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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES, Plaintiff, **v.** **JOHN WAGNER, 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,** Defendants.	C 06-4095 MHP **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Hearing: September 24, 2007 Time: 2:00 p.m. Courtroom: 15, 18th floor Judge: The Hon. Marilyn H. Patel

INTRODUCTION

Plaintiff's motion for summary judgment altogether fails to present any basis upon which this Court can enter judgment for it. While plaintiff contends that the California Department of Social Services (DSS) "has failed to make foster care maintenance payments that meet the Child Welfare Act's specific requirements" (Plaintiff's Motion for Summary Judgment, p. 1:17-18), the simple fact is that DSS's rate classification level system is fully compliant with federal law. Plaintiff's inability to show otherwise dooms its motion. Accordingly, judgment must be entered on behalf of defendants.

Curiously, plaintiff uses nearly six pages of text in its motion for summary judgment to rehash arguments it presented in its opposition to defendants' motion to dismiss for failure to state a claim of nearly a year ago. As this Court concluded in its order of October 26, 2006, the Child Welfare Act "confers an individual right on plaintiff's members for enforcement of foster care maintenance payments pursuant to section 675(4)(A)." (Order, entered October 27, 2006, at p. 8:4-5.)

Revisiting that day in Court is all well and good. However, securing the opportunity to bring a lawsuit by surviving a motion to dismiss is one matter; prevailing on a motion for summary judgment is quite another.

ARGUMENT

I.

CALIFORNIA'S RCL SYSTEM COMPLIES WITH THE CHILD WELFARE ACT

More than 17 years ago California's Legislature enacted Welfare and Institutions Code section 11462, a comprehensive and detailed statute that created the "rate classification level" (RCL) system for setting payment rates for foster care group homes. The statute charged DSS with the implementation and administration of the system, which established 14 different rate classification levels at which group home programs would be paid for the provision of care and services to foster children.[1/]

Under federal law, a state may receive reimbursement from the federal government for allowable foster care payments pursuant to Title IV-E of the Social Security Act, 42 U.S.C. sections 670-679b, the Child Welfare Act (CWA), for foster children who meet federal eligibility requirements. In order to receive federal monies a state must submit a detailed plan to the Secretary of the Department of Health and Human Services (DHHS) setting forth its system for implementing and administering the program, which is subject to review and approval by the Secretary. (42 U.S.C. § 671.)

The point that plaintiff's motion for summary judgment tries unsuccessfully to make is

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1. Details of the creation and history of the RCL system are set forth at pp. 3-6 of defendants' Cross Motion for Summary Judgment.

that the RCL system used by California fails to pass muster under the CWA. Not so. All state plans relating to the setting of rates for foster care group by DHHS at any time in which the RCL system has been in place have been approved, and plaintiff has not refuted and can not refute this fact.[2/] Accordingly, plaintiff's motion for summary judgment must be denied and that of the State must be granted.

II.

PLAINTIFF'S EFFORT TO SHOW THAT THE RCL SYSTEM FAILS TO COMPLY WITH THE CHILD WELFARE ACT LACKS SUPPORT.

A. California's Statute and Regulations are Consistent with Federal Law.

At the bottom of page 11 of its motion, plaintiff finally begins discussing the RCL with respect to federal law.[3/] Plaintiff cites one case, *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir.1997), for the proposition that a reviewing court should be concerned that state law and regulations are consistent with federal law. (Plaintiff's Motion, p. 12:2-3, citing *Id*. at 1496.) Contrary to plaintiff's view, that case actually illustrates the fact that the state law and regulations at issue here are consistent with federal law.

In *Orthopaedic*, the court found that the California Department of Health Services acted arbitrarily and capriciously, and contrary to law, in setting hospital outpatient reimbursement rates under Medicaid based on factors that did not consider hospitals' costs. However, that case was decided when the now-repealed Boren amendment was still in effect.[4/] Moreover, *Orthopaedic* held that a state agency's interpretation of federal statutes is not entitled

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2. An electronic copy of California' currently operative, 50-page Title IV-E plan can be found at http://www.childsworld.ca.gov/res/pdf/2002TitleIV-EStatePlan4_03.pdf. Plaintiff inaptly places an unsupported statement the "standardized schedule of rates used to make payments to group homes under California's RCL system is inadequate, fails to comply with the Child Welfare Act" within its "Statement of Undisputed Facts" (Plaintiff's Motion, p. 3:25-27). While the placement is amusing, the statement is not only unsupported, but, more importantly, simply wrong.

3. As the issue of plaintiff's right to bring this action was decided last year and is not germane to the issue now before this Court, defendants will not address that matter here.

4. The federal Balanced Budget Act of 1997 repealed the Boren Amendment, giving states far greater freedom in setting nursing home payment rates.

to the deference afforded a federal agency's interpretation of its own statutes. (103 F.3d at 1495.) This is not the situation before this Court. Here, the Secretary of DHHS, empowered to disapprove a state's IV-E plan, has never denied California's plan. Additionally, *Orthopaedic* held that the violation of Medi-Cal rates there was due to the California Department of Health Services' failure to set hospitals' costs based on reliable information when setting reimbursement rates. (*Id*. at 1499.) In the instant case there is no dispute that the statute that created the RCL system was itself based on thorough cost studies – in which group home program service providers participated and were instrumental (see Welf. and Inst. Code section 11462 (a)(1), and 11462 (c)) – putting to rest any suggestion that DSS did not take into account reliable information when creating the RCL system.

B. The CWA Does Not Require the Payment of Actual Costs.

Plaintiff also makes much ado about "actual" costs and the lack of reference in Welfare and Institutions Code section 11460 (b) to the CWA's reference to payments to "cover the cost of (and the cost of providing)" the required services to children when those children are in group homes. (Plaintiff's Motion, at p. 12:14-22, citing 42 U.S.C. § 675(4)(A).) This is a specious argument.

Despite plaintiff's statement to the contrary, there is no reference in federal or state law to "actual" costs. The CWA requires that reimbursement rates cover the allowable and reasonable costs, rather than the actual costs, of foster care maintenance. (*See* 42 U.S.C. § 675(4)(A).) (Only allowable costs can be reimbursed because foster care maintenance payments cover the cost of -- and the cost of providing -- generally described services, including "food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to and from the child's home for visitation." (42 U.S.C. § 675(4)(A).) In the case of institutional foster care providers, only reasonable costs can be reimbursed because the CWA limits the coverage of institutional foster care "to the reasonable costs of administration and operation of an institution to the extent that

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they are "necessarily required to provide" specific services. (*Id.*)[5/]

C. California's RCL Covers the Costs It Is Required to Cover Under the CWA.

To support its fundamental contention that the RCL is non-compliant with the CWA, plaintiff relies largely on a case from the district court in the Western District of Missouri, *Missouri Child Care Association v. Martin*, 241 F.Supp.1032 (WD Mo. 2003). In that case, the district court found that under the CWA the state was obligated to have a process for determining rates for foster care maintenance payments that took into account statutory criteria specifically mandated by the CWA, and that Missouri's failure to consider these statutory criteria, by instead basing its reimbursement rates solely on budgetary concerns, violated the CWA.

As the Missouri court noted: "At a minimum, the State is obligated to have a process for determining rates that takes into account the statutory criteria mandated by the CWA." (241 F.Supp. at 1045, citations omitted.) That is not akin to the situation here, where California's system did just what the CWA required by creating a complex rate classification level system based on detailed costs analyses done in concert with group home providers. (See Welf. & Inst. Code § 11462 (a)(1), and 11462 (c).) California's effort far exceeds this minimum.

Moreover, the Missouri court further noted that a state need only to be in "substantial compliance" with the CWA to meet its obligation (*Id.* at 1046, note 7), and that budget considerations may be taken into account in the creation of a reimbursement methodology (*Id.*). This comment is germane here, in recognition of the California statute's proviso that the statutory annual increases in funding for foster care maintenance payments is "subject to the availability of funds." (Welf. & Inst. Code § 11462 9g)(2).)

The final word of the Missouri court is noteworthy: "This Court is not holding that the [Missouri state] Defendants need a certain or particular methodology, just that the Defendants

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5. Office and Management Budget Circular A-87, which is used to define the term "reasonable" for purposes of "foster care maintenance payment" in the administration of the CWA, provides that costs are "reasonable" if they do not exceed those that would be incurred by a "prudent person." See http://www.whitehouse.gov/omb/circulars/a087/a87_2004.html at Attachment A, General Principles for Determining Allowable Costs, Section C ("Basic Guidelines"), Item 2, "Reasonable Costs."

need a methodology that considers the required factors." (241 F.Supp. at 1046.) California has such a methodology, and thus its RCL is more than in "substantial compliance" with the CWA.

D. Plaintiff's "Lack of Funds" Contention is Misplaced.

Finally, plaintiff cites *Blanco v. Anderson*, 39 F.3d 969 (9th Cir. 1994) for the proposition that "lack of funds" is no excuse for failing to provide required payments. (Plaintiff's Motion, p. 14:15-25.) Plaintiff's "*see*"citation to *Blanco* does not help its case.

In *Blanco*, plaintiffs sought injunctive relief from defendants -- state social welfare officials sued in their official capacities – alleging that defendants violated the federal Food Stamp Act, Aid to Families with Dependent Children, and federal Medicaid law because they had approved weekday closings of county welfare offices that administered those programs in several California counties. (39 F.3d at 970.) The real point of *Blanco* differs from "lack of funds" argument that plaintiff tries to mount. (Plaintiff's Motion, p. 14:24-25),

In *Blanco*, plaintiffs contended that the federal laws at issue required that the county welfare offices be open on certain days or hours, a demand the Court addressed by commenting that "plaintiffs ask for too much." (*Id*., 39 F.3d at 971.) The Court noted that "we can find nothing in federal law imposing a federal obligation as to the hours the county welfare offices must stay open to the public." (*Id.*) As the Ninth Circuit explained, the implementing regulations at issue were clear: "'State agencies shall be responsible for determining the hours that food stamp offices shall be open.' [citation]" (*Id*.) After further discussion of the analogous AFDC and Medicaid regulations, the Court stated: "We find nothing in the statute or the regulations requiring county welfare offices be open on certain days or hours." (*Id*.) The unstated but unmistakable message of the Court was, of course, that where the State is given responsibility to implement a directive, the State is afforded the discretion to implement it without the micro management of the federal government.[6/]

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6. In *Blanco*, the Ninth Circuit also noted that the State's role in implementation these statutes and regulations required that it exercise its duty in supervising county welfare offices so that the purposes of the statutes would not be frustrated (39 F.3d at 971-972), and remanded the matter to the district court and the parties "to fashion a decree consistent with its opinion" to that effect. (*Id.* at 973.) However, this did not change the character of the Court's ruling as to the (cont.)

If the federal government wished to direct the state to provide foster care group home providers with the actual costs for operating their programs, it could choose to do so by specific directives in the CWA to that effort, or by disapproving the California RCL system that has been in place, *without federal disapproval*, for more than 17 years. The federal government has taken neither step. Plaintiff may be unhappy with the level of payments its members receive from the State of California, but they are not entitled to a judgment from this Court by a change in the statutory scheme now in place, or otherwise. For this reason, too, plaintiff's motion should be denied.

III.

GIVEN PLAINTIFF'S INABILITY TO MAKE A FACTUAL SHOWING THAT THE RCL SYSTEM FAILS TO COMPLY WITH THE CHILD WELFARE ACT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT MUST BE GRANTED.

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Once the moving party discharges this initial burden, the nonmoving party may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 248.

As demonstrated above, plaintiff has failed to make the showing required of it to win a grant of summary judgment on its behalf. Its motion must thus be denied.

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State's discretion to implement the law, as opposed to being directed *how* to implement the law.

CONCLUSION

In this case there is no valid basis to plaintiff's contention that the RCL violates the Child Welfare Act. For the reasons set forth above -- and contrary to plaintiff's contention -- the RCL system does not violate the Child Welfare Act or any of its regulations or other provisions. Thus, plaintiff's motion for summary judgment should be denied, defendants' cross motion for summary judgment in their favor and against plaintiff should be granted, and this action should be dismissed.

Dated: September 4, 2007

Respectfully submitted,

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