SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

FRANCES RIVERA, MARK MULLIN, EBONY PICKETT, GROTO NI, and MATERNAL AND CHILD HEALTH ACCESS, Petitioners, vs. TOBY DOUGLAS, in his capacity as Director, California Department of Health Care Services, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, and DOES 1-20, Respondents.	Case No. RG14740911 **ORDER GRANTING PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION**

The Motion of Petitioners Frances Rivera, Mark Mullin, Ebony Pickett, Groto Ni and Maternal and Child Health Access ("Petitioners") for Preliminary Injunction, came on regularly for hearing on December 2, 2014, December 16, 2014, December 17, 2014, and December 22, 2014, in Department 14 of the above-entitled court, the Honorable Evelio Grillo presiding. Petitioners appeared by counsel Lucy

Quacinella and Michael Keys. Respondents Toby Douglas and California Department of Health Care Services ("Department") appeared by counsel Joshua Sondheimer.

Following the hearing on December 22, 2014, the court took the matter under submission. The court has considered all of the papers filed in connection with the motion, and the arguments at the hearings and, good cause appearing, hereby rules as follows:

CASE SUMMARY

Petitioners filed this petition for writ of mandate contending that the Department has failed to timely determine eligibility for Medi-Cal applicants. Medi-Cal is a joint federal and state program providing comprehensive health coverage to low-income people that cannot otherwise afford to cover their medical needs. (Welf. & Inst. Code secs. 14000, et seq.) In Fall 2013, Medi-Cal began using a new eligibility and enrollment process and new computer system to implement health care reform under the Patient Protection and Affordable Care Act of 2010 (ACA) (Pub. L. No. 111-148, 124 Stat. 119.) The state also began implementing a new program, Covered California, with federal subsidies for individuals with income over Medi-Cal's limits, up to of the 400% poverty level. (Gov. Code secs. 100500 et seq.; 10 C.C.R. sec. 6474.)

The Department is the state agency responsible for administering and supervising Medi-Cal. Petitioners claim that the Department has failed to comply with its duty to issue applicants legally required notices granting or denying them benefits within 45 days of their applications. In this motion, Petitioners therefore seek a preliminary injunction prohibiting the Department from: (1) failing to provide provisional Medi-Cal benefits to backlogged applicants, (*i.e.* applicants whose applications have been pending for more than 45 days, who appear to be eligible based on information received by the Department with the application or during the application process, including eligible individuals waiting for income verification), until the state or county has completed their eligibility reviews, and (2) failing

to issue immediate, individualized notices of the right to request a hearing to all other backlogged applicants.

LEGAL STANDARD

On a motion for preliminary injunction the court evaluates the two interrelated factors of (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm the plaintiff may suffer if the injunction is denied as compared to the harm that the defendant may suffer if the injunction is granted. (*Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 338-339, 342. See also *Tahoe Keys Property Owners' Ass'n v. State Water Res. Co.* (1994) 23 Cal. App. 4th 1459, 1470-1471.)

The court also considers that the primary purpose of a preliminary injunction is to maintain the status quo. (*O'Connell v. Superior Court* (2006) 141 Cal. App. 4th 1452, 1472; *Cox Cable of San Diego v. Bookspan* (1987) 195 Cal App.3d 22, 25.) "The judicial resistance to injunctive relief increases when the attempt is made to compel the doing of affirmative acts. A preliminary mandatory injunction is rarely granted." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1048.)

PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

1. TIMELINESS STANDARDS FOR DETERMINING MEDI-CAL APPLICATIONS

Welfare and Institutions Code section 15926(f)(5) provides:

> The eligibility of an applicant shall not be delayed beyond the timeliness standards as provided in Section 435.912 of Title 42 of the Code of Federal Regulations or denied for any insurance affordability program unless the applicant is given a reasonable opportunity, of at least the kind provided for under the Medi-Cal program pursuant to Section 14007.5 and paragraph (7) of subdivision (e) of Section 14011.2 to resolve discrepancies concerning any information provided by a verifying entity.

(Welf. and Inst. sec. 15926(f)(5).) The timeliness standards in section 435.912 state that except as provided in section 435.912(e), the determination of eligibility for any applicant may not exceed: (i)

Ninety days for applicants who apply for Medicaid on the basis of disability; and (ii) Forty-five days for all other applicants. (42 C.F.R. sec. 435.912(c)(3).)[1] Section 435.912(e) provides for an exception in "unusual circumstances," giving the following examples:

> (1) When the agency cannot reach a decision because the applicant or an examining physician delays or fails to take a required action, or
>
> (2) When there is an administrative or other emergency beyond the agency's control.

(42 C.F.R. sec. 435.912(e).)

In this case, there is no dispute that the Department has failed to issue eligibility determinations for all Medi-Cal applicants within 45 days of their applications. Petitioners submit a number of declarations from applicants who did not receive notices granting or denying them eligibility for well-past 45 days of their applications. (See Declarations In Support Of Petitioners' Memorandum of Points and Authorities.) Moreover, the Department acknowledges that there is still a backlog of thousands of applications. (See Second Mollow Decl, para. 3 ["DHCS's initiative to preliminarily grant Medi-Cal eligibility to applicants for health coverage determined by county eligibility workers to be "likely eligible" and whose Medi-Cal eligibility determinations have been delayed beyond 45 days, is now well underway. Through this effort more than 50,000 applications previously included in the State's "backlog count" are expected, within the next two weeks, to either have been enrolled in Medi-Cal pending a final eligibility determination, or removed from the backlog as the effort also identifies applications that already were granted or denied eligibility by the counties but remained pending in the State's eligibility system."]; see also Transcript of December 2, 2014 hearing, 3:17-19.)

The Department instead asserts that "unusual circumstances" apply here such that the 45-day timeline is extended because there are "unusual circumstances beyond the Department's control." 42 C.F.R. section 435.912 states, in its entirety:

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[1] The 90 day timeliness standard for applicants who apply for Medicaid on the basis of disability is not at issue in this writ proceeding.

§ 435.912 Timely determination of eligibility.

(a) For purposes of this section--

(1) "Timeliness standards" refer to the maximum period of time in which every applicant is entitled to a determination of eligibility, subject to the exceptions in paragraph (e) of this section.

(2) "Performance standards" are overall standards for determining eligibility in an efficient and timely manner across a pool of applicants, and include standards for accuracy and consumer satisfaction, but do not include standards for an individual applicant's determination of eligibility.

(b) Consistent with guidance issued by the Secretary, the agency must establish in its State plan timeliness and performance standards for, promptly and without undue delay--

(1) Determining eligibility for Medicaid for individuals who submit applications to the single State agency or its designee.

(2) Determining potential eligibility for, and transferring individuals' electronic accounts to, other insurance affordability programs pursuant to § 435.1200(e) of this part.

(3) Determining eligibility for Medicaid for individuals whose accounts are transferred from other insurance affordability programs, including at initial application as well as at a regularly-scheduled renewal or due to a change in circumstances.

(c)(1) The timeliness and performance standards adopted by the agency under paragraph (b) of this section must cover the period from the date of application or transfer from another insurance affordability program to the date the agency notifies the applicant of its decision or the date the agency transfers the individual to another insurance affordability program in accordance with § 435.1200(e) of this part, and must comply with the requirements of paragraph (c)(2) of this section, subject to additional guidance issued by the Secretary to promote accountability and consistency of high quality consumer experience among States and between insurance affordability programs.

(2) Timeliness and performance standards included in the State plan must account for--

(i) The capabilities and cost of generally available systems and technologies;

(ii) The general availability of electronic data matching and ease of connections to electronic sources of authoritative information to determine and verify eligibility;

(iii) The demonstrated performance and timeliness experience of State Medicaid, CHIP and other insurance affordability programs, as reflected in data reported to the Secretary or otherwise available; and

(iv) The needs of applicants, including applicant preferences for mode of application (such as through an internet Web site, telephone, mail, in-person, or other commonly available electronic means), as well as the relative complexity of adjudicating the eligibility determination based on household, income or other relevant information.

(3) Except as provided in paragraph (e) of this section, the determination of eligibility for any applicant may not exceed--

(i) Ninety days for applicants who apply for Medicaid on the basis of disability; and

(ii) Forty-five days for all other applicants.

(d) The agency must inform applicants of the timeliness standards adopted in accordance with this section.

(e) The agency must determine eligibility within the standards except in unusual circumstances, for example--

(1) When the agency cannot reach a decision because the applicant or an examining physician delays or fails to take a required action, or

(2) When there is an administrative or other emergency beyond the agency's control.

(f) The agency must document the reasons for delay in the applicant's case record.

(g) The agency must not use the time standards--

(1) As a waiting period before determining eligibility; or

(2) As a reason for denying eligibility (because it has not determined eligibility within the time standards).

(42 C.F.R. § 435.912.)

The Department is correct that section 435.912(e) provides for an exception to the 45-day timeline based on "administrative or other emergency beyond the agency's control." The Department has not established though, that such circumstances apply here. While there is no doubt that there were multiple problems contributing to the Department's delay in processing Medi-Cal applications, including computer glitches and other problems detailed in the Department's mitigation plan, the Department has not established that all of these circumstances are beyond the Department's control.

The Department states that it has now implemented measures including technological fixes, workarounds and new policies such as more streamlined verification processes allowing the Department to reduce the number of applications for more than 45 days from a high of some 900,000 in March 2014, to approximately 134,000 as of November 12, 2014. (See Department's Opposition, p.3; Mollow Decl., Exh. F.) Tellingly, since this action was filed, the Department reduced the backlog to 99,900 as of the December 2, 2014 hearing. (See Transcript of December 2, 2014 hearing, p.3.) At a subsequent hearing, the Department represented that the backlog had been reduced to approximately 44,143.[2] Petitioners also submit declarations from individuals who waited months for their Medi-Cal benefits and who were able to obtain their Medi-Cal benefits within weeks after seeking legal counsel. (See e.g., Declarations in Support Of Petitioners' Motion for Preliminary Injunction – Lomeli decl.; Mullin decl.; Ni decl.; Picket decl.) These facts demonstrate that the Department is capable of significantly reducing the backlog. Thus the Department has not established that there is an administrative or other emergency that continues to be "beyond the Department's control."

Moreover, even if "unusual circumstances" were found to apply, the Department may not simply delay issuing eligibility determinations. Section 435.912(d) provides that the "agency must inform applicants of the timeliness standards adopted in accordance with this section." Section 435.912(f) also provides that the "agency must document the reasons for delay in the applicant's case record." Additionally, section 435.912(g) provides that the agency may not use the time standards as a waiting period for determining eligibility or as a reason for denying eligibility because it was unable to comply with the statutory time standards.

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[2] The reduction in backlog of more than 50,000 applications appears in large part to be attributable to the Department granting provisional benefits to those applicants who are "likely eligible" for Medi-Cal benefits pending a final eligibility determination. (See Second Supp. Mollow Decl., ¶ 3.) This suggests that there were circumstances within the Department's control and that the Department could address the backlog of applications rather than allowing applicants to wait months and months without medical care until their eligibility was determined. Providing such provisional benefits is also part of the mitigation plan being implemented by the Department. (See Second Supp. Mollow Decl., Exh. N, p.13.)

The court is convinced that even if unusual circumstances do exist, the Department may not continue to delay in making eligibility determinations where such delay causes irreparable harm to applicants. Section 435.912 requires the Department to inform applicants of the statutory timeframe for making eligibility determinations, and the statute also requires the Department to document in its records the reason for each application's delay. The Department states that it requires a welcome packet to be provided to applicants, including the Department's form MC219, "Important Information for Persons Requesting Medi-Cal." The form MC219 advises beneficiaries of their right to request a hearing regarding inaction by the Department or the county and how to request such a hearing. (See Mollow Decl., ¶ 41, Exh. I.) The Department also sent letters to applicants who applied by April 15, 2014 confirming that the Department received their application and advised the applicants of the reasons for the delay in processing the application, that an eligibility determination would be made as soon as possible, how to seek reimbursement and what to do it they need health care while awaiting a determination. (See Department's Opposition to Motion for Preliminary Injunction, p.3; Mollow Decl., ¶¶ 39-40, Exh. H.) The Department sent a substantially similar letter on November 12, 2014 to individuals who had applied by July 31, 2014. (*Id.*) The Department argues that by providing these document to applicants, the Department has discharged its statutory duty under section 435.912. The court disagrees.

Neither the Department's form MC219, nor these letters however, advised applicants of the timeliness standards under section 435.912. "Timeliness standards" as defined in section 435.912(a)(1), refer to "the maximum period of time in which every applicant is entitled to a determination of eligibility, subject to the exceptions in paragraph (e) of this section." Applicants therefore have a right to be advised of the timeframe under which the Department is required to make a determination on their applications. The Department has not provided evidence of its compliance with the statute by

documenting the reasons for the delay in each applicant's record. The statute's inclusion of language requiring the Department to document the reason for the delay in each record suggests that the Legislature did not intend "unusual circumstances" to be a license for the blanket delay in the processing of thousands of applications, but instead suggests that the Legislature recognized the necessity for a safety valve to be available when specific problems or circumstances beyond the applicant's or Department's control prevented compliance with the statutory timeliness standards. The "unusual circumstances" exception does not appear to contemplate allowing the Department to delay in issuing Medi-Cal eligibility determinations indefinitely, or even for for months on end. Following the Department's logic, if the "unusual circumstances" exception to the timeliness standards apply to the Department's present practices, then the Department would have no time limit for determining Medi-Cal eligibility. (*See e.g.*, Declarations in Support of Petitioners' Motion for Preliminary Injunction – Morales decl. (applied for benefits January 2014 for his family, children received benefits on October 15, 2014, and his wife is still waiting for benefits); Mullin decl. (applied for benefits in February 2014 and received benefits on July 15, 2014); Ni decl. (applied for benefits in January 2014 and received benefits on May 23, 2014); Rogers decl. (applied for benefits in January 2014 for his family and received benefits on October 10, 2014); Saldivar decl. (applied for benefits in March 2014 and still has not received anything from Medi-Cal as of the date he signed his declaration, October 25, 2014); Serrano decl. (applied for benefits in February 2014 and still has not received anything from Medi-Cal as of the date of his signed declaration, October 25, 2014). Clearly, indefinite delay of months and months cannot be what the Legislature intended by providing an exception to the timeliness standard for "unusual circumstances."

Petitioners also assert that that the Department has a duty to make an eligibility determination on

each application within 45 days of the application pursuant to California Code of Regulations, title 22, section 50177, which provides:

> (a) The county department shall complete the determination of eligibility and share of cost as quickly as possible but not later than any of the following:
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> (1) Forty-five days following the date the application, reapplication or request for restoration is filed.
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> (2) Ninety days following the date the application, reapplication or request for restoration is filed when eligibility depends on establishing disability or blindness.
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> (b) The 45- and 90-day periods may be extended for any of the following reasons:
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> (1) The applicant, the applicant's guardian, or other person acting on the applicant's behalf, has for good cause, been unable to return the completed Statement of Facts, Supplement to Statement of Facts for Retroactive Coverage/Restoration, or necessary verification in time for the county department to meet the promptness requirement.
>
> (2) There has been a delay in the receipt of reports and information necessary to determine eligibility and the delay is beyond the control of either the applicant or the county department.
>
> (c) The determination of eligibility shall be considered complete on the date the Notice of Action is mailed to the applicant.

(Cal. Code Regs. tit. 22, § 50177.)

The Department argues that section 50177 applies only to counties to whom responsibility for making eligibility determinations has been delegated and therefore it has no application to the Department. (See Department's Opposition to Motion for Preliminary Injunction, 12:1-8.)

Though it is true that section 50177 applies to counties, the court nevertheless finds that both California Code of Regulations, tit.22, section 50177, and 42 C.F.R. section 435.912, were intended to require eligibility determinations on Medi-Cal applications to be made within 45 days, unless there existed "unusual circumstances" beyond the applicant's, the county's or the Department's control. And even in those cases in which unusual circumstances excused some delay, it seems highly unlikely that the Legislature intended to allow the Department to delay making such eligibility determinations for

several months (or indefinitely), with the end result being hundreds of thousands of applicants being denied both benefits ***and*** a timely eligibility determination. Moreover, as discussed above, the Department has not demonstrated that "unusual circumstances" beyond the Department's control were in fact, the reason for the delay in failing to issue timely eligibility Medi-Cal determinations on all of these backlogged applicants, as evidenced by the Department's ability to significantly reduce the backlog and the granting of Medi-Cal benefits by the Department to individuals who obtained legal assistance.

The court therefore finds that the Department has failed to comply with its duty under section 15926(f)(5) not to delay eligibility of an applicant beyond the 45-day timeliness standards under 42 Code of Federal Regulations section 435.912.

2. MOOTNESS

The Department also claims that Petitioners' claim for provisional benefits is now moot because the Department has initiated a process to do exactly what Petitioners are asking, *i.e.* to provide provisional benefits to those applicants who appear to be Medi-Cal eligible, but have not received a determination within 45 days of their applications. More specifically, the Department has agreed to provide provisional benefits for "likely eligible" applicants. The Department has also agreed to identify "likely eligible" applicants and to continue to enroll on an ongoing basis likely eligible applicants who applied before November 15, 2014 and have not received an eligibility determination within 45 days. (See Second Mollow Decl., ¶ 10.) The Department also claims it will continue to provide such provisional benefits for applicants who enter the backlog after December 1, 2014. Additionally, the Department has agreed to extend preliminary enrollment under a similar process to any new applicants under the 2015 open enrollment for Covered California whose eligibility is not determined within 45 days. (*Id.*, ¶ 11, and Exh. N.) Finally, the Department argues --somewhat persuasively-- that the declining number of backlogged applicants (approximately 99,900 as of the December 2, 2014 hearing

and approximately 44,143 at a subsequent December hearing), suggests that that the problem for which Petitioners seek relief has been addressed.

The court is not persuaded that this issue is moot. The Department's eligibility process is fluid, and in view of the Department's admission that provisional benefits have not yet been provided to all provisionally eligible applicants, and in further view of the continuing backlog, there is a present, continuing controversy that warrants judicial review. Although the Department stated in oral argument that it believes a large number of these remaining applications are denials, without the Department being able to represent to the court that all "likely eligible" applicants have now been provided benefits, or that backlogged applications for "likely eligible" recipients have been addressed, Petitioners' claims are not moot.

Moreover, the relief sought by Petitioners is two-fold. Petitioners seek a preliminary injunction prohibiting the Department "from failing to: (1) provide temporary, provisional, and/or conditional Medi-Cal eligibility to backlogged applicants who appear to be eligible based on the information received by Respondents with the application or during the application process, including but not limited to otherwise eligible individuals waiting for income verification, until the state or the county has completed their eligibility reviews; and (2) for other backlogged individuals, issue immediate, individualized notices of the right to request a hearing to prevent further delay of their eligibility determination." (See Petitioners' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, 15:8-15.) Thus, providing provisional benefits to likely eligible Medi-Cal applicants is only part of the relief sought by Petitioners. Even if all likely eligible applicants are provided provisional benefits, providing such benefits to likely eligible applicants does not address the remaining applicants, *i.e.,* those applicants who the Department has found ***are not*** likely eligible for Medi-Cal benefits and to whom the Department has provided no relief.

Although the court acknowledges the Department's commitment to provide benefits to likely eligible Medi-Cal applicants, the court finds that as of the date that this motion was submitted, the

motion was not moot based on the simple fact that 1) a substantial backlog still exists, and (2) the Department has not agreed to provide the entire relief requested by Petitioners in this motion.

3. PRIMARY JURISDICTION DOCTRINE

The Department is under close oversight of the federal Centers for Medicare and Medicaid Services ("CMS"), and therefore the Department asserts that the court should defer to CMS under the doctrine of primary jurisdiction. (See *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 931.) To support invoking the doctrine, the Department argues its delay in processing the applications resulted primarily from an unanticipated large volume of applicants and continuing technological problems. (See Morrow Decl., paras. 12, 20-30.) The Department has been working with its county partners and technology vendors, as well as health care advocates to identify specific causes for the delays in processing the applications and to develop and implement solutions. (Morrow Decl., paras. 12, 31-40.) The Department also submitted a mitigation plan to CMS for resolving the backlog, including CMS' approval to grant eligibility on a provisional basis to applicants who are awaiting an eligibility determination but who are likely eligible for benefits. (Morrow Decl. paras. 13, 37.) The Department also sent a letter to counties seeking a list of those pending applicants who appear likely eligible and has directed the counties to return the lists to the Department by December 1, 2014. (*Id.*) The Department also sent letters on September 17, 2014 to individuals with pending applications who had applied for health coverage as of April 15, 2014, advising applicants who have an urgent need for care to call their county human services agency and ask them to review their applications more quickly. (*Id.* at para. 39.)[3] On November 12, 2014, the Department then sent a similar letter to English-speaking pending applicants who applied for coverage between April 15, 2014 and July 31, 2014.[4] (Morrow Decl., para.

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[3] A delay of approximately 154 days.

[4] A delay of approximately105 to 210 days.

40.) Subsequently, CMS sent a letter on December 11, 2014 approving the Department's mitigation plan to address the backlog of Medi-Cal eligibility determinations and to mitigate the impact of the backlog on applicants. (See Department's Supplemental Request for Judicial Notice filed December 15, 2014.)

"Primary jurisdiction" applies where a claim is originally cognizable in court, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. (*Jonathan Neil & Associates, Inc., supra* at 931, citing *Farmers Ins. Exchange v. Sup. Ct.* (1992) 2 Cal.4th 377, 390.) In such a situation, the judicial process is suspended pending referral of such issues to the administrative body for its views. (*Id.*) The policies behind the primary jurisdiction doctrine are to enhance court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and to help assure uniform application of regulatory laws. (*Jonathan Neil & Associates, Inc., supra* at 932.) It is within the court's discretion to determine the extent to which such policies are implicated and courts have considerable flexibility to avoid application of the doctrine in appropriate situations, as required by the interests of justice. (*Id.*)

Applying those policies here, the court recognizes that CMS is the federal agency charged with overseeing compliance by states with the requirements of the Medicaid Act. (See *Keffeler v. P'ship Healthplan of California* (2014) 224 Cal. App. 4th 322, 327 ["States must submit to a federal agency (CMS [Centers for Medicare & Medicaid Services], a division of the Department of Health and Human Services) a state Medicaid plan that details the nature and scope of the State's Medicaid program. It must also submit any amendments to the plan it may make from time to time. And it must receive the agency's approval of the plan and any amendments."].) The court also recognizes that CMS has required the Department to submit a mitigation plan to CMS to address the current backlog, and that the Department has provided a mitigation plan to CMS, which has now been approved by CMS. (See

Mollow Decl., ¶¶ 13-19, and attached Exhs. A-F; Second Mollow Decl., ¶ 11, and attached Exh. N; Department's Supplemental Request for Judicial Notice filed December 15, 2014.)

Thus, the court is not inclined to step into CMS's role with respect to overseeing the issues causing the backlog and what remedies are needed to address specific issues such as computer system errors, duplicate applications, errors by applicants and county eligibility workers. Nor are Petitioners asking for such relief in this motion. The court therefore defers to CMS's jurisdiction on these issues and CMS's approval of the Department's mitigation plan for addressing the backlog.

Nevertheless, the court in its discretion finds that the primary jurisdiction doctrine does not preclude the court from ruling on this motion where it is undisputed that the Department is not complying with its duty under the law and finds that the primary jurisdiction doctrine does not preclude the court from making such a finding. One of the underlying claims brought by Petitioners is that the Department is failing to comply with its duty under the law to determine eligibility for Medi-Cal applicants who have submitted complete applications or failing to issue such applicants the legally required notice within no more than 45 days of the application date. (See Verified Petition for Writ of Mandate, pp.13, 17.) The Department does not dispute that it has failed to comply with the statute's 45-day time frame for issuing eligibility determinations on pending applications. Thus, while the court recognizes that CMS is charged with overseeing the Department's compliance with the Medicaid Act and is in fact requiring the Department to address its lack of compliance, the court is not persuaded that it must, or that it can, lend so much deference to CMS such that the court is precluded from taking any action when the Department admittedly is not complying with its duty under the law, simply because the Department now has a plan in place to address its lack of compliance.

4. PETITIONERS HAVE ESTABLISHED BOTH A LIKELIHOOD OF PREVAILING ON THEIR CLAIM AND IRREPARABLE HARM

As discussed above, Petitioners' motion is two-fold. For likely eligible applicants, Petitioners pray for an injunction that the Department be prohibited from failing to provide provisional benefits

until the Department has completed review of those applications. For the remaining individuals who are deemed not likely eligible for benefits by the Department, Petitioners seek an injunction prohibiting the Department from failing to issue immediate notices about the right to request a hearing to prevent further delay of their eligibility determinations.

A. INJUNCTION RE: LIKELY ELIGIBLE APPLICANTS

At the hearing, the Department represented that it is committed to providing provisional benefits for those applicants that are likely eligible for Medi-Cal benefits whose applications have been pending for more than 45 days, and has already begun the process for providing such benefits. (See Transcript of December 2, 2014 hearing, p.3.) Rene Mollow ("Mollow"), the Deputy Director of Health Care Benefits and Eligibility for the Department of Health Care Services, states that the Department's initiative to preliminarily grant such provision benefits is now well underway. (Second Mollow Decl., ¶ 3.) The Department also anticipated doing further runs to determine whether additional applicants whose applications become pending for more than 45 days after the date cutoff for the first set of processing runs benefit from this policy. (Second Mollow Decl., ¶ 10.)

Thus, the Department appears committed to providing provisional benefits for applicants that are likely eligible for Medi-Cal benefits whose applications have been pending for more than 45 days as well as those applicants that will continue to enter the backlog. The Department sent a letter dated November 14, 2014, to the counties advising them of the Department's requirement for the counties to develop lists of pending applicants who appear likely eligible and thus qualify for the preliminary determination of eligibility and required the counties to return the lists to the Department by December 1, 2014. (See Mollow Decl., ¶ 37, Exh. M.) On receipt of the returns from the counties, the Department

anticipated granting provisional benefits to likely eligible applicants by December 8, 2014, unless the county had already made a final eligibility determination by December 1, 2014. (*Id.*)

At the hearing, Petitioners were clearly concerned as to whether applicants continuing to enter the backlog will in fact, be provided provisional benefits. Petitioners' concern is understandable in light of the harm detailed in the declarations submitted by Petitioners of applicants who have suffered and continue to suffer harm because of the delay in receiving a determination of eligibility for their Medi-Cal benefits beyond the 45 day statutory maximum. (See Declarations in Support of Petitioners' Motion for Preliminary Injunction.) Despite its efforts and intentions to address the backlog, the Department could not provide a date certain by which provisional benefits would either be provided, or alternatively, the backlog of applications would be cleared. (See Transcript of December 2, 2014 hearing, pp.3-5.)

The Department also argues that even if there is some interim harm to Petitioners from not having a timely eligibility determination, the court cannot order the payment of provisional benefits since there is no ministerial duty for the Department to provide such provisional benefits. The Department's contention appears to be correct insofar as the Legislature may not have appropriated money for funding the payment of provisional benefits pending a fair hearing. (*McCullough v. Terzian* (1970) 2 Cal.3d 647, 657-658 and n.6 (in absence of a regulation requiring aid to be continued pending a fair hearing courts may not order continued benefits pending a fair hearing); see also *Butt v. State of California* (1992) 4 Cal.4th 668, 697-698 (trial court's authorization to the controller to disburse funds to complete school year improperly invaded the Legislature's constitutional authority and non-judicial power of appropriation because the Legislature had not made these funds reasonably available for disbursement to the District). The Department's agreement to pay provisional benefits to likely eligible applicants strongly suggests that the Legislature has in fact appropriated funds for the payment of provisional benefits, as it would be highly unusual for a governmental agency to pay money to members of the public in absence of the Legislature's appropriation and authorization to disburse funds to the

intended recipients. (Evidence Code section 664 [presumption of regularity attaching to official acts of administrative agencies].)

The Department's argument misses the point. The Department's duty, absent unusual circumstances, is for the "eligibility determination of an applicant [to]l not be delayed beyond the timeliness standards as provided in Section 435.912 of Title 42 of the Code of Federal Regulations or denied for any insurance affordability program unless the applicant is given a reasonable opportunity of at least the kind provided for under the Medi-Cal program pursuant to Section 14007.5 and paragraph (7) of subdivision (e) of Section 14011.2, [and] to resolve discrepancies concerning any information provided by a verifying entity." (See Welf. & Inst. Code § 15926(f)(5); 42 C.F.R. sec. 435.912(c)(3).) There is no dispute that thousands of applicants that are likely eligible for Medi-Cal benefits are not being timely provided with such benefits and therefore going without medical care. The interim harm suffered by the Petitioners here, along with other applicants, is substantial and irreparable if Petitioners' preliminary injunction is denied. In contrast, there does not appear to be any harm to the Department as the Department has already represented that it is committed to providing such provisional benefits to these likely eligible Medi-Cal applicants. The harm to be suffered by Petitioners is much greater than any harm that could potentially be suffered by the Department.

Thus, the court finds here that it may exercise its remedial powers to order the Department to address its failure to comply with its statutory duty. (*Butt, supra*, 4 Cal.4th at 694-697.) It is clear that the Department has failed to comply with the timeliness standard for making eligibility determinations to the irreparable harm of Petitioners and many others. Therefore the court GRANTS Petitioners' preliminary injunction and hereby prohibits the Department from failing to comply with its duty to make such eligibility determinations within 45 days. Alternatively, since it appears that the Department may not be able to comply with this duty immediately, the court finds, but does not order, that the Department may in its discretion, provide provisional benefits to those applicants who are likely eligible

for Medi-Cal benefits and whose applications have not been acted upon within 45 days, until those applications have been determined, as an alternate means of complying with its legal duties under the statute. [5]

B. INJUNCTION RE: NOTICE TO APPLICANTS THAT ARE NOT PROVIDED PROVISIONAL BENEFITS

i. STATUTORY NOTICE IS REQUIRED

Petitioners seek injunctive relief prohibiting the Department from failing to issue a notice of hearing advising these applicants of their right to request a fair hearing. Since the Department is failing to decide these Medi-Cal applications within 45 days, often exceeding this limit by many months, Petitioners claim that these applicants should therefore be notified of this failure and that the applicant has a right to demand an administrative hearing.

The Department argues that it has no duty to send out a notice to applicants advising of the right to request a hearing based on the Department's inaction. The only relevant provision provides for a NOA to be sent to applicants, which only applies in adverse actions, discontinuances or increase in the share of cost or in all other instances that the county takes action. (See Cal. Code Regs., tit. 22, § 50179(d).) Welfare and Institutions Code section 10950 does not speak to when notice must be provided, but specifies only that an applicant be afforded an opportunity for a hearing. The Department claims it has already provided notice to applicants of the right to request a hearing with its "welcome packet" that is provided to applicants. (See Mollow Decl., ¶ 41.) One of the documents included is a document titled "Important Information for Persons Requesting Medi-Cal" that advises beneficiaries of the right to request a hearing regarding inaction by the Department or county and how to request a such

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[5] The court expresses no view on whether provisional benefits could be ordered in this case consistent with *McCullough* and *Butts*, as this issue was neither briefed by the parties, nor does the record address this (Legislative appropriation) specific issue.

a hearing. (Mollow Decl., ¶ 41, and Exh. I.) The Department has also issued letters to most of the pending applicants confirming the Department's receipt of their applications and advising the applicants of the reasons for the delay in determining eligibility, that a determination will be made as soon as possible and what to do if they need health care while they are awaiting their eligibility determination. (Mollow Decl., ¶¶ 39-40, and Exh. H.)

When an application for Medi-Cal benefits is denied, by statute, counties are required to provide written notification to an applicant or beneficiary by issuing a Notice of Action ("NOA") that includes the reason the application is being denied as well as the right to request a hearing. (See Cal. Code Regs, tit. 22, § 50179[6].) "The determination of eligibility shall be considered complete on the date the Notice

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[6] California Code of Regulations, title 22, section 50179, in its entirety, states:

(a) County departments shall notify beneficiaries in writing of their Medi-Cal-only eligibility or ineligibility, and of any changes made in their eligibility status or share of cost. This notification shall be called the "Notice of Action."

(b) The Notice of Action shall be on a form prescribed by the Department and shall include the name and telephone number of the eligibility worker who completed the eligibility determination, and the date the form was completed. A copy of the Notice of Action shall be placed in the case file.

(c) The Notice of Action shall include the following:

(1) The approval, denial or discontinuance of eligibility, the recision of a denial or discontinuance, or the change in the share of cost and the effective date of the action.

(2) The amount of the share of cost, if any, and the amount of the net nonexempt income used to determine the share of cost.

(3) The reason an action is being taken and the law or regulation that requires the action, if the action is a denial, discontinuance or increase in share of cost.

(4) The right to request a State hearing if dissatisfied with:

(A) Any action or inaction by the county department that affects the applicant's or beneficiary's Medi-Cal eligibility or share of cost, except as limited in Section 50951(a).

(B) Any action taken by, or on behalf of, the Department that affects the applicant's or beneficiary's Medi-Cal benefits.

(5) The procedures for requesting a State hearing and the time limits within which a state hearing must be requested.

(6) The circumstances under which aid will be continued if a hearing is requested.

(7) A statement, when appropriate, regarding the information or action necessary to reestablish eligibility or determine a correct share of cost.

of Action is mailed to the applicant." (Cal. Code Regs. tit. 22, § 50177(c).) A NOA is to include "the approval, denial or discontinuance of eligibility" and the effective date of the action. (C.C.R., tit. 22, § 50179(c)(1).) Such notice must be mailed for "[a]dverse actions, at least 10 calendar days prior to the first of the month in which the action becomes effective, excluding the date of mailing," "[d]iscontinuances or increases in the share of cost which are not adverse actions," and "[a]ll other instances, no later than the date the county department takes the action." (*Id.* at § 50179(d).)

Welfare and Institutions Code section 10950(a) also provides:

> (a) If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his or her application for or receipt of public social services, if his or her application is not acted upon with reasonable promptness, or if any person who desires to apply for public social services is refused the opportunity to submit a signed application therefor, and is dissatisfied with that refusal, he or she shall, in person or through an authorized representative, without the necessity of filing a claim with the board of supervisors, upon filing a request with the State Department of Social Services or the State Department of Health Care Services, whichever department administers the public social service, be accorded an opportunity for a state hearing.

(Welf. & Inst. Code § 10950(a).)

(d) The Notice of Action shall be mailed for:

(1) Adverse actions, at least 10 calendar days prior to the first of the month in which the action becomes effective, excluding the date of mailing.

(2) Discontinuances or increases in the share of cost which are not adverse actions, in sufficient time to reach the beneficiary by the effective date of the action.

(3) All other instances, no later than the date the county department takes the action.

(e) Duplicate Notices of Action shall be mailed to the administrator of the long-term care facility in which the applicant or beneficiary resides, if the applicant or beneficiary or person acting on their behalf has made such a request.

(f) Conditional notices, which advise applicants or beneficiaries that eligibility will be denied or discontinued unless specified actions are taken by the applicants or beneficiaries, shall not be considered to meet the Notice of Action requirements of (a).

(Cal. Code Regs. tit. 22, § 50179.)

The court finds that Petitioners have also established a likelihood of prevailing on their claim that the Department has not complied with its statutory duty to those applicants who are not being provided provisional benefits and have not been issued a timely eligibility determination. Had the Department complied with its duty to timely decide each Medi-Cal application within 45 days, the Department would have been required to issue a NOA to each applicant either granting or denying eligibility. In essence, the Department's failure to timely determine whether applicants are eligible or ineligible for Medi-Cal benefits, effectively operates to deny all of these applicants Medi-Cal benefits without issuing the required NOA that would advise applicants of the right to request a hearing if they are dissatisfied with the eligibility determination. (Id. at § 50179(c)(4)(A), (B).) The Department's argument that it has no duty to issue any notice to applicants until it makes such determinations, even where such applications are delayed for months and months, is unpersuasive and contrary to the intent of and plain language of the statute that requires the Department to issue timely determinations of applications for Medi-Cal benefits.

The court is also persuaded that the Department has a duty under Welfare and Institutions Code section 10950 to provide these applicants with notice of their right to request a hearing. Section 10950 provides that these applicants have the right to a hearing "if his or her application is not acted upon with reasonable promptness." The Department contends that it has no present duty to notify applicants of the right to a hearing because the Department discharged its duty when it sent a welcome containing a MC 219 from packet to each applicant. (See Mollow Decl., ¶ 41, and Exh. I.) Paragraph 21 of the MC 219 form, which is part of the section addressing "Medi-Cal Applicant/Beneficiary Rights, Responsibilities, and Understandings," states:

> Have a state hearing if I am dissatisfied with an action taken (or not taken) by the local social services office or the State Department of Health Care Services, except actions relating to the Health Insurance Premium Payment (HIPP) and Employer Group Health Plan (EGHP) programs. If I want a state hearing to appeal the decision, I must ask for it within **90 days** of the date the

> Notice of Action (NOA) was mailed to me. If I do not receive a NOA, I must request a hearing within **90 days** from the date I discover the action (or inaction) from which I am dissatisfied. The date of discovery is the date I know, or should have known, of the action. The best way to ask for a hearing is to contact the nearest local social services office.

(Mollow Decl., Exh. I, ¶ 21.) This paragraph fails to provide adequate notice of an applicant's right to request a fair hearing where the Department has failed to timely issue an eligibility determination. Instead, it places the burden on the applicant to discover the Department's inaction, and moreover, limits the applicant to only 90 days to request a hearing based on when the applicant knew or should have known about the Department's inaction! If this statement were accurate, then not only would these applicants not have been issued a timely NOA in which they could request a hearing within 90 days to appeal the decision, but these applicants could also be barred from requesting a fair hearing, despite waiting months and months for a NOA, because they should have known about the Department's failure to timely issue such NOA.

Putting that aside, the MC 219 form does not provide an applicant with notice of the time frame for when an applicant may request a hearing based on the Department's inaction. As discussed above, 42 C.F.R. section 435.912 requires that "[t]he agency must inform applicants of the timeliness standards adopted in accordance with this section." The Department has not demonstrated that it has complied with this requirement.

Construing the Medi-Cal statutes and regulations together, the court is convinced that the Department has a duty to notify applicants of their right to request a hearing where the Department has not made a timely eligibility determination. This construction is supported by the requirement in 42 C.F.R. section 435.912(d) that applicants be notified of the timeliness standards for making eligibility determinations, the requirement in Welfare and Institutions Code section 10950 that the applicant has a right to request a hearing where an applicant is not acted upon with reasonable promptness, and the

requirement in California Code of Regulations, title 22, section 50179 that a NOA be issued once an eligibility determination has been made. The Department's MC 219 form does not satisfy this duty because it does not inform applicants of when an applicant has the right to request a hearing based on the Department's inaction, and furthermore misleadingly states that the applicant only has 90 days from when the applicant knew or should have known to request such a hearing. The Department has not pointed to any other evidence from which the court finds that the Department has satisfied this duty. Petitioners have therefore established a likelihood of prevailing on this claim that the Department has failed to comply with its duty to provide notice of these applicants' right to request a hearing.[7]

The court thus turns to the harm to be suffered by Petitioners if the injunction is denied as compared to the harm to be suffered by the Department if the injunction is granted. As discussed above, the harm detailed by Petitioners from waiting months and months for an eligibility determination resulting in a lack of medical care, is substantial and irreparable. (See Declarations in Support of Petitioners' Motion for Preliminary Injunction.) The evidence also supports that those applicants that obtained legal assistance and requested a hearing were able to obtain their Medi-Cal benefits shortly thereafter. (Id.)

In contrast, the harm claimed by the Department is that to issue such a notice of right to request a hearing on these pending applications would invite a flood of hearing requests that would interfere with prompt determinations of eligibility because it would divert county resources to address those requests for hearing and therefore add to delayed determinations for those applicants whose applications that are still pending that have not requested a hearing.[8]

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[7] In making this finding, the court does not address when such notice should be sent out, but only that the Department has a duty to provide notice of the time frame for the right to request a hearing based on the Department's failure to timely issue eligibility determinations, and that the Department has not complied with its duty at this time.

[8] The Department could easily have included in the letters sent to backlogged applicants notice of the right to request a hearing based on the Department's delay, or advised that the Department is required to make a determination on each

The court however, finds that the harm to these applicants from not receiving notice of their right to request a hearing combined with effectively being denied Medi-Cal benefits during this time, outweighs the Department's harm that this would put a strain on the Department's resources. (See *Goldberg v. Kelly* (1970) 397 U.S. 254, 266 [Although state hearings may involve greater expense, state has weapons to minimize increased costs and interest of welfare recipients in uninterrupted receipt of public assistance outweighed the state's concern about fiscal and administrative burdens.].)

Based on the above, Petitioners' motion for a preliminary injunction enjoining the Department from failing to issue a notice of hearing to all other backlogged applicants that the Department has found not eligible for provisional Medi-Cal benefits, is GRANTED.

ii. DUE PROCESS VIOLATIONS

Petitioners also argue that the Department's failure to decide applications within 45 days combined with the failure to provide written notice of the right to challenge these delays violates the due process clauses of the United States and California Constitutions. (See *People v. Ramirez* (1979) 25 Cal.3d 260.) In *People v. Ramirez*, supra, 25 Cal.3d at 268, the California Supreme Court held that "due process safeguards required for protection of an individual's statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty." "This approach presumes that when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making and in being treated with respect and dignity." (*Id.*)

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application within 45 days. Yet the Department apparently made a conscious decision not to include such information for this reason. (See Department's Opposition to Motion for Preliminary Injunction, 14:3-14; DeCuir Decl. ¶¶ 7-12.)

The Department contends that there has not been any due process violation because these applicants have not been deprived of any statutorily conferred benefits. Once again, the Department also contends that applicants have been advised of their right to request a hearing, and that to issue such a notice would invite a flood of hearing requests that would divert county resources to hearings instead of determining pending applications.[9]

This same argument however, was rejected in *Goldberg v. Kelly* (1970) 397 U.S. 254, in which New York City welfare recipients brought suit challenging termination of such aid without prior notice and hearing, contending that it denied them due process of law. After the suit was filed, the state and city adopted procedures for notice and hearing, and the recipients then challenged the constitutional adequacy of those procedures. (*Id.* at 257.) The U.S. Supreme Court found that only a pretermination evidentiary hearing would satisfy the Due Process Clause. (*Id.* at 260-261.) For qualified recipients, the court found that "welfare provides the means to obtain essential food, clothing, housing and medical care." (*Id.* at 264.) The crucial factor in Goldberg was that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." (*Id.*) Since recipients lack independent resources, the situation becomes immediately desperate, which adversely affects the recipient's ability to seek redress from the welfare bureaucracy. (*Id.*) Although the state argued that these considerations were outweighed by countervailing governmental interests in conserving fiscal and administrative resources justifying the delay of an evidentiary hearing until after discontinuance of aid, the U.S. Supreme Court held that such governmental interests are not overriding in the welfare context. (*Id.* at 266.) While the court acknowledged that these hearings would involve some greater expense, it found that the state was not without weapons to minimize these increased costs and moreover the interest of the recipients in

[9] As discussed above, the court rejects these arguments by the Department.

uninterrupted receipt of public assistance coupled with the state's interest that payments not be erroneously terminated, clearly outweighed the state's concern about fiscal and administrative burdens. (*Id.*).

Having found that Petitioners have established a likelihood of prevailing on their claim for notice on statutory grounds, the court need not reach Petitioners' constitutional arguments, or the Department's remaining contentions, that there is no protected liberty or property interest at stake, and that there is no constitutional duty to send a notice of action. (See *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357 ["The conclusion we reach also permits us to avoid the difficult question whether the local rule and order violate petitioner's right to due process of law, "[m]indful [as we are] of the prudential rule of judicial restraint that counsels against rendering a decision on constitutional grounds if a statutory basis for resolution exists." (*NBC Subsidiary (KNBC–TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190.).)

CONCLUSION

Based on the above, Petitioners' motion for a preliminary injunction is GRANTED. Petitioners are to submit a proposed preliminary injunction, after submission to the Department for review, by February 2, 2015.

The court also exercises its discretion to waive the bond requirement based on a finding that the beneficiaries on whose behalf this petition is brought, are indigent and unable to provide a bond. (See C.C.P. § 995.240.)

IT IS SO ORDERED.

DATED: JAN 20 2015

Evelio M. Grillo
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG14740911

Case Name: Rivera vs. Douglas

1) Order Granting Petitioners' Motion for Preliminary Injunction

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below by placing it for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

January 22, 2015

Executive Officer/Clerk of the Superior Court
By M. Scott Sanchez, Deputy Clerk

Sondheimer, Joshua N.
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 941027004

Keys, Michael
Bay Area Legal Aid
1035 Market Street
6th Floor
San Francisco, CA 94103