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CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES

UNITED STATES DISTRICT COURT

FOR THE 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.	Case No. C 06-4095 MHP **OPPOSITION TO MOTION TO DISMISS** Date: October 2, 2006 Time: 2:00 p.m. Place: Ctrm. 15, 18th Floor Judge: The Hon. Marilyn H. Patel

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I. INTRODUCTION

This action was filed by the California Alliance of Child and Family Services (the "Alliance") to obtain foster care maintenance payments by defendants the California Department of Social Services and its Division of Children and Family Services (collectively referred to as the "DSS" or "the State") as required by the Child Welfare Act. 42 U.S.C. §§ 670 – 679b.

The Child Welfare Act and related federal regulations require states receiving federal aid to make foster care maintenance payments to institutions that provide foster care and transitional independent living programs 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 satisfy the Child Welfare Act's 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. 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 is a non-profit association of approximately 150 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 130 of these agencies operate one or more group home programs, with a total licensed capacity for approximately 5,700 children and youth. The Alliance brings this action as authorized by its members, who are affected by the DSS's unlawful non-compliance with the Child Welfare Act as alleged in the complaint.

The State's motion to dismiss asserts that there is no private right of action under 42 U.S.C. § 1983 for group homes to enforce the payment provisions of the Child Welfare Act. The

authorities cited by the State, however, are inapposite, and the Alliance has a right to seek Section 1983 redress to enforce the provisions of the Child Welfare Act. A private right of action under Section 1983 requires that three prongs be met:

1. Congress must have intended that the provision in question benefit the plaintiff;
2. the right protected by the statute is not vague or amorphous; and,
3. the provision must be couched in mandatory terms.

The Child Welfare Act meets all three of the above requirements:

1. Congress intended for the payments required under the Child Welfare Act to benefit foster care institutions and group homes — 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 Alliance. By specifically conferring monetary entitlements on group homes, Congress intended to benefit group homes.
2. The payments required under the Child Welfare Act are not vague. The Child Welfare Act clearly defines what foster maintenance costs should be paid to group homes.
3. The language of the Child Welfare Act is mandatory — it states that these payments shall be made. Furthermore, given that the definition of what items are included in foster care maintenance costs is so detailed, there is no ambiguity regarding what payments should be made.

In addition to the above three factors, the Child Welfare Act includes "rights-creating" language. It is focused on the children and the foster care institutions that take care of those children. In addition, the clarity with which Congress drafted the Child Welfare Act and the mandatory language Congress used puts both the states and the group homes on notice regarding what payments the Child Welfare Act guarantees.

In a recent similar case, the United States District Court for the District of Missouri held that foster care institutions and group homes may enforce their rights to foster care maintenance payments provided by the Child Welfare Act under 42 U.S.C. § 1983 because the Act met these

criteria. *Missouri Child Care Ass'n v. Martin et. al.*, 241 F.Supp.2d 1032 (W.D. Mo. 2003). The same findings apply here to permit this case to move forward.

The Child Welfare Act provides that certain foster care maintenance payments will be paid to group homes; however, the state's Rate Classification Level ("RCL") method has reneged and continues to renege on this promise. As a result, the Alliance has brought this action on behalf of its members, seeking declaratory and injunctive relief.

II. STATEMENT OF ISSUES

1. Whether there is a private right of action for violations of the Child Welfare Act under 42 U.S.C. Section 1983.
2. Whether the Alliance may seek Section 1983 relief for violations of the Child Welfare Act.

III. STATEMENT OF 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 5,700 of California's children and youth are cared for in these homes. Complaint for Declaratory and Injunctive Relief ("Complaint"), ¶ 1.b.[1] 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. *Id.*, ¶ 9. 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, the federal and state government 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). *Id.*, ¶ 10. To become eligible to receive federal funding, the 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. *Id.* at

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[1] In reviewing a Rule 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

¶ 12; 42 U.S.C. §§ 671(a)-(b), 675(4).

The State has received and continues to receive federal funding intended to cover a portion of the foster care maintenance payments. Complaint, ¶ 17. The State has developed a RCL methodology that determines how much to pay group homes. The RCL is based on the qualification of the staff and the number of hours worked per child. Cal. Wel. & Inst. Code §§ 11229, 11460(a), 11462; *see also* Complaint, ¶¶ 4 and 17. The RCL system is inadequate, fails to comply with the Child Welfare Act, and is the subject of the case.

The RCL method does not take into account the actual foster care maintenance costs required by the Child Welfare Act. In addition, under the RCL model, the amount paid to foster care institutions may be adjusted from year to year, pursuant to the California Necessities Index ("CNI"), "*subject to the availability of funds*" — not based on the rate at which costs have actually increased. Cal. Wel. & Inst. Code § 11462(g)(2) ; *see also* Complaint, ¶ 19 and n.2. Thus, not only does the RCL method 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.

The Alliance brings this action because the ability of its members to continue to provide for nearly 6,000 dependent children is seriously jeopardized due to the State's noncompliance with the Child Welfare Act. Complaint, ¶1.b. The members of the Alliance are seriously impacted by the lack of adequate funding, and evidence in the case will show that some former members have had to cease operations, while the remaining members are significantly reducing services. Complaint, ¶ 21. 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. The Child Welfare Act Was Enacted By Congress To Provide Funding To Foster Care Institutions And Group Homes For The Care Of Foster Care Children.

The Child Welfare Act is codified in Title IV of the Social Security Act, and was primarily enacted to provide funding for the care of foster care children who would otherwise be

eligible for Aid to Families with Dependent Children. 42 U.S.C. §§ 670-679b; *Nebraska HHS v. United States HHS*, 340 F.Supp. 2d 1, 13 (D.D.C. 2004). The State of California participates in the Child Welfare Act and, through that participation, receives federal matching funds to cover part of the costs for foster care services furnished to eligible program beneficiaries. *See Land v. Anderson*, 55 Cal.App.4th 69, 75-77 (1997). Pursuant to the Child Welfare Act, the DSS must provide for payments to foster care institutions in an amount that covers "the cost of (and the cost of providing) food, clothing, shelter, daily supervision,[2] 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).

B. California's Rate Classification Level System Does Not Comply With The Child Welfare Act.

Instead of paying group homes for the types of payments listed in the Child Welfare Act, the DSS pays foster care group home providers based on the RCL system referenced in Part III, *supra*. Cal. Wel. & Inst. Code § 11462(a). The RCL methodology assigns points based almost entirely on hours of service provided by the group home staff. These points are prospective estimates. Cal. Wel. & Inst. Code § 11462(a); California DSS Operations Manual, Regulations 11 – 402.12. Furthermore, under the RCL model, the amount paid to foster care institutions may be adjusted from year to year, pursuant to the California Necessities Index, but is "subject to the availability of funds" — and is not based on the rate at which costs have actually increased. Cal. Wel. & Inst. Code § 11462(g)(2).

California's RCL method is thus partially based on the State's budgetary restrictions rather than actual or reasonable costs of foster care maintenance. Just as the court in *Missouri Child Care Association v. Martin et. al.*, *supra*, held that Missouri violated the Child Welfare Act

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[2] For purposes of a group home, "daily supervision" means routine day-to-day direction and arrangements to ensure the well being and safety of the child. 45 C.F.R. § 1355.20(a) (2001).

by devising a state plan that failed to take into account the Child Welfare Act's criteria in determining its foster care maintenance rate and instead based its rate solely on budgetary concerns, so, too, does California's RCL method violate the Child Welfare Act. The fatal flaw of the RCL methodology is that it fails to "cover" the costs identified in the definition of "foster care maintenance payments" because it lacks a mechanism to keep rates congruent with "real world" costs. *See Missouri Child Care Ass'n v. Martin et. al., supra*, 241 F.Supp.2d at 1045, 1047 (holding that Missouri's rate methodology, which focused exclusively on the "available appropriations designated specifically for residential treatment," failed to comply with the federal definition of "foster care maintenance payments.").

C. Title IV-E Of The Child Welfare Act Creates A Federal Right Under Which The Alliance May Seek Section 1983 Redress.

1. Section 1983 Redress Is Available For Violations Of The Child Welfare Act.

Well-established case law provides that private relief is available under 42 U.S.C. §1983 for violations of the Child Welfare Act and similar statutes. *See Blessing v. Freestone*, 520 U.S. 329, 346 (1997) (stating that the Court "[did] not foreclose the possibility that some provisions of Title IV-D give rise to individual rights"[3]); *San Lazaro Ass'n v. Connell et al.*, 286 F.3d 1088, 1099, fn. 9 (9th Cir. 2002); *ASW v. Oregon et al.*, 424 F.3d 970 (9th Cir. 2005) (holding that 42 U.S.C. §§ 671(a)(12) and 673(a)(3) of the Child Welfare Act create federal rights enforceable through a Section 1983 claim).

In *Missouri Child Care Association v. Martin et. al., supra*, the State of Missouri recently faced a nearly identical action brought by an association similar to the Alliance that represented

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[3] *Blessing* held that the plaintiff's claim as alleged did not give rise to an individual right of action under Section 1983 because the statute at issue was merely a "yardstick for the Secretary to measure the systemwide performance of a State's Title IV-D program." *Id.* at 345-46. However, the Court explained in dicta that if plaintiff had claimed that the state had not given her money to which she was entitled under the statute, she may have had a federal right to receive said money. *Id.* at 345-46. The scenario provided in dicta is more akin to the rights of the foster care institutions under the Child Welfare Act because the Child Welfare Act is not a "yardstick," but rather, specifically sets forth the items for which the State must pay foster care institutions. Thus, the Alliance should be able to pursue its claims herein under Section 1983.

approximately 60 different child care agencies. The plaintiff in that case, acting on behalf of its member agencies to obtain compliance with the Child Welfare Act, was held to have a private right of action under Section 1983 to obtain payments for reasonable costs of foster care under the Child Welfare Act. The court held that a state must "have a process for determining rates that takes into account the statutory criteria mandated by the [Child Welfare Act]." 241 F.Supp. 2d at 1045. The court further held that the 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 went on to determine that "while the ultimate beneficiaries of the [Child Welfare Act] are the foster children, *Congress mandated that foster care providers should recover their costs....*" *Id.* (emphasis added). The court also held that Congress "provided sufficient guidance in the [Child Welfare Act] to permit judicial enforcement" because payments under the Child Welfare Act are "based either on itemized costs or reasonable overhead, issues routinely entrusted to the judiciary in both statutory and common law actions." *Id.* Thus, the court found that the Child Welfare Act met all of the *Blessing* factors and the foster care providers could bring a private right of action under Section 1983 to enforce the Child Welfare Act.

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 or not 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.

a. Congress Intended For The Payments Under The Child Welfare Act To Benefit Foster Care Institutions And Thus The Alliance Has Standing To Seek Redress Under Section 1983.

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,[4] 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 similar to the members of the Alliance; if not intended for such caregiving agencies, to whom would the payments go?

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:

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[4] For purposes of a group home, "daily supervision" means routine day-to-day direction and arrangements to ensure the well being and safety of the child. 45 C.F.R. § 1355.20(a) (2001).

> 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 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. 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.

The State's argument that the children (or their parents) are the exclusive holders of the right to bring a Section 1983 claim is untenable. *See* Motion, p. 6:21-23. 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 who the State asserts are the intended beneficiaries of the Act will be unable to enforce their rights under the Act.

It is totally unrealistic to expect individual foster children to do the complex financial and legal research necessary to determine whether the State's RCL system complies with the Child Welfare Act. First, they would have to determine the financial situation of the group home program in which they are placed. This would require gathering a great deal of financial data about the group home program, including its actual operational costs and the total amount of the

foster care payments it is receiving. A meaningful comparison of a group home's costs with its foster care payments would also require a detailed and sophisticated financial analysis of the data to determine which portion of the costs are allowable under the federal definition of "foster care maintenance payments" and whether the allowable costs incurred for each category of expenditures are "reasonable" or whether they are more than a prudent person would expend under similar circumstances. Second, the financial analysis would have to be expanded to include a large number of other group home programs to differentiate those financial problems that are peculiar to individual group home programs from those which are systemic and caused by the inadequacy of the State foster care payment system as a whole. Finally, individual foster children (or attorneys acting on their behalf) would have to do the legal research and analysis to determine what legal action would be appropriate to take to resolve any inadequacies identified in the State foster care payment system. It is unreasonable to expect children, particularly dependent children for whom the State acts as guardians, to undertake this kind of action.

Moreover, the parents of these children are unlikely to bring an action since the children have been declared dependents of the State, in most cases because either there are no parents in the picture or because the children were abused and/or neglected by their parents. Cal. Wel. & Inst. Code §§ 300 *et seq*. This action should not be dismissed on this ground. For example, in *Ad Hoc Committee of Concerned Schoolteachers v. Greenburgh # 11 Union Free School District*, 873 F.2d 25 (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..." *Id.* at 27. The court stated:

> The Committee admits that it has not been appointed to represent the Children in this lawsuit. This much being conceded, there are good reasons to allow the Committee to represent the Children as "next friend." First, the Committee represents teachers who are intimately involved with the Children's education and possess a first-hand knowledge of the Children's educational needs. Secondly, those teachers appear to have instituted this suit in good faith and out of genuine concern for the Children's development. Lastly, the Committee is the only group of adults likely to seek

> vindication of the Children's constitutional rights to a learning environment free of any racially discriminatory practices.

Id. at 30.

The State's comparison of the situation before this Court and the references to the Medicaid providers in *Sanchez v. Johnson et al.*, 416 F.3d 1051 (9th Cir. 2005), is without merit. The statute at issue in *Sanchez* did not speak "of any individual's right but of the State's obligation to develop 'methods and procedures' for providing services generally." Under the Medicaid statute in *Sanchez*, "the State is directed to 'provide methods and procedures...sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." *Id* at 1059. The only reference in the statute in *Sanchez* to recipients of Medicaid services was in the aggregate, as members of 'the general population in the geographic area.'" *Sanchez* went on to say that the statute which required the State to "provide such methods and procedures relating to...care and services...as may be necessary to...assure that payments are consistent with efficiency, economy, and quality of care" may "benefit taxpayer[s] to the detriment of medical providers and recipients." *Id.*

The State's reference to Medicaid providers in *Sanchez* is not relevant to the case at hand. *See* Motion to Dismiss, 7:1-7. Unlike the Medicaid statute at issue in *Sanchez*, the Child Welfare Act clearly states that foster care institutions should be paid for the items listed under the Child Welfare Act. Foster care institutions are a core component of the Child Welfare Act, not merely a passing aggregate reference as the Medicaid providers in *Sanchez*. The only entities that would receive any benefit under the Child Welfare Act are the foster care institutions; there is no balancing of interests as in the *Sanchez* case. Simply put, the Child Welfare Act requires specific payments be made to the foster care institutions.

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.[5]

Similarly, the Child Welfare Act also requires states to pay foster homes for specific costs that have been expended. 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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[5] The Court in *Gonzaga University v. Doe*, 536 U.S. 273, 279 (2002), cited *Wilder* with approval, distinguishing the Family Educational Rights and Privacy Act ("FERPA") at issue there from the statute at issue in *Wilder*; the Court referred to the statute in *Wilder* as "individualized, concrete monetary entitlement." *Id.*, 536 U.S. at 288, n.6.

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.

Just as the defendants in *Wilder* tried to argue that the real beneficiaries of the statute at issue were the patients, here, too, the State has tried to argue the real beneficiaries are the children. Motion to Dismiss, 6:21-23. However, just as this argument failed in *Wilder*, so too, does it fail here. The State characterizes *ASW v. Oregon*, *supra*, as holding that Sections 671(a)(12) and 673(a)(3) of the Child Welfare Act did permit enforcement under Section 1983 as a private right of action for parents only. Motion to Dismiss, 6:n.7. However, the State overlooks that one of the two statutes at issue in *ASW* involved adoptive parents *only*. Indeed, Section 673's title begins with the phrase "Agreements with adoptive parents of children with special needs." The court did not discuss whether Section 673 would apply to foster care institutions because that specific section of the statute does not contain any provisions for foster care institutions. In contrast, the sections of the Child Welfare Act at issue in this case specifically reference 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). Just as the *ASW* statute "requires that the amount of adoption assistance payments be determined through agreement between the adoptive parents and the State," so, too, does the Child Welfare Act section at issue in this case require that the amount of foster care maintenance as defined in the Child Welfare Act be paid to foster care institutions. The *ASW* court held that this language requiring payment "evinces a clear intent to create a federal right" and has "an unmistakable focus on the benefited class." *Id.* at 975-76. By analogy, the Child Welfare Act

statute at issue here, requiring payments, also creates a federal right by focusing on the benefited class.

b. 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 is whether "the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-341; *see also Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431 (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 State argues that private enforcement of Spending Clause statutes "is the rare exception." *See* Motion to Dismiss, 3:23-27, citing *Gonzaga, supra*, 536 U.S. at 280. However, the *Gonzaga* Court held that that the provision of FERPA at issue was enacted under Congress' "spending power to condition the receipt of federal funds on certain requirements" and that particular provision of FERPA did not give rise to a private cause of action. *Gonzaga*, *supra*, 536 U.S. at 279. Furthermore, as *Gonzaga* clarified, in cases where "Congress spoke in terms that could not be clearer," "conferred entitlements sufficiently specific and definite to qualify as enforceable rights" and wherein the statute provides for no administrative remedy or procedure, the courts have found a private right of action exists under Section 1983. *Id.* at 280. While the provisions of FERPA at issue in *Gonzaga* do not meet these factors, the provisions of the Child Welfare Act at issue before this Court do.

The Alliance is seeking to require the State to put in place a plan that would allow 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, supra*, 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").

Under the Child Welfare Act, the factors to be considered 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. Indeed, 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").

c. 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.

2. *The Child Welfare Act Includes "Rights-Creating" Language Unlike The Statute At Issue In The Gonzaga Case.*

The State cites various inapposite cases that do not involve the Child Welfare Act or any similar statutes. For example, the State cites *Gonzaga, supra*, in which the Supreme Court found that there was no private right of action under the FERPA provision that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records...of students without the written consent of their parents to any individual, agency, or organization." The Court held that FERPA lacked rights-creating language because FERPA: (1) spoke "only to the Secretary of Education" and directed the Secretary that no funds should be given to educational institutions that did not comply with FERPA; (2) focused on the aggregate rather than the individual by using language that referred to institutional policy and practice instead of individual instances of disclosure; (3) imposed no duties on educational institutions as they could avoid termination of funding so long as they "comply substantially" with FERPA's requirements; and (4) provided for a federal administrative process to review, investigate and adjudicate violations of the statute. *Id.* at 288-290.

The State's reliance on *Gonzaga* is misplaced because the Child Welfare Act imposes an absolute duty on the State to make foster care maintenance payments to foster care institutions and group homes, while the provision of FERPA at issue in *Gonzaga* merely provided a prohibition on funding in certain circumstances (*i.e.,* the provision did not require payments to educational institutions or agencies if a FERPA-compliant privacy policy were in place), and the plaintiff in *Gonzaga* was merely a coincidental beneficiary of a compliant privacy policy. Thus, unlike FERPA, the statutory language of the Child Welfare Act meets the *Blessing* factors, and satisfies the additional standards discussed in *Gonzaga*. The Child Welfare Act is phrased in "rights creating" language that is focused on the State making "foster care maintenance payments...with respect to a child" — the focus is on the welfare of the child rather than an aggregate focus on the general policies of the State's child welfare agency. 42 U.S.C. § 672(a).

Whereas FERPA states "[n]o funds shall be made available," the Child Welfare Act language is more akin to the individual language in Titles VI and IX that "[n]o person...shall...be subjected to discrimination." *See Cannon v. University of Chicago*, 441 U.S. 677 (1979) (holding that plaintiff had right under Title IX to pursue a private cause of action against universities for denying her admission). The Child Welfare Act expressly identifies 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). Furthermore, the Child Welfare Act is phrased in mandatory terms (*i.e.*, "shall make foster care maintenance payments") and imposes absolute duties by clearly identifying for the State what costs are subsumed under the term "foster care maintenance payments." 42 U.S.C. §§ 672(a) and 675. The Child Welfare Act does not provide foster care providers with any federal administrative review process for violations of the Child Welfare Act. Thus, the Child Welfare Act is nothing like the FERPA statute in *Gonzaga*; rather, the Child Welfare Act's differences from the FERPA are precisely what make the Child Welfare Act a statute for which Section 1983 redress is available.

The State relies on *31 Foster Children v. Bush et al.*, 329 F.3d 1255 (11th Cir. 2003) for the proposition that "[i]f [the statute] provide[s] some indication that Congress may have intended to create individual rights, and some indication it may not have, that means Congress has not spoken with the requisite 'clear voice.'" Motion to Dismiss, 5:11-14. Among other claims, the plaintiffs brought claims under Section 1983 for violations of 42 U.S.C. §§ 675(5)(D) and (E) — two definitional sections of the Child Welfare Act that require foster care children's health and education record be reviewed and updated, or providing for institution of parental rights termination proceedings. *Id.* at 1268. The Eleventh Circuit held that the provisions did not provide for a private right of action under Section 1983 because: (1) they are definitional and do not confer rights; and (2) the language of the statutes has an aggregate focus because the only

references to individuals are made in the context of what the procedure is supposed to ensure and whether the programs are in substantial conformity with State plan requirements. *Id.* at 1271-72. The court held that because of these reasons, these provisions did not give plaintiffs "an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 1274.

31 Foster Children involves a different provision of the Child Welfare Act that is not part of the Act under which the Alliance is bringing its claims. This Court should not look at unrelated portions of the Child Welfare Act, but instead "review only the particular statutory provision at issue" here. *See ASW, supra,* 424 F.3d at 976-77. The sections of the Child Welfare Act at issue in this case are similar to the sections at issue in *ASW.* In *ASW*, the provision required payments that should be paid to the adoptive parents based on the parents' resources and the special needs of the child. *Id.* Here, the provisions require payments that should be paid to foster care institutions based on a list of items that are defined within the Child Welfare Act. If anything, the Child Welfare Act provisions at issue here are even more concrete and clearly defined than the provisions at issue in *ASW.*

The State also relies on *Alexander v. Sandoval*, 532 U.S. 275 (2001), for the proposition that a statute must have "rights creating language" in order for it to be enforceable under Section 1983. Motion to Dismiss, 5:4-5. This case is also not relevant to the Child Welfare Act. While *Alexander* does, in passing, mention rights-creating language, it does not discuss a private right of action under Section 1983 because the plaintiff did not bring his claim under Section 1983 (indeed, Section 1983 is mainly discussed in the dissent). *Id.* at 299-302.[6]

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[6] In *Alexander*, the plaintiff was a driver's license applicant who brought a class action under Title VI that Alabama's policy regarding administering Alabama's driver's exam in English only was a violation of federal regulations forbidding methods that have the effect of discriminating. *Id.* at 278. The Court looked to two sections under Title VI: 1) Section 601 of 42 U.S.C. §§ 2000d *et seq.*, which provides that "no person shall on the grounds of race, color...be...subject to discrimination..." and 2) Section 602, which authorizes federal agencies to effectuate the provisions of Section 601. Under the authority of Section 602, the Department of Justice ("DOJ") had promulgated the federal regulation at issue in *Alexander*, which forbade recipients of funding from the DOJ and Department of Transit from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination." *Id.* The DOJ regulations prohibited disparate impact discrimination, where there may an effect of discrimination without any intention to discriminate. The Court held that Section 601 only

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V. CONCLUSION

The Alliance's members have a right, not merely a benefit or interest, to payment for the amounts they have spent in foster care maintenance payments. Specifically, they are entitled to "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).

On behalf of its members, the Alliance has a right to seek redress under Section 1983 for declaratory and injunctive relief regarding the State's violation of the Child Welfare Act. First, foster care institutions and group homes are clearly the intended beneficiaries of the Child Welfare Act as it declares that payments on behalf of eligible children must be paid to child-care institutions, including group homes. By specifically conferring monetary entitlements on group homes, Congress intended to benefit group homes. Second, the Child Welfare Act clearly defines what foster maintenance costs should be paid to group homes. And, third, the Child Welfare Act states that these payments *shall* be made. Furthermore, given that the definition of what items are included in foster care maintenance costs is so detailed, there is no ambiguity regarding what payments should be made. The Child Welfare Act includes "rights-creating" language.

Because of the State's noncompliance with the Child Welfare Act, the Alliance has brought this action: without the State's compliance, the group homes will be forced to choose between providing inadequate care or eliminating services and eventually ceasing operations, to

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(Footnote Continued from Previous Page.)

prohibits intentional discrimination, not disparate impact, and as such, the private right to enforce Section 601 would not include plaintiff's claim. *Id.* at 285-86. Furthermore, Section 602 provides that federal agencies are "authorized and directed to effectuate the provisions of § 601," and thus, arguably, Section 602 confers the authority to promulgate disparate impact regulations. *Id.* at 286, 289. The Court held that Section 602 lacked rights-creating language because "it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating." *Id.* at 289.

the great detriment of the 5,700 children who are wards of the state and have nowhere else to turn.

For all of these reasons, the Alliance respectfully asks that this Court deny the State's Motion to Dismiss and allow this case to move forward.

DATED: September 11, 2006 BINGHAM McCUTCHEN LLP

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