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14 SERVICES

15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION  
18

19 CALIFORNIA ALLIANCE OF CHILD AND  
FAMILY SERVICES,

20 Plaintiff,

21 v.

22 CLIFF ALLENBY, Interim Director of the  
California Department of Social Services, in his  
23 official capacity; MARY AULT, Deputy Director  
of the Children and Family Services Division of  
24 the California Department of Social Services, in  
her official capacity,

25 Defendants.  
26

CASE NO. C 06-4095 MHP

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Date: September 24, 2007  
Time: 2:00 p.m.  
Place: Ctrm. 15, 18th Floor  
Judge: The Hon. Marilyn H. Patel

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The only issue before this Court is whether payments made by the State of California  
4 (“State”) pursuant to California’s Rate Classification Level (“RCL”) system comply with the  
5 Child Welfare Act’s requirement that states pay for foster care maintenance to cover the cost of  
6 providing food, shelter, school supplies, insurance, other necessities and the reasonable cost of  
7 administration and operation of the group home. The State admits that payments made to group  
8 homes for the benefit of foster children during the past 16 years are at least 32 percent less than  
9 the amount costs have increased during this period as measured by the California Necessities  
10 Index. Nevertheless, the State’s summary judgment motion denies that its RCL system violates  
11 the Child Welfare Act. The State presents two arguments, unsupported by any case law, in  
12 support of its Motion for Summary Judgment: (1) neither the Child Welfare Act, its  
13 implementing regulations, nor the federal government dictate the manner in which states are to  
14 set rates for foster care group homes; and (2) California’s plan relating to setting payment rates  
15 for foster care and group homes submitted to the Department of Health and Human Services  
16 (“DHHS”), which is “subject to the availability of funds” (Cal. Wel. & Inst. Code  
17 § 11642(g)(2)), has never been rejected by DHHS and therefore must be valid.

18 Both of these assertions are incorrect. First, the federal government’s deference to state  
19 implementation and administration of payments required by the Child Welfare Act does not  
20 permit states to violate the Child Welfare Act by imposing a payment scheme that fails to cover  
21 the costs of food, shelter and other necessities required by the Child Welfare Act. The extent to  
22 which the federal government guides participating states in devising and implementing a plan  
23 that is compliant with the Child Welfare Act is irrelevant to determining the State’s compliance  
24 with the Child Welfare Act. The statute and its enabling regulations do not permit a state to  
25 implement a system that fails to meet the Child Welfare Act’s requirements. Secondly, there is  
26 no legal authority cited by the State to support its argument that DHHS’s “acceptance” of the  
27 State’s plan equates to a judgment by the federal government that the plan complies with federal  
28 law, and there is no reasonable basis for this conclusion as a matter of law. Moreover, the

1 State's implementing statutory provision that increases in payments are "subject to the  
2 availability of funds" (Cal. Wel. & Inst. Code § 11642(g)(2)) is invalid to the extent it attempts  
3 to exempt the State from payment of the costs required by the Child Welfare Act. There is no  
4 "funds availability" exception to compliance with the Child Welfare Act. Participating states  
5 such as California must comply.

6 It is undisputed that the State is not paying group homes the cost of providing foster care  
7 to California's children as required by the Child Welfare Act. The State's Motion for Summary  
8 Judgment fails to cite any authority in support of its position. The motion should be denied and  
9 the Alliance's motion for summary judgment should be granted.

## 10 **II. ARGUMENT**

11 The State moves for summary judgment on one ground: the Alliance has failed to prove  
12 the California's RCL system violates the Child Welfare Act. (Defendant's Motion for Summary  
13 Judgment ("Def. Mot."), Document 37, p. 9.) The State's Motion is unsupported by legal  
14 authority and admits that the State has failed to pay group homes the costs enumerated and  
15 required in the Child Welfare Act. The State argues that the Child Welfare Act is not violated  
16 when a state pays its foster care providers an amount less than the "actual operating costs faced  
17 by those providers" because neither the Child Welfare Act nor its implementing regulations  
18 dictate to participating states "what type of system a state must use to meet its obligations under  
19 the Act." (Def. Mot. at p. 7.) The State also argues that the federal government does not  
20 "prescribe a particular system for payment" nor "set[s] any particular method" for determining  
21 and calculating costs. (Id.)

22 The essence of the State's contention, without any legal support, is that the State can  
23 make any amount of payment that it chooses in any way that it likes because the Act and the  
24 implementing agency have not specified any particular manner of compliance. There is no legal  
25 authority cited for this contention because none exists. This position makes enforcement of any  
26 such statutory requirement a farce - all that a state would need to do is assert that it has  
27 unfettered discretion and the deference of the federal agency to implement a compliance plan,  
28 and therefore any system it creates complies with the Act. This gives license to implement

1 arbitrary or obsolete payment schemes that violate federal law.

2 The key point is that the State's Motion fails to address the dispositive issue of whether  
3 the RCL payment system violates the Child Welfare Act. Whether or to what extent the federal  
4 government prescribes a particular system for payment under the Child Welfare Act is not  
5 relevant. The Court should pay little attention to such matters, and must concern itself with  
6 "whether the state law and regulations are consistent with federal law." *Orthopaedic Hospital v.*  
7 *Belshe*, 103 F.3d 1491, 1495-96, 1500 (9th Cir. 1997) (holding that California's Department of  
8 Health's arbitrary and capricious Medicaid reimbursement rates were "contrary to law"). Thus,  
9 the relevant inquiry is whether payments made to group homes under the RCL system comply  
10 with the Child Welfare Act by covering the actual costs of and costs of providing foster care to  
11 California's children. It is undisputed that the RCL system as currently implemented does not do  
12 so.

13 **A. California's RCL System Payments Do Not Cover the Costs of**  
14 **and Costs of Providing Foster Care to Children in Group**  
15 **Homes.**

16 The Child Welfare Act requires each participating state to "make foster care maintenance  
17 payments on behalf of each child who has been removed from the home of a relative...into foster  
18 care..." 42 U.S.C. § 672(a)(1). Foster care maintenance payments are defined as "*payments to*  
19 *cover the cost of (and the cost of providing)* food, clothing, shelter, daily supervision, school  
20 supplies, a child's personal incidentals, liability insurance with respect to the child, and  
21 reasonable travel to and from the child's home for visitation... [and] the reasonable costs of  
22 administration and operation of the [foster care] institution as are necessarily required to provide  
23 the items described in the preceding sentence." 42 U.S.C. § 675(4)(A) (emphasis added).

24 Courts have held that the Child Welfare Act requires that "a State must consider certain  
25 factors and implies that a methodology that does not consider these factors is invalid." *Missouri*  
26 *Child Care Ass'n v. Martin, et al.*, 241 F.Supp.2d 1032, 1043-44, 1046 (W.D. Mo 2003)  
27 (holding that "the Defendants need a methodology that considers the cost of certain items, the  
28 cost of providing certain items, and the reasonable costs of administration for institutional

1 providers.”). The *Missouri Child Care Association* court ruled that, “[a]t a minimum, the State is  
2 obligated to have a process for determining rates that takes into account the statutory criteria  
3 mandated by the [Child Welfare Act].”

4 As noted above, the Child Welfare Act requires that states pay group homes for the “cost  
5 of (and cost of providing)” foster care to children. However, the California statute that  
6 effectuates the RCL system omits the Child Welfare Act’s “cost of (and cost of providing)”  
7 language.<sup>1</sup> The State admits that RCL system payments do not cover the actual costs incurred by  
8 group homes for providing foster care to children. (Def. Mot. at p. 7, Ins. 5-7.) “[D]efendants  
9 recognize that *a discrepancy exists between the increases in governmental payments to foster  
10 care group homes providers and the increases in various operating costs faced by those  
11 providers.*” (Id., emphasis added.) The State further admits that RCL payment rate increases do  
12 not correspond with increases in the California Necessities Index (“CNI”). (JSUF ¶¶ 15-16.)  
13 For example, from the fiscal year 1990-1991 to present, RCL payment rates increased 27%,  
14 compared to CNI increases of 59%. (JSUF ¶¶ 15-16.)

15 Thus, it is uncontroverted that California’s RCL system fails to pay group homes their  
16 actual costs of and costs of providing foster care for thousands of children. California’s failure  
17 to cover the cost of and cost of providing foster care violates the Child Welfare Act.

18 **B. The Approval of California’s Plan by a Federal Agency Does**  
19 **Not Equate to Compliance with Federal Law.**

20 The State argues that the Child Welfare Act “merely requires a participating state to  
21 submit a plan for financial assistance to the Secretary of the DHHS [Department of Health and  
22 Human Services] for approval.” (Def. Mot. at p. 7, Ins. 23-24.) The State contends that it  
23 submits a plan that “identifies the state law that meets the federal requirements,” along with a  
24 “certificate of compliance, which ensures compliance with federal requirements,” has submitted  
25

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26 <sup>1</sup> California Welfare and Institutions Code section 11460(a) states that “[f]oster care providers  
27 shall be paid a per child per month rate in return for the care and supervision of the AFDC-FC  
28 child placed with them.”

1 the required plan since the RCL's inception, and "[t]here have been no denials of any state plan  
2 relating to the setting of rates for foster care group homes by DHHS." (Def. Mot. at p. 7-8, Ins.  
3 5-7.) The State concludes that the Alliance cannot prevail because "California's RCL system has  
4 been in place for more than 17 years, and has not been found by the federal agency and officials  
5 under whose authority the system has operated to be out of compliance with the Child Welfare  
6 Act." (Def. Mot. at p. 9, Ins. 18-20.)

7 The State asserts that because the DHHS has never rejected its plan, its plan is compliant  
8 with the Child Welfare Act. The State offers no support for its contention that acquiescence by a  
9 federal agency to its plan means that it complies with the Child Welfare Act. As noted above, it  
10 is the Court's jurisdiction to decide "whether the state law and regulations are consistent with  
11 federal law. Neither the district court nor [the Ninth Circuit] defer to the state to answer that  
12 question." *Orthopaedic Hospital v. Belshe*, *supra*, 103 F.3d at 1495-96. This argument provides  
13 no support for the State's Motion for Summary Judgment and should be given no weight.

14 **C. Budgetary Constraints Do Not Excuse California's Violation of**  
15 **the Child Welfare Act.**

16 The State admits it does not pay group homes for the actual costs of and costs of  
17 providing foster care. (Def. Mot. at p. 7, Ins. 5-7.) The State asserts that its "attempts to provide  
18 costs [sic] increases to group home operators in step with the CNI" are excused because in  
19 "certain times there are simply insufficient funds to provide the funding increases...". (Id.) The  
20 State also argues that the language, "subject to the availability of funds," is included in Section  
21 11642 of the Welfare and Institutions Code to provide the State with the authority to limit funds  
22 to group homes when necessary. Thus, the State argues that its failure to pay group homes the  
23 actual costs of and costs of providing foster care to children is excused by budgetary constraints  
24 that are authorized by state statute, not the Child Welfare Act.

25 The State cannot excuse its noncompliance with federal law by claiming that it has  
26 determined that it lacks funds. There is no "lack of funds" exception to the Child Welfare Act's  
27 requirement that participating states make foster care maintenance payments. To receive the  
28 federal government's matching funds, Defendants must comply with the Child Welfare Act. *See*,



1 e.g., *Orthopaedic Hospital, supra*, 103 F.3d at 1493 (“To receive matching federal financial  
2 participation for such services, states must agree to comply with the applicable federal Medicaid  
3 law.”). Further, the Ninth Circuit has held that “lack of funds” is no excuse for failing to provide  
4 required payments. *See Blanco v. Anderson*, 39 F.3d 969, 973 (9th Cir. 1994) (“Lack of  
5 resources and lack of bad faith on the part of the agency officials [are] no excuse for failing to  
6 provide the plaintiffs their statutory entitlements”) (quotation and citation omitted).

7 The State offers no legal authority, aside from its own statute, to support its argument that  
8 lack of sufficient funds excuses its requirement under federal law to make payments to group  
9 homes that cover the actual costs of and costs of providing foster care to children. Therefore, in  
10 accordance with *Orthopaedic* and *Blanco*, the State’s insufficient payments are not excused by  
11 its own budgetary constraints.

### 12 III. CONCLUSION

13 The Child Welfare Act requires participating states, like California, to pay group homes  
14 for the actual costs of and costs of providing foster care. The State, by its own admission, fails to  
15 pay group homes for all of these costs. Federal courts do not recognize a lack of funds defense  
16 to a state’s noncompliance with federal law. Accordingly, the State’s Motion for Summary  
17 Judgment should be denied because California’s RCL system violates the Child Welfare Act.

18 DATED: September 4, 2007

Bingham McCutchen LLP

19  
20  
21 By: \_\_\_\_\_ /s/  
22 William F. Abrams  
23 Attorneys for Plaintiff  
24 CALIFORNIA ALLIANCE OF CHILD AND  
25 FAMILY SERVICES  
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Pursuant to General Order No. 45, Section X, I attest that concurrence in the filing of this  
document has been obtained from Mr. Abrams.