January 14, 2022.

9  
10 **IT IS SO ORDERED.**

11

12 Nov. 15, 2021

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JUDGE OF THE SUPERIOR COURT

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**ETHAN P. SCHULMAN**

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1 **PROOF OF SERVICE**

2 I, Owen Sutter, declare:

3 I am a citizen of the United States and employed in the County of San Francisco, State of  
4 California. I am over the age of eighteen (18) years and not a party to this action. My business  
5 address is 503 Divisadero Street, San Francisco, CA 94117 and my email address is  
osutter@lexlawgroup.com.

6 On November 16, 2021 I served the following document(s) on all interested parties in this  
7 action by placing a true copy thereof in the manner and at the addresses indicated below:

8 **NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFF'S MOTION FOR  
9 WRIT OF MANDATE**

10  **BY MAIL:** I am readily familiar with the firm's practice for collecting and processing mail  
11 with the United States Postal Service ("USPS"). Under that practice, mail would be deposited  
12 with USPS that same day with postage thereon fully prepaid at San Francisco, California in the  
ordinary course of business. On this date, I placed sealed envelopes containing the above  
mentioned documents for collection and mailing following my firm's ordinary business practices.

13  **BY FACSIMILE:** I caused all pages of the document(s) listed above to be transmitted via  
14 facsimile to the fax number(s) as indicated and said transmission was reported as complete and  
without error.

15  **BY ELECTRONIC MAIL:** I transmitted a PDF version of the document(s) listed above via  
16 email to the email address(es) indicated on the attached service list [or noted above] before 5 p.m.  
on the date executed.

17 *See attached service list.*

18  **BY PERSONAL DELIVERY:** I placed all pages of the document(s) listed above in a sealed  
19 envelope addressed to the party(ies) listed above, and caused such envelope to be delivered by  
hand to the addressee(s) as indicated.

20  **BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility  
21 regularly maintained by FedEx, or delivered such document(s) to a courier or driver authorized by  
FedEx, with delivery fees paid or provided for, and addressed to the person(s) being served  
below.

22 I declare under penalty of perjury under the laws of the State of California that the  
23 foregoing is true and correct.

24 Executed on November 16, 2021 at San Francisco, California.

25 

26 Owen Sutter

**SERVICE LIST**  
**FATE v. CDPH, et al.**  
**CPF-20-517278**

<b>ADDRESS</b>	<b>PARTY</b>
Howard Hirsch Joseph Mann Lexington Law Group 503 Divisadero Street San Francisco, CA 94117 hhirsch@lexlawgroup.com jmann@lexlawgroup.com	<i>Plaintiff</i> Foundation Aiding The Elderly
Xavier Becerra Jennifer G. Perkell Jennifer C. Addams 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 Jennifer.Addams@doj.ca.gov	<i>Defendants</i> California Department Public Health Dr. Tomas Aragon Cassie Dunham