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CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES,

Plaintiff,

v.

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,

Defendants.

No. C 06-4095 MHP

PLAINTIFF CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES'S MOTION FOR SUMMARY JUDGMENT

Date: August 27, 2007
Time: 2:00 p.m.
Place: Ctrm. 15, 18th Floor
Judge: The Hon. Marilyn H. Patel

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT on August 27, 2007 at 2:00 p.m. or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Marilyn H. Patel, located at Courtroom 15 of the United States District Court, Northern District of California, 450 Golden Gate Ave., San Francisco, CA 94102, plaintiff California Alliance of Child and Family Services (the "Alliance") will, and hereby does, move this Court for an Order that the State of California's Rate Classification Level system violates the federal Child Welfare Act, on the grounds that there are no genuine issues of material fact in dispute, and, therefore, the Alliance is entitled to judgment as a matter of law.

This motion is made on the ground that there is no triable issue of material fact. This motion is based on this Notice of Motion and Motion, the accompanying Points and Authorities, the Parties' Joint Statement of Undisputed Facts, and all other papers filed in this action and oral testimony or other information introduced at the hearing on this motion.

DATED: July 16, 2007 Bingham McCutchen LLP

By: /s/
William F. Abrams
Attorneys for Plaintiff
CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES

Pursuant to General Order No. 45, Section X, I attest that concurrence in the filing of this document has been obtained from Mr. Abrams.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action was filed by the California Alliance of Child and Family Services (the "Alliance") to obtain declaratory and injunctive relief to enforce the foster care maintenance payments required under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670 – 679b (the "Child Welfare Act"). The Alliance is a non-profit association of approximately 130 private, non-profit agencies that provide adoption, foster care, group home, mental health treatment, family preservation and support, wrap-around, educational, and other services. Approximately 100 of these agencies operate one or more group home programs, with a total licensed capacity for approximately 5,000 children and youth.

The Alliance brought this action because defendants the California Department of Social Services and its Division of Children and Family Services (collectively referred to as the "DSS" or "the State") have violated and continue to violate the Child Welfare Act and enabling regulations that require states receiving federal aid to make foster care maintenance payments to child care institutions that, *inter alia*, provide foster care for a child when a court has determined that it is necessary under applicable law that the child be removed from his or her home and placed in out-of-home care. The DSS has failed to make foster care maintenance payments that meet the Child Welfare Act's specific requirements.

This case is brought on behalf of non-profit charitable organizations that care for children who have been removed from their homes and for whom the State of California has failed to provide adequate funding as required by the federal Child Welfare Act. This action seeks to prevent further violation of law by the State of California and obtain proper payment to the non-profit organizations sufficient to provide these children the appropriate care and shelter to which they are entitled and which the Child Welfare Act requires. Without the State's compliance, the non-profit agencies will be forced to choose between providing inadequate care or eliminating services and eventually ceasing operations, to the great detriment of the affected children. The Alliance brings this action as authorized by its members, who are injured by the DSS's unlawful non-compliance with the Child Welfare Act.

Congress intended to confer a federal right on foster care institutions and group homes in enacting the Child Welfare Act. The Child Welfare Act clearly declares that payments on behalf of eligible children must be paid to child-care institutions, including group homes, such as the group homes which comprise the members of the Alliance. By specifically conferring monetary entitlements on group homes so that they would have adequate financial resources to provide appropriate care and supervision to eligible foster children, Congress intended to benefit group homes. There is no practical way for Congress to ensure that eligible foster children, placed in group homes and other types of child care institutions by child welfare agencies, receive the care and supervision which they need and to which they are entitled without also ensuring that States provide such child care institutions with adequate financial support in the form of foster care maintenance payments which cover the costs of care and supervision. The Child Welfare Act clearly defines what foster care maintenance costs should be paid to group homes. The language of the Child Welfare Act is mandatory — it requires that these payments *shall* be made to group homes.

The State's Rate Classification Level[1] ("RCL") system, however, fails to meet this requirement. Because the crux of this case involves the interpretation of a state and a federal law, both of which are undisputed facts, there is no triable issue of material fact, and summary judgment is appropriate. Accordingly, the Alliance moves this Court for an Order that declares the RCL system is not in compliance with the Child Welfare Act and that the Alliance is entitled to declaratory and injunctive relief as a matter of law.

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[1] The RCL system has two major components: the RCL classification methodology and the standardized schedule of rates. The RCL classification methodology uses a point system to classify all group home programs into one of 14 levels based on the number of "paid-awake" hours worked by their child care and social work staff, weighted to take into consideration the training, education, and experience of the child care staff and the professional qualifications of the social work staff. The RCL point system also gives limited consideration to the amount of mental health treatment services received by the children placed in each group home program. All group homes in the same Rate Classification Level are paid the same rate using a standardized schedule of rates. The only exceptions are two group home programs with "grandfathered" rates above the standard rate for their RCL which were established prior to the implementation of the RCL system in 1990. *See* California Welfare and Institutions Code §§ 11462(h)(1); *see also* JSUF ¶¶ 10-11.

II. STATEMENT OF ISSUES TO BE DECIDED

1. When a state statute deprives a plaintiff of a federal right, that plaintiff is entitled to relief pursuant to 42 U.S.C. §1983.

2. The Child Welfare Act has conferred a federal right on the Alliance's members.

3. As a matter of law, the state of California's Rate Classification Level system is in violation of the Child Welfare Act.

III. STATEMENT OF UNDISPUTED FACTS

The Alliance has brought this action for declaratory and injunctive relief as a representative action on behalf of its members, who provide foster care to California's children in various group homes. Approximately 5,000 of California's children and youth are cared for in these homes. Complaint for Declaratory and Injunctive Relief ("Complaint"), ¶ 1.b. Congress enacted the Child Welfare Act in 1980 to address the need for providing funds to take care of children who are dependants or wards of the state. Joint Statement of Undisputed Facts ("JSUF"), ¶ 1. The Child Welfare Act establishes a cooperative federal-state program that assists states in meeting the costs of providing foster care to these children. Under this program, federal and state governments share the cost of providing funds for licensed third parties that care for these children (such as the group homes that the Alliance is representing). JSUF, ¶ 2. To become eligible to receive federal funding, a state must agree to administer its foster care program pursuant to the Child Welfare Act and provide "foster care maintenance payments" on behalf of eligible children to group homes. JSUF, ¶¶ 4-7; 42 U.S.C. §§ 671(a)-(b), 675(4).

The State of California has received and continues to receive federal funding intended to cover a portion of the foster care maintenance payments. JSUF, ¶ 9. The State has developed the RCL system to determine how much to pay group homes. The RCL system classifies group homes based on the qualifications of the staff and the number of hours worked per child. Cal. Wel. & Inst. Code §§ 11229, 11460(a), 11462; *see also* JSUF, ¶ 11. 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, and is the subject of the case.

The standardized schedule of rates used to make payments to group homes under

California's RCL system does not consider the current actual foster care maintenance costs required by the Child Welfare Act. In addition, under the RCL system, the amount paid to foster care institutions may be adjusted from year to year, pursuant to the California Necessities Index ("CNI"), but is "subject to the availability of funds" — not based on the percentage by which costs have actually increased. Cal. Wel. & Inst. Code § 11462(g)(2); JSUF, ¶ 13. Thus, not only does the RCL system undercut the amount of funding that the Child Welfare Act requires the State to pay to group homes, but this substandard amount may not be (and in the past, has not been) regularly increased in accordance with inflation and the cost of living. Indeed, from State fiscal year 1990-91 to 2006-07, the CNI has increased by over 59%, whereas the rates which comprise the RCL standardized schedule of rates have increased by an average of less than 27%. JSUF, ¶¶ 13-16.

The Alliance has brought this action because the ability of its members to continue to provide for approximately 5,000 dependent children is seriously jeopardized due to the State's noncompliance with the Child Welfare Act. The members of the Alliance, and more importantly the children placed under the supervision of the members, are seriously and adversely impacted by the lack of adequate funding. This case is not about technical compliance with bureaucratic regulations, but about real, practical issues that imperil foster care services to the children of this State who are in dire need.

IV. ARGUMENT

A. Legal Standard For Summary Judgment.

"Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment under the legal principles that govern the case at issue." *Moreland v. Las Vegas Metro. Police Dept.*, 159 F.3d 365, 369 (9th Cir. 1998); *see also* Fed. R. Civ. P. 56(c) (summary judgment is proper when the pleadings, discovery and affidavits 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."). An issue is "material" only if the disputed fact may "affect the outcome of the suit under the governing law...." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L. Ed. 2d 202, 211 (1986).

The issue before this Court in this Motion is whether a state statute violates a federal statute: specifically, whether the amounts of the foster care maintenance payments now being paid by California's RCL system violate the Child Welfare Act. This is purely a legal issue that is ripe for judgment--there are no facts in dispute as the statutes speak for themselves.

B. When A State Statute Does Not Comply With A Federal Right, The State Statute Must Fail As A Matter of Law.

The Ninth Circuit is clear that when a plaintiff brings a claim regarding a state law or regulation, the Court is concerned with "whether the state law and regulations are consistent with federal law. Neither the district court nor [the Ninth Circuit] defer to the state to answer that question." *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491, 1495-96, 1500 (9th Cir. 1997) (holding that California's Department of Health's arbitrary and capricious Medicaid reimbursement rates were "contrary to law").[2]

The Supreme Court has rejected arguments by states that state statutes that set rates that are unreasonable and inadequate under the corresponding federal statutes are valid. In fact, the Court has deemed that such state enacted statutes would render the federal statute "entirely meaningless" and "a dead letter." For example, in *Wilder v. Virginia Hospital Ass'n*, the Court affirmed the denial of Virginia's motion for summary judgment and held that an amendment to the Medicaid Act created a federal right to have states adopt "reasonable and adequate rates to meet the costs of an efficient and economical health care provider." 496 U.S. 498, 513-14; 110 S.Ct. 2510, 2519-20; 110 L.Ed.2d 455, 470 (1990). *See also Rosado v. Wyman*, 397 U.S. 397, 421; 90 S.Ct. 1207, 1222; 25 L.Ed.2d 442, 460 (1970) (holding that welfare recipients were entitled to declaratory and injunctive relief under New York statute that did not comply with federal statute, stating that "federal funds are being allocated and paid in a manner contrary to that intended by Congress").

Similarly, courts have held that the Child Welfare Act requires that "a State must

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[2] The Ninth Circuit also held that "a state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes." *Id.*

consider certain factors and implies that a methodology that does not consider these factors is invalid." *Missouri Child Care Ass'n v. Martin, et al.*, 241 F.Supp.2d 1032, 1043, 1046 (W.D. Missouri 2003) (holding that "the Defendants need a methodology that considers the required factors"). The *Missouri Child Care Association* court set out the factors that must be taken into account in a state statute under the Child Welfare Act: "1) the cost of certain items, 2) the cost of providing certain items, and 3) the reasonable costs of administration for institutional providers." *Id.* at 1044.

As shown below, the Child Welfare Act does confer a federal right under 42 U.S.C. § 1983. Because the RCL system conflicts with the Child Welfare Act, the RCL system deprives the Alliance's members of their federal rights. As such, as a matter of law, the State statute that effectuates the RCL system should be held invalid under the Child Welfare Act and the Alliance should be granted declaratory and injunctive relief. The Alliance requests that this Court enter a declaratory judgment that the standard rates currently paid under the RCL system violate federal law, and that this Court grant interim injunctive relief whereby the standard rates paid under the RCL system are increased so that they comply with the cumulative increases in CNI since 1990-91 to the present, and any CNI increases during future years during which the State has not yet implemented a system which complies with federal law. In the meantime, the Alliance respectfully asks that this Court set a status conference to discuss further proceedings on developing and implementing a State system that complies with federal law and that this Court retain jurisdiction over this matter until the State has developed and implemented such a system.

C. The Child Welfare Act Confers A Federal Right Under 42 U.S.C. §1983.

The Alliance has already established that it is entitled to relief under Section 1983. This Court previously held that the Child Welfare Act "confers an individual right on [the Alliance's] members for enforcement of the foster care maintenance payments." Memorandum and Order dated Oct. 26, 2006, 8: 4-5.

A plaintiff seeking Section 1983 redress must assert the violation of a federal right. The courts look to three factors, often referred to as the "Blessing factors," in deciding whether a

statute confers a right: "[1] Congress must have intended that the provision in question benefit the plaintiff; [2]the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain juridical resources, and [3] the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Missouri Child Care Association v. Martin et. al.*, 241 F.Supp.2d at 1039-40 (quotations and citations omitted) . Each of these prongs is met here as shown below.

1. Congress Intended For The Payments Under The Child Welfare Act to Benefit Foster Care Institutions.

The Child Welfare Act requires that states provide "foster care maintenance payments" on behalf of eligible children to child-care institutions, including group homes. 42 U.S.C. §§ 671(a)(2), 672(b)(2), 675(4); 45 C.F.R. § 1356.21(a) (2001). The term "foster care maintenance payments" is defined as payments that cover "the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation,... [and] the reasonable cost of administration and operation of the [foster care] institution as are necessarily required to provide the items described in the preceding sentence." 42 U.S.C. § 675(4)(A).

Furthermore, the statute clearly includes foster care institutions: "Foster care maintenance payments may be made under this part only on behalf of a child... who is... (2) in a child-care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term 'foster care maintenance payments.'" 42 U.S.C. § 672(b). The payments available under the Child Welfare Act are thus plainly intended for organizations such as the members of the Alliance; if not intended for such caregiving agencies, to whom would the payments go and how would foster children receive the care and supervision they require?

Indeed, the *Missouri Child Care Association v. Martin et. al.* court agreed that "the Child Welfare Act's reimbursement provisions are in fact intended to benefit foster care institutions." 241 F.Supp.2d at 1040. The court held that "[t]he Child Welfare Act... explicitly confers

monetary entitlements on the foster care institutional providers and evidences Congress' intent to permit those foster care institutions to enforce their rights in federal court using §1983." Id. at 1041. The court recognized that:

> while the ultimate beneficiaries of the Child Welfare Act are foster children, Congress mandated that foster care providers should recover their costs, thereby creating a... right of enforcement... Furthermore, in... the Child Welfare Act..., the reference to costs focuses on the institutions and not the children. Congress must have recognized that if costs were not covered, reputable foster care service would eventually not be available. Congress would also have been aware that as a general proposition foster care institutions, not foster children, would be in a better position to enforce those rights, thereby ensuring the continued implementation of congressional intent.

Id.

While children are indeed beneficiaries of the Section 1983 right in this case, the Child Welfare Act identifies and entitles the caretakers of the foster children to the foster care maintenance payments. Every member of the Alliance that operates a foster care group home is the kind of caretaker that is entitled to bring a Section 1983 action to enforce the Child Welfare Act. Furthermore, "Congress would...have been aware that as a general proposition foster care institutions, not foster children, would be in a better position to enforce those rights..." *Missouri Child Care Ass'n v. Martin et. al.*, 241 F.Supp.2d at 1041. *See also Ad Hoc Committee of Concerned Schoolteachers v. Greenburgh # 11 Union Free School District*, 873 F.2d 25, 27 (2nd Cir. 1989) (the court held that a group of teachers had standing to bring a claim on behalf of school children to "vindicate the Children's constitutional right to a school environment free from the effects of racially discriminatory practices...") Thus, on behalf of its members, the Alliance not only has standing to bring the current complaint, but furthermore, is in a better position than the foster children themselves to bring the instant complaint.[3]

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[3] In the past, the State has argued that the children (or their parents) are the exclusive holders of the right to bring a Section 1983 claim; however, this argument is untenable and has previously been disposed of by the Court. Order and Memorandum dated October 26, 2006, Denying

(Footnote Continued on Next Page.)

The Alliance's standing as a beneficiary to seek redress under Section 1983 is similar to that of the plaintiff in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990). *See also Missouri Child Care Ass'n. v. Cross*, 294 F.3d 1034, 1040-41 (8th Cir. 2002) (the court refers to *Wilder* in making its decision: "The Child Welfare Act, like the Medicaid statute in *Wilder*, explicitly confers monetary entitlements on the foster care institutional providers and evidences Congress' intent to permit those foster care institutions to enforce their rights in federal court using § 1983."). The statute at issue in *Wilder* required the state to

> provide... for payment... of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded... through the use of rates... which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws...

Id. at 502-503. The providers claimed that the federally-approved state plan included a rate formula that failed to include factors related to the cost of providing care as required by the statute. *Id.* at 510. The Supreme Court allowed a Section 1983 suit by health care providers to enforce this reimbursement provision. The Court held that "Congress left no doubt of its intent for private enforcement... because the provision required States to pay an 'objective' monetary entitlement to individual health care providers...." *Id.* at 522-23.

Similarly, the Child Welfare Act also requires states to pay foster care providers to cover the costs of specified items. Just as the *Wilder* statute created a monetary entitlement for individual health care providers, so too does the Child Welfare Act create a monetary entitlement for the foster care providers. While the ultimate beneficiaries of the statute at issue in *Wilder* were the indigents who received medical services, the Supreme Court held that the hospitals had

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(Footnote Continued from Previous Page.)

Motion to Dismiss (Doc 24). The children are by definition minors and not competent to bring a legal action and, more importantly, are unable to bring an action as a practical matter. Unless a group such as the Alliance seeks legal redress, the children whom the State had asserted are the intended beneficiaries of the Act would be unable to enforce their rights under the Act.

a right to be paid according to the terms of the statute, and that the hospitals could use Section 1983 as a mechanism to enforce that right. *Id.* at 430 ("There can be little doubt that health care providers are the intended beneficiaries of the [statute]... The provision establishes a system for reimbursement of providers and is phrased in terms of benefiting... providers"). Just as the plaintiffs in *Wilder*, the Alliance should be able to use Section 1983 to enforce its right to payments under the Child Welfare Act.

2. The Rights That The Alliance Is Seeking To Enforce Under The Child Welfare Act Are Not Vague Or Amorphous.

The second factor that courts look to in deciding whether a statute gives rise to an enforceable claim under Section 1983 and thus confers a federal right is if "the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing v. Freestone*, 520 U.S. 329, 340-341; 117 S. Ct. 1353, 1359-1360; 137 L. Ed. 2d 569, 581-582 (1997) ; *see also Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431; 107 S.Ct. 766, 774; 93 L.Ed.2d 781, 793 (1987) (holding that statute's provision for a "reasonable" allowance for utilities is not too vague and amorphous to confer on tenants an enforceable "right" within the meaning of Section 1983).

The Alliance seeks to require that the State implement a plan that allows the Alliance's members to recover the costs to which they are entitled under the Child Welfare Act, namely, "the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation,... [and] the reasonable cost of administration and operation of the [foster care] institution as are necessarily required to provide the items described in the preceding sentence." 42 U.S.C. § 675(4)(A). The statute is clear; Congress specified its intent by listing the specific items for which the members of the Alliance should be paid. It is clear which items are covered and which are not. Indeed, courts have found that much less definite language can qualify a statute as worthy of a private right of action. *See Wilder, supra*, 496 U.S. 498 (holding that a statute using the term "reasonable access" without defining the term, was sufficiently defined to permit judicial enforcement under Section 1983); *see also ASW v. Oregon, et al.*, , 424

F.3d 970, 976 (9th Cir. 2005) (holding that individualized payment determinations taking into account the adoptive parents' resources and the adopted child's special needs is a "concrete and objective right, the enforcement of which does not strain judicial competence").

Under the Child Welfare Act, the factors that should be used in determining the amount that should be paid are clear. "The payments must cover (1) the cost of certain items, (2) the cost of providing certain items, and (3) the reasonable costs of administration for institutional providers... the list of factors... are sufficiently detailed to put the State on notice and to permit a court to review whether the State has based its reimbursement on those statutory criteria." *Missouri Child Care Ass'n v. Martin et. al., supra*, 241 F.Supp.2d at 1044. The factors listed under the Child Welfare Act are even more detailed here than that upheld as "a concrete and objective right" in *ASW*. 424 F.3d at 976 (holding that individualized payment determinations taking into account the adoptive parents' resources and the adopted child's special needs is a "concrete and objective right, the enforcement of which does not strain judicial competence").

3. The Rights Are Mandatory.

Lastly, the rights under the Child Welfare Act are mandatory. The language of the statute clearly states that "[i]n order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which provides for foster care maintenance payments." 42 U.S.C. § 671(a)(1). Thus, the foster care maintenance payments are mandatory. Furthermore, the definition of what is included in "foster care payments" is so specific and detailed, that there is no ambiguity regarding what payments must be made.

Because the Child Welfare Act meets the *Blessing* factors, it confers a federal right.

D. The Rate Classification Level System Established By California Statute Does Not Comply With The Federal Child Welfare Act.

1. The Child Welfare Act Requires Specific Payments To Foster Care Providers.

As noted above, Alliance's motion for summary judgment should be granted upon a showing that defendants have deprived the Alliance's members of their right to the establishment of rates pursuant to the Child Welfare Act. Thus, the relevant standard against which

defendants' actions or omissions should be measured are the requirements in the federal Act. *Orthopaedic Hospital*, 103 F.3d at 1496 ("What concerns us is whether the state law and regulations are consistent with federal law"). The Child Welfare Act requires that "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative... into foster care...." 42 U.S.C. § 672(a)(1). As shown above, foster care maintenance payments are defined as "*payments to cover the cost of (and the cost of providing)* food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation." 42 U.S.C. 675(4)(A) (emphasis added). Thus, the relevant inquiry is whether group homes in California are receiving payments that cover the cost of (and the cost of providing) the services they provide to foster children as required by the Child Welfare Act.

2. The California Statute Superficially Seems To Comply With The Child Welfare Act, But That Is Not The Case.

California Welfare and Institutions Code section 11460(a) states that "[f]oster care providers shall be paid a per child per month rate in return for the care and supervision of the AFDC-FC child placed with them." Further, "care and supervision" is defined as "food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation." Cal. Wel. & Inst. Code § 11460(b). While this is largely the same definition for "foster care maintenance payments" found in Title IV-E, it does not include the "cover the cost of (and the cost of providing)" language found in the federal law. *See above*, 42 U.S.C. 675(4)(A).

Instead, the rates paid to group homes are determined by California Welfare and Institutions Code section 11462. The rates paid to group homes are supposed to be based on the level of care and services provided by the group homes. *See, e.g.*, Cal. Wel. & Inst. Code § 11462(e) ("the department shall determine the [rate classification level ("RCL")] for each group home program on a prospective basis, according to the level of care and services that the group home operator projects will be provided during the period of time for which the rate is being

established"). Language regarding actual costs incurred by group homes was included in the initial rates for each RCL. *See* Cal. Wel. & Inst. Code § 11462(c) ("The rates effective July 1, 1990, were developed using 1985 calendar year costs and *reflect adjustments* to the costs for each fiscal year, starting with the 1986-87 fiscal year, *by the amount of the California Necessities Index*") (emphasis added). In addition, the statute contemplates a method of accounting for increases in costs through the use of the California Necessities Index ("CNI"). Cal. Wel. & Inst. Code § 11462(g)(2) ("Beginning with the 2000-01 fiscal year, the standardized schedule of rates *shall be adjusted annually by an amount equal to the CNI* computed pursuant to Section 11453, subject to the availability of funds") (emphasis added). Unfortunately, the State has failed to comply with this requirement, resulting in this litigation.

3. The State Fails To Comply With Federal Law By Refusing To Cover The Costs Required Under The Child Welfare Act.

Despite the explicit requirements of the Child Welfare Act noted above, which require payments of the cost and the cost of providing specific items for foster care children, the State's method of providing foster care payments to foster care institutions and group homes in California misses the mark.

a. Under the current Rate Classification Level system, the payment rates are outdated and increases in rates have been capricious and arbitrary, totaling less than half of the increase in actual costs.

While the State's initial adoption of the RCL system contemplated and provided requirements for annual adjustments based on a clear and reasonable standard (the CNI), the State has not followed these yearly increases. After the initial setting of rates for the 1990-1991 fiscal year, California law, amended year after year, has established payment rates based on outdated costs and has given increases in an arbitrary and capricious manner that, in total, are less than half the increase in CNI over the past several years. The bottom line is that the State's current schedule of rates under the RCL system do not comply with federal law.

There is no dispute that the standardized schedule of foster care rates provided by the State were increased on average approximately 27 percent from the 1990-91 fiscal year to the

2006-07 fiscal year. JSUF, ¶ 13. It is also undisputed that the CNI, which is a weighted average of increases in various necessary costs of living for low-income consumers, increased by over 59 percent from the 1990-1991 fiscal year to the 2006-07 fiscal year. JSUF, ¶ 16. Thus, while food, clothing, fuel, utilities, rent, and transportation (Cal. Wel. & Inst. Code § 11453) costs in California have increased by 59 percent during the last 16 years, the standardized schedule of rates paid by the State to group homes were increased by less than 27 percent during the same period. JSUF, ¶¶ 13-19.

Simply put, the increase in costs incurred by group homes from providing services to foster children in California have not been met with a corresponding increase in payments for those services. As a result, the State's payments to group homes violate federal law as the payments do not cover "the cost of (and the cost of providing)" the services the group homes provide to foster children as required by the Child Welfare Act. *See Missouri Child Care Assoc.*, 241 F. Supp. 2d at 1045 ("At a minimum, the State is obligated to have a process for determining rates that takes into account the statutory criteria mandated by the [Child Welfare Act]").

While the State has attempted to blame budgetary constraints for the lack of increases, that is not a valid basis for violating the Child Welfare Act. The State cannot excuse its noncompliance with federal law by claiming a lack of funds. *See, e.g.*, Cal. Wel. & Inst. Code § 11462(g)(2) (increases in payment rates will be made annually subject to the availability of funds). As an initial matter, there is no "lack of funds" exception to the Child Welfare Act's requirement that states make foster care maintenance payments. To receive the federal government's matching funds, defendants must comply with the Child Welfare Act. *See, e.g., Orthopaedic Hospital*, 103 F.3d at 1493 ("To receive matching federal financial participation for such services, states must agree to comply with the applicable federal Medicaid law"). Further, the Ninth Circuit has held that "lack of funds" is no excuse for failing to provide required payments. *See Blanco v. Anderson*, 39 F.3d 969, 973 (9th Cir. 1994) ("Lack of resources and lack of bad faith on the part of the agency officials [are] no excuse for failing to provide the plaintiffs their statutory entitlements") (quotation and citation omitted); *see also Missouri Child Care Association*, 241 F. Supp. 2d at 1046 (Missouri was not in substantial compliance with

Child Welfare Act by failing to consider the relevant statutory factors).

E. The Alliance Should Receive Injunctive And Declaratory Relief For Defendants' Failure To Comply With The Child Welfare Act.

The standardized schedule of rates being used to make payments to group homes under California's RCL system does not take into account the current actual foster care maintenance costs required by the Child Welfare Act. As such, the state law violates federal law. Given this non-compliance, this Court has jurisdiction to enter declaratory and injunctive relief, as well as requiring the State to comply with federal law. *See Ekloff v. Rodgers*, 443 F. Supp. 2d 1173 (D. Ariz. 2006) ("The permanent injunction enjoins the State, its administering agencies and those parties that contract with administering agencies to provide necessary medical services" in accord with federal Medicaid law); *Ball v. Biedess*, 2004 WL 2566262 (D. Ariz.) (court issues numerous specific orders covering a broad range of issues enjoining defendants to comply with federal Medicaid law); *Missouri Child Care Association*, 241 F. Supp. 2d at 1046-47 (declaratory and injunctive relief granted).

For the Alliance's members to provide the proper amount of care to the foster children with whom the State has entrusted them, the Alliance asks that this Court enter a declaratory judgment holding that the State's current RCL standard rates do not comply with the Child Welfare Act. Furthermore, the Alliance asks that this Court grant interim injunctive relief whereby the standard rates being paid to foster homes is immediately adjusted so that the standard rates paid under the RCL system are increased so that they comply with the cumulative increases in CNI since 1990-91 to the present, and any CNI increases during future years during which the State has not yet implemented a system which complies with federal law. The Alliance also asks that this Court set a status conference to discuss further proceedings on development and implementation of a State system in compliance with the Child Welfare Act, with the Court retaining jurisdiction over this matter until such a system has been drafted and implemented.

V. CONCLUSION

The Alliance's members provide care to abused and neglected children whom the State

has entrusted to these group homes. While food, clothing, fuel, utilities, rent and transportation costs in California have increased by 59 percent over the last 16 years, the standardized schedules of rates for group homes in California have increased less than 27 percent. Since 1990-91, the Alliance's members have cared for California's foster children without receiving the money to which federal law entitles them. While the State has given arbitrary increases in the standardized schedule of rates during this time period, the increases have not been consistent and have not caught up with the true, real increases in costs.

This has to stop. California cannot continue to ignore the Child Welfare Act and the children it is supposed to protect. The Alliance asks that this Court:

(1) enter declaratory judgment finding that the State's current RCL standard rates do not comply with the Child Welfare Act;

(2) grant interim injunctive relief whereby the standard rates being paid to foster care group homes are immediately adjusted so that the rates take into account the CNI-adjustments from fiscal year 1990-91 to the present; and,

(3) set a status conference to discuss further proceedings on development and implementation of a State system in compliance with the Child Welfare Act, with the Court retaining jurisdiction over this matter until such a system has been drafted and implemented.

DATED: July 16, 2007

Bingham McCutchen LLP

By: /s/
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CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES

Pursuant to General Order No. 45, Section X, I attest that concurrence in the filing of this document has been obtained from Mr. Abrams.