



**FILED**  
ALAMEDA COUNTY

JUN 21 2019

CLERK OF THE SUPERIOR COURT

By *C. Williams* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

ANALILIA JIMINEZ PEREA, et al,

Plaintiffs,

v.

DIANA DOOLEY, et al,

Defendants.

No. RG17-867262

ORDER OVERRULING DEMURRER TO  
THIRD AMENDED COMPLAINT

Date: 6/21/19

Time: 10:00 A.M.

Dept.: 21

The demurrer of Defendants Department of Health Care Services et al (collectively “DHCS”) to the Third Amended Complaint came on for hearing on 6/21/19, in Department 21 of this Court, the Honorable Winifred Smith presiding. Counsel appeared on behalf of Plaintiffs and on behalf of Defendants. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The demurrer of DHCS to the Third Amended Complaint is OVERRULED.

PROCEDURE

On 7/12/17, Plaintiffs filed this case alleging generally that the State of California discriminated against Latinos in the state’s provision of Medi-Cal.

1 On 4/12/18, the court sustained the demurrer to the Complaint with leave to amend as to  
2 all causes of action.

3 On 9/21/18, the court sustained the demurrer to the First Amended Complaint without  
4 leave to amended as to Causes of Action 1, 2, 5, and 6 [discrimination based on disparity  
5 between Medi-Cal and private insurance] and with leave to amend as to causes of action 3, 4, 7,  
6 and 8 [discrimination based on decrease is services over time], and 9 [substantive due process].  
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8 On 10/29/18, Plaintiffs filed the Second Amended Complaint. The court approves of the  
9 practice of reiterating Causes of Action 1, 2, 5, and 6 in the Second Amended Complaint while  
10 noting that they have been dismissed. This will help provide a clean record in the event of an  
11 appeal. (2AC at 2:25-27.) On 4/12/18, the court sustained the demurrer to the Second Amended  
12 Complaint with leave to amend.

13 On 4/9/19, the DHCS filed the demurrer to the Third Amended Complaint.  
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15  
16 THE THIRD AMENDED COMPLAINT

17 The 3AC clarifies that the claims concern DHCS administrative action or inaction. The  
18 claims are not challenges to statutes or regulations on a facial or as applied basis. The claims are  
19 not asserted against the State for the legislature's funding decisions. (Oppo at 14:3-10.)

20 The 3AC summarizes the three categories of DHCS action or inaction: (1) proposing,  
21 recommending, setting, or otherwise approving inadequate financial reimbursement rates; (2)  
22 failing to monitor and enforce the minimum standards for the quality of the services provided;  
23 and (3) creating and permitting administrative burdens that impair the quality of the services  
24 provided. (3AC, para 175-181.)  
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1 The third, fourth, seventh, and eighth causes of action assert claims for discrimination  
2 under Govt Code 11135 and for violation of constitutional equal protection. These claims are  
3 based on all three categories of DHCS action or inaction.

4 The ninth cause of action asserts a violation of constitutional substantive due process.  
5 (Cal Const., Art I, sec. 7(a).) This claim is similarly based on all three categories of DHCS  
6 action or inaction. (3AC, para 245, 246.)

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8 The tenth and eleventh causes of action are derivative of the other causes of action.

9  
10 **THE CLAIMS ARE NOT UNCERTAIN**

11 The demurrer to the Third Amended Complaint based on uncertainty is **OVERRULED**.  
12 The Order of 2/1/19 stated “the court had difficulty identifying the allegedly unlawful decisions  
13 of the DHCS and therefore the appropriate legal analysis that would be applied to the claims” and  
14 “The identification of which state entity made what decision in what context is important.” The  
15 3AC has clarified and focused the claims.

16  
17 At the hearing on 6/21/19, the DHCS argued that the 3AC was unclear regarding whether  
18 the inadequate financial reimbursement rates claims were against the DHCS or the legislature.  
19 The 3AC is clear that the claims are against the DHCS. (Compare Order of 2/1/19 at 6, 7, 9-10.)  
20 The 3AC alleges that the DHCS is the single state entity responsible for determining and  
21 recommending rates and that other executive branch officials, the legislature, and the federal  
22 government rely on the DHCS to fulfill its rate-setting responsibilities. (3AC, paras 98-99.) The  
23 3AC allege facts regarding the legislature and the state budget as background to its claims against  
24 DHCS. (3AC, paras 149, 149(b), 152, 153, 160.) Consistent with the DHCS’s role, the prayer  
25 for relief asks for a judgment that directs the DHCS to “seek funding sufficient to set Medi-Cal  
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1 reimbursement rates” but does not seek an order directing the legislature to provide more funding  
2 sufficient for Medi-Cal reimbursement rates. (3AC, p62.) At the hearing on 6/21/19, the DHCS  
3 also argued that the 3AC was unclear in other respects, but most of those concerned background  
4 facts.

5           The 3AC provides adequate notice to DHCS and provides an adequate basis to define  
6 relevance for purposes of discovery. The court notes that interrogatories can be “used to clarify  
7 the contentions of the parties ... are an adjunct to the pleadings” and should be used liberally “for  
8 the purpose of clarifying and narrowing the issues made by the pleadings.” (*Jacobs v. Coldwell*  
9 *Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 445.) Such interrogatories are  
10 often more productive after there has been the opportunity for discovery. (*McCaugherty v.*  
11 *Sifferman* (N.D.Cal. 1990) 132 F.R.D. 234, 249; *McCarthy v. Paine Webber Group* (D. Conn  
12 1996) 168 F.R.D. 448.)  
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16 FIRST CAUSE OF ACTION – DISPARATE IMPACT DISCRIMINATION UNDER GOVT  
17 CODE 11135 – COMPARISON WITH PRIVATE INSURANCE.

18           The first cause of action alleges that the DHCS is unlawfully discriminating against  
19 Latinos in violation of Govt Code 11135 by failing to comply with Govt Code 14000(a) and by  
20 failing to providing Medi-Cal that is equivalent to Medicare and private insurance. The court  
21 PREVIOUSLY DISMISSED this claim in the 9/21/18 Order. Plaintiffs restate the claim to  
22 preserve it for possible appeal.  
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1 SECOND CAUSE OF ACTION – INTENTIONAL DISCRIMINATION UNDER GOVT CODE  
2 11135 – COMPARISON WITH PRIVATE INSURANCE.

3 The second cause of action alleges that the DHCS is intentionally discriminating against  
4 Latinos in violation of Govt Code 11135 by failing to comply with Govt Code 14000(a) and by  
5 failing to providing Medi-Cal that is equivalent to Medicare and private insurance. The court  
6 PREVIOUSLY DISMISSED this claim in the 9/21/18 Order. Plaintiffs restate the claim to  
7 preserve it for possible appeal.  
8

9  
10 THIRD CAUSE OF ACTION – DISPARATE IMPACT DISCRIMINATION UNDER GOVT  
11 CODE 11135

12 The third cause of action asserts that the DHCS violated Govt Code 11135 because its  
13 actions and inaction had a disparate impact on plaintiffs and the members of the putative class.  
14 The demurrer to the third cause of action is OVERRULED.

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16 Govt Code 11135 states “No person in the State of California shall, on the basis of ...  
17 race, color, ancestry, national origin, ethnic group identification, ... be unlawfully denied full and  
18 equal access to the benefits of, or be unlawfully subjected to discrimination under, any program  
19 or activity that is conducted, operated, or administered by the state or by any state agency, is  
20 funded directly by the state, or receives any financial assistance from the state.” (See also 2 CCR  
21 11154(i)(2).) The court’s analysis in the Order of 9/21/18 at pp 6-10 held that Govt Code 11135  
22 concerns access to or discrimination within a program or activity.  
23

24 The DHCS argues that as a matter of law that under Govt Code 11135 there can be no  
25 claim for disinvestment over time because claims for discrimination must be based on current  
26 differential treatment of similarly situated persons. A defendant can be held liable only for action

1 or inaction within the statute of limitations.<sup>1</sup> The claims in the 3AC are focused on DHCS's  
2 current policies and practices. The 3AC at 62-63 seeks only prospective relief in the form of an  
3 injunction and/or writ of mandate. The parties and the court will not need to address the issue of  
4 compensation for past alleged discrimination.

5 DHCS's citation to *People v. Floyd* (2003) 31 Cal.4th 179, 188-189, misses the mark  
6 because in that case the issue was whether the legislature could determine that a statute was  
7 effective as of a certain date and had no retroactive application. That is not the issue in this case.  
8 The issue in this case is whether the DHCS is unlawfully discriminating in violation of Govt  
9 Code 11135 and whether it did so within the statute of limitations.

11 The temporal reach of a claim should not be confused with the temporal scope of the  
12 evidence that can be offered in support of the claim. The statute of limitations does not limit the  
13 temporal reach of evidence. Plaintiffs and defendants can present evidence of individual  
14 decisions, as well as patterns or practices that are outside the statute of limitations as evidence of  
15 intent inside the statute of limitations. (Evid Code 352.) In the context of this case, evidence of  
16 DHCS's action or inaction over the years might be relevant to DHCS's intent for its action or  
17 inaction within the statute of limitations.

19 The DHCS argues that as a matter of pleading plaintiffs have failed to identify two  
20 similarly situated groups that are being treated differently. The 3AC at identifies two  
21 comparators: (1) Medi-Cal long term care beneficiaries and (2) Medi-Cal participants in the past.  
22 (3AC, para 148-167.) The 3AC assert that both groups of comparators have proportionately  
23 fewer Latinos than the current Medi-Cal population. This allegation is adequate for purposes of  
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26 <sup>1</sup> The statute of limitations can be extended in the case of a continuing violation.  
(*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802.)

1 the complaint. The identification of similarly situated persons is fact specific. The court cannot  
2 readily determine on the pleadings whether a specific person or group of persons is similarly  
3 situated.

4 The court considers the concepts of “similarly situated” and “temporal proximity” in the  
5 more familiar context of a single plaintiff discrimination claim. A plaintiff could credibly assert  
6 that co-workers with the same job title were similarly situated and support a disparate impact  
7 claim with evidence that an employer policy or procedure had a disproportionate adverse effect  
8 on the plaintiff when compared to the co-workers in a time frame that ran from six months before  
9 to six months after the challenged employer decision. Regarding “similarly situated,” the co-  
10 workers might be similarly situated if they had different, but similar, job descriptions or worked  
11 in different, but similar, conditions. Regarding “temporal proximity,” the impact of the employer  
12 policy or procedure regarding the co-workers (1) would probably be a relevant comparator if it  
13 applied the same policy or procedure within six months of the challenged decision, (2) might be a  
14 relevant comparator if it applied the same policy or procedure within years of the challenged  
15 decision if the economic or other surrounding circumstances were similar, and (3) would not  
16 likely be a relevant comparator if it applied the same policy or procedure if the economic or other  
17 surrounding circumstances were materially different. A change in content of the policy or  
18 procedure over time would be another relevant consideration. These are fact specific  
19 determinations.

20 Also regarding the definition of similarly situated persons, a plaintiff does not necessarily  
21 need to identify a similarly situated person to prove a claim of discrimination. The Order of  
22 9/21/18 at 12-13 stated, “A person can prove a claim of discrimination without identifying a  
23 similarly situated person who was treated differently. For example, a woman can prove that she  
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1 was denied a promotion because of her gender if the employer elected to leave the position  
2 vacant. ... There is no bright line rule that there must be a similarly situated person or group.”

3         The DHCS argues that as a matter of pleading plaintiffs have failed to assert facts that  
4 could support a disparate impact claim when the actions or inaction of the DHCS is evaluated  
5 under the rational basis standard of review. *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279,  
6 298-299, sets out the law. *Hernandez* states that “economic and social welfare legislation in  
7 which there is a “discrimination” or differentiation of treatment between classes or individuals”  
8 ... “requir [es] merely that distinctions drawn by a challenged statute bear some rational  
9 relationship to a conceivable legitimate state purpose.” In contrast, ““ [a] more stringent test  
10 [that] is applied ... in cases involving “suspect classifications” or touching on “fundamental  
11 interests.” Here the courts adopt “an attitude of active and critical analysis, subjecting the  
12 classifications to strict scrutiny. ... [T]he state bears the burden of establishing not only that it  
13 has a compelling interest which justifies the law but that the distinctions drawn by the law are  
14 necessary to further its purpose.”” (*Hernandez*, 41 Cal.4<sup>th</sup> at 289-299.)

15         A plaintiff cannot transform “economic and social welfare legislation” into legislation  
16 involving “suspect classifications” by presenting evidence that the facially neutral legislation has  
17 a disproportionate effect on suspect classifications. *Jefferson v. Hackney* (1972) 406 U.S. 535,  
18 545-548, addressed this in the context of constitutional equal protection claim. *Jefferson* states:

19         So long as its judgments are rational, and not invidious, the legislature's efforts to  
20 tackle the problems of the poor and the needy are not subject to a constitutional  
21 straitjacket. The very complexity of the problems suggests that there will be more  
22 than one constitutionally permissible method of solving them.

23         The standard of judicial review is not altered because of appellants' unproved  
24 allegations of racial discrimination. ...  
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1 Appellants are thus left with their naked statistical argument: that there is a larger  
2 percentage of Negroes and Mexican-Americans in AFDC than in the other  
3 programs, and that the AFDC is funded at 75% whereas the other programs are  
4 funded at 95% and 100% of recognized need. As the statistics cited in the footnote  
5 demonstrate, the number of minority members in all categories is substantial. ...  
6 The acceptance of appellants' constitutional theory would render suspect each  
7 difference in treatment among the grant classes, however lacking in racial  
8 motivation and however otherwise rational the treatment might be. Few  
9 legislative efforts to deal with the difficult problems posed by current welfare  
10 programs could survive such scrutiny, and we do not find it required by the  
11 Fourteenth Amendment.

12 Applying the traditional standard of review under that amendment, we cannot say  
13 that Texas' decision to provide somewhat lower welfare benefits for AFDC  
14 recipients is invidious or irrational.

15 (406 U.S. 535, 546-549.) (See also *Whitfield v. Oliver* (M.D. Ala., 1975) 399 F.Supp. 348, 351.)

16 The 3AC adequately asserts a claim under Govt Code 11135 for discrimination based on  
17 disparate impact. This is a demurrer and the court accepts the allegations of the complaint as true  
18 and construes them in favor of plaintiffs. Given the stage of the proceeding, the DHCS has not  
19 had the opportunity to present any evidence of any rational basis for the alleged disparate impact  
20 between the plaintiffs and the putative class and the alleged comparators. *Jefferson* appears to  
21 have been decided following a trial on the papers in which the trial court considered "depositions  
22 of Welfare officials." (406 US at 547.) (See also *Jefferson*, 406 US at 575 [dissent] ["The  
23 evidence also shows that 87% of the AFDC recipients in Texas are either Negro or Mexican-  
24 American"].) *Whitfield* likewise appears to have been decided following a trial on the papers, and  
25 the trial court considered "voluminous depositions and a mass of documentary data." (399  
26 F.Supp. at 351.) The application of the rational basis test might make the claim difficult to  
prove at trial, but this is a demurrer. (Order of 9/21/18 at 20:24-25.)

1 The demurrer to the third cause of action is OVERRULED.

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3 FOURTH CAUSE OF ACTION – INTENTIONAL DISCRIMINATION UNDER GOVT CODE  
4 11135

5 The fourth cause of action asserts that the DHCS has violated Govt Code 11135 because  
6 its actions and inaction demonstrate an anti-Latino intent to discriminate against plaintiffs and  
7 the members of the putative class. The demurrer to the fourth cause of action is OVERRULED.  
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9 A plaintiff can assert a claim for intentional discrimination based on a “sensitive” multi-  
10 factor inquiry. Under *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252,  
11 266-268, a court analyzes whether the defendant's actions were motivated by a discriminatory  
12 purpose by examining (1) statistics demonstrating a “clear pattern unexplainable on grounds  
13 other than” discriminatory ones, (2) “[t]he historical background of the decision,” (3) “[t]he  
14 specific sequence of events leading up to the challenged decision,” (4) the defendant's departures  
15 from its normal procedures or substantive conclusions, and (5) relevant “legislative or  
16 administrative history.” (*Pacific Shores Properties, LLC v. City of Newport Beach* (9<sup>th</sup> Cir.,  
17 2013) 730 F.3d 1142, 1156-1157.) The 3AC is not required to allege facts regarding each of the  
18 *Arlington* factors, and the court can consider allegations of circumstantial evidence of intentional  
19 discrimination that does not fit neatly into one of the *Arlington* factors. (*Avenue 6E Investments,*  
20 *LLC v. City of Yuma, Ariz.* (9<sup>th</sup> Cir., 2016) 818 F.3d 493, 504.)  
21

22 The 3AC alleges (1) statistics demonstrating a “clear pattern unexplainable on grounds  
23 other than” discriminatory ones, (2) “[t]he historical background of the decision,” and (3) “[t]he  
24 specific sequence of events leading up to the challenged decision.” These are the same  
25 allegations that support the claim for disparate impact discrimination. Both *Whitfield v. Oliver*  
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1 (M.D. Ala., 1975) 399 F.Supp. 348, and *Committee Concerning Community Improvement v. City*  
2 *of Modesto* (9<sup>th</sup> Cir. 2009) 583 F.3d 690, involved claims for intentional discrimination and both  
3 considered evidence of historical patterns and disparate impact as circumstantial evidence that  
4 might tend to prove intentional discrimination. In *Whitfield* the court examined statistical  
5 historical patterns of funding (399 F.Supp. at 352) and in *Modesto* the court examined statistical  
6 historical patterns of Latino residency (583 F.2d at 704). Historical evidence can support an  
7 inference of current discriminatory intent because under *Arlington Heights*, 429 U.S. at 266, the  
8 trier of fact can infer intentional discrimination from statistics demonstrating a “clear pattern  
9 unexplainable on grounds other than” discriminatory ones, “[t]he historical background of the  
10 decision,” and [t]he specific sequence of events leading up to the challenged decision.” In  
11 *Whitfield* and *Modesto* the allegations or evidence of disinvestment supported claims for  
12 intentional discrimination.  
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14  
15 The 3AC alleges that DHCS departed from the required procedures by failing to conduct  
16 rate reviews and revisions as required by W&I 14079. (3AC, para 149(b) and 152.)

17 The 3AC alleges additional relevant history in the form of comments allegedly made by  
18 DHCS personnel. (3AC para 169, 170, 173.)

19 The demurrer to the fourth cause of action is OVERRULED.  
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21 FIFTH CAUSE OF ACTION – DISPARATE IMPACT - EQUAL PROTECTION –  
22 COMPARISON WITH PRIVATE INSURANCE.  
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24 The fifth cause of action asserts a claim under Cal Const Art I, sec 7(a) and Art IV, sec  
25 16(a) for a denial of equal protection based on failing to providing Medi-Cal that is equivalent to  
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1 Medicare and private insurance. The court PREVIOUSLY DISMISSED this claim in the 9/21/18  
2 Order. Plaintiffs restate the claim to preserve it for possible appeal.

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4 SIXTH CAUSE OF ACTION – INTENTIONAL DISCRIMINATION - EQUAL PROTECTION  
5 – COMPARISON WITH PRIVATE INSURANCE.

6  
7 The sixth cause of action asserts that the State has denied equal protection to Latinos by  
8 failing to provide Medi-Cal that is equivalent to Medicare and private insurance. The court  
9 PREVIOUSLY DISMISSED this claim in the 9/21/18 Order. Plaintiffs restate the claim to  
10 preserve it for possible appeal.

11  
12 SEVENTH CAUSE OF ACTION – DISPARATE IMPACT - EQUAL PROTECTION

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14 The seventh cause of action alleges that the DHCS has denied equal protection to Latinos  
15 under the equal protection clauses of the California and United States Constitutions because its  
16 actions and inaction had a disparate impact on plaintiffs and the members of the putative class.  
17 The analysis regarding the disparate impact claim under Govt Code 11135 applies to the  
18 disparate impact claim. The demurrer to the seventh cause of action is OVERRULED.

19  
20 EIGHTH CAUSE OF ACTION – INTENTIONAL DISCRIMINATION - EQUAL  
21 PROTECTION

22  
23 The eighth cause of action asserts that the State has intentionally denied the equal  
24 protection to Latinos required under the equal protection clauses of the California and United  
25 States Constitutions because its actions and inaction demonstrate an anti-Latino intent to  
26 discriminate against plaintiffs and the members of the putative class. The analysis regarding the

1 intentional discrimination (disparate treatment) claim under Govt Code 11135 applies to the  
2 constitutional intentional discrimination (disparate treatment) claim. The demurrer to the eighth  
3 cause of action is OVERRULED.

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5 NINTH CAUSE OF ACTION – SUBSTANTIVE DUE PROCESS

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7 The ninth cause of action asserts a claim under Cal Const Art I, sec 7(a) for a denial of  
8 substantive due process. The demurrer to the ninth cause of action is OVERRULED.

9 The substantive due process claim concerns DHCS’s administrative decisions. In this  
10 context, “[T]he determination of when a substantive due process violation occurs is contextual.  
11 ... [A] substantive due process violation is not ordinary government error but conduct that is in  
12 some sense outrageous or egregious—a true abuse of power. ... the mere finding that a  
13 government decision is arbitrary or capricious is not sufficient to establish a substantive due  
14 process violation. ... Only a substantial infringement of state law prompted by personal or  
15 group animus, or a deliberate flouting of the law that trammels significant personal or property  
16 rights, qualifies for relief ... Inadvertent errors, honest mistakes, agency confusion, even  
17 negligence in the performance of official duties, do not warrant redress [for a substantive due  
18 process violation].” (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1032-1034.)

19  
20 The substantive due process claim does not concern the constitutionality of a statute or  
21 regulation. Therefore, it appears that the court does not need to address the nature of the right at  
22 issue and whether it is regular right that is reviewed under the rational basis standard or is a  
23 fundamental right or liberty interest that is subject to enhanced scrutiny. (*Duarte Nursery, Inc. v.*  
24 *California Grape Rootstock Improvement Com.* (2015) 239 Cal.App.4th 1000, 1008-1010.)

1 The substantive due process claim is based on administrative action or inaction that  
2 allegedly resulted in (1) inadequate financial reimbursement rates; (2) failing to monitor and  
3 enforce the minimum standards; and (3) creating and permitting administrative burdens. (3AC,  
4 para 245-246.)

5 The analysis regarding the disparate impact and intentional discrimination (disparate  
6 treatment) claims supports a substantive due process claim based on “a substantial infringement  
7 of state law prompted by personal or group animus.”  
8

9 The 3AC also contains allegations that could support a finding of “a deliberate flouting of  
10 the law that trammels significant personal or property rights.” Specifically, the 3AC asserts that  
11 DHCS set reimbursement rates below the cost of care, failed to annually review and adjust rates,  
12 failed to monitor compliance with network adequacy, and permitted managed care organizations  
13 with insufficient networks to participate in Medi-Cal. (3AC, paras 95-118 and 132-135.) These  
14 allegations are not conclusory. The 3AC references a Legislative Analyst Office report stating  
15 that there is “no rational basis” for the rate-setting system (para 106), a 2015 State Auditor report  
16 (para 132) and a DMHC report (para 133)  
17

18 The allegations are adequate at the pleading stage. As with the claims for discrimination,  
19 the court notes that this is a demurrer and the court accepts the allegations of the complaint as  
20 true and construes them in favor of plaintiffs.  
21

## 22 TENTH CAUSE OF ACTION – TAXPAYER CLAIM 23

24 The tenth cause of action asserts a claim under CCP 526a for expenditure of tax money in  
25 an illegal manner. This is derivative of causes of action 3-4 and 7-8. The demurrer to the tenth  
26 cause of action is OVERRULED.

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ELEVENTH CAUSE OF ACTION –PETITION FOR WRIT

The eleventh cause of action is a petition for a traditional writ of mandate under CCP 1085 seeking a writ requiring the State to comply with a ministerial duty to comply with the law. This is derivative of causes of action 3-4 and 7-8. The demurrer to the eleventh cause of action is OVERRULED.

FURTHER PROCEEDINGS

The DHCS must file an answer on or before 7/19/19.

Dated: June 21, 2019

  
Winfred Smith  
Judge of the Superior Court