C.A. NO. 08-16267

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| **CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES,**<br><br>Plaintiff/Appellant,<br><br>**v.**<br><br>**CLIFF ALLENBY, Interim Director of the California Department of Social Services, in his official capacity; MARY AULT, Deputy Director of the Children and Family Services Division of the California Department of Social Services, in her official capacity,**<br><br>Defendants/Appellees. | U.S. District Court (N.D. Cal.)<br><br>Case No. C 06-04095 MHP |

On Appeal from the United States District Court, Northern District of California
The Honorable Marilyn H. Patel, Judge

# APPELLEES' ANSWERING BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California
DOUGLAS M. PRESS
Senior Assistant Attorney General
GEORGE PRINCE
Deputy Attorney General
State Bar No. 133877
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5749
Fax: (415) 703-5480

Attorneys for Defendants/Appellees

C.A. NO. 08-16267

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| **CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES,**<br><br>**Plaintiff/Appellant,**<br><br>**v.**<br><br>**CLIFF ALLENBY, Interim Director of the California Department of Social Services, in his official capacity; MARY AULT, Deputy Director of the Children and Family Services Division of the California Department of Social Services, in her official capacity,**<br><br>**Defendants/Appellees.** | U.S. District Court (N.D. Cal.)<br><br>Case No. C 06-04095 MHP<br><br>APPELLEES' ANSWERING BRIEF |

## STATEMENT OF JURISDICTION

This is an appeal from a judgment entered on March 12, 2007, denying the motion for summary judgment brought by plaintiff/appellant (appellant) and granting the motion for summary judgment of defendants/appellees (appellees). The District Court had subject matter jurisdiction under 28 United States Code section 1331.

Appellant filed its notice of appeal of April 29, 2007; this Court has jurisdiction under 28 United States Code section 1291.

## ISSUE PRESENTED

The sole question on appeal is whether the District Court erred in granting appellee's motion for summary judgment, and concurrently denying appellant's

motion for summary judgment, on the basis that the California's foster care maintenance payments system for group homes does not violate the federal Child Welfare Act (Title IV-E of the Social Security Act, 42 United States Code sections 670-679b (Title IV-E or the Act)).

## STATEMENT OF THE CASE

Appellees do not disagree with the appellant's Statement of the Case as far as it goes, but supplement it on two matters, one that appellant apparently chose not to mention, and one that appellant mis-describes.

First, appellant's statement declined to note that on December 10, 2007, Judge Patel issued a post-hearing order directing that the California Department of Social Services (CDSS) submit evidence, in the form of declarations containing detailed information and contemporary documents, as to annual reviews where it was determined that the standardized rate schedules would not be adjusted subject to the non-availability of funds. (Clerk's Record (CR) 54, p. 2:4-10 (a copy of the Clerk's Record is included in Appellant's Excerpts of Record (ER), Volume 2 of 2, at pp. 85-96).) CDSS complied with Judge Patel's order by timely filing, on January 24, 2008, a declaration with five documentary exhibits. (CR 56.) Judge Patel's request for additional evidence followed the hearing on the cross motions by more than 11 weeks, and the submission of the additional evidence preceded the issuance of the order that granted summary judgment in favor of appellees and denied it as to appellant by nearly seven weeks.

Second, while appellant states that "[o]n April 9, 2008, the district court denied [appellant's] Motion for Reconsideration and Relief from Judgment[,]" (Appellant's Opening Brief (AOB), p. 4), what the District Court actually did on April 9, 2008, was deny appellant's motion for *leave to file* a motion for

reconsideration and relief from judgment. (See Memorandum & Order Re: Motion for Leave to File a Motion for Reconsideration and Relief from Judgment, CR 74, a copy of which appears in Appellant's ER, Volume 1 of 2, at pp. 1-2.)[1/]

## STATEMENT OF FACTS[2/]

The facts set out below come from appellee's motion for summary judgment, where they were presented as Defendants' Statement of Facts Not Reasonably in Dispute (CR 37, at pp. 3-6); they were not disputed by appellant.

Prior to 1990, there had been negotiations and advisory discussions and meetings with stakeholder groups made up of CDSS employees, counties, and provider groups, which studied options for a new rate setting system. Legislation was proposed in the form of Senate Bill (SB) 747, which did not pass. A later bill, SB 370 (Chapter 1294, Statutes of 1989) established the Foster Care Group Home Rate structure and was the authority for that initial promulgation of regulations for rate setting for group home programs.

In 1990, a group of CDSS employees with the Foster Care Branch worked on the drafting of regulations pursuant to Senate Bill 370 that were implemented July

---

1. By contrast, and curiously, in the Statement of Facts section of its AOB, appellant correctly states that it was a motion for leave to file a motion for reconsideration and relief that the District Court denied on April 9, 2008 (AOB, p. 12), not just a motion for reconsideration and relief as averred in the Statement of the Case (AOB, p. 4).

2. Appellees note that at least one assertion in appellant's Statement of Facts is inaccurate: on page 9 of its opening brief, appellant states: "Several members of the Alliance have already ceased operating their group homes or have reduced the capacity of their group home programs." (AOB, p. 9.) Appellant supports this statement only by reference to its complaint; as Judge Patel noted in her opinion below, "... plaintiff has not presented any evidence that group homes are going out of business." (CR 57, p. 10:12-13, at endnote 5.)

1, 1990. SB 370 established both a standard rate for each of the 14 Residential Care Levels (RCLs) and a rate floor. In fiscal year 1990-1991, each provider submitted data on rate, costs, and staffing levels from the prior fiscal year that substantiated the RCL at which its program would enter the flat rate system. The standard rates were to be phased in over a three-year period beginning July 1, 1990, with a rate floor for each of the three years. The implementing legislation required CDSS to raise the standard rate for each RCL based on information from the California Necessities Index (CNI) for fiscal years 1991-1992 and 1992-1993. Thereafter, annual CNI-based rate increases for group homes would become a discretionary item in the State budget process.

The RCL point system measures the number of "paid/awake" hours worked per month by a program's child care and social work staff and their first-line supervisors. The point system also counts the number of hours of mental health treatment services received by the children in the program, although these services do not have to be paid for by the provider. These hours are then weighted to reflect the experience, formal education, and ongoing training of the child care staff and the qualifications of the social work and mental health professionals. These "weighted hours" are then divided by 90% of the program's licensed capacity to compute the program's RCL points, which are used in the determination of the amount of payments the program receives.

Federal reimbursement funding to states is conditional upon states meeting the requirements of Title IV-E. The federal government does not prescribe a particular system for payment for children placed in group homes, nor does in set any particular method for determining how costs are to be measured, set, or calculated. However, the state is required to submit a plan that identifies the state law that meets the

federal requirements. The plan is submitted with a certificate of compliance, which ensures compliance with federal requirements, to the appropriate federal regional office.

California's Title IV-E State Plan consists of a compilation of California statutes, regulations, All County Letters (ACLs), All County Information Notices (ACINs), County Fiscal Letters (CFLs), and other documents that implement federal requirements and instructions for the federal foster care program, which must be followed in order for the State to claim Federal Financial Participation (FFP) in payments made under the program. CDSS amends California's state plan when the federal Department of Health and Human Services (DHHS) issues new federal requirements, changes existing federal regulations, or when a new state requirement as the result of law or court order substantially affects the state's foster care program. Updates to the state plan that are submitted to DHHS in response to such requirements or instructions include any new statutes, regulations, and ACLs that came into effect since the previous update. Any changes to the state plan must be approved by Region IX of DHHS, the regional division of DHHS that oversees the agencies activities in California and several other states.

Common practice in preparing ACLs that substantially change the way California claims FFP in the foster care program is that CDSS provides drafts to, and consults informally with, Region IX DHHS staff about the contents of the proposed ACL. The purpose of the consultation is to ensure that the ACL will ultimately be approved by DHHS as an amendment to California's Title IV-E State Plan. If Region IX indicates disagreement with the contents of the ACL, attempts are made to address its concerns by changing the contents of the ACL.

Subsequent to the establishment of the state's RCL system for group home

payment rates, the most recent substantial state plan amendment was submitted in 2003. There have been no denials of any state plan relating to the setting of rates for foster care group homes by DHHS at any time in which the RCL system has been in place.

## SUMMARY OF ARGUMENT

Appellant's opening brief challenges the decision of the District Court primarily on a semantic level: appellant urges that the word "cost" within the Child Welfare Act's definitions section should be read to mean "actual costs." Like the District Court, appellees disagree with the construction offered by appellant, and note that appellant has not provided any substantive authority for its proposition that "cost" means "actual costs" despite having had more than seven months since the cross-motions for summary judgment were decided in favor of appellees to locate such authority.

Appellees further support the decision of the District Court by challenging a series of false-premise arguments raised by appellant: 1) that the court below improperly created a "substantial compliance" test, which appellees attack on the basis that appellant's argument misstates what Judge Patel wrote in her opinion; and 2) that the District Court also created a "lack of funds exception" for California, which appellees also assail on the basis that appellant mischaracterizes what Judge Patel opined. Finally, appellees contest appellant's tautological contention that because Judge Patel misinterpreted and misconstrued the Act she incorrectly concluded that California was in compliance with the Act.

## ARGUMENT

## I. THE DISTRICT COURT'S APPROPRIATE GRANT OF SUMMARY JUDGMENT TO APPELLEES SHOULD NOT BE DISTURBED.

### A. Introduction.

Appellant sets forth three basic arguments to support its theory that the District Court erred in granting appellee's motion for summary judgment and denying that of appellant. First, it contends that Judge Patel misread the Act by finding that it does not require California to cover the "actual costs" associated with the provision of the items set forth under the "foster care maintenance payments" section of the Act. Next, it assails the court below for making use of a "substantial compliance" test in its analysis of the cross motions. Finally, it claims the District Court created an improper "lack of funds" excuse for the State of California. Appellant is mistaken on each of these points.

### B. Standard of Review.

Appellees agree with appellant that this Court reviews *de novo* an order granting a motion for summary judgment. *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1119 (9th Cir. 2008).

### C. Judge Patel Correctly Interpreted and Construed the Child Welfare Act.

#### 1. Appellant's "Actual Costs" Argument Lacks Foundation.

Appellant's first argument against Judge Patel's decision is that she incorrectly analyzed the Act to find that it does not require the payment of "actual costs." To the contrary, it is appellant who is mistaken here.

The Act states:

> The term 'foster care maintenance payments' means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, and reasonable travel to the child's home for visitation. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

42 U.S.C. sec. 675 (4)(A). The statute does not say "actual costs," "entire costs," "all costs," or any of the other phrases with which appellant seasons its argument. (See, for example, AOB, at p. 17, note 2, where appellant explains its interpretation of the term "actual costs.") The Act says "cost" without the use of any of the qualifiers proposed by appellant, or otherwise.

The logic behind this straightforward use of the language is simple, and understandable. The Act also uses the word "food" – but does not attempt to define it further by stating what sort of food it means (high quality? low quality?), what kind of diet within those sorts is to be provided (omnivorous? vegetarian?), or what type of food within those kinds might satisfy the law (potatoes? truffles?). Similar inquiries could be made for each of the other enumerated categories, but the point is merely that there is a degree of categorical variability that makes any attempt at specificity problematic, at best. The Act's generalities inherently recognize the flexibility accorded by its provisions.

Appellant tries to support the "actual costs" argument by citing the Child Welfare Policy Manual[3/], a sort of frequently-asked-question-type guide that

---

3. The Child Welfare Policy Manual, which as of October 11, 2008, could be found in its entirely on the internet via the web address http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/index.jsp does not appear in appellant's Excerpt of Record, unsurprisingly, as it was not part of the record below. The portion of the manual referred to in appellant's brief --

introduces itself by stating: "This Child Welfare Policy Manual updates and reformats the existing relevant policy issuances (Policy Announcements and Policy Interpretation Questions) into an easy to use question and answer format."[4/]

Notwithstanding the source of the "authority," the descriptive phrase appellant cites from the Manual is not helpful to its argument or to this Court: the phrase appellant emphasizes in boldfaced italics as suggesting what the Act means by "costs" -- "an amount necessary to cover the costs" (AOB, p. 21) – is no more specific than what the Act itself states with the phrase, "payments to cover the cost of ... ." 42 U.S.C. section 675 (A)(4). Presumably appellant searched the Manual in its effort to find wording or narrative supporting its theory that "cost" means "actual costs"; appellant's inability to find any language more supportive of its "actual costs" theory in the Manual than the identical phraseology that exists in the Act itself suggests that there simply is no language there to support appellant's view: unless appellant missed something, the Manual does not say "actual costs," nor does it create any norm or standard for costs. It does not create any norm or standard for cost, does not designate an existing index by which to measure cost nor establish a new index for that purpose, or even suggest, let alone require, that some type of a cost-of-living adjustment is required under the Act.

Despite appellant's argument to the contrary, Judge Patel was correct in noting that the law "is silent about actual costs." (AOB, p. 23, citing Judge Patel's

---

http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp?citID=53 – sets forth in their entireties the question and answer appellant quotes in part. (A copy of that portion of the Manual is reproduced at Appellant's Addendum to Opening Brief at pp. 60-64.)

4. From the introductory paragraph of the manual on the website page http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/index.jsp.

Memorandum & Order Re: Cross-Motions for Summary Judgment, at p. 7 (CR 57, a copy of which is included in Appellant's ER, Volume 1 of 2, at pp. 4-13).)

In another variation on its argument that "cost" in section 675(4)(A) of the Act means "actual costs" -- however those might be subjectively determined -- appellant notes that Congress used the word "reasonable" to qualify "administrative and operational costs" in another portion of 42 U.S.C. section 370. (AOB, pp. 23-24.) According to appellant, this reasonableness qualifier was included in the costs calculus "presumably because Congress viewed funding for the actual *costs* associated with the categories of costs identified in Section 675(4)(A) as routine." (*Id.*, p. 24, emphasis by appellant.) Appellant continues: "Thus, far from supporting the District Court's ruling, the inclusion of a reasonableness limitation only for administrative and operating costs, if anything, supports the view that Congress intended no such limitation to the funding of the routine categories of costs required to be 'covered' by Section 675(4)(A)." (*Id.*)

However, it does not follow that Congress meant what appellant urges this Court to believe. If Congress had wanted to qualify the word "cost" in the primary descriptive portion of section 675(4)(A) with words such as "actual," "full," or something of the like, it could have done so explicitly. The lack of such a qualifier here leaves to the states the interpretation of "cost" and the manner in which they are to incorporate into their state plans a mechanism to determine how to "cover the cost" of foster care maintenance payments, as required by the Act, according to their individual circumstances. California did just that in the creation of its RCL system, as described above in the Statement of Facts.

Appellant's argument also mischaracterizes Judge Patel's decision: she did not read into the statute a wholesale "reasonableness" standard, as appellant suggests,

by focusing on the second sentence of the definition and somehow using the words "reasonable costs" in relation to administration and operation costs to create an interpretation of the statute that allows a "reasonable" standard for the other costs listed in the definition. (AOB, p. 23.) All Judge Patel opined was that the statute is silent about "actual costs." Importantly, her decision stated that she could not find a basis for requiring "actual costs": "Without explicit statutory authorization or any other evidence in support, the court cannot find the requisite statutory intent to provide payments of actual costs." (CR, p. 7:12-13.) This is hardly linking the word "cost" to the "reasonable costs" phrase, as appellant posits.

Appellant makes much of the word "cost" in its brief as it attempts to expand the meaning of the word to mean "actual costs", and cites various cases regarding statutory construction in its efforts, along with the dictionary and the Child Welfare Policy Manual. (AOB, pp. 19-22.) However, another canon of statutory construction is to not presume that Congress intended an absurd result. *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1303 (9th Cir. 1995). To interpret the Act's use of the word "cost" to mean "actual costs," as appellant urges, despite a lack of substantive authority for the proposition, would be absurd.

At this time, despite Judge Patel's invitation to appellant to find such authority, and despite having more than seven months since her decision first issued to find such authority, appellant still has yet to provide any authority to support its "actual costs" theory. Accordingly, this Court should reject appellant's contention that the Act requires that "foster care maintenance payments must be enough to cover the entire costs of providing the enumerated items." (AOB, p. 26.)

2. Appellant's "Substantial Compliance Test" Argument is Specious.

Appellant next challenges Judge Patel's opinion on the basis that she "held

that the State is only required to substantially comply with the requirements of the statute -- a concept that is not contained anywhere in the language of the Child Welfare Act." (AOB, p. 26.) Again, appellant misstates what the court below said.

In her decision, Judge Patel explained that the court would not defer to the state to make the call as to whether state law was consistent with federal law, but that "the court must determine whether the State based its reimbursement standard on the statutory criteria mandated by the federal statute." (CR 57, p. 6:4-6.) On that point, Judge Patel found that "the State has presented uncontroverted evidence" that its process for determining rates took into account the statutory criteria mandated by the Act and that this evidence, in conjunction with the California statute implementing the Act that "largely mirrors the CWA's language," convinced her that the State took the statutory criteria required by the Act into account. (CR 57, p. 6:9-15.) While Judge Patel also cited the fact that California's statutory language "largely mirrors" that of the Act to state that California was in substantial compliance with the Act, her holding was "further buttressed by plaintiff's failure to present any evidence that the State's initial rate determination, in 1990-91, did not take the CWA factors into account." (*Id.*, lines 19-21.) Appellant's suggestion that this amounts to an impermissible creation of a substantial compliance standard where one does not exist is disingenuous.

After proffering the faulty premise that the court below relied upon an improper substantial compliance standard, appellant tries to circle back to its "actual costs" argument by suggesting that California's payments system does not substantially comply with the Act because it does not cover "actual" costs. Appellant cites the case of *Withrow v. Concannon*, 942 F.2d 1385 (9th Cir. 1991) to support this notion, to no avail.

In *Withrow*, the Court found that Oregon's failure to provide certain hearings required by federal statutes in regard to various AFDC, food stamp, and Medicaid programs within specific time frames made it impossible to find that Oregon was in substantial compliance with those programs. That is not surprising, as failure to provide timely hearings could never support a finding of substantial compliance: if a timely hearing is required and it is not provided, the requirement for a timely hearing is obviously not met. In the case at bar, however, the issue is not that the State is *not* providing payments; the State is clearly doing so, and appellant cannot deny that fact. Rather, the State is simply not making payments at the "actual costs" level that appellant believes is required by the Act.

By analogy to the facts in *Withrow* case, appellant's argument here is akin to arguing that even if the hearings in *Withrow* were provided on a timely basis, appellant would still have a legitimate basis to argue that there was a violation of its rights if it were aggrieved about the outcomes of those hearings, or quality of the hearing officers, or some other function of the hearing process. But that is not what was at issue there: what the *Withrow* court faulted was the lack of the compliance with the requirement that timely hearings occur; those matters attendant to the hearings were not at issue. In our case, there is no issue as to whether the payment are made, nor even issues as to the State's incorporation of the federal statutory criteria into the implementing state statutes (see CR 57, p. 6:7-21): here, as to the substantial compliance question as framed by appellant, all that is at issue is whether payments are made. Unquestionably the payments are made, in compliance with the Act's substantive directive that payments be made. The other cases cited by appellant are not different on this point, and merely instruct that substantial compliance cannot be found where states are untimely in providing hearings or

processing applications for benefits: none of these cases stands for the proposition, as appellant suggests, that the level of a given payment in a federal-state cooperative social welfare program can be substantially out of compliance with a program's requirement based solely on a difference of opinion as to the level of the payment.

Appellant's statement that the issue is that "either the State pays the full foster care maintenance payment, or it does not" (AOB, p. 31) incorrectly frames the issue. Judge Patel's finding that the Act does not require the payment of "actual" costs – as discussed in Argument 1, above -- makes that clear, whether appellant replaces "actual" with "full" or some other word that is not found in the Act. Appellant's suggestion that the issue is one of the level of payments -- rather than simply that the payments are made, as they are, and that the system for establishing the payment rates system and setting its initial levels are in compliance with the Act, as Judge Patel so found they were -- must be rejected.

3. Appellant's "Lack of Funds Exception" Argument Lacks Merit.

Appellant's third argument is also based on a faulty premise, which is that Judge Patel "carved out an exception to the Child Welfare Act that excuses California, or any state, from complying with the Child Welfare Act based on a claim that it has insufficient funds." (AOB, p. 32.) This argument, like the premise upon which it based, is faulty.

First, California is not using "lack of funds" as an "excuse" to avoid complying with the Act. California complies fully with the Act; it has not suspended or ceased making foster care maintenance payments, and California's Title IV-E plan has never been rejected by DHHS. (CR 57, p. 3:3-4.) The real issue appellant has with California's system is not that it is out of compliance with the Act, but that California's payment rates schedule is simply -- in appellant's view -- too low.

Second, appellant misstates what the court below found. Judge Patel noted that while appellant when in the District Court argued that there was no "lack of funds" exception in the Act, such an argument "ignore[d] the fact that the CWA does not prohibit taking budgetary considerations into account." (CR 57, p. 7:26-27.) Judge Patel's decision added that appellant was "unable to point to any federal statute that compels cost of living increases for payments made to foster care providers." (*Id.*, p. 8:1-2.) This lack of any such statute compelling a cost of living adjustment lays bare appellant's conceit: in the absence of any federal law requiring that a cost-of-living-type of indexing system be an integral part of a state's IV-E plan, there is simply no such federal requirement, and California cannot be said to be violating the Act on that basis.

The District Court properly took appellant to task for focusing on that portion of state law establishing the State-created cost-of-living adjustment system – Welfare and Institutions Code section 11462 (reproduced at Appellant's Addendum to Opening Brief at pp. 48-59) – while simultaneously ignoring the provision in the same section of that statute that makes such adjustments "subject to the availability of funds." (*Id.*) In Judge Patel's words: "It is disingenuous for plaintiff to argue that CNI increases are mandatory when the latter half of the very clause that provides for the increases allows budgetary considerations to make the increases discretionary." (CR 57, 8:4-6.)

Not insignificantly, appellant still has yet to "point to any federal statute that compels cost of living increases for payments made to foster care providers[,]" as the District Court's order implicitly suggested appellant might want to do in an effort to support its argument. From appellant's brief, it remains unclear whether appellant simply ignored the District Court's advice or was unable to find any such authority;

however, no matter what the reason, given that more than seven months have passed since Judge Patel provided appellant with this hint as to how to support its case, appellant's inability to do so even with that additional time -- and certainly with the incentive to find such authority -- strongly suggests that no such authority exists.

Rather than provide such authority for this Court, appellant instead engages in a tangential argument about statutory construction that attempts to fault the District Court for what it did *not* do: Judge Patel did *not* create a lack of funds exception to the Act, but merely pointed out that federal law does not compel cost of living increases, and that state budgetary considerations are entirely and properly among the considerations a state may take into account in its rate-setting methodology. (CR, p. 8:7-14.) Judge Patel also noted that California had in fact "provided for CNI increases over the past seventeen years." (*Id.*, lines 14-15.) Appellant's attempt to argue that "full compliance" with the Act requires creation of a cost-of-living-type mechanism albeit the Act does not contain any such directive, explicitly or implicitly, is misguided. It should be rejected.

In its final sub-argument in this section of its brief, appellant contends that the District Court misapplied this Court's decision in *Blanco v. Anderson*, 39 F.3d 969 (9th Cir. 1994), and that the decision below also conflicts with *Orthopedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997). (AOB, pp. 36-37.). Appellant is wrong. The statutory entitlement in *Blanco* was explicit: the law at issue there required an availability of assistance in county welfare offices that was compromised by weekday closings of those offices, and a lack of resources argument was rejected by this Court under the circumstances of that case, which involved a regulation that explicitly prohibited budgetary considerations to be taken into account. That is not

the situation in the instant case, as Judge Patel pointed out in her decision. (CR 57, p. 7:14-25.)

As to its belief that Judge Patel's decision conflicts with *Orthopedic Hospital v. Belshe*, appellant cites the statement from that case that "[t]o receive matching federal participation for such services, states must agree to comply with the applicable Medicaid law." (AOB, p. 37.) Appellant's suggestion that California somehow does not agree to comply with the federal law applicable to the Act in this case is a tautology: only if appellant's theory that the Act requires some cost-of-living provision is correct can appellant be correct in suggesting that California is not in compliance with the law. As appellant's theory about such a cost-of-living provision is wrong, as demonstrated above, there can be no compliance failure by California.

Again, appellant's attempt to argue that the Act contains a cost-of-living adjustment requirement – even though appellant cannot identify any language in the Act that so requires, either explicitly or by implication – is without foundation. It defies logic to suggest that California can be ignoring a command of the Act that the Act does not contain. Appellant's efforts to insert any of the various adjectives they offer to qualify the word "cost" in 42 U.S. C. section 675(4)(A) -- actual, full, all, complete, or any of the other qualifiers that pepper appellant's argument -- must be rejected.

D. California's Rate Classification Level Complies with the Act.

In its final argument, appellant contends that because Judge Patel misinterpreted and misconstrued the Act, she also (1) "incorrectly concluded" that California complies with the Act (AOB, p. 39) and (2) "erred in determining that California has satisfied [a 'substantial compliance'] standard." (AOB, p. 43.) Both

prongs of appellant's two-part circular argument lack merit.

In the first part of the two-part argument, appellant reiterates its claim that California fails to comply with the Act because it does not pay the actual costs of the items enumerated in the Act. This claim is just as incorrect in reiteration as it is in the original, which, as explained in Argument C, above, lacks merit. From this flawed premise, appellant points to fact that, as measured by the CNI, "California only covers approximately 80% of the costs of providing the basic necessities enumerated in the Child Welfare Act." (AOB, pp. 39-40.) This percentage figure is not disputed and, indeed, was clearly noted by Judge Patel even as she concluded that such a disparity did not render California out of compliance with the statutory criteria outline in the Act.[5/] (CR 57, p. 7:1-4; at that point in her opinion, Judge Patel stated as follows in an endnote: "This is further buttressed by the fact that plaintiff has not presented any evidence that group homes are going out of business." (CR 57, p. 10, endnote 5).)

Appellant's argument continues, reiterating points the State has already

---

5. Of note here is that Judge Patel found California to be in substantial compliance with the statutory criteria of the Act, not that the 80% figure represented substantial compliance by California as to a measurement based on a 100% figure. Also of note here is that at this stage in appellant's argument, it again reaches beyond the facts that were before the court below, as set forth in the amended joint statement of undisputed facts (CR 41, a copy of which is included in appellant's ER, Volume 2 of 2, at pp. 64-70), and drops into its brief a "fact" about a 70% figure with respect to the CNI (AOB, p. 40) that was not even before the District Court prior to the grant of appellees' motion for summary judgment. This new "fact" was raised for the first time in a declaration in support of appellant's motion for leave for reconsideration and relief, which was not the motion considered by the District Court, as it rather denied appellant's *motion for leave to file a motion for reconsideration and relief* summarily, without counter briefing by appellees and without holding a hearing. (CR 74, appellant's ER, Volume 1 of 2, at pp. 1-2.)

spoken to in Argument C, above: the question of whether DHHS's approval of a state's Title IV-E plan is dispositive of compliance with the Act (it is not, as Judge Patel opined on her way to finding California in compliance with the Act independently of DHHS's approval of California's state plan, on the basis of California's compliance with the statutory criteria mandated by the Act), and the issue of whether "cost" under the Act means "actual costs" (also discussed in detail, above).

Next, appellant turns to *Missouri Child Care Association v. Martin*, 241 F.Supp. 2d 1032, (W.D. Mo 2003), for the dubious proposition that "suggested" that if *Missouri* ever *did* comply with the Act the amount of its funding levels *might* be subject to scrutiny by a court, and thus California's failure to increase payments commensurate with the CNI (albeit not so required by federal law) as to "average actual costs" leads to the conclusion that California was out of compliance with the Act. (AOB, p. 42.)

Lastly, in the second part of its two-prong final argument, appellant creates another false premise contention, that is, that "even if this Court concludes that the district court was correct in applying a 'substantial compliance' test, the district court erred in determining that California has satisfied this standard." (AOB, p. 43.) To buy into this proposition, this Court would have to agree that Judge Patel in fact applied a "substantial compliance" test to find that California was in substantial compliance with the Act on the basis of its 80%-of-CNI-levels payments rate. But that is not what Judge Patel found.

Rather, Judge Patel based her discussion as to whether California was in "substantial compliance" with the Act not on any percentages bases, but only on the basis that "the process for determining foster care payment rates is still substantially

compliant with the statutory criteria outlined in the Child Welfare Act." (CR 57, p. 7:2-4.) Judge Patel did not, as appellant asks this Court to believe, tie her finding to the rates, but instead tied it, as was appropriate, to whether California focused on the criteria in the Act, which it did. The Act does not dictate a specific rate structure, nor does it dictate the use of an index to track rates: it simply sets forth the specific cost categories that a state must fund and, wisely, leaves the manner in which a state is to determine those costs up to the state, so long as it takes into account all of the categorical enumerations. This California has done, as Judge Patel correctly found; that appellant believes that the payment rates should be higher than what they now are is immaterial.

Again, appellant wishes to blur the distinction between compliance with the Act's directives as to what categories of costs must be considered and the level of payments with respect to those categories. California's Title IV-E state plan properly considers each of those requisite categories, and has since its inception in the early 1990s. Though California has been unable always to meet its goal of increasing payment rates to group home providers of foster care services in step with the CNI as costs rise, it has always been straightforward as to intention to do so "subject to the availability of funds." It should not now be punished for its intent to do all it can, within the constraints of its budget, to provide for children in foster care group homes.

## CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's order granting summary judgment in favor of appellees.

Dated: October 15, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DOUGLAS M. PRESS
Senior Assistant Attorney General

GEORGE PRINCE
Deputy Attorney General

Attorneys for Defendants/Appellees

## STATEMENT OF RELATED CASES

To the best of counsel's knowledge, there are no related cases ending in this Court.

## CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure and the Ninth Circuit Local Rules, I hereby certify that this brief has been prepared using proportionately double-spaced type with a typeface of at least 14 points, and contains 5,926 words, up to and including the signature lines that follow the conclusion of the brief.

Dated: October 15, 2008

GEORGE PRINCE
Deputy Attorney General

Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE BY HAND DELIVERY

I am over eighteen years of age, not a party in this action, and employed in San Francisco County, California at 455 Golden Gate Boulevard, San Francisco, California 94102. I am readily familiar with the practice of this office for collection and processing of documents for filing and service upon the Court by hand delivery.

On October 14, I caused to be served the original and 15 copies of APPELLEES' ANSWERING BRIEF by hand delivery to:

Office of the Clerk
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1518

I declare that I am employed in the office of the CA Attorney General of this state at whose direction the service was made and that this declaration was executed on October 14, 2008 at San Francisco, California..

Eva Merrick

## CERTIFICATE OF SERVICE

I am over eighteen years of age, not a party in this action, and employed in San Francisco County, California at 455 Golden Gate Boulevard, San Francisco, California 94102. I am readily familiar with the practice of this office for collection and processing of correspondence for mail/fax/hand delivery/next business day delivery, and they are deposited that same day in the ordinary course of business. On October 14, I served the attached APPELLEES' ANSWERING BRIEF by mail by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California in sealed envelope(s) with postage prepaid, addressed as set forth below. I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence is deposited with the United States Postal Service the same day it is left for collection and processing in the ordinary course of business.

Bingham McCutchen LLP
William F. Abrams/Jennifer A. Lopez
Craig A. Taggart/Michael D. Mortenson
1900 University Avenue
East Palo Also, CA 94303

I declare that I am employed in the office of the CA Attorney General of this state at whose direction the service was made and that this declaration was executed on October 14, 2008 at San Francisco, California.

Eva Merrick

**SF2006401941**
**20154344.wpd**