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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CV 09

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12 SERVICES

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17 CALIFORNIA ALLIANCE OF CHILD AND
18 FAMILY SERVICES,

19 Plaintiff,

20 v.

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

24 Defendants.

Case No.

**PLAINTIFF CALIFORNIA
ALLIANCE OF CHILD AND
FAMILY SERVICES'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE REGARDING
PRELIMINARY INJUNCTION**

Date:

Time:

Dept:

Complaint filed: September 18, 2009

1 **I. INTRODUCTION**

2 California Alliance of Child and Family Services (the "Alliance") brings this action to
3 enjoin the State of California from implementing the portion of its newly enacted budget for
4 State Fiscal Year 2009-10 that will reduce, effective October 1, 2009, the already deficient
5 payments to foster care group homes in violation of the federal Child Welfare Act. Although
6 California receives federal funding under the Child Welfare Act, it fails to comply with the Act's
7 requirement to make "foster care maintenance payments" to group homes that "cover" the costs
8 of providing the most basic necessities to California's foster care children, including food,
9 shelter, clothing and supervision. The budget cuts will have a devastating effect on one of
10 California's most vulnerable populations. Many foster care group homes will be forced to
11 reduce the number of children they care for or close altogether, and many others will be forced to
12 significantly reduce staff, reduce or eliminate essential programs and cut staff benefits and pay.
13 To avoid irreparable harm to the foster care group homes and the vulnerable children under their
14 care, the Alliance respectfully requests that the Court issue a temporary restraining order
15 enjoining the State from implementing the ten-percent rate cuts in the newly enacted budget.

16 The group foster homes that bring this action provide care for foster children who county
17 social workers and probation officers have determined have significant emotional or behavioral
18 problems and need of the structured living environment provided by group homes. The ten
19 percent cut mandated by the new budget, coupled with the already insufficient payment rates
20 under the current State payment system that are the subject of a case before the Ninth Circuit, is
21 devastating. For 14 of the 19 fiscal years between 1990-91 and 2009-10, the State has failed to
22 adjust its payment rates to correspond with substantial cost of living increases. This failure has
23 culminated in a gap of more than 30% between the amount that the State currently pays foster
24 care providers and current costs of providing the required and necessary foster care. The new
25 budget exacerbates this problem by cutting "foster care maintenance payments" by ten percent.
26 These cuts violate the Child Welfare Act and will result in immediate and irreparable harm to the
27 Plaintiff group foster homes and to the children they serve.

1 Before the enactment of the 2009-10 budget, the Alliance filed an action against the State
2 in the Northern District of California for violation of the Child Welfare Act. *See California*
3 *Alliance of Child and Family Services v. Allenby*, No. C 06-04095 MHP (N.D. Cal. June 30,
4 2006) (“*California Alliance I*”). At the time, California’s foster care maintenance payments
5 covered only 80% of foster care group homes’ costs. The district court held that the State’s
6 payment system substantially complied with the Child Welfare Act and that the State was
7 permitted to take into account budgetary considerations in setting its foster care maintenance
8 payment rates, although this could not be the only factor. *California Alliance I*, 2008 WL
9 686860 (N.D. Cal. Mar. 12, 2008). The court stated, however, that: “The court is aware that
10 over time, given a multitude of years with budgetary constraints, the standard rate schedule could
11 become greatly out of synch with the costs of items enumerated in the CWA. . . . [I]t is worth
12 repeating that without further increases over time, the California system may well be in violation
13 of federal law.” *California Alliance I* is on appeal to the Ninth Circuit and is set for hearing on
14 October 7, 2009. C.A. NO. 08-16267 (emphasis added).

15 The opinion in *California Alliance I* was prescient. The State has now enacted a new
16 budget that will cut payments to foster care group homes by ten percent, a decision based solely
17 on budgetary considerations. When this rate cut takes effect, the State will not be in even
18 substantial compliance with the mandates of the Child Welfare Act. Moreover, since the most
19 recent budget impermissibly conflicts with the mandates of the Child Welfare Act, it is
20 preempted by the Child Welfare Act under the Supremacy Clause in the United States
21 Constitution and, accordingly, its implementation must be enjoined.

22 The four factors Courts consider in deciding whether to grant a motion for preliminary
23 injunction weigh heavily in favor of granting the requested relief:

24 1. **Immediate and irreparable injury will result to the Alliance if this relief is not**
25 **granted.** Without the requested relief, by the time there is a trial on the merits in this action
26 California’s foster children and the group homes that provide them essential services will suffer
27 irreparable injury because they will be unable to provide services that are essential for these
28 children. The private nonprofit agencies that are forced to close or reduce the size of their group

1 home programs will, among other things, sell or terminate the leases for their group home
2 facilities; give up their Community Care licenses and, for facilities licensed for more than six
3 children, their local use permits; and dismiss their dedicated and experienced child care and
4 social work staff. The group homes that remain open, but are forced to reduce the pay and/or
5 benefits for their staff, will lose many of their most highly educated and experienced employees.
6 Unless Defendants' conduct is immediately enjoined, the Alliance, its members and California's
7 foster children will suffer irreparable and immeasurable injury.

8 2. *The Alliance is likely to prevail on its claims against Defendants.* The Alliance
9 is likely to prevail on its claims because: (1) the Child Welfare Act requires the State to "cover"
10 the costs of providing foster care services; (2) the State fails to "cover" the costs of providing
11 foster care services in violation of the Child Welfare Act; and (3) the State's most recent budget
12 significantly reduces the amount the State pays to foster care group home providers, which has
13 caused and will continue to cause large numbers of group homes to close or reduce services
14 and/or personnel.

15 3. *The balance of hardships tips strongly in the Alliance's favor.* The Alliance, its
16 members and the foster children for whom they provide services will suffer damages far beyond
17 those that could be remedied monetarily at trial. It would be tragic for California's foster
18 children to be wrongfully deprived of essential benefits if homes close or otherwise have reduced
19 services and populations. The hardship to the State will not require services or employment cuts,
20 and can be made up by restoring budget cuts if the State prevails on the merits. Thus, the
21 balance of hardships tips strongly in the Alliance's favor.

22 4. *An injunction is in the public's interest.* The public interest weighs heavily in
23 favor of granting relief to the Alliance. The members of the Alliance serve California's foster
24 children. Unlike the recipients of nearly all other public assistance programs, neither the foster
25 children nor their parents request foster care services. The State intervenes in the lives of these
26 children to protect them from abuse or neglect and places them into foster care under a court
27 order. The children have no choice in the matter. Since the State takes the initiative to remove a
28 child from his/her own home and from the custody of his/her parents, and places them into foster

1 care, for their own protection and “in their best interest,” the State has a unique obligation to
2 provide adequate financial support for the care and supervision of these children, even in
3 difficult budgetary situations. Thus, the public interest is served in protecting their interests.

4 Therefore, the Alliance respectfully requests that the Court issue a temporary restraining
5 order enjoining and prohibiting Defendants from reducing the foster care maintenance payments
6 made to foster care providers under the recently enacted budget and issue an order to show cause
7 why a preliminary injunction should not be granted.

8 **II. STATEMENT OF FACTS**

9 **A. The Alliance**

10 The Alliance is a non-profit organization that represents the interests of group homes that
11 provide care and supervision for foster children with significant emotional or behavioral
12 problems who cannot live safely in their own homes or in another family setting, and who
13 require more restrictive out-of-home placement environments. (Declaration of Doug Johnson
14 [“Johnson Decl.”], ¶ 2.) The Alliance’s membership includes approximately 115 private, non-
15 profit member agencies that provide adoption, foster care, group home, mental health treatment,
16 family preservation and support, wrap-around, educational, and other services. (*Id.*) The
17 Alliance’s member agencies operate 87 group home programs, with a licensed capacity of 3,720
18 beds. (*Id.*) The California Department of Social Services (“DSS”) licenses, audits, and provides
19 funding to these group homes through the Aid to Families with Dependent Children - Foster
20 Care (“AFDC-FC”) program. Cal. Health and Safety Code §§ 1500, et seq.; Welf. & Inst. Code
21 §§ 11450(d), 15200(c)(1).

22 The Alliance’s members receive foster care maintenance payments pursuant to the Child
23 Welfare Act, 42 U.S.C. §§ 670-679b, which was enacted in 1980 to address the need to provide
24 an appropriate setting for children who California and other states have made dependents or
25 wards of the state. (Johnson Decl., ¶ 5.) In addition to specifying the features that each state
26 plan must contain, the Child Welfare Act sets forth specific requirements that each participating
27 state must follow when implementing its plan. 42 U.S.C. §§ 670-679b. Among these
28 requirements, the Child Welfare Act commands that “[e]ach State with a plan approved . . . *shall*

1 make foster care maintenance payments on behalf of each child who has been removed from the
2 home of a relative” 42 U.S.C. § 672(a)(1) (emphasis added). The Child Welfare Act
3 defines “foster care maintenance payments” as

4 payments to cover the cost of (and the cost of providing) food,
5 clothing, shelter, daily supervision, school supplies, a child’s
6 personal incidentals, liability insurance with respect to a child, and
7 reasonable travel to the child’s home for visitation, and reasonable
8 travel for the child to remain in the school in which the child is
9 enrolled at the time of placement. In the case of institutional care,
such term shall include the reasonable costs of administration and
operation of such institution as are necessarily required to provide
the items described in the preceding sentence.

10 42 U.S.C. § 675 (4)(A). The Child Welfare Act also requires states to conduct a “periodic
11 review” of “amounts paid as foster care maintenance payments and adoption assistance to ensure
12 their continuing appropriateness.” 42 U.S.C. § 671(a)(11).

13 Following the enactment of the Child Welfare Act, California enacted a Rate
14 Classification Level System (“RCL”) to determine the amount of foster care maintenance
15 payments to make to each foster care group home. (Johnson Decl., ¶¶ 6-7.) The original
16 standardized schedule of rates was developed using the average actual and reasonable costs of a
17 sample of group home programs for 1985, adjusted to take into account the increase in the
18 California Necessities Index (“CNI”) between 1985 and 1990. (*Id.*, ¶ 8.) The CNI is a weighted
19 average of increases in various costs of living for low-income consumers, including food,
20 clothing, fuel, utilities, rent and transportation. *See, e.g.*, Cal. Welf. & Inst. Code § 11453.
21 Subsequent to its implementation, California law requires that “the standardized schedule of
22 rates shall be adjusted annually by an amount equal to the [CNI] computed pursuant to section
23 11453, subject to the availability of funds.” Cal. Welf. & Inst. Code § 11462(g)(2).

24 Although California law requires foster care maintenance payments to be adjusted
25 annually to correspond with the CNI, “subject to the availability of funds,” the RCL standard
26 rates for group homes in effect on July 1, 2009 increased by an average of only 33% from their
27 original 1990-91 level, whereas the CNI has increased by more than 76% during that time
28 period. (Johnson Decl., ¶ 9.) As a result, the RCL standard rates covered less than 76% of the

1 costs of providing care and supervision for children placed in group homes. (*Id.*)

2 **B. Unless Its Implementation Is Enjoined, The State's New Budget Will Cause**
3 **Irreparable Harm to The State's Most Vulnerable Children**

4 In July 2009, the State passed a revision to its budget for fiscal year 2009-10, including
5 trailer bills to amend California statutes in order to implement the various financial provisions of
6 the revised State budget (the "2009 Budget"). (Johnson Decl., ¶ 10, Ex. A.) The revised State
7 Budget for 2009-10 will reduce the standardized schedule of rates for group homes by 10%,
8 effective October 1, 2009.¹ (*Id.*, ¶ 10, Ex. A, pg. 39 ("The new standardized schedule of rates as
9 provided for in paragraph (4) [of Cal. Welf. & Inst. Code § 11462] shall be reduced by 10
10 percent, effective October 1, 2009. . . .") After this rate cut takes effect, the current RCL
11 standard rates for group homes will have increased by less than 20% from their 1990-91 levels,
12 whereas the CNI will have increased by more than 76%. (*Id.*, ¶ 10.) Thus, the new RCL
13 standard rates for group homes will cover only 68% of the costs of providing care and
14 supervision, as measured by the increase in the CNI since 1990-91.

15 Implementation of the 2009 Budget will cause irreparable harm to the foster care group
16 homes that are part of the Alliance as well as the foster children for whom these group homes
17 provide services. The majority of foster care group homes' funding comes from the DSS, which
18 makes foster care maintenance payments as required under the federal Child Welfare Act and
19 California's Welfare and Institutions Code. (Declaration of Charles Rich ["Rich Decl.,"] ¶ 4;
20 Declaration of Jim Martin ["Martin Decl.,"] ¶ 4.) The foster care maintenance payments are
21 used to provide the most basic necessities to foster children, including food, shelter, daily
22 supervision, school supplies and many other essential items required under the federal Child
23 Welfare Act and California Welfare and Institutions Code. (Rich Decl., ¶ 5; Martin Decl., ¶ 5.)

24 If the rate reductions go into effect, several Alliance members will be forced to close their
25

26 ¹ Foster care providers receive an AFDC-Foster Care payment a behalf of a child from the
27 county which placed the child with them by the 15th day of the month following the month in
28 which the care was provided. Thus the first payments under the 2009 Budget will be made
between November 1 and November 15, 2009. (Johnson Decl., ¶ 10.)

1 group home programs completely. (Johnson Decl., ¶ 23.) Others will likely be forced to reduce
2 the size of their programs. (*Id.*) Those agencies that are able to stay in business have already
3 eliminated all non-essential aspects of care and supervision, reduced staffing and have reduced
4 staff pay and benefits. (*Id.*) They will now be forced to further reduce the number of child
5 workers, social workers and support staff even further. (*Id.*) These homes will also have to
6 significantly reduce the level of support provided to the children, reduce or eliminate staff who
7 have the skills needed to provide tutoring to children to help them successfully complete their
8 homework and to work with the schools to avoid suspensions and expulsions. (*Id.*)

9 For example, David & Margaret Youth and Family Services (“David & Margaret”),
10 which was founded in 1910 and provides services to eleven-to eighteen-year-old females, has
11 already reduced its services and will be forced to make additional cuts. (Rich Decl., ¶ 3.) DSS’s
12 foster care maintenance payments make up approximately 39% of its operating budget. (*Id.*, ¶
13 4.) Prior to the enactment of the 2009 Budget, David & Margaret was forced to reduce the size
14 of its program because the foster care maintenance payments failed to cover all of the costs of
15 providing its services. (*Id.*, ¶ 7.) David & Margaret now has beds for 50 girls, a significant
16 reduction from the 100 beds it previously provided. (*Id.*, ¶ 7.) Furthermore, the facility has been
17 forced to lay-off four social workers, three case managers and four child care workers. (*Id.*, ¶ 6.)
18 This staff reduction has, in turn, caused it to reduce the services offered to David & Margaret’s
19 residents to the bare minimum. (*Id.*, ¶ 6.) David & Margaret was also forced to phase out a
20 special program for children with learning disabilities which has been very successful in the past
21 and was forced to freeze staff wages and benefits making it difficult to attract and retain qualified
22 staff with the education, training and experience to understand the emotional and behavioral
23 issues confronting the children. (*Id.*, ¶¶ 8-9.) Unless implementation of the 2009 Budget is
24 enjoined, David & Margaret will be forced to eliminate its staff pension match program and will
25 likely be forced to institute a staff pay-cut and make further reductions in the size of its staff.
26 (*Id.*, ¶¶ 11-12.) It may consider reducing the number of girls it serves. (*Id.*)

27 Martin’s Achievement Place, which operates eight residential group homes for forty-
28 eight teenage boys that have been involved in inappropriate sexual behavior, will also be

1 significantly affected by the rate cuts and will be forced to cut essential services for the foster
2 children it houses. DSS's foster care maintenance payments make up approximately sixty-five to
3 seventy percent of its operating budget. (Martin Decl., ¶ 4.) If implementation of the 2009
4 Budget is not enjoined, Martin's Achievement Place will likely make reductions to its programs
5 or institute pay-cuts for its staff despite the fact that the children under its care require
6 specialized care and supervision. (*Id.*, ¶ 8.)

7 In addition, Family Life Center ("Family Life"), which operates a private school and a
8 group home that serves boys and girls age thirteen to eighteen who have severe mental health
9 issues including depression, anxiety, ADHD and drug and alcohol addiction, will have to reduce
10 services to the foster children it serves if the rate reduction goes into effect. (Declaration of
11 Susan Lemieux ["Lemieux Decl.,"] ¶¶ 3, 8.) If the rate cuts go into effect, Family Life will be
12 unable to afford to hire the additional staff it needs, including three full-time child care workers
13 and one full-time administration/office position. The rate reductions will mean that the children
14 will have less supervision, which effects Family Life's ability to proactively work with children
15 in order to prevent crisis situations. (*Id.*, ¶ 8.) Furthermore, its staff is often overly-stressed,
16 increasing the potential for errors and the lack of an administration/office position leads to delays
17 in obtaining crucial information from past service providers. (*Id.*, ¶ 9.) This, in turn, directly
18 impacts Family Life's ability to plan for the children's treatment. (*Id.*)

19 Lincoln Child Center, a licensed group home operating since 1883 that provides services
20 to children aged 6 to 14 that are classified as severely emotionally disturbed, will have to cut
21 essential programs if the ten-percent reduction goes into effect. (Declaration of Chris Stoner-
22 Mertz ["Stoner-Mertz Decl.,"] ¶ 3.) Unless the counties it serves are able to fill the gap between
23 its costs and the State-established foster care maintenance payments with county funds, it will be
24 forced to close. (*Id.*, ¶ 8.)

25 Additionally, Aviva Family and Children's Services ("Aviva"), an organization founded
26 in 1913 that operates a group home for thirty-six teenage girls, will likely be forced to close its
27 facility if the rate cuts go into effect. (Declaration of Andrew Diamond ["Diamond Decl.,"] ¶ 3.)
28 The girls who are served are referred through the Los Angeles County Department of Probation

1 and the Department of Child and Family Services and have serious emotional problems and
2 severe learning problems. (*Id.*) They all require intensive supervision, therapy and many require
3 special education services. (*Id.*) Aviva cannot lay-off staff or reduce the services it provides
4 without compromising the quality of its residential program. (*Id.*, ¶ 9.)

5 Hathaway-Sycamores Child & Family Services (“Hathaway-Sycamores”), Los Angeles
6 County’s largest children’s mental health and welfare agency formed through the 2005 merger of
7 two legacy organizations that were opened in 1902 and 1919, has already had to reduce 118 beds
8 and will likely have to reduce its program even further if the rate cuts are implemented.

9 (Declaration of William P. Martone [“Martone Decl.”], ¶¶ 3, 7, 11.) If the rate cut goes into
10 effect, it will eliminate staff, an administrative position and reduce social worker supervision
11 time, the size of its nursing staff and its crisis intervention staff. (*Id.*, ¶ 12.)

12 Even before the rate reductions take effect on October 1, 2009, several members of the
13 Alliance were forced to close their group home programs completely or to make significant
14 reductions in the size of their programs. Despite their best efforts to control increases in their
15 operating costs, these agencies found that the gap between the costs of providing decent quality
16 care and services to foster children and the level of funding provided by the standardized
17 schedule of rates became larger than what could be covered by private charitable contributions.

18 (Johnson Decl., ¶ 11, Ex. B.)

19 For example, until June 1, 2009, Aviva operated a group home for teenage girls called the
20 Milken Family Graduate House, which provided services for over twenty years, first as a run-
21 away shelter and then as a licensed residential facility. (Diamond Decl., ¶ 7.) The decision to
22 close the facility was a direct result of inadequate DSS reimbursement rates. (*Id.*) Even if the
23 facility had been filled to capacity, it would have been operating at a loss. (*Id.*)

24 Similarly, Long Beach Youth Home, a group home for boys that began operating in 1970
25 and had the capacity to provide services for forty boys, was forced to close in 2007 because of
26 the failure of the foster care maintenance payments to cover its costs. (Declaration of Robert Di
27 Stefano [“Di Stefano Decl.”], ¶¶ 3, 6.) At the time of its closure, the facility was projected to
28 have a deficit of \$750,000 annually which was due exclusively to unreimbursed inflation-related

1 expenses from 1990 to 2007. (*Id.*, ¶ 7.) The home's closure directly resulted from the revenue
2 deficit caused by the State's failure to adjust reimbursement rates for inflation. (*Id.*, ¶ 8.)

3 Hathaway-Sycamores was also forced to close several group homes as a result of the
4 failure of the foster care maintenance payments to cover its costs. (Martone Decl., ¶ 7.) In 2005
5 and 2006, Hathaway-Sycamores was forced to close three community-based homes that provided
6 18 beds. (*Id.*, ¶ 7.) In 2007, Hathaway-Sycamores was forced to close a 100 bed co-ed
7 residential facility. (*Id.*) Financial concerns resulting from DSS's inadequate reimbursement
8 rates were a substantial factor in these closures. (*Id.*) It now operates one forty-bed home for
9 eight to eighteen-year-old boys. (*Id.*, ¶ 4.) This facility once accommodated sixty children but
10 Hathaway-Sycamores was forced to reduce its size. (*Id.*, ¶ 8.) Hathaway-Sycamores has also
11 been forced to reduce the size of its on-site nursing staff, hire less experienced and less educated
12 staff and decrease the number of management staff. (*Id.*, ¶ 9.)

13 Closures and the reduction in size of group home programs harm foster children because
14 they decrease the placement options open to social workers and probation officers seeking
15 placements for children who have emotional and/or behavioral problems and require a structured
16 living environment and 24-hour supervision. (Johnson Decl., ¶ 12.) As a result, social workers
17 and probation officers may be forced to place a child in a group home program that is outside of
18 the county or state in order to meet the child's specific needs for supervision and services. (*Id.*)
19 Such long distance placements make family involvement with the children very difficult which is
20 a critical factor in achieving positive outcomes for the children, reunifying them with their
21 families and avoiding multiple and long-term stays in foster care. (*Id.*)

22 Alternatively, county social workers and probation officers may be forced to place a child
23 in a group home program that is not designed to meet that child's specific needs. (Johnson Decl.,
24 ¶ 13.) This will reduce the chance of achieving a positive outcome for the child and is likely to
25 result in multiple failed foster care placements and a longer length of stay in out-of-home care.
26 (*Id.*) In the absence of another alternative, a delinquent foster youth may be placed in a more
27 restrictive, locked detention setting, such as a county juvenile hall, camp or ranch, even though
28 the youth would not pose a threat to public safety. (*Id.*)

1 In addition to closures and reductions to their programs, the Alliance's members have
2 been forced to reduce the level of care and services they provide to the foster children placed
3 with them because the standardized schedule of rates has not been adjusted on a regular and
4 periodic basis to cover the steady increase in the costs of doing business. (Johnson Decl., ¶ 14.)

5 In the years when the standardized schedule of rates has remained frozen without a cost
6 of living adjustment (in 14 of the 19 years since 1990), group homes were still required to pay
7 for items the prices of which were beyond their control, such as food, clothing, rent, utilities and
8 transportation costs. (Johnson Decl., ¶ 15.) After paying for these other operating costs, group
9 homes were left with little money to pay for the wages and benefits of child care staff, their first-
10 level supervisors and social workers. (*Id.*) As a result, many group home programs were forced
11 to freeze, and in some cases even reduce, their staff members' pay and benefits. (*Id.*) This, in
12 turn, has made it increasingly difficult for group homes to be competitive in the labor market and
13 to recruit qualified staff, with the education, training, and experience to understand and engage
14 the emotional and behavioral issues confronting the children placed into group care. (*Id.*)

15 Group homes have also found it increasingly difficult to retain qualified staff and have
16 experienced high turn-over rates in the range of 50% to 75% annually. (Johnson Decl., ¶ 16.)
17 The single most important contribution that a group home program can make towards the
18 achievement of positive outcomes for a child is facilitating the development of a stable and
19 supportive relationship between the child and a skilled and dedicated caregiver. (*Id.*) Many
20 children placed into group care have had few, if any, such relationships with a caring adult
21 during their young lives. (*Id.*) With this high level of turn-over, it is difficult for a child to
22 develop a stable relationship with the caregivers. (*Id.*) This reduces the effectiveness of the
23 group home treatment program, increases their length of stay in a group care setting and delays
24 reunification with their own family or another permanent family. (*Id.*)

25 When the current RCL rate-setting system was initially implemented in 1990, the amount
26 included in the standardized schedule of rates for wages of an entry-level child care worker was
27 \$5.93 per hour. (Johnson Decl., ¶ 17.) At the time, it was 40% above the minimum wage in
28 effect in California at that time. *Id.* For a child care worker with a Bachelor's degree in a

1 behavioral science, the amount was \$8.01 per hour, over 88% above the minimum wage. (*Id.*)

2 By 2009, the amount included in the standardized schedule of rates for the wages of an
3 entry-level child care worker had only increased to \$8.22 per hour -- less than 3% above
4 California's current \$8.00 per hour minimum wage. (Johnson Decl., ¶ 18.) For a child care
5 worker with a Bachelor's degree, the amount only increased to \$11.10 per hour (or \$23,088
6 annually)-- only 39% above the minimum wage. (*Id.*) If the ten-percent rate reduction is
7 allowed to take effect on October 1, 2009, the amount for an entry level child care worker would
8 drop to \$7.40 per hour -- more than 7% *below* California's current minimum wage. (*Id.*, ¶ 24.)

9 With an entry-level wage of near minimum wage, and minimal benefits, the pool of job
10 applicants for group home child care worker positions is extremely limited. (*Id.*, ¶ 19.) For child
11 care workers with a Bachelor's degree, the current annual salary of \$23,088 cannot compete with
12 a starting salary of approximately \$40,000 annually (plus substantial benefits) for a teacher
13 working nine months out of the year and teaching children who do not necessarily have any
14 emotional or behavioral problems. (*Id.*) Reducing that annual salary by 10%, to \$20,779, will
15 make group homes even less competitive in the labor market. Group homes are already having
16 great difficulty recruiting and retaining qualified staff. (*Id.*, ¶ 24.) A ten-percent rate reduction
17 would make recruitment and retention even more difficult.

18 Some group homes have also been forced to reduce the level and/or frequency of support
19 provided to the children. (Johnson Decl., ¶ 21.) For example, some have eliminated the child
20 care staff who provided tutoring to children to assist them with their homework and who worked
21 with schools to avoid suspensions and expulsions which is inevitable with children placed in
22 group care with significant emotional and/or behavioral problems. (*Id.*) Other homes have
23 eliminated staff who provided transportation for, and supervision of, visits with family members
24 working towards reunification. (*Id.*) Staffing reductions of this kind have a clear and direct
25 negative impact on the educational outcomes for children and for their reunification. (*Id.*)

26 If the ten-percent rate reduction is allowed to take effect, staff turn-over rates will
27 increase, disrupting the stability of care for the children. (*Id.*, ¶ 25.) It will not be possible to
28 recruit new staff with the education, training and experience to understand the emotional and

1 behavioral issues confronting the children placed into group care. (*Id.*) Group care in California
2 will become a place where foster children with emotional and/or behavioral problems can only
3 be contained, because group homes' staff will not have the skill, experience or time needed to
4 help these children resolve their underlying problems and be ready to move back to living in a
5 family environment. (*Id.*)

6 **C. California Alliance I**

7 On June 30, 2006, the Alliance filed an action under 42 U.S.C. § 1983 in the Northern
8 District of California against the State of California for violations of the Child Welfare Act. *See*
9 *California Alliance I*, No. C 06-04095 MHP (N.D. Cal. June 30, 2006). At the time, California's
10 foster care maintenance payments were 80% of foster care group homes' costs. The court issued
11 an order granting the State's Motion for Summary Judgment and denying the Alliance's Motion
12 for Summary Judgment. *See California Alliance I*, No. C 06-04095 MHP, 2008 WL 686860
13 (N.D. Cal. Mar. 12, 2008). The court held that the State was permitted to substantially comply
14 with the requirements of the Child Welfare Act, that reimbursement of 80% of the costs of
15 providing foster care was substantial compliance and that the State could take into account
16 budgetary considerations in setting its foster care maintenance payment rates. *California*
17 *Alliance I* is currently on appeal and is set for hearing before the Ninth Circuit Court of Appeals
18 on October 7, 2009.

19 **III. THE COURT SHOULD ISSUE A TEMPORARY RESTRAINING ORDER**
20 **ENJOINING THE STATE FROM IMPLEMENTING THE TEN-PERCENT**
21 **RATE CUTS IN FOSTER CARE MAINTENANCE PAYMENTS**

22 It is well established that the issuance of a temporary restraining order is to prevent a
23 state from taking an action that is alleged to be preempted by federal law. *See, e.g., Doran v.*
24 *Salem Inn, Inc.*, 422 U.S. 922, 931-34 (1975) (holding that the district court did not abuse its
25 discretion in enjoining a town from enforcing an ordinance that allegedly violated the First and
26 Fourteenth Amendments); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 964 (9th Cir. 2005)
27 (upholding an injunction prohibiting the California Corporations Commissioner from ordering
28 regulatory audits of a national bank that allegedly violated 12 U.S.C. § 484(A)); *Bernhardt v.*
County of Los Angeles, 339 F.3d 920, 925-32 (9th Cir. 2003) (determining that the district court

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1 erred in refusing to enjoin the County of Los Angeles from applying a lump sum settlement
2 policy in civil rights cases that allegedly violated 42 U.S.C. § 1988).²

3 Issuance of a temporary restraining order is intended to preserve the status quo pending a
4 full hearing on a preliminary injunction. See *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395
5 (1981); *Bronco Wine Co. v. U.S. Dept. of Treasury*, 997 F. Supp. 1309, 1313 (E.D. Cal. 1996).
6 To prevail on request for temporary restraining order or preliminary injunction, a plaintiff must
7 establish that (1) “he is likely to succeed on the merits,” (2) “he is likely to suffer irreparable
8 harm in the absence of preliminary relief,” and (3) “the balance of equities tips in his favor, and
9 that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council*, -- U.S. --, 129
10 S.Ct. 365, 374 (2008); see also *Am. Trucking Ass’ns v. City of L.A.*, 559 F.3d 1046, 1052 (9th
11 Cir. 2009). “In each case, courts ‘must balance the competing claims of injury and must
12 consider the effect on each party of the granting or withholding of the requested relief.’” *Winter*,
13 129 S.Ct. at 376 (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542
14 (1987)).

15 As set forth below, each of these factors weighs heavily in favor of issuing the requested
16 preliminary injunction.

17 **A. Foster Children Will Suffer Immediate and Irreparable Harm if the State is**
18 **Not Enjoined From Implementing the 2009 Budget**

19 Courts have consistently held that withholding benefits and reducing payments for vital
20 services like those provided by members of the Alliance would cause irreparable harm. The
21 Ninth Circuit recently held that a ten-percent reduction in Medi-Cal benefits in California would
22 cause irreparable harm if not enjoined. *Independent Living Center, of So. Cal., Inc. v. Maxwell-*
23 *Jolly*, 572 F.3d 644, 663 (9th Cir. 2009). The court held that irreparable harm was shown
24 because enforcement of the ten-percent reduction “may deny [Medi-Cal recipients] needed
25 _____

26 ² Further, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), “it is appropriate for a
27 party to move for a preliminary injunction in federal court against state officers ‘who threaten
28 and are about to commence proceedings, either of a civil or criminal nature, to enforce against
parties affected an unconstitutional act, violating the Federal Constitution.’”

1 medical care.” *Id.* at 659 (quoting *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982)). *See*
2 *also LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 55-56 (2d Cir. 2004)
3 (affirming preliminary injunction prohibiting reduction of retiree health benefits, including
4 increased cost of prescription medications, because would pose “substantial risk to plaintiffs’
5 health”); *Beltran*, 677 F.2d at 1322 (finding sufficient risk of irreparable injury when plaintiffs
6 showed that absent injunction would be denied “needed medical care”).

7 Additionally, last week Judge Armstrong of this Court enjoined the State from
8 implementing the 2009 Budget’s reduction in benefits provided to Medi-Cal Adult Day Health
9 Care (“ADHC”) Members. *Brantley v. Maxwell-Jolly*, No. 4:09-cv-03798-SBA (Sept. 10, 2009).
10 The plaintiffs in *Brantley* argued that the implementation of the 2009 Budget would force many
11 of the individuals receiving day care services paid for by the State to be institutionalized in
12 violation of the Americans with Disabilities Act (“ADA”). The court held that the harm to this
13 vulnerable population “is particularly irreparable and imminent” because “[e]ach of the Plaintiffs
14 suffers from debilitating physical and/or mental conditions for which the availability of ADHC
15 services is critical to ensuring that their tenuous physical and mental conditions remain stable,
16 enabling them to remain in the community.” *Id.* at 20.

17 Similar to the Medi-Cal recipients in *Independent Living Center* and *Brantley*, the
18 Alliance’s members and California’s foster care children will suffer immediate and irreparable
19 harm if the rate cuts are implemented. Children who are eligible for foster care maintenance
20 payments are in dire need of assistance from the State and Federal government. These children
21 rely on the State’s obligation to provide for their basic necessities. Unlike the recipients of
22 nearly all other public assistance programs, neither the foster children nor their parents request
23 foster care services. On the contrary, the State intervenes in the lives of these children to protect
24 them from abuse or neglect and places them into foster care under a court order. Unless the
25 Court issues a preliminary injunction, the State will implement the 2009 Budget, resulting in a
26 ten-percent reduction in the foster care maintenance payments made to foster care group homes,
27 including those in the Alliance. This will cause severe and irreparable harm to members of the
28 Alliance and the foster children they serve.

1 Additionally, the reduction in the foster care maintenance payments will cause many
2 foster care providers to reduce their staff or to close their group homes entirely. Many foster
3 children will be unable to find satisfactory care at another facility, especially since many of these
4 group homes are the only homes in the area that provide services to the specific groups of high-
5 risk foster children. Other group homes that are able to stay in business will be forced to
6 dramatically cut necessary programs that benefit these foster children. These foster care
7 providers have already had to drastically reduce their staff and the services and programs they
8 offer the foster children they serve. With the additional rate reduction, they will be forced to
9 make even more cuts, to the detriment of California's foster children.

10 As described in Section II(B) *supra*, David & Margaret will be forced to freeze staff
11 wages and benefits, eliminate its staff pension match program and institute a staff pay-cut and
12 make further reductions in the size of its staff. (Rich Decl., ¶¶ 9, 11.) Martin's Achievement
13 Place will have to make reductions to its programs or institute pay-cuts for its staff in addition to
14 the cuts it has already made. (Martin Decl., ¶ 8.) Family Life will have to reduce services to the
15 foster children it serves if the rate reduction goes into effect, including a reduction in the amount
16 of supervision it can provide which will impact Family Life's ability to provide adequate care to
17 the children it serves. (Lemieux Decl., ¶ 9.) Lincoln Child Center, a licensed group home
18 operating since 1883, will have to cut essential programs if the ten-percent reduction goes into
19 effect. (Stoner-Mertz Decl., ¶ 8.) Likewise, Aviva will suffer irreparable harm as well as the
20 children with serious emotional problems and severe learning problems that it serves. (Diamond
21 Decl., ¶ 9.) The ten-percent reduction in reimbursement rates may force Aviva to consider the
22 viability of continuing to operate the Annenberg Center. (*Id.*) Finally, Hathaway-Sycamores
23 will also likely have to reduce its program even further if the rate cuts are implemented.
24 (Martone Decl., ¶ 11.) In the event that it cannot maintain the quality of care that the children
25 deserve due to the reduction of staff or other programs for the foster children it serves, it will
26 close entirely. (*Id.*)

27 In sum, the ten-percent rate cut in the 2009 Budget for foster care maintenance payments
28 will have a dramatic effect on the level and quality of care provided to California's foster

1 children and will eliminate appropriate foster care placements and services to high-risk segments
2 of this already vulnerable population. As a result, foster children's quality of life, as well as that
3 of their caregivers and the staff working at foster care group homes, will be greatly diminished,
4 causing them irreparable harm.

5 **B. The Alliance Has an Overwhelming Likelihood of Success on the Merits**

6 **1. The Child Welfare Act Confers A Federal Right Under**
7 **42 U.S.C. § 1983.**

8 The Child Welfare Act gives foster care group homes the right to receive foster care
9 maintenance payments -- an enforceable right under 42 U.S.C. § 1983. *California Alliance I*,
10 459 F. Supp. 2d 919, 925 (N.D. Cal. 2006) (holding that the "CWA confers an individual right
11 on plaintiff's members for enforcement of the foster care maintenance payments pursuant to
12 section 675(4)(A)"); *California State Foster Parent Ass'n v. Wagner*, No. C 07-05086 WHA,
13 2008 WL 191283, at * 1 (N.D. Cal. Jan. 22, 2008) (holding that a private action pursuant to the
14 Child Welfare Act can proceed pursuant to § 1983).

15 Section 1983 creates a private right of action where "Congress intended to confer
16 individual rights upon a class of beneficiaries." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285
17 (2002). The United States Supreme Court has set forth a three part test to guide this inquiry. *See*
18 *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997). The test requires that: (1) "Congress must
19 have intended that the provision in question benefit the plaintiff"; (2) "the plaintiff must
20 demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous'
21 that its enforcement would strain judicial competence"; and (3) "the provision giving rise to the
22 asserted right must be couched in mandatory, rather than precatory terms." *Id.* (citations
23 omitted).

24 First, it is clear that Congress intended the Child Welfare Act to confer individual rights.
25 The Child Welfare Act requires that states provide "foster care maintenance payments" on behalf
26 of eligible children to child-care institutions, including group homes. 42 U.S.C. §§ 671(a)(2),
27 672(b)(2), 675(4); 45 C.F.R. § 1356.21(a) (2001). The statute clearly includes foster care
28 institutions: "Foster care maintenance payments may be made under this part only on behalf of a

1 child ... who is ... (2) in a child-care institution. . . .” 42 U.S.C. § 672(b). The payments
2 available under the Child Welfare Act are thus plainly intended for organizations such as the
3 members of the Alliance.

4 Second, the rights protected by the Child Welfare Act are “not so ‘vague and amorphous’
5 that its enforcement would strain judicial competence.” *Blessing v. Freestone*, 520 U.S. 329,
6 340-341 (1997). The Alliance seeks to require that the State implement a plan that allows the
7 Alliance’s members to recover the costs to which they are entitled under the Child Welfare Act,
8 namely, “the cost of (and the cost of providing)” the enumerated items in the Act. 42 U.S.C. §
9 675(4)(A). The statute is clear; Congress specified its intent by listing the specific items for
10 which the members of the Alliance should be paid. It is clear which items are covered and which
11 are not.

12 Finally, the rights under the Child Welfare Act are mandatory. The language of the
13 statute clearly states that “[i]n order for a State to be eligible for payments under this part, it *shall*
14 have a plan approved by the Secretary which provides for foster care maintenance payments.”
15 42 U.S.C. § 671(a)(1) (emphasis added). Thus, the foster care maintenance payments are
16 mandatory. Furthermore, the definition of what is included in “foster care payments” is specific
17 and detailed, and there is no ambiguity regarding what payments must be made.

18 Accordingly, the Child Welfare Act confers a federal right and this action can proceed
19 pursuant to § 1983.

20 **2. The 2009 Budget Conflicts With The Child Welfare Act And Is**
21 **Preempted And Invalid Under The Supremacy Clause**

22 **a. The Child Welfare Act Requires Full Compliance**

23 The budget cuts in the 2009 Budget violate the Child Welfare Act. The Child Welfare
24 Act commands that “[e]ach State with a plan approved . . . *shall* make foster care maintenance
25 payments on behalf of each child who has been removed from the home of a relative” 42
26 U.S.C. § 672(a)(1) (emphasis added). The Child Welfare Act defines “foster care maintenance
27 payments” as “payments to *cover the cost of (and the cost of providing)*” the enumerated items
28 in the Act, including food, clothing, shelter and supervision. 42 U.S.C. § 675(A)(4) (emphasis

1 added). Because the 2009 Budget fails to cover these costs, it is invalid and preempted under the
2 Supremacy Clause of the United States Constitution. *See Independent Living Center*, 572 F.3d
3 644 (issuing a preliminary injunction preventing the implementation of a ten-percent rate
4 reduction in Medi-Cal payments in California because the plaintiff would likely prevail on the
5 merits of its claim that the rate reduction was preempted by Title XIX of the federal Social
6 Security Act and is therefore invalid under the Supremacy Clause).

7 The Supremacy Clause permits Congress to preempt any state law that conflicts with the
8 exercise of federal power. Conflict preemption arises “when compliance with both federal and
9 state regulations is a physical impossibility, or where state law stands as an obstacle to the
10 accomplishment and execution of the full purposes and objectives of Congress.” *PG&E Co. v.*
11 *State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983) (internal quotation
12 marks and citations omitted); *see also Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003).

13 Under this so-called “obstruction” preemption, “an aberrant or hostile state rule is preempted to
14 the extent it actually interferes with the ‘methods by which the federal statute was designed to
15 reach [its] goal.’” *Id.* at 1137 (quoting *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987))
16 (alteration in original). “Thus, obstruction preemption focuses on both the objective of the
17 federal law and the method chosen by Congress to effectuate that objective, taking into account
18 the law’s text, application, history, and interpretation.” *Id.*

19 The plain language and purposes of the Child Welfare Act require that “foster care
20 maintenance payments” must “cover” the costs of providing the essential items set forth in
21 Section 675(4)(A), not just some percentage of those costs. Canons of statutory interpretation
22 require this result: “In interpreting a statute [the Court] first look[s] to the plain meaning of its
23 text.” *Paul Revere Ins. Group v. U.S.*, 500 F.3d 957, 962 (9th Cir. 2007) (citing *Molski v. M.J.*
24 *Cable, Inc.*, 481 F.3d 724, 732 (9th Cir. 2007) (“Statutory interpretation begins with the plain
25 meaning of the statute’s language.”)). Furthermore, ““unless otherwise defined, words will be
26 interpreted as taking their ordinary, contemporary, common meaning.”” *Wilderness Soc’y v. U.S.*
27 *Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (quoting *Perrin v. United*
28 *States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L.Ed.2d 199 (1979)). “It is also a fundamental canon

1 that the words of a statute must be read in their context and with a view to their place in the
2 overall statutory scheme.” *Paul Revere Ins. Group*, 500 F.3d at 962 (internal quotations
3 omitted); *see also Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991).

4 The definition of “foster care maintenance payments” is not ambiguous. The Act defines
5 the term as “payments to cover the cost of (and the cost of providing)” the essential items set
6 forth in the statute. 42 U.S.C. § 675. The plain meaning of this phrase is that states must make
7 payments that *cover* all of the costs of providing the enumerated items that are necessary and
8 reasonable for that purpose, not just a portion of those costs.

9 The common, ordinary definition of “cover” in the context of money payments or costs is
10 an amount “enough to pay” or “sufficient to defray, meet or offset the cost.” *See Concise Oxford*
11 *English Dictionary* 330 (Catherine Soanes & Angus Stevenson, eds., 11th ed., Oxford Univ.
12 Press 2004) (“(of money) be enough to pay (a cost): there are grants to cover the cost of
13 materials for loft insulation.”) (emphasis added). There is no evidence that Congress intended
14 anything other than the common, ordinary meaning of this term. *Sherman v. U.S. Parole Com’n*,
15 502 F.3d 869, 874 (9th Cir. 2007) (“when Congress uses a term of art, such as ‘warrant,’ unless
16 Congress affirmatively indicates otherwise, we presume Congress intended to incorporate the
17 common definition of that term.”) (citations and quotations omitted). Thus, the plain language
18 compels the conclusion that Congress intended to require states to make “foster care
19 maintenance payments” that cover all, not some undefined portion, of the necessary and
20 reasonable costs of providing the basic necessities enumerated in Section 675(4)(A), including
21 the reasonable costs of administration and operation. *See Connecticut Nat. Bank v. Germain*,
22 503 U.S. 249, 254 (1992) (“When the words of a statute are unambiguous, then, this first canon
23 is also the last: judicial inquiry is complete.”) (quotations omitted).

24 Based on the plain language of the Child Welfare Act, foster care maintenance payments
25 must be enough to *cover* the *costs* of providing the enumerated items. However, California fails
26 to do so and has made the situation more dire through the passage of the 2009 Budget. Although
27 foster care rates have increased by only 33% from the 1990-1991 fiscal year to the 2009-10 fiscal
28 year, the increase in average costs of providing care and supervision for children far exceeds

1 33%. By 2008-09, California only covered approximately 77% of the costs of providing the
2 basic necessities enumerated in the Child Welfare Act. Now that the 2009 Budget has been
3 enacted, California's payments did not receive a CNI-based cost-of-living increase at the
4 beginning of the fiscal year on July 1 and will be reduced by ten-percent on October 1, 2009. As
5 measured by the increase in the CNI, the purchasing power of AFDC-FC rates for the 2009-10
6 fiscal year will fall to only approximately 68% of the level they had in 1990, when the current
7 RCL rate-setting system was implemented. (Johnson Decl., ¶ 10.) In sum, California's foster
8 care maintenance payments do not come close to covering "the cost of (and the cost of
9 providing)" the items enumerated in the Child Welfare Act. Thus, the 2009 Budget violates the
10 Child Welfare Act and is void under the Supremacy Clause.

11 **b. The 2009 Budget Does Not Even Substantially Comply With**
12 **The Requirements of The Child Welfare Act**

13 Although it is the Alliance's position that the Child Welfare Act requires full compliance
14 and not mere "substantial compliance," the State has even failed to substantially comply with the
15 requirements of the Act. The court in *California Alliance I* held that the Child Welfare Act
16 permitted "substantial compliance," but cautioned that "given a multitude of years with
17 budgetary constraints, the standard rate schedule could become greatly out of synch with the
18 costs of items enumerated in the CWA. In that case, the rate may very well fall to a level that
19 does not satisfy the State's obligation to 'have a process for determining rates that takes into
20 account the statutory criteria mandated by the CWA.'" 2008 WL 686860, *4 (citing *Missouri*
21 *Child Care Ass'n v. Martin*, 241 F. Supp. 2d 1032, 1045 (W.D. Mo. 2003)).³ At the time the
22

23 ³ The Alliance has appealed the court's order arguing, among other things, that the Child Welfare
24 Act requires full compliance based upon applicable case law in the Eighth Circuit as well as case
25 law requiring full compliance with the Aid to Families with Dependent Children ("AFDC"), the
26 Food Stamp Act and Medicaid programs. See *Missouri Child Care Ass'n v. Cross*, 294 F.3d
27 1034, 1042 (8th Cir. 2002) (holding that since Missouri voluntarily participated in the program
28 and accepted federal money for its participation, the Act "requires the state to reimburse
providers for specified expenses [and] **does not grant** Missouri officials **any discretion to deny**
providers these payments: 'Each State with a plan approved under this part shall make foster
care maintenance payments . . .'" (first emphasis added)); *Gorrie v. Bowen*, 809 F.2d 508, 520
(8th Cir. 1987) ("The state voluntarily accepts the conditions imposed [upon states receiving

(Footnote Continued on Next Page.)

1 district court rendered its decision in *California Alliance I*, foster care maintenance payments
2 were 80% of foster care group homes' costs. If the additional 10% rate reduction on October 1,
3 2009 goes into effect, decreasing rates to approximately 68%, there is no question that the rate
4 has become "greatly out of synch" with the costs of items enumerated in the Child Welfare Act.
5 Since the 2009 Budget does not even substantially comply with the requirements of the Child
6 Welfare Act, it is void under the Supremacy Clause

7 **c. The State's Reliance Solely On Budgetary Considerations in**
8 **Setting Its Foster Care Maintenance Payment Rates Is A**
9 **Violation Of The Child Welfare Act**

9 The 2009 Budget is also void under the Supremacy Clause because the State
10 impermissibly relied solely on budgetary considerations when determining the reduced foster
11 care maintenance payment rates. The court in *California Alliance I* held that the "availability of
12 funds *cannot be the only consideration* when setting reimbursement methodology" 2008
13 WL 686860, at *5 (emphasis added). Furthermore, the Ninth Circuit recently held, in
14 *Independent Living Center*, that state Medicaid rate reductions may not be based solely on state
15 budgetary concerns. *Independent Living Center*, 572 F.3d at 655. In that case, the record
16 reflected that "the only reason for imposing the cuts was California's current fiscal emergency."
17

18 (Footnote Continued from Previous Page.)

19 federal funds] by Congress and, once it chooses to do so, the supremacy clause obliges it to
20 comply with federal . . . requirements."); *Withrow v. Concanon*, 942 F.2d 1385, 1387 (9th Cir.
21 1991) (rejecting arguments that a state need only substantially comply with the requirements of
22 the AFDC, Food Stamp Act and Medicaid programs and holding that these programs require full
23 compliance because the "language of the federal regulations is unequivocal, and states that a
24 decision 'shall' or 'must' be made within the specified number of days."); *Haskins v. Stanton*,
25 794 F.2d 1273, 1277 (7th Cir. 1986) (holding that the Food Stamp Act mandated strict
26 compliance, requiring that the state "comply[] with the Act as strictly as is humanly possible.");
27 *Southside Welfare Rights Organization v. Stangler*, 156 F.R.D. 187, 195 (W.D. Mo. 1993)
28 (requiring "compl[iance] with the Food Stamp Act 'as strictly as is humanly possible' and [the]
'eliminat[ion of] all but the truly inevitable instances of noncompliance'" and allowing 93-95%
compliance "as long as defendants continue good faith substantial efforts to achieve 100 percent
compliance."); *Robertson v. Jackson*, 766 F. Supp. 470, 473-474 (E.D. Va. 1991) (rejecting the
state's argument that it need only substantially comply with the Food Stamp Act and holding that
taking as long as 60 days to process an application when federal law requires no more than 30
days was "an intolerable, heartless and blatant disregard of the law" and that, as a result,
"[t]housands of class members are currently deprived of the help they need and are entitled to
under the law in their effort to feed themselves and their families.")

1 *Id.* The legislation was passed in an emergency session called to “address[] the fiscal
2 emergency declared by the Governor.” *Id.* “Thus, . . . the State’s decision to reduce Medi-Cal
3 reimbursement rates based solely on state budgetary concerns violated federal law.” *Id.* at 656
4 (citing *Rite Aid v. Houstoun*, 171 F.3d 842, 856 (3d Cir. 1999) (“[B]udgetary considerations may
5 not be the sole basis for a rate revision”); *Beno v. Shalala*, 30 F.3d 1057, 1069 n. 30 (9th Cir.
6 1994); *Amisub (PSL), Inc. v. Colo. Dep’t of Soc. Servs.*, 879 F.2d 789, 800-01 (10th Cir. 1989)).

7 Here, it cannot be disputed that the 2009 Budget’s ten-percent reduction in foster care
8 maintenance payments was based solely on the availability of funds and on budgetary
9 considerations. The State was in a fiscal emergency, requiring drastic cuts. These cuts had
10 nothing to do with costs associated with providing care to the State’s foster children. Therefore,
11 California’s most recent rate reduction violates the Child Welfare Act and is void under the
12 Supremacy Clause.

13 **C. The Balance Of Hardships Tips Strongly In The Alliance’s Favor And An**
14 **Injunction Is In The Public’s Interest**

15 In contrast to the harm likely to befall the Alliance and its members -- decreased care,
16 decreased housing, decreased services, pay cuts to their staff, turnover of staff, etc. --
17 Defendants’ sole injury would be, at most, temporary financial costs associated with making
18 foster care maintenance payments at 76% of the cost of care, instead of 68%, for the modest
19 period of time until this case can be heard on the merits. This financial impact does not
20 outweigh the hardship that the Alliance, its members and the foster children they serve would
21 suffer absent an injunction:

22 [T]he physical and emotional suffering shown by plaintiffs in the
23 record . . . is far more compelling than the possibility of some
24 administrative inconvenience or monetary loss to the government .
25 . . . Faced with such a conflict between financial concerns and
26 preventable human suffering, we have little difficulty concluding
27 that the balance of hardships tips decidedly in plaintiffs’ favor.

28 *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983); *see also Golden Gate Restaurant Ass’n*
v. City & County of San Francisco, 512 F.3d 1112, 1126 (9th Cir. 2008) (“While the City’s and
Association’s injuries are entirely economic, the Intervenors’ injuries include preventable human
suffering. Therefore, the balance of hardships tips sharply in favor of the parties seeking relief.”)

1 The Ninth Circuit held in *Independent Living Center* that although the “state may suffer
2 an abstract form of harm whenever one of its acts is enjoined[,] . . . [this harm is] outweighed by
3 the hardships likely to be suffered by Medi-Cal beneficiaries, who would be forced to go without
4 medical care.” 572 F.3d at 657. The court specifically rejected the State’s “suggestion that,
5 merely by enjoining a state legislative act, we create a per se harm trumping all other harms.” *Id.*
6 at 658.

7 In this case, the public interest weighs heavily in favor of granting relief to the Alliance.
8 “Our society as a whole suffers when we neglect the poor, the hungry, the disabled” *Lopez*,
9 713 F.2d at 1437. It would be tragic, not only from the standpoint of the individuals involved
10 but also from the standpoint of society, were California’s foster children to be wrongfully
11 deprived of essential benefits for any period of time.

12 **IV. THE COURT SHOULD DISPENSE WITH ANY REQUIREMENT FOR FILING**
13 **A BOND**

14 Federal Rule of Civil Procedure 65(c) provides that no preliminary injunction “shall issue
15 except upon the giving of security by the applicant, in such sum as the court deems proper, for
16 the payment of such costs and damages as may be incurred or suffered by any party who is found
17 to have been wrongfully enjoined or restrained.” “Rule 65(c) invests the district court with
18 discretion as to the amount of security required, if any.” *Jorgensen v. Cassidy*, 320 F.3d 906,
19 919 (9th Cir. 2003). In determining the amount of the bond, the court may consider the
20 applicant’s resources and likelihood of success on the merits. The court should not impose a
21 bond in an amount so high that it “would risk denying . . . access to judicial review.” *See*
22 *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1211 (9th Cir. 2000). In addition, a strong
23 likelihood of success on the merits may favor “a minimal bond or no bond at all.” *See Cal. ex*
24 *rel. Van De Kamp v. Tahoe Reg’l Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985). In
25 *Cal. ex rel Van De Kamp*, the court held that a district court has discretion to allow a non-profit
26 to obtain relief under Rule 65 without posting a bond or after posting a nominal bond “where
27 requiring security would effectively deny access to judicial review.” The Ninth Circuit held that
28 the district court’s decision to allow plaintiff to proceed without posting a bond was proper

1 because: (1) plaintiff was a non-profit that could not afford a substantial bond; (2) the case was
2 brought under a statute creating a private right of action and that fact obligated the court to
3 ensure plaintiffs had access to the courts; and (3) plaintiff's likelihood of success on the merits
4 was high. *Id. See also National Resource Defense Council, Inc. v. Morton*, 337 F. Supp. 167,
5 168 (D.C. 1976) (stating that "Rule 65(c) gives the Court wide discretion in the matter of
6 requiring security" and setting bond at \$100 for non-profit plaintiff); *Save Strawberry Canyon v.*
7 *DOE*, 613 F. Supp. 2d 1177, 1190-91 (N.D. Cal. 2009) (requiring no bond because plaintiff was
8 a small non-profit that would have difficulty posting a bond).

9 The Alliance is a non-profit organization that represents the interests of group homes that
10 provide care and supervision for foster children. This motion seeks to prevent the State from
11 reducing the amount of foster care maintenance payments made to the Alliance's members
12 because the foster care group homes and the children they serve will be financially devastated if
13 the rate cut is imposed. Therefore, this Court should waive any requirement that the Alliance
14 post a bond in this case.

15 **V. CONCLUSION**

16 Based on the foregoing, the Alliance respectfully requests that this Court issue a
17 temporary restraining order and an order to show cause why a preliminary injunction should not
18 issue prohibiting Defendants, as well as their agents, representatives, and employees, from
19 reducing the foster care maintenance payments made to foster care group homes pursuant to the
20 2009 Budget and taking any other act calculated to or likely to reduce the foster care
21 maintenance payments to foster care group homes.

22 DATED: September 18, 2009

Bingham McCutchen LLP

23 By: 
24

25 William F. Abrams
26 Attorneys for Plaintiff
27 CALIFORNIA ALLIANCE OF CHILD AND
28 FAMILY SERVICES