Haller, Sara E.

From: Abrams, William F.
Sent: Friday, August 25, 2006 3:45 PM
To: Haller, Sara E.
Subject: FW: Activity in Case 3:06-cv-04095-MHP California Alliance of Child and Family Services v. Allenby et al "Motion to Dismiss"

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U.S. District Court

California Northern District

Notice of Electronic Filing

The following transaction was received from Prince, George entered on 8/25/2006 at 3:18 PM and filed on 8/25/2006

Case Name: California Alliance of Child and Family Services v. Allenby et al
Case Number: 3:06-cv-4095
Filer: Cliff Allenby
Mary Ault
Document Number: 7

Docket Text:
First MOTION to Dismiss filed by Cliff Allenby, Mary Ault. Motion Hearing set for 10/2/2006 02:00 PM in Courtroom 15, 18th Floor, San Francisco. (Prince, George) (Filed on 8/25/2006)

The following document(s) are associated with this transaction:

Document description: Main Document
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[STAMP CANDStamp_ID=977336130 [Date=8/25/2006] [FileNumber=2838506-0] [6b5e13343d3c4d7aa685767371ebbb7cd77ea90ea00a70bc29fd998dfa057f5af43b2 dddb61e1410a7f065b2d2b3750e393e33ee18dc19a593bb537fc6b7bdce]]

3:06-cv-4095 Notice will be electronically mailed to:

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3:06-cv-4095 Notice will be delivered by other means to:

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Attorneys for Defendants

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

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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

TO PLAINTIFF CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT defendants Cliff Allenby and Mary Ault will move this Court, on October 2, 2006, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 15, the Honorable Marilyn Hall Patel,[1/] presiding, in the United States District

1. Defendants are filing concurrently with this Notice of Motion and Motion a request for leave of the court to file this motion to dismiss in advance of the initial case management conference, as required by Judge Patel's Standing Order number 4.

Courthouse at 450 Golden Gate Avenue, San Francisco, California, for an order dismissing this action for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Defendants' motion to dismiss is made on the ground that plaintiff's complaint cannot be sustained against defendants because plaintiff does not have a private right of action under 42 U.S.C. section 1983 to enforce the provisions of the Child Welfare Act cited in this case (Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679b).

This motion is based on this notice of motion and motion, the supporting memorandum of points and authorities in support thereof, the request for leave to file the motion to dismiss, and on the pleadings and records on file with the Court in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This is a civil-rights lawsuit filed June 30, 2006, purportedly on the basis of 42 U.S.C. § 1983, by plaintiff California Alliance of Child and Family Services.[2/] Plaintiff states that it brings this action "on behalf of non-profit charitable organizations that care for children who have been removed from their homes and for whom the State of California has failed to provide adequate funding required by the federal Child Welfare Act." (Complaint for Declaratory and Injunctive Relief (Complaint), p. 1:25-27.)

Plaintiff summarily describes itself as a California non-profit corporation "that, among other pursuits, represents the interests of group homes that provide care and supervision for foster children[.]" (Complaint, p. 2:9-11.) In paragraphs subsequent to that summary description, plaintiff provides additional, but general, descriptions of its constituent non-profit agencies and the services they perform. (*Id.*, lines 12-28.) Although plaintiff avers that each of its group-home members has independent standing to bring an action against defendants, plaintiff asserts its claims "without the participation of an individual member of the Alliance." (*Id.*, p. 3:4-7.)

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2. By stipulation of the parties, and as subsequently ordered by this Court, defendants have been granted an extension of time through August 25, 2006, to respond to the complaint.

ARGUMENT

THIS ACTION SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE THERE IS NO PRIVATE RIGHT OF ACTION UNDER SECTION 1983 AVAILABLE TO THIS PLAINTIFF TO ENFORCE THOSE PORTIONS OF THE CHILD WELFARE ACT AT ISSUE HERE.

The gravamen of plaintiff's case is that defendants' alleged "failure ... to comply with the Child Welfare Act's mandated factors in setting rates for foster care maintenance payments deprives the Alliance's member group homes of their federal rights, privileges and immunities under color of state law in violation of 42 U.S.C. § 1983." (Complaint, p. 7:14-17.) This conclusory contention fails to state a claim upon which relief can be granted because there is no private right of action available to this plaintiff under 42 U.S.C. section 1983 (Section 1983) to enforce those provisions of the Child Welfare Act at issue here.

A. Plaintiff's Burden Under the Applicable Legal Standards.

To sustain its claims for relief here, plaintiff must demonstrate that it seeks redress for violation of a federal *right*, not just a federal *law*. *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002). Specifically, plaintiff must thus show that it has a right to the establishment of rates of payment under Title IV-E of the Social Security Act, 42 U.S.C. sections 670-679(b). Plaintiff's blithe claim that defendants' alleged failure to comply with Title IV-E's rate factors "deprives the Alliance's member group homes of their federal rights, privileges and immunities under color of state law in violation of 42 U.S.C. § 1983" (Complaint, p. 7:15-17) lacks merit.

In *Gonzaga,* the Supreme Court clarified the principles to be applied in determining whether a federal statute enacted pursuant to Congress's spending power confers individual rights enforceable under 42 U.S.C. § 1983. The Court began by confirming that private enforcement of Spending Clause statutes is the rare exception. "'In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.'" *Gonzaga*, 536 U.S. at 280, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981). Therefore, "unless Congress 'speaks with a clear voice' and manifests an 'unambiguous' intent to confer individual rights,

federal funding provisions provide no basis for private enforcement by § 1983. (Citation omitted.)." *Id.*

B. Clarification of the *Blessing v. Freestone* Factors: Creation of an Unambiguous Right.

The Court in *Gonzaga* also addressed the "confusion" that had led some courts to misinterpret its prior decisions, including *Blessing v. Freestone*, 520 U.S. 329 (1997), as endorsing a less stringent standard. In *Blessing*, the Court had formulated a three-factor test to evaluate whether Congress had conferred an enforceable right: (1) Congress must have intended that the statutory provision in question to benefit the plaintiff; (2) the right must not be so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce;" and (3) the statute "must be couched in mandatory, rather than precatory, terms." 520 U.S. at 340-41.[3] While not abandoning the test, the *Gonzaga* Court dispelled any suggestion 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."[4] *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. And, because only *rights* may be enforced, the Court's implied right of action cases "should guide the determination of whether a statute confers rights enforceable under § 1983." *Id.*

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3. The Supreme Court granted certiorari in *Blessing* to resolve disagreement among the Courts of Appeals as to whether individuals could sue state officials under Section 1983 for violations of Title IV-D of the Social Security Act. 520 U.S. at 339-340. Justice O'Connor's opinion, for a unanimous court, held that Title IV-D did *not* give individuals a federal right to force a state agency to substantially comply with Title IV-D. *Id.* at 333. Part D of Title IV immediately precedes Part E, at issue here, in the Social Security Act.

4. 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.").

C. Statutory Analysis Under *Gonzaga*.

As *Gonzaga* explains, under the private right of action cases, the "text and structure" of the statute must demonstrate that Congress unambiguously intended to grant individual rights. 536 U.S. at 286. Critical to this inquiry is whether the statutory provision uses "rights-creating" language. 536 U.S. at 287; *Alexander v. Sandoval*, 532 U.S. 275, 288-289 (2001). Such language must clearly impart an "individual entitlement," and have an "unmistakable focus on the benefitted class." *Id.*; *Cannon v. University of Chicago*, 441 U.S. 677, 692, n. 13 (1979) (text of statute must be "phrased in terms of the person benefitted.") "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of person." (Internal quotes and citation omitted). *Gonzaga*, 536 U.S. at 287, quoting *Alexander*, 532 U.S. at 289. "If [the statute] provide[s] some indication that Congress may have intended to create individual rights, and some indication it may not have, that means Congress has not spoken with the requisite 'clear voice.' Ambiguity precludes enforceable rights." *31 Foster Children*, 329 F. 3d at 1270. The *Gonzaga* Court invoked as exemplars of "rights-creating" language Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681(a). Each of those statutes provides: "No person in the United States shall . . . be subject to discrimination." According to *Gonzaga*, this language creates individual rights because it is phrased "with an *unmistakable focus* on the benefitted class." 536 U.S. at 284 (quoting *Cannon*, 441 U.S. at 691) (emphasis original).

Additional closely related principles relevant to determining whether the text and structure of a statutory provision manifest a congressional intent to confer an enforceable right include: (1) statutes that have an "aggregate" focus rather than a focus upon whether the needs of any particular person has been satisfied do not give rise to individual rights; (2) statutes that speak only in terms of institutional policy and practice do not evince an intent to create private rights of enforcement; (3) a statutory provision that references the individual only in the context of describing the type of policy or practice that will trigger a funding prohibition, does not reflect a congressional intent to create a private right of action; and (4) a provision that allows a state

entity to avoid a loss of federal funds through substantial compliance reflects a congressional intent to confer group rather than individual rights. *Gonzaga*, 536 U.S. at 288.

In explaining just what is required to demonstrate Congress' intent to create an individual right enforceable under Section 1983, the Ninth Circuit just last year, in *Sanchez v. Johnson*, 416 F.3d 1051 (2005), recited examples given by the *Gonzaga* Court "of paradigmatic rights-creating language" used by the Congress in Title VI of the Civil Rights Act of 1964 ("No person in the United States shall ... be subjected to discrimination") and in Title IX of the Education Amendments of 1972 ("No person in the United States shall, on the basis of sex ... be subjected to discrimination"). *Sanchez*, 415 F.3d at 1058. The Ninth Circuit then added:

> Although our inquiry should not be limited to looking for these precise phrases, statutory language less direct must be supported by other indicia so unambiguous that we are left without any doubt that Congress intended to create an individual, enforceable right remediable under § 1983.

Id.

D. Plaintiff Lacks Any Basis for Its Claims.

Applying the principles discussed above to the instant action demonstrates that nothing in Title IV-E § grants any unambiguous right enforceable by Section 1983 to the plaintiff here.

1. The "Text and Structure" of Part IV-E Benefits Children, Not Providers

Plaintiff's contention that its members are entitled to relief under Section 1983 is belied by the clear language of Part IV-E. That Part contains no language susceptible of interpretation as benefitting or creating rights for institutional providers of care such as plaintiff's constituent members. To the extent there is any "rights-creating" language,[5] the intended holders of the right are the individual beneficiaries of the services -- that is, the children[6] -- not the providers.[7] To the extent the providers are mentioned, the references are

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5. *Gonzaga*, 536 U.S. at 287; *Alexander*, 532 U.S. at 288-289.

6. *Alexander*, 532 U.S. at 288-289; *Cannon*, 441 U.S. at 692, n. 13.

7. In *ASW v. Oregon*, 424 F.3d 970 (2005), the Ninth Circuit found that Part IV-E did create federally enforceable rights to (1) payment determinations (per 42 U.S.C. § 673(a)(3)) and (2) fair hearings before state agencies to challenge individual benefit reductions (per 42 U.S.C. §

analogous to the references to Medicaid providers that were discussed by the Ninth Circuit in *Sanchez:* "The text does at least refer explicitly to Medicaid providers, but as a means to an administrative end rather than as individual beneficiaries of the statute." *Id.*, 416 F.3d at 1059. The *Sanchez* court added that the Medicaid providers "may certainly benefit from their relationship with the State, but they are, at best, indirect beneficiaries and it would strain common sense to read [42 U.S.C. § 1396a(a)(30)(a), a provision at issue in *Sanchez*] as creating a 'right' enforceable by them." *Id.*

Moreover, just as the true beneficiaries of Part IV-E are children, the focus of the statutes is clearly on the State and its responsibilities to those children. (See, for example, 42 U.S.C. section 671 -- entitled "State plan for foster care and adoption assistance" -- which sets forth the burdens on a State for the receipt of federal funding.) Nothing within this detailed section suggests any intent by Congress to confer rights on anyone save for those children.[8/]

2. The Other Gonzaga Principles Also Militate Against Plaintiff Here.

Analyzing the instant care under the other principles discussed in *Gonzaga*[9/] as relevant to determining whether the text and structure of a statutory provision manifest a congressional intent to confer an enforceable right yield no better result for plaintiff.

First, the statutes comprising Part IV-E have an "aggregate" focus on the provision of care to children, rather than a focus upon whether the needs of any particular person. To the extent they can be construed to focus on anyone in particular, it is an individual child, not an institutional care provider.

Second, Part IV-E speaks almost entirely in terms of institutional policy and practice

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671(a)(12)). However, those rights were specific to the *parents* of adopted children. This is clearly distinguishable from the instant action, where plaintiff is not a parent, nor even a provider of benefits to children, but merely an organization claiming standing through its averment that it represents group homes that it says are adversely affected by defendants' actions. (Complaint, p. 3:1-3.)

8. *Gonzaga*, 536 U.S. at 287, quoting *Alexander v. Sandoval*, 532 U.S. at 289. And, to the extent the Ninth Circuit's decision in *ASW v. Oregon* (footnote 7, post) found otherwise, the right found extended, again, only to the adoptive parents of those children.

9. 536 U.S. at 288

and, again, to the extent it suggests any intention to create private rights of enforcement those rights redound to the children, not their service providers.

Third, the provisions of Part IV-E reference the individual largely in the context of describing the type of policies or practices that will trigger funding prohibitions. (See for example, again, 42 U.S.C. section 671 -- entitled "State plan for foster care and adoption assistance" -- which sets forth the burdens on a State for the receipt of federal funding and hence details what policies and practices, if *not* followed, will result in a loss of that funding.) And, again, to the extent that the creation by Congress of any private right of action could be inferred from this language, that right would be for children, not institutional service providers.

Finally, although it is not entirely clear from Part IV-E whether substantial compliance with its provisions will allow a state entity to avoid a loss of federal funds, the focus of those provisions remains on benefitting the children, not institutions providing their care.

In sum, after *Gonzaga,* it matters not that plaintiff -- even if it were a service provider, not merely an organization that claims to represent aggrieved service providers -- may fall within the "general zone of interest" Part IV-E is intended to protect. *Id.,* 536 U.S. at 283. As the Ninth Circuit pointed out in *Sanchez*, even being the intended beneficiary of a statute is not enough: "*Gonzaga* made it clear that simply being the intended beneficiary of a statute is not enough to demonstrate the intentional creation of an enforceable right." *Sanchez*, 416 F.3d at 1062. "After *Gonzaga*," the Ninth Circuit added, "there can be no doubt that, to satisfy the *Blessing* test, a plaintiff seeking redress under § 1983 must assert the violation of an individually enforceable *right* conferred specifically upon him, not merely a violation of federal law or the denial of a *benefit* or *interest*, no matter how unambiguously conferred." *Id.* (emphasis original). And where, as in the instant case, a plaintiff fails the first prong of the *Blessing* test, there is no need to consider the second and third prongs. *See id.*

That the statutes here may benefit plaintiff directly or indirectly is insufficient; to be actionable under Section 1983, the provisions of those statutes must unambiguously create an enforceable right, which, for plaintiff, they do not.

CONCLUSION

Plaintiff's conclusory assertion that its members have been deprived of their federal rights, privileges, and immunities under color of state law in violation of 42 U.S.C. section 1983 does not withstand scrutiny. Accordingly, for the reasons stated above, defendants Allenby and Ault respectfully request that this Court dismiss plaintiff's complaint pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure.

Dated: August 25, 2006

Respectfully submitted,

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