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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

California State Foster Parent Association, California State Care Providers Association, and Legal Advocates for Permanent Parenting,

Plaintiffs,

v.

JOHN A. WAGNER, 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.

Case No. C 07-5086 WHA

PLAINTIFF'S REPLY IN SUPPORT OF SECOND MOTION FOR FURTHER RELIEF

Date: May 26, 2011
Time: 2:00 p.m.
Ctrm: Courtroom 9, 19th Floor
Judge: Honorable William H. Alsup

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I. INTRODUCTION

More than two years have passed since this Court declared that the foster parent reimbursement rates paid by Defendants violated the federal Child Welfare Act ("CWA") and granted judgment in favor of the Plaintiffs California State Foster Parent Association, California State Care Providers Association, and Legal Advocates for Permanent Parenting (collectively, "Plaintiffs" or "Foster Parents").[1] More than eight months have passed since the Ninth Circuit affirmed that judgment on appeal.[2] More than four weeks have passed since the date (April 8, 2011) that Defendants were ordered by the Court to "complete their implementation and submit a statement to the Court describing the new method for determining the rates of payments to foster parents that includes consideration of the cost factors required by the CWA."[3] And bear in mind that Defendants have been violating the CWA since California's rate schedule was first enacted almost 30 years ago because, as the Court held, California's rate schedule for foster parents was not and is not "in any way based on the cost categories . . . in the Child Welfare Act."[4]

It is long past time for Defendants to comply with federal law. Defendants admit that the reimbursements that have continued to be paid for more than two years after being declared unlawful are 26.8 to 17.6 percent too low, depending on the age of the child.[5] Defendants do not argue that they have complied either with the CWA or the Court's December 16, 2010 Order regarding implementation of new rates. Nor, critically, do Defendants commit to a date by which they will ever comply. Instead, Defendants plead powerlessness—that they have "taken all steps within their power" and that they are "moving forward to meet [their] obligation."[6] The essence

[1] December 5, 2008 Judgment (Docket 105).

[2] August 30, 2010 Opinion (Docket 151).

[3] December 16, 2010 Order (Docket 163) at 6.

[4] October 21, 2008 Order (Docket 98) at 10.

[5] Defendants' Statement to the Court Describing the New Method for Determining the Rates of Payments to Foster Parents ("Defendants' Statement to the Court") (Docket 166) at 5.

[6] Defendants' Opposition to Plaintiffs' Second Motion for Further Relief ("Defendants' Opposition") (Docket 178) at 1; *see also* Defendants' Statement to the Court (Docket No. 166) at 6 (proposing new rates be made effective July 1, 2011 "assuming approval by the Legislature and final enactment of the budget by the Governor"); April 14, 2011 All County Information Letter

(Footnote continues on next page.)

of Defendants' argument is that the dictates of federal law and compliance with the Court's Order are subordinate to whether the Governor and the Legislature ever decide to repeal or amend the state foster parent reimbursement rate statutes declared illegal by this Court two years ago.

In this Second Motion for Further Relief, the Foster Parents have not requested that the Defendants be held in contempt for failing to implement the new reimbursements by April 8, 2011. Nor do Foster Parents request that this Court forbid the Defendants to receive federal payments until they comply with their side of the bargain under the CWA. Instead, Foster Parents seek to provide Defendants one last opportunity to correct a wrong that only grows more grievous with the passage of time. More specifically, Foster Parents request that Defendants be ordered to immediately make foster care maintenance payments that reflect the amounts calculated by the Defendants' own study using the enumerated cost factors specified under Title IV-E.[7]

This Court's power to enforce federal law does not yield to California's legislative processes. Defendants, in their opposition, are simply putting the state cart before the federal horse. As discussed below, an order from this Court is the needed catalyst to cause California to come into compliance with the CWA. The Foster Parents respectfully request that the Court grant their Second Motion for Further Relief and finally bring this case to an end.

II. STATE LEGISLATIVE PROCESSES CANNOT DELAY IMPLEMENTATION OF A FEDERAL COURT ORDER

Defendants argue that "equitable principles" mean that Court should permit California to continue, for an indefinite period of time, to violate federal law and this Court's Order because the Legislature and the Governor have not repealed the unlawful reimbursement rates nor enacted a budget that funds the significantly higher rates that Defendants concede are required to meet their federal obligations.[8] Essentially, Defendants argue that they are obliged to continue to flout

(Footnote continued from previous page.)

(Docket No. 169) (confirming that implementation of CDSS's proposed new rate methodology is "contingent on approval by the Legislature and final enactment of the budget by the Governor").

[7] Defendants' Statement to the Court (Docket No. 166) at 3-4, 5.

[8] Docket 166 at 5; Docket 178 at 1, 3, 5-9.

the law, and are permitted to draw down federal dollars to support the illegal program at the same time, until other state actors change state law. Happily for the efficacy of federal statutes and federal court orders, the law is directly contrary to Defendants' argument. On this point, the Supreme Court, the Ninth Circuit, and the District Courts are in firm agreement.

The United States Supreme Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* confirms the power of a federal court to require compliance by a State defendant with the court's orders. 443 U.S. 658, 695 (1979). In *Washington*, a district court entered an injunction that required a Washington State department to both prepare and implement regulations protecting Native-American Indians' treaty rights. *U.S. v. Washington*, 384 F. Supp. 312, 414 (W.D. Wash. 1974) (vacated by 443 U.S. 658 (1979)). However, in a subsequent decision, the Washington State Supreme Court did not accept the district court's interpretation of the treaties at issue. *Puget Sound Gillnetters Assn. v. Moos*, 88 Wn.2d 677, 692-693 (1977) (vacated by 443 U.S. 658 (1979)). The state Supreme Court thus held that the State could not comply with the federal court's order that required the State to adopt regulations protecting the Indians' treaty rights, since the state Supreme Court believed that no such rights were afforded to them under these treaties. *Id.*

The U.S. Supreme Court, however, vacated the Washington Supreme Court's decision, and held that as "parties to this litigation, [Defendants] may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if State law withholds from them the power to do so." *Washington v. Washington State*, 443 U.S. at 695-96. The Court further stated that "it is therefore absurd to argue, as do the [defendants], both that the state agencies may not be ordered to implement the decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision. The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court." *Id. at* 695-9. Furthermore, the U.S. Supreme Court has made clear that it is the district court's duty to make certain that an individual's "federal rights governed by federal law . . . are fully protected, as the Congress

intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for '… the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 361 (1957).

The Ninth Circuit has likewise held that federal laws and federal court orders trump state legislative action. In *Spain v. Mountanos*, which involved unconstitutional conditions of confinement at a California state prison, the Ninth Circuit affirmed in part (and reversed in part) the district court's decision to enter an injunction against certain prison practices. 690 F.2d 742, 743 (9th Cir. 1982). Upon remand, the parties entered into a settlement agreement that included a provision requiring defendants to pay plaintiff's attorney's fees, pursuant to 42 U.S.C. § 1988. *Id.* at 743-44. After the California state legislature refused to appropriate the funds for payment of plaintiff's attorneys' fees, however, the district court issued an order compelling state officials to pay the claim for attorney's fees. *Id.* at 746. The officials appealed.

The Ninth Circuit affirmed the district court's decision, holding that "a court, in enforcing federal law, may order state officials to take actions despite contravening state laws," and rejected the state officials' arguments that the court order was improper because state law prohibited payment of these fees without legislative appropriations. *Id.* at 745-46.

District courts have similarly rejected the argument that state legislative inaction can force the enforcement of federal laws into jurisprudential limbo. In *Miller v. Healy*, the district court entered an order that permanently enjoined State and Federal defendants from denying child care benefits through Aid to Families with Dependent Children to plaintiff class members. No. 91-0676, 1992 U.S. Dist. LEXIS 4605, at *5 (N.D. Cal. Mar. 24, 1992). Pursuant to the court's order, the State submitted an "Implementation Plan," which outlined the State's program for compliance with the Court's injunction. *Id.* at *5-6. The *Healy* plaintiffs objected to the plan, arguing that it "unnecessarily delays relief to class members," since the defendants' timeline for implementation of the plan would, in direct defiance of the court's order, "effectively deny [plaintiffs] of child care benefits" for a significant time period. *Id.* at *1, 6, 7. Defendants, however, asserted that "their planned time frame for implementing the Court's Order is

reasonable given the State's fiscal constraints . . . . State defendants also point out that they must comply with certain (albeit unidentified) state and federal regulations which govern implementation of all new programs." *Id.* at *7.

The district court in *Healy* first made quick work of arguments that state budget constraints justify postponing obedience to federal court orders or federal law:

> First, their argument concerning the fiscal strain caused by compliance with the Court's Order continues in the same theme previously presented by State defendants, and rejected by this Court. The State has raised this argument in their oppositions to plaintiffs' motion for preliminary injunction, motion to stay enforcement of the preliminary injunction pending appeal, and summary judgment motion for permanent injunction. At each turn, this Court has concluded that fiscal constraints do not and cannot justify the State's illegal conduct. *See, e.g., Miller v. Carlson*, 768 F. Supp. 1331, 1340 ("fiscal constraints cannot justify the state's failure to comply with its legal obligations."). State defendants have presented the Court with no new reasons as to why budgetary concerns should now excuse their failure to immediately comply with Federal law.

Id. at *7-8.

Next, the district court ruled that "the State's excuse that more expedient compliance with the Court's Order is hindered by state and federal laws" was meritless.[9] *Id.* at *8 (citing *Spain v. Mountanos*); *see also Hook v. Arizona*, 907 F. Supp. 1326, 1336 (D. Ariz. 1995) ("[T]his court has the authority to order compliance with the federal district court orders even though the action may violate" state laws); *U.S. v. Gov't of Guam*, No. 02-00022, 2008 U.S. Dist. LEXIS 5450, at *3-4, *14 (D. Guam Jan. 24, 2008) (district court ordering defendants to "proceed immediately" to comply with its previous orders where their continued reliance on Guam's Public Law resulted in inaction and noncompliance).

It is evident that there is simply no basis in either law or logic supporting Defendants' opposition to Plaintiffs' Motion. The dictates of federal law and federal court orders are not held

[9]Any attempts by Defendants to align themselves with the defendants' in the *Healy* case in order to avoid compliance with a specific deadline for implementation should be unavailing. While the *Healy* court declined "to adopt any specific deadline for the State's compliance with the Order," (1992 U.S. Dist. LEXIS 4605, at *10, n.8) ("The Court cannot allow the State to unnecessarily delay in providing child care benefits as required by federal law."), this Court has already imposed a deadline for implementation of Defendants' new rate methodology. (Dec. 16, 2010 Order at 6.) Defendants have been given considerable time to implement new compliant rates and should not be permitted to continue to delay at foster parents' expense.

in suspense awaiting the time when State Legislatures get around to effectuating them—either by repeal or affirmative enactment—in their own state laws.[10]

III. THE EQUITIES SUPPORT GRANTING THE PLAINTIFFS RELIEF, BECAUSE THE DEFENDANTS HAVE FAILED TO INVOKE THE STATE LEGISLATIVE PROCESS TO TRY TO COMPLY WITH THIS COURT'S ORDER.

"Defendants do not quarrel with the legal authorities plaintiffs cite in support of their motion. This Court most certainly has the statutory power under 28 U.S.C. § 2202 to issue orders to enforce a declaratory judgment." Defendants' Opposition (Docket 178) at 8. Nevertheless, Defendants argue that the Court should refrain from enforcing its declaratory judgment because they have done "everything within their power" to comply with the Court's orders and, therefore, "equitable principles" serve to deny the Foster Parents that relief. But even if Defendants were right that federal courts should not enforce their judgments until a state legislature acts to affirm the effect of the judgment, they are wrong that they have done everything in their power to use and obtain state statutory authority to comply with federal law. First, the existing Welfare and Institutions Code grants DSS the authority to implement the new reimbursement rates—authority that DSS has not attempted to use. Second, Defendants' failure to invoke all of the options available to them to obtain an amendment to the Code (if one were even necessary) illustrates their lack of diligence in complying with this Court's Order and highlights that equitable principles, in addition to legal authorities, support a decision by the Court to enter the order sought by Foster Parents.

DSS has all of the California state statutory authority it needs to pay the rates that it determined are required by federal law. California Welfare and Institutions Code section 11461 requires that "[b]eginning with the 1991-92 fiscal year, the schedule of basic rates . . . shall be

[10] Indeed, the absurdity of Defendants' argument that state legislative action is required to complete the implementation of federal court orders is revealed when one considers that the legislatures of four states—Montana, Nevada, North Dakota, and Texas—meet only every other year. National Conference of State Legislatures, Annual versus Biennial Legislative Session, available at www.ncsl.org/default.aspx?tabid=17541 (last viewed May 12, 2011). In those states, justice need not "wait 'til next year" in an off-year.

adjusted by the percentage changes in the California Necessities Index . . . ." According to the study commissioned by DSS, the new rates are ***less*** than the cumulative CNI-adjusted 1991 rates:

> The rates adopted in 1991, based on those developed in 1981 but incompletely adjusted for inflation, provide another validation check for the proposed Rates #1 and #2. Had FFH rates kept pace with inflation since 1991, they would be, on average, 38.3% higher than they are. It so happens, and quite by accident, that the higher of the rates proposed here correspond to an average (weighted) increase of 37.7%, which is remarkably close to the inflation adjustment required to reach the 1991 level.

Alternative Proposals for a New Foster Family Home Rate Structure in California (Docket 165) at 5. So DSS is indeed empowered by state law to raise the reimbursement rates even beyond the new rates because it may make adjustments for inflation. No state legislative action is required for DSS to comply with federal law.

But even if state legislative action were required, DSS has not done everything it could to obtain it. It has missed several key deadlines, and has not tried to include the statutory changes it claims are necessary into appropriate legislation that has recently become law.

This Court ordered the Defendants to "implement" lawful reimbursements by April 8th in December of last year. December 16, 2010 Order (Docket 163) at 6. The deadline for introducing a bill to be considered by the California Legislature was February 11, 2011. *See* Calif. Legis. Joint Rules, Rules 61(a)(1) and 54(a). While Defendants, arguably, had not completed their report stemming from a study commissioned by CDSS for the purpose of making recommendations toward implementing changes in the rate structure to be used for funding foster family homes until March 11, 2011 (Document 165), Defendants apparently believed well before February 11, 2011 that they would need to change, by statute, the foster care rate methodology currently set forth in California Welfare and Institutions Code § 11461. Therefore, they could have caused to be introduced a spot bill or quasi-spot bill, knowing that the blanks in the bill would be filled in before the bill could arrive at the Governor's desk by April 8th. Declaration of Edward Howard in Support of Plaintiffs' Reply in Support of Plaintiffs' Second Motion for Further Relief ("Howard Decl.") at ¶ 12. Defendants failed to do so.

Hundreds of bills have already been introduced in the California State Legislature this year. *Id.* at ¶ 9. Many of these bills will require an appropriation of State funds. *Id.* at ¶ 9. Of the bills introduced this year, 23 have already been signed by the Governor and some, such as SB 90 and SBX1 2, require the expenditure of significant state funds. *Id.* at ¶ 9. In particular, SB 72, which was signed by the Governor on March 24, 2011 (after the date by which Defendants completed their study of a new method for determining the rates of payments to foster parents), was a budget trailer bill that included necessary Human Services statutory changes and would have been an appropriate means for including the statutory changes Defendants indicate are necessary to implement this Court's Orders. *Id.* at ¶ 9. These bills have all already been signed this year even though the budget is, once again, stalled in the California Legislature.

Thus, even assuming—wrongly—that the absence of conforming state legislation can block the implementation of federal law, Defendants had ample time to introduce and move any bill to the Governor's desk if they wanted to do so or if they were truly doing everything they could to implement this Court's Order. *Id.* at ¶¶ 10-12. This failure to make the attempt is particularly troubling since the State's violation of the CWA jeopardizes the State's continued receipt of federal funding pursuant to the CWA.[11] 42 U.S.C. § 671(a)(1).

Moreover, the California Constitution permits the introduction and passage of urgency statutes—statues that go into effect immediately upon their enactment. Calif. Constitution, Art.

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[11] Furthermore, it is uncontested that implementing a new rate methodology that increases rates paid to foster parents will save the state money (apart from jeopardizing any federal funding).

> "The low rates reduce participation by foster parents and therefore increase the need for institutional care. Institutional care, plaintiffs assert, is by definition more costly to the state than care by foster parents, irrespective the level at which the state sets its foster payment rates. That is, an increase in the state's rates, plaintiffs argue, would not only better satisfy the [Child Welfare] Act's mandate to place foster children in the 'least restrictive (most family like)…setting available,' but could actually *save* the state money by inducing more foster parents to enter the program and thus reducing the need for (more expensive) institutional care options. Again, defendants offer no factual rebuttal to this evidence."

October 21, 2008 Order Re Cross-Motions for Summary Judgment (Docket No. 98) at 4-5. A tiny restoration of family supply and movement away from the more expensive commercial group homes will more than pay for any increased reimbursement to foster parents.

IV, § 8; Howard Decl. at ¶ 10. Had new legislation truly been required to implement this Court's Order, and had Defendants truly been using every available means to attempt compliance with this Court's Order, legislative efforts such as those described could have and would have been made. Howard Decl. at ¶¶ 13-15.

Defendants appear to have been looking to the year-long (and in recent years, year-long-plus) budget process to implement this Court's Order, notwithstanding the April 8th deadline. It is for this reason that Defendants argue that they have received "approval from Agency and Department of Finance to submit its proposed methodology to the Legislature for inclusion in the May revision of the Governor's proposed fiscal year 2011-12 budget." Defendant's Opposition (Docket 178) at 5. This warrants some emphasis: from their inaction on the legislative front, and their reliance upon the **May** budget revision, it appears as though Defendants never intended to abide by this Court's April 8th implementation deadline.

In any event, this May revision of the state budget (commonly referred to as the "May Revise") bears little to no connection with a likelihood that the provisions in the budget will be signed by the Governor by July 1st of that year. First, the May Revise goes through several iterations and is amended several times before it reaches the Governor's desk for signature. Second, recent history shows that up to five months may pass between introduction of the May Revise and the Governor's signature on the State's budget. (Howard Decl. ¶ 17.)

IV. IF FURTHER DELAY IS ALLOWED, THE IMPLEMENTATION PROPOSED BY DEFENDANTS WILL BE—BY THEIR OWN TERMS—ALREADY TOO LOW.

In implementing the new rate methodology detailed in Defendants' April 8th Statement, Defendants must increase the proposed rates of maintenance payments to foster parents by the 2011-2012 California Necessities Index (CNI) in order to account adequately for the current cost of living. As it currently stands, the Defendants' new rate methodology includes payment rates that are "inflation-adjusted to 2009" (and "applicable to the Budget Year 2010-2011") using the CNI. Alternative Proposals for a New Foster Family Home Rate Structure in California (Docket 165) at 10. Because these payment rates were calculated in 2010 and only reflect an adjustment for inflation to 2009, they no longer account for the current cost of living. However, Defendants

themselves have acknowledged "the need for a measurement as a basis for making cost of living adjustments to this new rate." *Id.* at 6.

The Center for Public Policy Research—the organization that the CDSS hired to help develop a recommended methodology for setting new compliant rates—has also clearly indicated that "to ensure that [Foster Family Home] payment rates rise with the cost of living and do not fall behind the cost of caring for children, it will be important to routinize the application of the CNI to update foster care rates annually." *Id.* at 13. Further, in *California Alliance of Child and Family Services v. Allenby*, Judge Patel stressed that the "standardized schedule of rates shall be adjusted annually, no later than the first day of the State's fiscal year, July 1, to reflect the change in the CNI for the current fiscal year." No. 06-4095, 2010 U.S. Dist. LEXIS 43537, at *4 (N.D. Cal. Apr. 30, 2010).

In order to account accurately for any adjustment in the cost of living and the cost of caring for foster children, these proposed rates must be increased by the 2011-2012 CNI no later than July 1, 2011—the first day of the State's fiscal year. If these rates are not increased by this 2011-2012 CNI, the payment rates under the State's *new* rate methodology will, when implemented, already be too low as to account for foster parents' current costs, and would continue to be in violation of the CWA, this Court's orders, and foster parents' civil rights to payments that cover the mandatory cost criteria.

V. CONCLUSION

If Defendants were a county that had been found to be in violation of federal voting rights laws by failing to register voters of color according to a discriminatory county ordinance, no federal court would wait for the county to repeal the illegal ordinance before commanding the county clerk to register such voters. The same is true here. Neither law nor equity supports Defendants' argument that states adjudicated to be operating in violation of federal law get to chose the time by which they comply.

As explained in Plaintiff's Second Motion for Further Relief, the need for immediate relief is great, as every month that passes results in irreparable deprivation of foster parents' rights to payments that cover the mandatory cost criteria, since Plaintiffs are precluded by the

Eleventh Amendment to the U.S. Constitution from recovering damages from the State in the federal courts. Defendants have not complied with this Court's Order, offer no date-certain by which they will comply, and have failed to take steps to comply with this Court's Order even when they (wrongly) assert legislative action is required to implement it.

Foster Parents have not sought a contempt order or an order preventing expenditure of federal funds until the State is in compliance with the conditions for receiving those funds. Instead, Foster Parents are respectfully asking this Court to provide the Defendants one final chance to comply with the CWA and obey the Court's Order.

For the reasons stated above and in the Plaintiff's Second Motion for Further Relief, the Foster Parents request that the Court order Defendants to implement the new methodology detailed in their April 8 Statement (Docket No. 166), effective immediately.

Dated: May 12, 2010

CHILDREN'S ADVOCACY INSTITUTE

By: /s/ Edward Howard

MORRISON & FOERSTER LLP

By: /s/ Marc David Peters

Attorneys for Plaintiffs
California State Foster Parent Association,
California State Care Providers Association,
and Legal Advocates For Permanent Parenting

GENERAL ORDER 45 ATTESTATION

I, Marc David Peters, am the ECF User whose ID and password are being used to file this Plaintiffs' Reply in Support of Second Motion for Further Relief. In compliance with General Order 45, X.B., I hereby attest that Edward Howard has concurred in this filing.

Dated: May 12, 2011

/s/ Marc David Peters