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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES,

Plaintiff,

v.

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

Defendants.

C 06-4095 MHP

REPLY TO OPPOSITION TO MOTION TO DISMISS

Hearing: October 23, 2006
Time: 2:00 p.m.
Courtroom: 15, 18th floor
Judge: The Honorable Marilyn H. Patel

INTRODUCTION

Echoing the erroneous contention underpinning its complaint, association plaintiff California Alliance of Child and Family Services opposes the state defendants' motion to dismiss by reiterating the contention that its members -- not one of which is a party to this action -- have the right to seek enforcement of the Child Welfare Act[1/] (Act) by means of 42 U.S.C. section

1. Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679b.

1983. On this basis plaintiff claims that it is empowered to compel state officials to increase the payment rates paid to its members for the services they provide to foster children. Plaintiff is mistaken.

Plaintiff demonstrates its mistaken understanding of the law from the outset of its Opposition to Motion to Dismiss (Opposition). In the introduction of the document, where it purports to paraphrase the three-prong test as to what under controlling law gives rise to a private right of action to enforce a provision of law under 42 U.S.C. section 1983, plaintiff misstates the law three times.

Initially, plaintiff states that the first prong of the three-part test is that "Congress must have intended that the provision in question benefit the plaintiff[.]" (Opposition, p. 3:2-4.) Plaintiff's characterization of the first prong of the test tracks what the Supreme Court announced in *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997), but blatantly ignores how that test was subsequently clarified by the Court. As defendants detailed in their motion to dismiss, and as apparently bears repeating here, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court rejected the notion that the first *Blessing* factor stood for the proposition that Congressional intent to permit enforcement under § 1983 will be found "so long as the plaintiff falls within the general zone of interest that the statute is intended to protect."[2/] *Id.* at 283. That the statute "benefits" the plaintiff is insufficient – the provision must unambiguously create a *right*:

> We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is *rights*, not the broader or vaguer "benefits" or "interests" that may be enforced under the authority of that section. (Emphasis original.)

Id.

Next, plaintiff misstates the second prong of the three-part test, describing it as "the right protected by statute is not vague or amorphous[.]" (Opposition, p. 3:5.) This

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2. See *31 Foster Children v. Bush*, 329 F. 3d 1255, 1269-1270 (11th Cir. 2003) ("The Supreme Court in *Gonzaga* clarified the first of the *Blessing* requirements.").

characterization drops a crucial factor that the Court added: "Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-341.

Finally, plaintiff incompletely states the third prong of the test as being that "the provision must be couched in mandatory terms." (Opposition, p. 3:6.) That is not what the Court said. It announced, rather: "Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341.

Given these misstatements of the law, it is not surprising that plaintiff is mistaken in its belief that it has a private right of action under 42 U.S.C. section 1983 to enforce the Act. As further explained below, plaintiff has no such right.

ARGUMENT

THIS ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO SHOW THAT IT HAS A PRIVATE RIGHT OF ACTION ENFORCEABLE UNDER SECTION 1983.

Following its misstatements of the law in its introduction, plaintiff launches into a "statement of facts" that largely reiterates the dire allegations of its complaint and is immaterial to the issue at heart of the motion to dismiss. Within this statement, however, plaintiff avers:

> "Pursuant to the Child Welfare Act, the DSS must provide for payments to foster care institutions in an amount that covers 'the cost of (and the cost of providing) food, clothing, shelter, daily supervision [footnote omitted], school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, ... [and] the reasonable cost of administration and operation of the [foster case] institution as are necessarily required to provide the items described in the preceding sentence.'"

(Opposition, p. 6:5-11, citing 42 U.S.C. sec. 675(4)(A).) Plaintiff's statement demonstrates that foster care institutions may be indirect beneficiaries of monies that flow through the Act, but the construction suggests that because plaintiff's members benefit from DSS's payments they, through their association or otherwise, have a private right of action to enforce the law under 42 U.S.C. section 1983. That suggestion lacks a valid legal foundation.

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1. Plaintiff's Reliance on *Missouri Child Care Association v. Martin, et al.* Is Misplaced.

Plaintiff makes much use in its opposition to the holdings of *Missouri Child Care Association v. Martin, et al.*, 241 F.Supp.2d 1032 (W.D. Mo. 2003). In that case, the District Court for the Western District of Missouri ultimately found that Missouri's methodology for determining foster care services costs was flawed and needed to take into account the federal statutory criteria in the Act. *Id*., generally, at 1042-1046. However, that holding was reached only after the Missouri court first found that the plaintiff there -- an association like plaintiff here -- had a private right of action to enforce the law by means of 42 U.S.C. section 1983. *Id*. at 1040. The decision of the Missouri district court -- which stated at 241 F.Supp.2d at 1040 that its conclusion was based on two 8th Circuit cases and *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) -- is not, of course, binding on this Court. Given the discussion of the *Wilder* case by the Supreme Court in the *Gonzaga* decision, 12 years after *Wilder* was decided, defendants submit that the district court in Missouri misapplied the lessons of *Wilder*.

In *Gonzaga*, the Court noted that "[s]ince *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights." *Gonzaga*, 536 U.S. at 280, referring to *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). Expanding on its statement, the Court first described *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987) (where it allowed a section 1983 suit by tenants to recover past overcharges under a rent-ceiling provision of the Public Housing Act on the ground that the provision unambiguously conferred "a mandatory [benefit] focusing on the individual family and its income." *Id*. at 430. The *Gonzaga* Court then discussed *Wilder*, where it allowed a section 1983 suit brought by health care providers to enforce a reimbursement provision of the Medicaid Act on the ground that the provision, much like the rent-ceiling provision in *Wright*, explicitly conferred specific monetary entitlements upon the plaintiffs. *Gonzaga*, 536 U.S. at 280-281, discussing *Wright*, 496 U.S. at 522-523.

Following these references, the *Gonzaga* decision notes the Court's change of direction in stating that "[o]ur more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes[,]" first discussing *Suter v. Artist M.*, 503 U.S.

347 (1992) and then *Blessing v. Freestone*, 520 U.S. 329 (1997), before concluding: "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under section 1983." *Gonzaga*, 536 U.S. at 283. Given this discussion, defendants submit that the Missouri district court's reliance on *Wilder* for the proposition that a private right of action exists for the Act's "reimbursement provisions are in fact intended to benefit foster care institutions and it has standing to pursue its claims[]" (*Missouri Child Care Association*, 241 F.Supp.2d at 1040) is misplaced.[3/]

2. The Act's Own Terms Provide No Basis for a Provider's Right of Action.

A review of the Act's provisions makes clear that children, not foster care providers, and certainly not an association representing foster care providers, are the intended recipients of any rights to enforce the Act's provisions. The Congressional declaration of purpose for the Act is explicit as to its intended beneficiaries: "For the purpose of enabling each State to provide, in appropriate cases, foster care and transitional independent living programs for children... ." 42 U.S.C. sec. 670. Moreover, the Congressional purpose clearly explains the means by which that purpose is to be served: "The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans under this part." *Id*. Also the states' plans may result in foster care providers receiving funds, the providers are not the intended and direct beneficiaries, and have no rights to those funds.

The requisite features of a state's plan for foster care and adoptive assistance are set forth in detail under 42 U.S.C. section 671(a). Nowhere in the 24 subdivisions of that section is any reference made to a beneficial interest of a provider in receiving a certain level of payment or, indeed, any payment whatsoever, let alone a right to a payment. Simply, section 671(a) sets forth the provisions that create the state and federal arrangement under which, if a state follows

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3. In *Sanchez v Johnson*, 416 F.3d 1051 (2005), in part upon which defendants base their instant motion to dismiss, the Ninth Circuit points out that Justice Stevens's dissent in *Gonzaga* suggests that "the reasoning in *Wilder* is so out of step with the Court's holding in *Gonzaga* that it has been effectively overruled." *Sanchez*, 416 F.3d at 1056, note 3.

the guidelines, a state shall receive approval from the federal government, stating, simply: "The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section." Should a state not follow those guidelines, that state shall not receive the federal monies. The statute grants nothing to providers, and thus there is no right for the providers, or an association representing them, to enforce by means of 42 U.S.C. section 1983.[4/]

Additionally, another section of the Act that is specific to plaintiff's members – 42 U.S.C. section 672, the "foster care maintenance payments program" provisions – contains no language suggesting that plaintiff's members have an right to proceeds of the Act. Indeed, the first portion of the introductory sentence of the "Qualifying children" section – "Each State with a plan approved under this part shall make foster care maintenance payments (as defined in section 675(4) of this title) under this part with respect to a child ... " -- is specific as to the child, *not* as to the *provider* for the child. 42 U.S.C. section 672(a).

The section 675(4) mentioned in section 672(a) is the "Definitions" section of the Act. Plaintiff's reliance on the those definitions in an attempt to show that its member providers have rights under the Act is on no avail to them. That the definitional section sets forth in detail the categories of costs that make up "foster care maintenance payments" (42 U.S.C. sec. 675 (4)(A)) does not make those costs entitlements to providers nor create in providers a right to compel the payment of them.

3. *ASW v. Oregon* Militates Against a Private Right of Action for Plaintiff in The Instant Case.

Plaintiffs assail defendants' reference (at note 7 in their Motion to Dismiss) to *ASW v. Oregon*, 424 F.3d 970 (2005), where defendants pointed out that the private right of action the *ASW* court found in the Act was specific to the *parents* of adopted children. (Opposition, p. 14:10-17.) Plaintiff tries to equate the parent-specific right in *ASW* to a provider-specific right

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4. Plaintiff's declaration that it "is in a better position than the foster children themselves to bring the instant complaint" (Opposition, p. 10:16-17) is irrelevant under *Gonzaga*, as nothing in the statute evinces Congressional intent to allow an association to enforce its provisions. If the foster children have a right to enforce the Act by means of section 1983, they can do so. Plaintiff, however, has no such right on its own and it does *not* represent the children.

in the instant case. (Id., 14:17-15:2.) However, plaintiff ignores the fact that the Act specifies in section 673 -- the "Adoption assistance program" section -- as follows: "Each State having a plan approved under this part shall enter into adoption assistance agreements (as defined in section 675(3) of this title *with the adoptive parents* of children with special needs." 42 U.S.C. sec. 673(a)(1)(A), emphasis added.

By contract, section 672 of the Act – the "Foster care maintenance payments program" provisions, discussed above – contains no language regarding a state's entry into an agreement with providers that is the equivalent to that of section 673's explicit statement that a state "shall enter into an adoption assistance agreements ... with the adoptive parents... ." 42 U.S.C. sec. 673(a)(1)(A). There is a clear distinction between an explicit agreement with adoptive parents and the more general licensing by a state for foster homes or child-care institutions (42 U.S.C. sec. 672(c): under *Gonzaga*, the former may support a private right of action, but the latter does not.

In sum, the lack of any reference in the Act to a right in a provider to seek enforcement of its provisions is fatal to plaintiff's claim that it has such a right under 42 U.S.C. section 1983.[5/]

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5. Indeed, another section of the Act -- 42 U.S.C. section 674, the "Payments to State" section -- does specify that a private right of action exists for a section of the Act: 42 U.S.C. section 671(a)(18), which addresses discrimination in foster care placements. Had Congress intended to create an unambiguous right of enforcement under other provisions of the Act besides section 671(a)(18), it could have done so. It did not.

CONCLUSION

Plaintiff's opposition has failed to overcome defendants' showing that the complaint is fundamentally flawed in that plaintiff's members have *not* been deprived of their federal rights, privileges, and immunities under color of state law in violation of 42 U.S.C. section 1983.

Thus, for the reasons stated above and the reasons stated in the motion to dismiss, defendants respectfully repeat their request that this Court dismiss plaintiff's complaint pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure.

Dated: October 9, 2006

Respectfully submitted,

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