

C.A. NO. 09-17649

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN WAGNER, Director of the
California Department of Social
Services, in his official capacity;
GREGORY ROSE, Deputy Director
of the Children and Family Services
Division of the California Department
of Social Services, in his official
capacity,

Appellants,

v.

CALIFORNIA ALLIANCE OF
CHILD AND FAMILY SERVICES,

Respondent.

USDC Case No. 09-04398-MHP

On Appeal From the United States District Court
for the Northern District of California
Honorable Judge Marilyn Hall Patel

**RESPONDENT CALIFORNIA ALLIANCE OF CHILD
AND FAMILY SERVICES' RESPONSE TO
APPELLANTS' MOTION FOR EMERGENCY STAY**

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CORPORATE DISCLOSURE STATEMENT

PURSUANT TO FRAP 26.1

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Plaintiff-Respondent California Alliance of Child and Family Services (“the Alliance”) states the following: that Alliance has no parent companies, and no publicly-held corporation owns 10 percent or more of its stock.

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I. INTRODUCTION

Ten months after the district court entered an injunction against the State's 10% cut in funding to foster care group homes, the State attempts to avoid further compliance. This Court has made it clear that the Child Welfare Act (the "Act") requires the State of California to "cover" the costs of providing the enumerated items to federally eligible children. *See California Alliance of Child and Family Services v. Allenby*, 589 F.3d 1017, 1023 (9th Cir. 2009). Though *Allenby* prohibits the 10% rate cut that the State attempted to implement in last year's budget, the State's Motion attempts to once again delay providing long overdue funding to California's foster care children, and must be denied.

Shortly before this Court issued its Order in *Allenby*, the district court found that the implementation of a 10% cut in payments to foster care group homes under California's 2009 budget would irreparably harm California's foster children and that Respondent California Alliance of Child and Family Services (the "Alliance") was likely to succeed on the merits of its claim. (D.C. Dkt. 57.) Accordingly, the district court granted the Alliance's Motion for Preliminary Injunction. (D.C. Dkt. 57.) The district court later clarified the scope of the Order and rejected the State's plan to pay reduced rates to children who were not eligible for federal aid because such a dual system would have resulted in inadequate payments to federally eligible children. (D.C. Dkt. 67.)

On November 24, 2010, the State filed an emergency motion for a stay of the Order in this Court. (A.C. Dkt. 4.) That motion was denied. (A.C. Dkt. 9.) The State now renews that motion although its position today is substantially weaker . Since last year, this Court has made it clear that the Act affords a private right of action and that “substantial compliance” with the Act is not enough. With decisions stacking up against it, the State attempts to re-litigate issues that have already been decided against it and forces the Alliance to rehash prior arguments.

As this Court found in denying the State’s first emergency motion for stay of injunction, a stay is inappropriate in this case. First, the only injury that the State claims it will suffer is monetary. In contrast, the Alliance has demonstrated that if a stay does issue, foster children will suffer irreparable harm because group homes will be forced to cut back on services, lay-off staff and eliminate programs. Additionally, the State is not likely prevail on the merits. Its entire argument is premised upon a mischaracterization of the district court’s reasoning. Contrary to the State’s assertion, the district court did not find any right to rate increases for the non-federally eligible children or any basis in state law, but rather determined that, under the State’s current system, rates must be raised for all children in foster care homes in order for California to ensure federally eligible children receive the full amount of funds required by the Act. The State’s motion does not address this reasoning. Therefore, the State’s latest stay request should be denied.

II. STATEMENT OF FACTS

A. The Alliance

The Alliance is a non-profit organization that represents the interests of group homes that provide shelter, care and supervision for foster children. (D.C. Dkt.57 at 2.) The Alliance's member agencies operate 87 group home programs, with a licensed capacity of 3,720 beds. (*Id.*) The DSS licenses, audits, and provides funding to these group homes. Health and Safety Code §§ 1500, et seq.; Welf. & Inst. Code §§ 11450(d), 15200(c)(1).

The Alliance's members receive foster care maintenance payments pursuant to the Child Welfare Act, 42 U.S.C. §§ 670-679b. (D.C. Dkt.57 at 7.) The Act requires that each participating state “*shall* make foster care maintenance payments on behalf of each child who has been removed from the home of a relative” 42 U.S.C. § 672(a)(1) (emphasis added). The Act defines “foster care maintenance payments” 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).

California enacted a Rate Classification Level System (“RCL”) to determine the amount of foster care maintenance payments to make to each foster care group home. Cal. Welf. & Inst. Code § 11462. The original schedule of rates was

developed using the average actual and reasonable costs of a sample of group home programs for 1985, adjusted to take into account the increase in the California Necessities Index (“CNI”) between 1985 and 1990. *Id.*, § 11453. The CNI is a weighted average of increases in various costs of living for low-income consumers. *Id.* California law requires that “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.” *Id.*, § 11462(g)(2). Nonetheless, the RCL standard rates for group homes have not kept pace with the increases in the CNI. (D.C. Dkt.57 at 6.)

B. California Alliance I

On June 30, 2006, the Alliance filed an action under 42 U.S.C. § 1983 against the State for violations of the Act. *See California Alliance of Child and Family Services v. Allenby* (“*California Alliance I*”), No. C 06-04095 MHP (N.D. Cal. June 30, 2006). The district court granted the State’s Motion for Summary Judgment and denied the Alliance’s Motion for Summary Judgment. *See California Alliance I*, No. C 06-04095 MHP, 2008 WL 686860 (N.D. Cal. Mar. 12, 2008), at *5-6. The district court held that the State was permitted to merely substantially comply with the Act and was, in fact, in substantial compliance.

After hearing oral argument, this Court issued its Opinion in *Alliance I*. *See California Alliance of Child and Family Services v. Allenby*, 589 F.3d 1017 (9th

Cir. 2009) (“*Allenby*”). The *Allenby* opinion made clear that the State violated the Act because it did not “cover” the costs of providing the enumerated items to the federally eligible children. *Id.* at 1021. The Court explained: “It is undisputed that the State is no longer paying this amount -- rather, it is paying somewhere in the neighborhood of 80 percent of the amount. In other words, the CWA requires California to cover the cost of certain items and California has developed a formula to determine what those items cost, but is now only partially covering the cost of those items. This runs afoul of the CWA’s mandate.” *Id.* The Court held that the State “must make yearly CNI adjustments (or some other inflationary adjustment) to account for the rise (or fall) in its standardized schedule of rates.” *Id.* at 1023.

The Court reversed the district court’s Order granting summary judgment to the State and denying summary judgment to the Alliance and directed the district court to enter judgment for the Alliance and to determine the proper scope of declaratory and injunctive relief. *Id.* at 1023.

C. The Alliance Files This Case To Enjoin The State’s New Budget Cuts

In July 2009, while the *Alliance I* appeal was pending, the State passed a revision to its budget, effective October 1, 2009 (the “2009 Budget”). The 2009 Budget reduced the standardized schedule of rates for group homes by 10%, which would have resulted in the State covering only 68% of the costs of providing care and supervision to California’s foster children. (D.C. Dkt.57 at 6.) The Alliance

filed a Complaint and an Application for a Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction to enjoin the State from implementing the 2009 Budget. (D.C. Dkt. 57 at 2.)

D. The District Court's Preliminary Injunction Order

On November 4, 2009, the Alliance filed its Motion for Preliminary Injunction. (D.C. Dkt. 57 at 7.) The Alliance filed numerous declarations demonstrating the consequences to the foster children of the State's failure to meet its obligations under the Act. (D.C. Dkt. 57 at 11.)¹ On November 13, 2009, the district court heard oral argument and granted the motion. The district court filed its Memorandum & Order on November 18, 2009. (D.C. Dkt. 57.)

The district court found that the Alliance was likely to succeed on the merits, that the balance of hardships tipped sharply in the Alliance's favor and that a preliminary injunction was in the public interest. (D.C. Dkt. 57. at 12-13.) The district court determined that the members of the Alliance have already made cuts to essential services, to staff positions, staff pay and benefits and have refrained from hiring as a result of the State's failure to keep pace with the CNI. The district

¹ Citing to the Declaration of Susan Lemieux, ¶ 8 ("Because of the past failure to make cost-of-living adjustments to reimbursement rates . . . we cannot afford to hire . . . [a] therapist, three full-time child care workers and one full-time administration/office position. We are also unable to afford additional hours by our psychiatrist."); Declaration of Charles Rich ("The majority of our residents have some form of learning disability Unfortunately, because of inadequate funding, only three girls are currently participating [in a program for children with learning disabilities] and no new residents will be accepted into the program.").

court found that “[t]he resources provided to cover food, clothing, shelter, daily supervision and other items enumerated under the CWA would decline substantially from a level that was already underfunded.” (D.C. Dkt. 57 at 13.)

In its preliminary injunction Order, the district court ordered that the “injunction prohibits implementation of the reduction only with respect to payments made in connection with children subject to the CWA. Execution of the injunction SHALL NOT be carried out in a manner that will reduce in any amount the full entitlement to such federally eligible children under this order.” (D.C. Dkt.57.) (emphasis added). The district court also noted that “[c]ounsel for the parties agreed at oral argument that the RCL system and group homes do not distinguish between federally eligible and non-federally eligible children in the rates set or the services provided.” (D.C. Dkt. 57.) (emphasis added). The district court then asked the State to explain how it planned to determine the amount of foster care maintenance payments that will satisfy the Order. (D.C. Dkt.57.)

In response to the district court’s request, the State merely submitted a plan with two different tables of rates -- one for federally eligible children and one for non-federally eligible children. (D.C. Dkt. 63.) The Alliance objected to the State’s plan on the grounds that “it does not specify how group homes are supposed to implement it in such a way as to ensure that federally eligible children are not subject to additional reductions in foster care maintenance payments, as

mandated by the court's preliminary injunction order." (D.C. Dkt.67.)

On December 18, 2009, the district court issued its Order in *Alliance II* and enjoined the State from implementing rate cuts rates for federally eligible and non-federally eligible children. The district court explained: "[a]t the preliminary injunction hearing, plaintiff represented to the court that group homes are required to provide the same basic level of care to all children placed with the home, regardless whether the children are federally eligible. The State did not dispute this characterization." (D.C. Dkt. 67) (internal citations omitted). The district court also noted that "nothing in the State's submission contests or even addresses the preliminary injunction Order's finding that 'group homes do not distinguish between federally eligible and non-federally eligible children in . . . the services provided.'" (D.C. Dkt. 67.) The district court then concluded, "Because group homes do not so distinguish, it is inevitable that simply reimbursing group homes differently for federally eligible and non-federally eligible children will result in the dilution of funds to federally eligible children." (D.C. Dkt. 67.) The district court held that "[i]mplementation of such reduction is enjoined both in relation to federally eligible children and non-federally eligible children." (D.C. Dkt. 67.)

E. The State's First Motion for Stay is Denied

On November 24, 2009, the State filed an Emergency Motion for Stay of Injunction Pending Appeal. (A.C. Dkt. 4.) In its motion, the State argued: 1) that

it was likely to prevail on appeal because the Act does not provide an implied right of action; and 2) the irreparable harm to the State if the preliminary injunction was not stayed outweighed any harm to foster children if a stay issued. (A.C. Dkt. 4.) On December 10, 2009, this Court denied the State's motion. (A.C. Dkt. 9.)

At the time this Court decided the State's first motion for a stay of injunction, *California State Foster Parent Association v. Wagner* was pending. In *Wagner*, foster parents sued the State under the Act for failure to cover the expenses incurred by foster parents in caring for their foster children. *California State Foster Parent Association v. Wagner*, No. 3:07-cv-05086, 2010 U.S. App. LEXIS 18117, *1-2 (9th Cir. Aug. 30, 2010). At issue was whether the Act provided a private right of action under 42 U.S.C. section 1983. *Id.* at *4-5. Because the preliminary injunction in this matter is premised upon the idea that the Act does provide a right of action, this Court gave the State leave to renew its motion for a stay once *Wagner* was decided. (A.C. Dkt. 9.)

On August 30, 2010, this Court issued its decision in *Wagner*. It held "that §§ 672(a) and 675(4)(A) of the Act establish a presumptively enforceable right under § 1983 to foster care maintenance payments from the State that cover the cost of the expenses enumerated in § 675(4)(A)." *Id.* at 19-20. Accordingly, the district court's decision in favor of the plaintiff foster parents was affirmed. *Id.*

III. ARGUMENT

A. There are No New Facts to Support the Renewed Motion

The State's Renewed Motion for Stay of Injunction forces the Alliance to resubmit arguments that were already made and decided by this Court. On December 10, 2009, this Court denied the State's first Motion for Stay, rejecting the State's arguments that it was likely to prevail on appeal and that the balance of hardships tipped in the State's favor. (A.C. Dkt. 9.) The State now renews the same motion because of two supposedly new facts: (1) this Court's decision in *Wagner*; and (2) the district court's December 18, 2009 Order regarding the preliminary injunction. (A.C. Dkt. 16 [Decl. of George Prince].) Neither of these developments impacts the merits of this Court's December 10, 2009 Order.

First, this Court gave the State leave to renew its motion for stay of injunction if *Wagner* was decided in the State's favor. Although the Order does not expressly prohibit the State from renewing its motion if *Wagner* were to be decided against it, such a prohibition is implicit. The only way that *Wagner* could affect the outcome in this case would be if it had held that the Act did not provide a private right of action. *Wagner* held just the opposite. Accordingly, *Wagner* does not afford the State a basis for renewing its motion for stay of injunction.

Second, the district court's December 18, 2009 Order merely clarified the scope of the preliminary injunction -- it did not alter the legal basis for the

injunction. (D.C. Dkt.67.) In its November 18, 2009 Order, the district court stated: “Execution of the injunction SHALL NOT be carried out in a manner that will reduce in any amount the full entitlement to such federally eligible children under this order.” (D.C. Dkt. 57.) In its December 18, 2009 Order, the district court rejected a plan by the State that proposed a two-tiered reimbursement system with lower payments for children who were not federally eligible because it violated the November 18, 2009 Order. (D.C. Dkt. 67.) Thus, the State’s attempt to portray the December 18, 2009 Order as a “new” development is unfounded.

In fact, the only new development in this matter since this Court’s December 10, 2009 order denying the State’s motion for stay of injunction is *Allenby*. Because that decision held that substantial compliance with the Act is not enough, the State’s position today is, if anything, weaker than it was when it first requested a stay. Although the Alliance previously briefed the issues in this motion, for convenience, the State’s arguments are addressed below.

B. A Party Seeking A Stay Pending Appeal Must Show Irreparable Harm And A Likelihood Of Success On The Merits

The Supreme Court recently reaffirmed that there is no automatic stay pending appeal of a preliminary injunction. Fed. R. Civ. P. 62(a)(1). “A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an ‘exercise of judicial discretion.’” *Nken v. Holder*, 129 S. Ct. 1749, 1760 (2009)

(citing *Virginian Railroad Co. v. United States*, 272 U.S. 658, 672-73 (1926)). The “traditional test for stays” has four factors: “1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether the issuance of the stay will substantially injure other parties interested in the proceedings; and 4) where the public interest lies.” *Nken*, 129 S. Ct. at 1760-61 (citation omitted). The party requesting the stay bears the burden of making a showing on each of the factors. *Id.* at 1761. The first two factors “are the most critical.” *Id.* “It is not enough that the chance of success on the merits be better than negligible [M]ore than a mere possibility of relief is required.” *Id.* (citations omitted).

The district court denied the State’s oral motion for a stay pending the resolution of its contemplated motion and this Court subsequently denied the State’s first emergency motion for a stay. (A.C. Dkt. 9.) The State’s instant motion relies upon the same deficient arguments and also should be denied.

1. The State’s Asserted “Irreparable” Injury Is Legally Insufficient To Justify A Stay

The State fails to establish that it has suffered or will suffer any legally cognizable injury at all, much less an irreparable one. In fact, it is the Alliance, and the foster children cared for by the Alliance’s members, that will suffer irreparable harm if the stay is granted. *See Nken*, 129 S. Ct. at 1760-61; *see* Part III.E, *infra*. The State argues that it will suffer irreparable injury if the preliminary

injunction is not stayed because the injunction requires it to pay “roughly \$1,567,520 [in additional maintenance payments] for [each] 21 day period” that the injunction remains in effect. (A.C. Dkt. 16 at p. 24.) The State asserts that it has a “limited ability” to recoup these funds if it ultimately prevails on appeal. (*Id.*) This purported injury is not sufficient to justify a stay.

First, the only harm that the State alleges it will suffer is monetary. This is not the type of injury that justifies staying an injunction. *See, e.g., Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). Furthermore, the State has been complying with the preliminary injunction for months. If compliance truly was causing some irreparable injury, that injury should have manifested itself by now. That the State’s motion points to no such injury strongly suggests that none exists.

Second, the only “evidence” submitted regarding this alleged harm is the declaration of the State’s attorney, George Prince, who has no personal knowledge of anything he declared. Thus, his entire declaration is hearsay and inadmissible.

2. Staying the Preliminary Injunction Pending Appeal
Will Irreparably Injure Vulnerable Children

Any monetary injury the State might suffer is minimal in comparison to the irreparable harm that will be suffered by California’s foster children if the motion to stay is granted. *See Lopez*, 713 F.2d at 1437 (“Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’

favor.”)² It is well established in this Circuit that withholding benefits and reducing payments for vital services like those provided by Alliance members causes irreparable harm. Indeed, this Court recently held that a 10% reduction in Medi-Cal benefits would cause irreparable harm if not enjoined because it “may deny [Medi-Cal recipients] needed medical care.” *Independent Living Center, of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 663 (9th Cir. 2009).³

Similarly, the Alliance’s members and California’s foster care children will suffer immediate and irreparable harm if the rate cuts are implemented. This Court has already correctly rejected the State’s argument that it would be harmed and denied the State’s first request to stay the preliminary injunction. In the nine months since the Court’s first ruling on this issue, the potential harm to foster children has not decreased. The 10% rate cut in the 2009 Budget will have a dramatic and tangible effect on the level and quality of care provided to California’s foster children and will eliminate appropriate foster care placements and services to high-risk segments of this vulnerable population.

3. The State Is Not Likely to Succeed on the Merits

The State asserts that it is likely to prevail on appeal because the district

² See also *Golden Gate Restaurant Ass’n v. City & County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008).

³ See also *Brantley v. Maxwell-Jolly*, No. C 09-3798 SBA, 2009 WL 2941519, at *12-15 (N.D. Cal. Sept. 10, 2009) (enjoining reduction in benefits provided to Medi-Cal Adult Day Health Care Members because the harm to this vulnerable population “is particularly irreparable and imminent.”).

court erred in requiring that “the group home rates be increased for all residents, including the 41 percent who are not federally eligible” (A.C. Dkt. 16 at p. 14.) The State’s argument is meritless. The district court acknowledged that non-federally eligible children are not subject to the contours of the Act. However, the district court did not abuse its discretion in concluding that, under the State’s current RCL system, the State must also increase funding for federally and non-federally eligible children to ensure that the California covers “the cost of (and the cost of providing)” the items enumerated in the Act for federally eligible children.

It is well established that “[t]he district court has substantial discretion in defining the terms of an injunction and appellate review is correspondingly narrow.” *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1256 n.16 (9th Cir. 1982) (citing *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973)); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (“Once plaintiffs establish they are entitled to injunctive relief, the district court has broad discretion in fashioning a remedy.”).

The district court did not abuse its discretion in tailoring the appropriate injunctive relief as demonstrated by its sound reasoning for requiring the State to increase rates for federally eligible and non-federally eligible children. Although the State quotes the district court’s reasoning, the State never addresses it other than to note that such concerns “are not sufficient to extend the District Court’s

jurisdiction beyond what the complaint before it defined” (A.C. Dkt. 16 at p. 27.) The State’s jurisdictional argument is both misplaced and specious.

The Alliance’s lawsuit was premised on allegations that the State did not comply with the Act because it failed to make “foster care maintenance payments” for qualifying children (i.e., federally eligible children) that “cover the cost” of the basic necessities set forth in Section 675. Based on the undisputed facts, this Court agreed: “It is undisputed that the State is no longer paying this amount -- rather, it is paying somewhere in neighborhood of 80 percent of the amount.... This runs afoul of the CWA’s mandate.” *Allenby*, 589 F.3d at 1021. Thus, this Court in *Alliance I* directed the district court to enter judgment for the Alliance and to determine the proper scope of declaratory and injunctive relief. *Id.* at 1023.

The district court enjoined the State’s 10% cut to foster care group home rates on the grounds that it rendered the rates out of compliance with the requirements of the federal Child Welfare Act. In analyzing the proper scope of the injunctive relief, the district court recognized that the State of California has set up a foster care system that does not distinguish between federally eligible and non-eligible children. The Court invited the State to present a plan for implementing the rate cuts to the non-eligible children under the State’s current RCL system that would not also result in a rate cut to the federally eligible children. (D.C. Dkt. 57.) The State failed to do so. (D.C. Dkt. 63.)

The district court correctly concluded that merely providing different rates was insufficient to protect the federally eligible children. (D.C. Dkt.67.) It explained: “[P]laintiff represented to the court that group homes are required to provide the same basic level of care to all children placed with the home, regardless whether the children are federally eligible. The State did not dispute this characterization.” (D.C. Dkt. 67) (internal citations omitted). The district court also noted that “nothing in the State’s submission contests or even addresses the preliminary injunction Order’s finding that ‘group homes do not distinguish between federally eligible and non-federally eligible children in . . . the services provided.’” (D.C. Dkt. 67.) The district court concluded that the effect of the State’s plan was to “cut benefits to federally eligible children... in contravention of the court’s preliminary injunction order. (D.C. Dkt. 67.) The district court then ordered that “[i]mplementation of such reduction is enjoined both in relation to federally eligible and non-federally eligible children.” (D.C. Dkt. 67.)

The district court’s analysis is correct and this Court’s Opinion in *Alliance I* later made clear that the State was not in compliance with the Act because it did not “cover” the costs of providing the enumerated items for the federally eligible children. *Allenby*, 589 F.3d at 1023. As the district court concluded, because the State does not distinguish between federally eligible and non-federally eligible children, “simply reimbursing group homes differently for federally eligible and

non-federally eligible children will result in the dilution of funds to federally eligible children.” (D.C. Dkt. 67.) In other words, providing a rate increase to only federally eligible children will render the funding to federally eligible children insufficient to “cover” the costs of the enumerated items since those funds will also be used to care for the non-federally eligible children.

The State did not disagree with the district court’s analysis and conclusion that to comply with the Act and “cover” the costs enumerated therein under the State’s current system, the State must provide CNI rate increases to federally eligible and non-federally eligible children. In the ten months since the district court’s Order was issued, the State could have revised its system so that its decision to cut funds to non-federally eligible children would not violate the Act. It has not done so. Instead, the State seeks this Court’s blessing for a dual funding scheme that results in payments for federally eligible children that fall below the levels required by the Act. To justify this request, the State mischaracterizes the district court’s conclusion and presents several meritless arguments.

First, the State argues that the district court exceeded its jurisdiction. (A.C. Dkt. 16 at pp. 15-18.) The district court did not provide relief under state law, and it did not expand its own jurisdiction. Rather, the district court tailored the relief to ensure that California’s system covers the costs for the federally eligible children.

Second, the State argues that the Act only applies to the federally eligible

children, and therefore including the non-federally eligible children renders the Judgment extra-jurisdictional. (A.C. Dkt. 16 at pp. 15-18.) But, yet again, the State mischaracterizes and never addresses the district court's reasoning for including the non-federally eligible children. The district court did not find that the Act requires California to make foster care maintenance payments to cover the costs for children that are not federally eligible. Rather, the district court found that under the current system that California has created, federally eligible children and non-federally eligible children are, among other things, mixed together, housed together and fed together. Thus, even if the State raises rates for the federally eligible children, unless rates are also increased for the non-federally eligible children, the result is that the average rate per federally eligible child will fall below the amount necessary to "cover" the costs required by the Act. The State created the RCL system, and it decided to treat federally eligible and non-federally eligible children the same. It cannot operate the system in a way that deprives federally eligible children of the full funding required by the Act.

Third, while the State devotes approximately four pages to the district court orders that provide the basis for the district court's inclusion of non-federally eligible children, the State never explains how the district court's reasoning is flawed. Instead, the State merely asserts that the State is "mindful of the District Court's concerns" (A.C. Dkt. 16 at p. 23.) The State then asserts that "those

concerns are not sufficient to extend the District Court's jurisdiction beyond what the complaint before it defined . . . that, in a case based on the federal Child Welfare Act, the District Court's jurisdiction cannot extend beyond the federal law it is empowered to enforce." (A.C. Dkt. 16 at p. 23.) However, as discussed, the district court did not extend its jurisdiction or federal law beyond the Act.

In sum, while the State makes several arguments in its motion, it never addresses the district court's reasoning for requiring the State to raise rates for federally eligible and non-federally eligible children. The district court did not find any right to rate increases for the non-federally eligible children or any basis in state law, but rather determined that under the State's current system rates must be raised for all children in foster care homes in order for California to ensure federally eligible children receive the full amount of funds required by the Act. Thus, the State is not likely to prevail on the merits.

IV. CONCLUSION

Based on the foregoing, the Alliance respectfully requests that this Court deny the motion to stay enforcement of the Orders issued on November 18, 2009 and December 18, 2009.

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ALLIANCE OF CHILD AND FAMILY SERVICES

STATEMENT OF RELATED CASES

To the knowledge of counsel, the following cases are related to this case:

(1) *California Alliance of Child and Family Services v. Allenby et al.*, Case No. 08-16267 (Alliance I), wherein this Court reversed district court order granting summary judgment in favor of defendants and directed the district court to enter an order granting summary judgment in favor of plaintiff. Alliance I raised questions under the Act that are similar to those at issue in this case.;

(2) *California Alliance of Child and Family Services v. Wagner et al.*, Case No. 09-17649 (Alliance II), wherein this Court denied the State's first request for a stay of the preliminary injunction issued by the district court in this case.