

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

**FILED**  
Superior Court of California  
County of Los Angeles

*[Signature]*  
**FEB - 8 2018**

Sherril R. Carter, Executive Officer/Clerk  
By *[Signature]* Deputy  
N. DiGiambattista

JUDY BOOTHBY, ET AL

) Case No.: BC627948

Plaintiffs,

) FINAL STATEMENT OF DECISION ON  
) PETITION FOR WRIT OF MANDATE:  
) GRANTED IN PART AND DENIED IN PART

vs

CALIFORNIA DEPARTMENT OF HEALTH CARE

SERVICES, ET AL

Defendants

Plaintiffs and Petitioners Judy Boothby, Gita Aminloo, Denise Cozza, Deborah Hagey, Melissa Hall, Maureen Kaye, Ingri Sparling, and Darci Trill ("Petitioners") seek a writ of mandate directing Respondents California Department of Health Care Services ("Department") and Jennifer Kent (collectively "Respondents") to rescind parts of a July 2016 bulletin that (1) cut the Denti-Cal provider rates for periodontal maintenance to \$55, and (2) requires radiographs and prior authorization for scaling and root planing.

**Judicial Notice**

Petitioner's Request for Judicial Notice (RJN) Tabs 1-5 – Granted. (Evid. Code § 452(c), (h).) However, the court does not judicially notice the truth of factual matters stated in official records.

Respondents' RJN Exhibits 1-8; Jackson Declaration, Exhibit B – Granted. (Evid. Code § 452(c), (h).) However, the court does not judicially notice the truth of factual matters stated in official records.

**Respondents' Evidentiary Objections**

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Declaration of Judy Boothby – see separate order

Declaration of Melissa Hall – see separate order

Declaration of Gita Aminloo – see separate order

Declaration of Maureen Kaye – see separate order

Declaration of Laurence Hall – see separate order

Declaration of Ashraf Soliman – see separate order

Declaration of William Jackson, D.D.S. – see separate order

Declaration of Kirsten Roling, D.D.S. – see separate order

Judicial Notice– see separate order

**Petitioners' Evidentiary Objections**

Declaration of Alani Jackson – see separate order

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1  
2 As relevant to the petition for writ of mandate, Petitioners allege that "sometime  
3 in January 2016 through October 2016, Defendants have circumvented and continue to circumvent, well  
4 established federal requirements for changes to Medicaid payment rates to providers ...." (SAC ¶ 18.)  
5 "Defendants [Denti-Cal Bulletin July 2016, Volume 32, Number 12] imposed a 68% reduction for the  
6 critical to Plaintiffs' patients treatment called perio-maintenance (\$130 to \$55) and wiped out all provider  
7 payments to Plaintiffs' patients for the lynch pin to perio-maintenance, a treatment called scaling and root  
8 planing ('SRPs') with a new impossible to meet x-ray requirement." (SAC ¶ 19.)

9  
10 "Defendants violated their mandatory duties ... to: 1. provide public notice of all  
11 proposed changes to provider payment rates or methodologies before imposing them and submitting  
12 same to [Department of Health and Human Services' Center for Medicare & Medicaid Services (CMS)]; 2.  
13 Provide public input process policies before reducing rates to obtain input related to access to care for  
14 CMS review and; 3. Obtain CMS approval for reducing or eliminating payment rates by submitting and  
15 getting approval for a State Plan Amendment ('SPA') to supersede and replace California's current SPA...  
16 to impose the draconian provider rates reductions ...." (FAC ¶ 20.)

17  
18 In their first cause of action, Petitioners allege that Respondents have a clear,  
19 present, and ministerial duty "to comply with Medicaid procedures and regulations of public notice, public  
20 process and obtaining approval of a State Plan Amendment when lowering or eliminating provider rate  
21 payments." (SAC ¶ 54.) In the second cause of action, Petitioners allege that Respondents have a clear,  
22 present, and ministerial duty "to comply with Welfare & Institutions Code § 14079 to conduct an annual  
23 review of provider services and periodically raise provider payments rates to ensure reasonable access to  
24 Medi-Cal beneficiaries." (Id. ¶ 62.) In their third cause of action for writ of mandate, Petitioners allege  
25 that Department's July 2016 Bulletin was the result of arbitrary and capricious decisionmaking. (Id. ¶¶ 68-  
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69.) The SAC relies in part on federal Medicaid law set forth in 42 U.S.C. section 1396a, including section 30(A), as discussed in further detail below. (Id. ¶¶ 27-38.)

July 2016 Bulletin

In July 2016, the Department issued a Denti-Cal provider bulletin (July 2016 Bulletin) notifying all dental providers of the following changes effective July 15, 2016:

1. Added Full Mouth Debridement (FMD) as a benefit, once in a 12-month period without prior authorization, for eligible Medi-Cal beneficiaries who reside in Skilled Nursing Facilities (SNF) or Intermediate Care Facilities (ICF);

2. Clarified that FMD is not a benefit when rendered on the same dates of service as Scaling and Root Planing (SRP), prophylaxis, or periodontal maintenance and within 24 months following the last SRP;

3. Increased the frequency of prophylaxis and fluoride treatments to once every four months for Medi-Cal beneficiaries residing in SNFs and ICFs;

4. Notified providers that prior authorization is required for Scaling and Root Planing (SRP) (CDT Codes D4341 and D4342). Radiographs to demonstrate medical necessity are required when submitting a treatment authorization request (TAR) for SRP. If radiographs are not possible, the Bulletin instructs that providers may submit photographs in support of the TAR.

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1 5. Finally, the Bulletin sets forth the Schedule of Maximum Allowances pertaining to the  
2 new policy. As relevant to this petition, the Bulletin sets the rate for periodontal maintenance  
3 (CDT Code D4910) at \$55.<sup>2</sup> (Resp. RJN Exh. 1.)  
4

5 Petitioners challenge these latter two changes in their petition. Petitioners submit evidence that  
6 prior to the July 2016 bulletin, Department did not require RDHAPs to submit radiographs or obtain  
7 authorization to perform SRPs.<sup>3</sup> (See e.g., Boothby Decl. ¶¶ 2-9, Exh. 1.) Petitioners also contend that  
8 the new rate for periodontal maintenance resulted in a cut in the provider rates from \$130 to \$55. (See  
9 e.g. Id. ¶¶ 4, 10; see also Resp. RJN Exh. 2 at p. 5-113 [showing July 2014 rate of \$130].)  
10

11 Respondents do not dispute that the July 2016 Bulletin resulted in a rate reduction for periodontal  
12 maintenance. Respondents concede that, until July 2016, Department did not enforce a radiograph and  
13 pre-authorization requirement for SRP as to RDHAPs. (Oppo. 18.)  
14

15 Statutory Framework

16  
17 Federal Law  
18

19 "Medicaid is a cooperative federal-state program through which the federal government  
20 reimburses states for certain medical expenses incurred on behalf of needy persons." (*Keffeler v.*  
21

22 <sup>2</sup> The Bulletin is titled, in part, "New Policy Regarding Full Mouth Debridement ... and  
23 Prior Authorization Requirements for Scaling and Root Planing for Medi-Cal  
24 Beneficiaries residing in a Skilled Nursing Facility or Intermediate Care Facility." (Resp.  
25 RJN Exh. 1.) The changes to the Schedule of Maximum Allowances are preceded by  
26 the heading, "New/Modified Procedures for SNF/ICF Residents." (*Ibid.*)  
27

28 <sup>3</sup> Petitioners also state that Department has always imposed an "arbitrary" requirement  
that all patients, regardless of their condition, have an SRP every 24 months in order to  
receive periodontal maintenance. (See Boothby Decl. ¶ 6.) That policy is not at issue  
for this writ proceeding.

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1 *Partnership Healthplan of California* (2014) 224 Cal.App.4th 322, 326-27; see 42 U.S.C. § 1396 et seq.)  
2 "States do not have to participate in Medicaid, but those that choose to do so must comply both with  
3 statutory requirements imposed by the Medicaid Act and with regulations promulgated by the Secretary of  
4 the U.S. Department of Health and Human Services." (*Keffeler, supra* at 326-27.) States administer the  
5 program and "determine eligibility, the types of services covered, payment levels for services, and other  
6 aspects of administration, within the confines of federal law." (*Id.* at 327.)

7  
8 To qualify for federal funds, a state must submit its Medicaid plan and any amendments to the  
9 federal agency that administers the program, the Centers for Medicare & Medicaid Services (CMS).  
10 (*Douglas v. Independent Living Center of So. Calif., Inc.* (2012) 565 U.S. 606, 610.) "Participating states  
11 are required to include in their plans reimbursement methods and standards for the medical services  
12 provided." (*California Hosp. Ass'n v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 565; see 42 C.F.R. §  
13 447.252(b) and § 430.10 [definition of "State Plan"].)

14  
15 State plans and amendments must "provide such methods and procedures relating to the  
16 utilization of, and the payment for, care and services available under the plan ... as may be necessary to  
17 safeguard against unnecessary utilization of such care and services and to assure that payments are  
18 consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so  
19 that care and services are available under the plan at least to the extent that such care and services are  
20 available to the general population in the geographic area." (42 U.S.C. § 1396a(a)(30)(A) [hereafter  
21 section 30(A)].)

22  
23 A state's plan "must provide that it will be amended whenever necessary to reflect ... Material  
24 changes in State law, organization, or policy, or in the State's operation of the Medicaid program." (42  
25 C.F.R. § 430.12(c)(1)(ii).) Participating states "must provide public notice of any significant proposed  
26 change in its methods and standards for setting payment rates for services." (42 C.F.R. § 447.205(a).)

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1           State Law

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3           Medi-Cal is California's state Medicaid program and Denti-Cal is the program that provides dental  
4 services for Medi-Cal beneficiaries. (See Welf. & Inst. Code §§ 14132(h), 14132.89.) Department is the  
5 state agency that administers the Medi-Cal program. (22 C.C.R. § 50004(a).)

6  
7           Periodontal treatment has been a covered benefit under the Denti-Cal program since at least July  
8 1, 1995. (See Welf. & Inst. Code §§ 14132(h)(2)(A) and (3).) State law authorizes the Department to  
9 implement utilization controls for covered benefits, including "prior authorization" and "limitation on  
10 number of services." (Id. § 14133(a) and (d).)

11  
12           Specifically as to RDHAPs, state law provides that "all dental hygiene services provided by a ...  
13 registered dental hygienist in alternative practice ... may be covered as long as they are within the scope  
14 of Denti-Cal benefits and they are necessary services provided by a ... registered dental hygienist in  
15 alternative practice." (Id. § 14132(q)(2).)

16  
17           Standard of Review

18  
19           The petition is brought pursuant to Code of Civil Procedure section 1085. There are two  
20 essential requirements to the issuance of an ordinary writ of mandate under Code of Civil Procedure  
21 section 1085: (1) a clear, present and ministerial duty on the part of the respondent, and (2) a clear,  
22 present and beneficial right on the part of the petitioner to the performance of that duty. (*California Ass'n*  
23 *for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704.) "An  
24 action in ordinary mandamus is proper where ... the claim is that an agency has failed to act as required  
25 by law." (Id. at 705.) "[T]he inquiry is limited to whether the decision was arbitrary, capricious, or entirely  
26 lacking in evidentiary support." (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843,  
27 849.)

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2 "Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is  
3 plain and unmixed with discretionary power or the exercise of judgment." (*Unnamed Physician v. Board*  
4 *of Trustees of Saint Agnes Medical Center* (2001) 93 Cal.App.4th 607, 618.)

5  
6 The court independently reviews legal questions, including questions of statutory  
7 construction. (*City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 718.) To the extent  
8 "purely legal issues involve the interpretation of a statute an administrative agency is responsible for  
9 enforcing, [the court] exercise[s] [its] independent judgment, 'taking into account and respecting the  
10 agency's interpretation of its meaning.'" (*Housing Partners I, Inc. v. Duncan* (2012) 206 Cal.App.4th  
11 1335, 1343; see also *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 11.)

12  
13 "The petitioner always bears the burden of proof in a mandate proceeding brought under Code of  
14 Civil Procedure section 1085." (*California Correctional Peace Officers Assn. v. State Personnel Bd.*  
15 (1995) 10 Cal.4th 1133, 1154.) The court is not required to search the record to ascertain whether it  
16 supports an appellant's contentions, nor make the parties' arguments for them. (*Inyo Citizens for Better*  
17 *Planning v. Inyo County Board of Supervisors* (2009) 180 Cal.App.4th 1, 14.)

18  
19 **Analysis**

20  
21 **Standing**

22  
23 Respondents argue that Petitioners have no private right of action to challenge the Department's  
24 alleged violation of 42 U.S.C. § 1396a(a)(30)(A) (Section 30(A)). Respondents argue that while the  
25 petition raises certain notice issues, the "crux" of the petition is that "Department's rates are too low and  
26 the radiograph requirement too expensive," which is a section 30(A) "equal access" argument. (Oppo.  
27 11-12.)

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2 Under California law, "one may obtain the writ only if the person has some special interest to be  
3 served or some particular right to be preserved or protected over and above the interest held in common  
4 with the public at large." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th  
5 155, 165.)

6  
7 The California Court of Appeal has held that California hospitals have standing to enforce the  
8 state's duty to comply with federal notice, comment, and analysis requirements for Medicaid rate  
9 adjustments, specifically 42 U.S.C. section 1396a(a)(13)(A) and its implementing regulation, 42 C.F.R.  
10 section 447.205. (*Mission Hospital Regional Medical Center v. Shewry* (2008) 168 Cal.App.4th 460, 478-  
11 480.) The court stated that "in California, a party who may not have standing to enforce the Medicaid Act  
12 under section 1983 of title 42 of the United States Code may still be entitled to enforce the act by means  
13 of a writ of mandate under Code of Civil Procedure section 1085 if he is a beneficially interested party  
14 under Code of Civil Procedure section 1086." (Id. at 479.)

15  
16 To challenge Petitioners' standing, Respondents rely on the U.S. Supreme Court's decision in  
17 *Armstrong v. Exceptional Child Center, Inc.* (2015) 135 S.Ct. 1378. In *Armstrong*, medical providers sued  
18 Idaho's Department of Health and Welfare claiming that Idaho violated section 30(A) "by reimbursing  
19 providers of habilitation services at rates lower than § 30(A) permits," and asked the court "to enjoin  
20 petitioners to increase these rates." (Id. at 1382.) The Supreme Court held that the Supremacy Clause  
21 of the U.S. Constitution did not confer a private cause of action on the medical providers. (Id. at 1383-  
22 85.)

23  
24 As relevant here, the *Armstrong* Court also held that the medical providers could not proceed in  
25 equity to enforce section 30(A) in federal court. (Id. at 1385-87.) Two aspects of section 30(A) showed  
26 Congress's "intent to foreclose" equitable relief. "First, the sole remedy Congress provided for a State's  
27 failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause  
28

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1 contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services. 42 U.S.C.  
2 § 1396c. As we have elsewhere explained, the 'express provision of one method of enforcing a  
3 substantive rule suggests that Congress intended to preclude others.'" (Id. at 1385.) Second, the Court  
4 considered "the judicially unadministrable nature of § 30(A)'s text." (Ibid.) "The sheer complexity  
5 associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, §  
6 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts." (Ibid.)  
7

8 In reply, Petitioners argue that *Armstrong* did not address a providers' standing to sue under state  
9 law. (Reply 7.) All of Petitioners' authorities on this issue predate *Armstrong*. In *Armstrong*, the Supreme  
10 Court held that the language of section 30(A) itself "precludes private enforcement of § 30(A) in the  
11 courts." (*Armstrong, supra* at 1385.) The Court's reasoning supports that there is no private right of  
12 action to enforce section 30(A) through state equitable claims under CCP section 1085. In reply,  
13 Petitioners fail to provide a persuasive argument to the contrary.  
14

15 As pleaded, the SAC primarily challenges the July 2016 Bulletin on procedural grounds, including  
16 that Department failed to provide notice of the changes and failed to obtain CMS approval. (SAC ¶¶ 54-  
17 60.) In their legal briefs, Petitioners continue to challenge the July 2016 on such grounds. (See Opening  
18 Brief (OB) 12-13.) Respondents have not disputed Petitioners' standing to raise these procedural  
19 arguments. (See Oppo. 12.) Moreover, *Armstrong* did not hold that petitioners lack standing to pursue  
20 such claims.  
21

22 However, Petitioners also argue that the Department violated section 30(A)'s "equal access"  
23 requirements, and much of the evidence presented in the declarations submitted in support of the  
24 opening brief relates to that issue. (See OB 10:25-11:1, 12:22-13:3; Reply 12.) Petitioners argue that the  
25 July 2016 Bulletin renders RDHAPs' provision of services to Denti-Cal beneficiaries residing in SNFs and  
26 ICFs fiscally impossible, and that without RDHAPs to provide these services, the beneficiaries will not  
27 receive care. (See e.g. Boothby Decl. ¶ 10; M. Hall Decl. ¶¶ 10-16; Soliman Decl. ¶¶ 3-9; Roling Decl. ¶¶  
28

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1 6-10.) Under *Armstrong*, Petitioners lack standing to challenge the July 2016 Bulletin on the basis that it  
2 violates the equal access mandate of section 30(A). Therefore, to the extent Petitioners request relief  
3 based on equal access arguments under section 30(A), the petition is denied.  
4

5 Public Notice for Changes in Statewide Methods and Standards for Setting Medicaid Provider

6 Payment Rates

7  
8 Petitioners argue that Respondents were required by federal regulation,  
9 specifically 42 C.F.R. section 447.205, to issue public notice for the changes at issue in the July 2016  
10 Bulletin. (OB 12-13; Reply 8-9.) In opposition, Respondents argue that no public notice was required  
11 because the July 2016 Bulletin made no changes to the Department's "methods and standards" for  
12 setting provider payment rates. (Oppo. 15.)  
13

14 Under federal Medicaid regulations, participating states "must provide public notice of any  
15 significant proposed change in its methods and standards for setting payment rates for services." (42  
16 C.F.R. § 447.205(a).) "Notice is not required if— (1) The change is being made to conform to Medicare  
17 methods or levels of reimbursement; (2) The change is required by court order; or (3) The change is  
18 based on changes in wholesalers' or manufacturers' prices of drugs or materials, if the agency's  
19 reimbursement system is based on material cost plus a professional fee." (§ 447.205(b).) None of these  
20 exceptions to the notice requirement apply here.  
21

22 "The notice must—(1) Describe the proposed change in methods and standards;

23 (2) Give an estimate of any expected increase or decrease in annual aggregate expenditures;

24 (3) Explain why the agency is changing its methods and standards;

25 (4) Identify a local agency in each county (such as the social services agency or health  
26 department) where copies of the proposed changes are available for public review;  
27

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1 (5) Give an address where written comments may be sent and reviewed by the public; and (6) If  
2 there are public hearings, give the location, date and time for hearings or tell how this information may be  
3 obtained." (§ 447.205(c).) Respondents apparently admit that Department did not provide such notice  
4 prior to issuing the July 2016 Bulletin. (See Oppo. 14-15; Alani Jackson Decl. (hereafter "Jackson Decl.")  
5 ¶¶ 13-17.)

6  
7 On its face, section 447.205 does not apply to the change in the July 2016 Bulletin that requires  
8 providers to submit radiographs and obtain pre-authorization for SRP services. This change imposed a  
9 "utilization control" on SRP services; it did not affect the setting of payment rates for SRP services.

10  
11 It is a closer question whether the reduction in rates for periodontal maintenance is a "method  
12 and standard for setting payment rates for services" subject to section 447.205. A reasonable argument  
13 could be made that a reduction in the rate for a specific benefit (i.e. periodontal maintenance) would not  
14 be a "method or standard." While neither party has provided a comprehensive legal discussion of federal  
15 or state case law interpreting section 447.205, *Mission Hospital Regional Center v. Sherwry* (2008) 168  
16 Cal.App.4th 460 supports the conclusion that a change in reimbursement rate may trigger the notice  
17 requirements of 42 C.F.R. section 477.205. In *Mission Hospital*, the court found the notice requirements  
18 of 42 C.F.R. section 477.205 to apply to the enactment of a legislature rate freeze. (168 Cal.App.4th at  
19 490). Respondent has not addressed this case in its opposition. Further, evidence presented in  
20 Respondents' opposition papers suggests that the rate reduction at issue here is a "method or standard"  
21 subject to notice under section 447.205.

22  
23 Respondents contend that California's State Plan defines Denti-Cal rate-setting standards and  
24 methodologies by reference to the Department's fee schedules. (Oppo. 13-14.)

25  
26 State Plan Attachment 4.19-B, entitled "**Description of Rate Methodologies**," states:  
27

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1 **Reimbursement Methodology for Dental Services**

2 **DHCS Fee Schedules** - As described on page 70, above. The fee schedule, effective  
3 July 15, 2016 can be found at the following link: <http://files.medical.ca.gov/pubsdoco/Rates/rates>  
4 [download.asp](http://files.medical.ca.gov/pubsdoco/Rates/rates)  
5 (Resp. RJN, Exh. 4, at p. 77a.)  
6

7 Page 70, as referenced in the above quotation, states:  
8

9 **Department of Health Care Services (DHCS) Fee Schedules-** Rates established by  
10 the single-state Medicaid agency for services reimbursable under the Medi-Cal program. Fee  
11 schedule rates are the maximum amount that can be paid for the service. For providers who have  
12 a usual and customary rate that is less than the fee schedule rates, the regional center shall pay  
13 the provider's usual and customary rate. (Id. at p. 70.)  
14

15 Attachment 4.19-B at page 20b states:  
16

17 **Payment for Dental Services**

18 The State developed fee schedule rates are the same for both public and private  
19 providers of dental services. The rates for dental services are published under

20 Section 5, Manual of Criteria and Schedule of Maximum Allowances, of the MediCal  
21 Dental Program Provider Handbook. The agency's fee schedule rates were last updated on June  
22 1, 2014, and are effective for services on or after that date. All rates are posted on the Denti-Cal  
23 website .... (RJN, Exh. 5, at p. 20b.)  
24

25 Respondents argue that the State Plan dictates the methodology Department  
26 must utilize to establish its Denti-Cal reimbursement rates, but the State Plan does not dictate the rates  
27 themselves. Rather, Respondents contend, the rates are memorialized in the Denti-Cal Schedule of  
28

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1 Maximum Allowances (SMA), which is part of the program's Manual of Criteria (MOC). (See Resp. RJN,  
2 Exh. 2, at pp. 5-106 - 5-126.) Respondents contend that the MOC, which is incorporated by reference into  
3 the California Code of Regulations, establishes provider rates and describes all covered dental  
4 procedures. (See 22 C.C.R. § 51003(e).) In this description, Respondents seem to equate the  
5 methodology with the fee schedule in the MOC. As cited above, the State Plan's "description of rate  
6 methodologies" (emphasis added) refers only to the fee schedules. Notably, Respondents do not provide  
7 evidence that the State Plan lists as its rate methodology a process by which the State reviews rates  
8 periodically by reference to other states' rates, and adjusts the fee schedule without regulatory action or  
9 public notice.

11 Respondents have not cited to any methods or standards for setting payment  
12 rates for Denti-Cal services in the State Plan, other than the Schedule of Maximum Allowances. (See  
13 Oppo. 14, citing Resp. RJN, Exh. 2, at pp. 5-106 - 5-126.) Respondents state that the MediCal Dental  
14 Program Provider Handbook (Handbook) and MOC "are periodically updated through the regulatory  
15 process." (Oppo. 14, citing Kennedy Decl. ¶ 4.) Respondents do not describe the relevant "regulatory  
16 process." Respondents state that "in between updates and republication, Department issues provider  
17 bulletins to provide notice of changes to rates to the MOC." (Oppo. 14 citing A. Jackson Decl. ¶ 7; RJN  
18 Exh. 2 at Preface and § 12; and Welf. & Inst. Code § 14132.89(c).) Again, the cited evidence is not  
19 helpful. The preface to Exhibit 2, the Handbook, does not describe any methods or standards for setting  
20 payment rates. Section 12 was not provided with Respondents' RJN Exhibit 2.

22 In paragraph 7 of her declaration, Alani Jackson, Division Chief of the Medi-Cal  
23 Dental Services Division of the Department, states that section 4.19 of the State Plan "outlines the  
24 standards and methodologies used to determine rates of payment for various services." She asserts that  
25 section 4.19 also refers to the MOC "which establishes applicable provider rates and describes all  
26 covered dental procedures." (A. Jackson Decl. ¶ 7.) She does not elaborate on any specific standards  
27 and methods contained in the State Plan or the MOC that applied to determining the payment rate for  
28

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1 periodontal maintenance at issue here. As discussed above, the portion of section 4.19 of the State Plan  
2 submitted by Respondents merely cite to fee schedules and no other methodology.

3  
4 Jackson further asserts that "since Denti-Cal rates are not specified in the State Plan, Denti-Cal  
5 rate adjustments do not require submission of a State Plan Amendment.... Rather, per Welfare and  
6 Institutions Code sections 14132.89 and 14149.8, the Department is permitted to adjust rates via their  
7 MOC and, in the interim, through provider bulletins." (Jackson Decl. ¶ 8; see also Oppo. 14 and 16, citing  
8 § 14132.89(c).)

9  
10 Welf. & Inst. Code section 14132.89(c) states that, to implement that statute, the Department is  
11 not required to comply with requirements of California's statutes governing administrative rulemaking, and  
12 may issue a "provider bulletin or similar instruction." However, section 14132.89(b) states that "this  
13 section shall only be implemented to the extent permitted by federal law." Respondents fail to explain  
14 their contention that this state law exempts them from the federal notice regulations of 42 C.F.R. §  
15 447.205. Therefore, the court finds Respondents' reliance on these provisions to be unpersuasive.

16  
17 In her declaration, Jackson further describes a process whereby the Department prepares the  
18 MOC internally with input from dental consultants. The MOC is then subject to the "Department's internal  
19 regulatory process and approved by the Office of Administrative Law." (Jackson Decl. ¶ 9.) Jackson  
20 supervised the issuance of the July 2016 Bulletin. (Id. ¶ 12.) She states that "after substantial research,  
21 the Department discovered that the rate of reimbursement previously provided for periodontal  
22 maintenance exceeded commercial rates and was out of line with California's rate standards and  
23 methodologies." (Id. ¶ 20.) The rate was adjusted to \$55 to be consistent with "similarly situated state  
24 Medicaid rates for periodontal maintenance." (Id. ¶ 20.) In adjusting the rate, Department conferred with  
25 its internal dental consultants and consultants with Delta Dental. It also reviewed the American Dental  
26 Association's 2013 and 2016 fee studies. (Id. ¶ 21.)  
27  
28

FINAL STATEMENT OF DECISION ON PETITION FOR WRIT OF MANDATE:

GRANTED IN PART AND DENIED IN PART - 16



1 Respondents cite no evidence from the State Plan that simply conferring with consultants or  
2 researching rates in other states is Department's "method or standard" for setting payment rates. At the  
3 hearing, respondents reiterated their position that the fee schedule is the methodology.  
4

5 Respondents suggest that the changes to the reimbursement rates for periodontal maintenance  
6 were not "significant." (Oppo. 15.) This argument is not supported. A reduction in the rate from \$130 to  
7 \$50 is significant. Moreover, Respondents themselves submit evidence that the number of claims from  
8 RDHAPs processed by Delta Dental for periodontal maintenance (CDT Code D4910) dropped from  
9 70,671 for the 19 months prior to the July 2016 Bulletin (1/1/2015 to 7/14/2016) to 38,915 claims for a  
10 similar period after the Bulletin (7/15/2016-12/31/2017.) (See Prabhu Decl. ¶¶ 6-27.) While not  
11 conclusive, this evidence supports that the rate change may have substantially reduced the amount of  
12 periodontal maintenance performed by RDHAPs.  
13

14 Based on the analysis above, the court concludes that the reduction in the rate for periodontal  
15 maintenance was a significant proposed change in Department's methods and standards for setting  
16 payment rates for services. Respondents themselves equate the fee schedule in the MOC with the  
17 methods the Department must utilize to establish its rates. (See Oppo. 14.) Department substantially  
18 reduced the fee schedule with respect to periodontal maintenance (D4910). Thus, it appears notice was  
19 required under 42 C.F.R. section 447.205.  
20

21 CMS Approval for Periodontal Maintenance Rate Cut and X-Ray and Authorization Requirements  
22 for SRP Services  
23

24 Petitioners argue that Respondents were required by federal law to seek CMS  
25 approval before reducing the provider rates for periodontal maintenance, and before imposing utilization  
26 controls for SRP services. (OB 12-16; Reply 8-11.) Petitioners' argument regarding CMS approval relies  
27 on 42 C.F.R. section 430.12. (See OB 14-16; Reply 8-9.)  
28

FINAL STATEMENT OF DECISION ON PETITION FOR WRIT OF MANDATE:

GRANTED IN PART AND DENIED IN PART - 17

1  
2 Section 430.12 provides in pertinent part that a state's plan "must provide that it  
3 will be amended whenever necessary to reflect ... Material changes in State law, organization, or policy,  
4 or in the State's operation of the Medicaid program." (42 C.F.R. § 430.12(c)(1)(ii).) Both parties appear  
5 to agree that the Department must seek CMS approval for amendments to the State Plan that involve  
6 "material changes in State law, organization, or policy, or in the State's operation of the Medicaid  
7 program." (See also Reply 10:2-17.) "A state must submit such an SPA and obtain approval  
8 before implementing any material change in a plan." (*Arc of California v. Douglas* (9<sup>th</sup> Cir. 2014) 757 F.3d  
9 975, 984, fn. 4.) "[A state] law that effects a change in payment methods or standards without [federal]  
10 approval is invalid." (*Ibid.*; see also *Developmental Services Network v. Douglas* (9<sup>th</sup> Cir. 2011) 666 F.3d  
11 540, 543-546 [state implemented law that limited reimbursement rates under state's Medicaid program;  
12 CMS approval required].)

13  
14 The court considers whether Petitioners have shown that Respondents have a clear, present, and  
15 ministerial duty to obtain CMS approval for the two changes at issue from the July 2016 Bulletin.  
16

#### 17 Periodontal Maintenance Rate Cut

18  
19 Both parties largely conflate their analyses of whether the periodontal  
20 maintenance rate cut complied with the notice requirements of section 447.205, and the CMS approval  
21 requirements of 430.12. (See e.g. *Oppo*. 13-15.) For the reasons stated above, the court concludes that  
22 the substantial cut in the periodontal maintenance rate was a "material change" in state Medicaid law,  
23 policy, or operations. (§ 430.12.) Therefore, CMS approval was required. See *Oregon Ass'n of Homes*  
24 *for Aging v. Oregon* (9<sup>th</sup> Cir. 1993) 5 F.3d 1239 (change in classification of services resulting in rate  
25 reduction required Plan Amendment).  
26

#### 27 X-Ray and Pre-Authorization Requirements for SRP Services

28  
FINAL STATEMENT OF DECISION ON PETITION FOR WRIT OF MANDATE:

GRANTED IN PART AND DENIED IN PART - 18

1  
2 Petitioners submit evidence that prior to the July 2016 bulletin, Department did not require  
3 RDHAPs to submit radiographs or obtain authorization to perform SRP services. (See e.g., Boothby  
4 Decl. ¶¶ 2-9, Exh. 1; M. Hall Decl. ¶¶ 6-15; Aminloo Decl. ¶ 5.) Petitioners point out that treating their  
5 patients at a SNF or ICF is not like providing dental care in a traditional dental practice, and obtaining x-  
6 rays may not be possible. (See M. Hall Decl. ¶ 9.)  
7

8 Significantly, Petitioner Boothby declares that she spoke with Dr. Bryan Quattlebaum, DDS, of the  
9 Department in 2001 to ensure that RDHAPs could provide SRP services without an x-ray or periodontal  
10 chart requirement. (Boothby Decl. ¶ 8.) Boothby submits a letter she received from Dr. Quattlebaum,  
11 dated February 13, 2001, which states in pertinent part:

12  
13 Dear Judy,  
14

15 As a follow-up to our telephone conversations, I wanted to notify you that the final Dental  
16 Operating Instruction Letter (DOIL) was released in its final form to Delta (our Medi-Cal dental  
17 fiscal intermediary) today. It contains the following *policy modifications* with regard to  
18 Treatment Authorization Requests (TARs) for periodontal scaling and root planning sent to Denti-  
19 Cal by [RDHAPs]:  
20

- 21
- 22 • No radiograph submission requirement
  - 23 • No periodontal chart submission requirement .... (Boothby Decl. Exh. 1 [emphasis added].)

24 Dr. Quattlebaum apparently signed this letter on behalf of the Department. (Ibid.)  
25

26 In opposition, Respondents argue that there was a preexisting radiograph and pre-authorization  
27 requirement for SRP as to RDHAPs, but it was not enforced by the Department until July 2016. (Oppo.  
28 18.) Respondents submit evidence that this policy of not enforcing the pre-authorization requirement as

FINAL STATEMENT OF DECISION ON PETITION FOR WRIT OF MANDATE:

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1 to RDHAPs was not documented in the MOC or the State Plan. (See Kennedy Decl. ¶ 27; A. Jackson  
2 Decl. ¶ 17, Exh. E; Resp. RJN Exh. 2 at p. 2-12.)

3  
4 However, Respondents do not dispute that Dr. Quattlebaum, on behalf of the Department, sent  
5 the letter quoted above to Bootbhy in February 2001. Respondents also do not dispute that, for  
6 approximately 15 years, the Department had a practice or policy of not requiring RDHAPs to submit  
7 radiographs or obtain pre-authorization to perform SRP services. Indeed, a chart submitted by Dr.  
8 Nirmala Prabhu, of Delta Dental, establishes that RDHAPs routinely did not submit treatment  
9 authorization requests (TARs) for SRP services prior to the July 2016 Bulletin. (See Prabhu Decl. ¶¶ 22-  
10 23, Exh. 2.)

11  
12 Respondents cite no authorities that a change to a State Medicaid policy not documented in the  
13 MOC does not fall within the requirements of section 430.12 for CMS approval. Subject to additional  
14 argument at the hearing, the court concludes that 42 C.F.R. section 430.12 applies to material changes in  
15 state Medicaid policy or operations, even if such policy has not been properly documented in the State  
16 Plan.

17  
18 Respondents argue that federal and state law permit the Department to implement utilization  
19 controls without CMS approval or regulatory notice. (Oppo. 15-16.) In support, Respondents cite to  
20 Welfare and Institutions Code section 14132.89(c), 14105.395(c), 10725, and 14105. (Oppo. 16:17-20.)  
21 As discussed above, section 14132.89(b) states that "this section shall only be implemented to the extent  
22 permitted by federal law." Respondents fail to explain their apparent contention that this state law  
23 exempts them from the federal regulations, including 42 C.F.R. section 430.12. The other cited  
24 provisions of the Welfare and Institutions Code also do not provide an exception to federal requirements  
25 that a Plan amendment requires CMS approval. Respondents have not made a persuasive argument to  
26 the contrary.

27  
28  
FINAL STATEMENT OF DECISION ON PETITION FOR WRIT OF MANDATE:

GRANTED IN PART AND DENIED IN PART - 20

1 Respondents argue that Department may require prior authorization as a utilization control, and  
2 that the TAR requirement is a permissible utilization control. (Oppo. 17-20.) Department's authority to  
3 impose utilization controls does not appear to be challenged by Petitioners. However, the issue is not  
4 whether the Department may impose utilization controls. Respondents do not address the issue in  
5 dispute - whether the utilization controls imposed on SRP "reflect ... Material changes in State law,  
6 organization, or policy, or in the State's operation of the Medicaid program."<sup>4</sup> (42 C.F.R. §  
7 430.12(c)(1)(ii).)  
8

9 The court concludes that the July 2016 Bulletin materially changed state policy and operations  
10 with regard to the utilization controls required for RDHAPs performing SRP services. Petitioners'  
11 declarations and the chart submitted as Exhibit 2 to Prabhu's declaration show that this change was  
12 "material."  
13

#### 14 Petitioners' Additional Arguments

15  
16 Petitioners asserts several additional arguments that do not appear material to the court's  
17 resolution of the writ petition. The court briefly analyzes these arguments below. The parties may  
18 respond further at the hearing.  
19

#### 20 Welfare and Institutions Code Section 14079

21  
22 In the second cause of action, Petitioners allege that Respondents have a clear, present, and  
23 ministerial duty "to comply with Welfare & Institutions Code § 14079 to conduct an annual review of  
24 provider services and periodically raise provider payments rates to ensure reasonable access to Medi-Cal  
25 beneficiaries." (SAC ¶ 62.) The court has granted Respondents' request for judicial notice of  
26

27 <sup>4</sup> While the court has sustained an objection to Exh. 1 to the Roling declaration on  
28 foundational grounds, the state appears to describe the change to TAR requirements for  
SRP as "policy change."

1 Department's recent rate reviews issued pursuant to section 14079. (See Oppo. 21, citing RJN Exh. 6-8.)  
2 Petitioners briefly refer to section 14079 in their moving brief, but they do not provide sufficient legal or  
3 factual discussion to show Respondents failed to comply with ministerial duties under that statute. (See  
4 OB 12, 14.)

5  
6 42 C.F.R. Section 447.203(b)(6) and (7)  
7

8 Petitioners briefly refer to documentation requirements in 42 C.F.R. section 447.203. (OB 14;  
9 Reply 8.) Section 447.203(b)(6) and (7) set forth, respectively, "special provisions for proposed provider  
10 rate reductions or restructuring" and "Mechanisms for ongoing beneficiary and provider input" with regard  
11 to State Plans and amendments. Again, Petitioners fail to provide sufficient discussion of this statute or  
12 point to relevant evidence in the record showing a violation of these provisions.

13  
14 Arbitrary and Capricious Decisionmaking  
15

16 In their third cause of action for writ of mandate, Petitioners allege that Department's July 2016  
17 Bulletin was the result of arbitrary and capricious decisionmaking. (SAC ¶¶ 68-69.) As analyzed above,  
18 Petitioners discuss at length the impacts of the changes at issue, and why Petitioners believe these  
19 changes violated section 30(A). (See OB 10:25-11:1, 12:22-13:3; Reply 12; Boothby Decl. ¶ 10; M. Hall  
20 Decl. ¶¶ 10-16; Soliman Decl. ¶¶ 3-9; Roling Decl. ¶¶ 6-10.) The court has concluded that the  
21 Department failed to act as required by law, specifically pursuant to sections 447.205 and 430.12, when it  
22 issued the July 2016 Bulletin. However, Petitioners lack standing to assert a 30(a) challenge.  
23 Respondents have provided evidence of their rationale in adopting the policy changes at issue here.  
24 (See Jackson and Kennedy declarations). Absent an analysis of 30(a) requirements, Petitioners have  
25 failed to develop sufficient evidence and argument on this record that the policy decision was otherwise  
26 arbitrary, capricious, or totally lacking in evidentiary support.  
27

28  
FINAL STATEMENT OF DECISION ON PETITION FOR WRIT OF MANDATE:

GRANTED IN PART AND DENIED IN PART - 22

1 Interplay Between Welfare and Institutions Code Sections 14132.89(c) and 14132(h)

2  
3 In reply, Petitioners contend that Respondents erroneously cite to Welfare and  
4 Institutions Code section 14132.89 to argue that the July 2016 Bulletin was exempt from state law  
5 requirements that apply to agency regulations and rulemaking. Petitioners argue that the benefits at  
6 issue in this case are governed by Welfare and Institutions Code section 14132(h), and not section  
7 14132.89. (Reply 10-11.) As analyzed above, the court finds Respondents' reliance on section 14132.89  
8 unpersuasive to the extent Respondents believe that this state law exempts the Department from  
9 compliance with federal regulations. The court agrees that Respondents have not sufficiently explained  
10 why they believe the benefits at issue are governed by section 14132.89, as opposed to section  
11 14132(h). While that issue appears irrelevant to the court's decision, the parties may address it further at  
12 the hearing if they disagree.

13  
14 Petitioners' Improper Reply Arguments

15  
16 New issues raised in reply are improper and may be disregarded. (*Regency*  
17 *Outdoor Advertising v. Carolina Lances, Inc.* (1995) 31 Cal.App.4th 1323, 1333.)

18  
19 In reply, Petitioners argue that Respondents were required to follow Government  
20 Code section 11340.5 and other state regulatory requirements prior to issuance of the July 2016 Bulletin.  
21 (Reply 11.) It appears Petitioners did not plead this state law claim in the SAC. They also did not rely on  
22 section 11340.5 in the moving papers.

23  
24 In a related reply argument, Petitioners cite to a purported methodology in the  
25 State Plan for establishing rates. (Reply 9-10.) Petitioners appear to rely on parts of the State Plan that  
26 have not been submitted as part of the record. Petitioners also did not brief this argument in the moving  
27 papers. The court disregards both of these new reply arguments.

28  
FINAL STATEMENT OF DECISION ON PETITION FOR WRIT OF MANDATE:

GRANTED IN PART AND DENIED IN PART - 23

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**Conclusion**

Based on the foregoing, Petitioners lack standing to challenge the July 2016 Bulletin on the basis that it violates the equal access mandate of section 30(A). Therefore, to the extent Petitioners request relief based on equal access arguments under section 30(A), the petition is DENIED.

The court concludes that Department did not comply with its ministerial duty under 42 C.F.R. section 447.205 to provide public notice of the proposed change in the reimbursement rate for periodontal maintenance (CDT Code D4910.) The court also concludes that Department failed to comply with its ministerial duties under 42 C.F.R. section 430.12 to obtain CMS approval for the reimbursement rate for periodontal maintenance, and the new radiograph and prior authorization requirements for SRP as applied to RDHAPs (CDT Codes D4341 and D4342.) Accordingly, the petition is GRANTED IN PART. A writ of mandate will issue directing Department to set aside these parts of the July 2016 Bulletin and comply with Department's ministerial duties under 42 C.F.R. sections 447.205 and 430.12 before imposing such changes.

Date: February 8, 2018



MARY H. STROBEL, JUDGE