

1 EDMUND G. BROWN JR.
 Attorney General of California
 2 SUSAN M. CARSON
 Supervising Deputy Attorney General
 3 State Bar No. 135875
 GEORGE PRINCE
 4 Deputy Attorney General
 State Bar No. 133877
 5 455 Golden Gate Avenue, Suite 11000
 San Francisco, CA 94102-7004
 6 Telephone: (415) 703-5749
 Fax: (415) 703-5480
 7 E-mail: George.Prince@doj.ca.gov

8 Attorneys for Defendants

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13
 14 **CALIFORNIA ALLIANCE OF CHILD
 AND FAMILY SERVICES,**

15 Plaintiff,

16 v.

17
 18 **JOHN WAGNER, Director of the California
 Department of Social Services, in his official
 19 capacity; GREGORY ROSE, Deputy
 Director of the Children and Family
 20 Services Division of the California
 Department of Social Services, in his official
 21 capacity,**

22 Defendants.

CV 09-4398 MHP

**DEFENDANTS' OPPOSITION TO
 MOTION FOR A TEMPORARY
 RESTRAINING ORDER AND AND
 ORDER TO SHOW CAUSE RE:
 PRELIMINARY INJUNCTION**

Date: October 9, 2009
 Time: 2:30 p.m.
 Courtroom: 15, 18th floor
 Judge The Hon. Marilyn Hall Patel

Action Filed: September 18, 2009

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
Introduction	1
Factual background	1
A. The RCL payments system	2
B. The Wraparound Program decreases the need for group homes.....	5
C. Plaintiff’s contentions regarding group home service cutbacks and closures is misleading and inaccurate	7
D. Alternative state funding sources for group homes	11
Argument	13
I. Plaintiff has not met the requirements for a temporary restraining order of a preliminary injunction because it has failed to show that it is likely to prevail on any of its claims.	13
A. The question of a private right of action under section 1983 is not settled.	14
B. Plaintiff’s interpretation of what the CWA covers is on appeal.	20
II. Plaintiff has no likelihood of success under the Supremacy Clause because the budget act does not conflict with the Child Welfare Act	20
III. Plaintiff has not established that it will suffer irreparable harm as a result of the reduction in the group home rate schedule; in fact, the evidence shows that group homes may actually experience an increase in their funding, even exclusive of the other sources of government funding available to group homes	21
Conclusion	24

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
31 <i>Foster Children v. Bush</i> 329 F. 3d 1255 (11th Cir. 2003).....	15, 20
<i>Alexander v. Sandoval</i> 532 U.S. 275 (2001).....	14
<i>Arcamuzi v. Continental Airlines, Inc.</i> 819 F.2d 935 (9th Cir. 1987).....	13, 21
<i>Blessing v. Freestone</i> 520 U.S. 329 (1997).....	16
<i>Brantley v. Maxwell-Jolly</i> No. 4:09-cv-03798-SBA (Sept. 10, 2009)	22
<i>California Alliance of Child and Family Services v. Allenby</i> No. C 06-04095 MHP	1, 4, 19
<i>California State Foster Parent Ass'n v. Wagner</i> Case No. 09-15025.....	19
<i>Cannon v. University of Chicago</i> 441 U.S. 677 (1979).....	14
<i>Caribbean Marine Services Co., Inc. v. Baldrige</i> 844 F.2d 668 (9th Cir. 1988) (injunction order held erroneous because district court credited speculative evidence of harm that was contingent on unlikely future events).....	22
<i>Foreman v. Heineman</i> 240 F.R.D. 456 (D. Neb. 2006).....	18
<i>Goldie's Bookstore, Inc. v. Superior Court</i> 739 F.2d 466 (9th Cir. 1984).....	22
<i>Gonzaga University v. Doe</i> 536 U.S. 273 (2002).....	14, 15, 18
<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers</i> 415 U.S. 423.....	13
<i>Hines v. Davidowitz</i> 312 U.S. 52, 67 (1941)	21

TABLE OF AUTHORITIES
(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

<i>Independent Living Center v. Maxwell-Jolly</i> 572 F.3d 663 (9th Cir. 2009).....	22
<i>Jimeno v. Mobil Oil Corp.</i> 66 F.3d 1514 (9th Cir. 1995).....	21
<i>Lands Council v. McNair</i> 537 F.3d 981 (9th Cir. 2008) (en banc).....	13
<i>Los Angeles Memorial Coliseum Comm’n v. National Football League</i> 634 F.2d 1197 (9th Cir. 1980).....	13
<i>Olivia Y. v. Barbour</i> 351 F. Supp.2d 543 (S.D. Miss. 2004).....	19
<i>Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture</i> 415 F.3d 1078 (9th Cir. 2005).....	13
<i>Republic of the Philippines v. Marcos</i> 818 F.2d 1473 (9th Cir. 1987).....	13
<i>Sprietsma v. Mercury Marine</i> 537 U.S. 51 (2002).....	21
<i>Suter v. Artist M.</i> 503 U.S. 347 (1992).....	16
<i>Wilder v. Virginia Hosp. Ass’n</i> 496 U.S. 498 (1990).....	15
<i>Winter v. Natural Resources Defense Council</i> ___ U.S. ___, 129 S. Ct. 365 (2008).....	13
<i>Wright v. Roanoke Redevelopment and Housing Authority</i> 479 U.S. 418 (1987).....	15
<i>Wyeth v. Levine</i> 129 S. Ct. 1187 (2009).....	20, 21

TABLE OF AUTHORITIES
(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

STATUTES

45 C.F.R.

§ 1356.21	17
§ 1356.21(a)	17
§ 1356.21(b)	17
§ 1356.21(b)(1)(i)	18
§ 1356.21(b)(1)(ii)	18

20 U.S.C. § 1681(a)	15
---------------------------	----

42 U.S.C.

§ 670	16
§§ 670-679b	15
§ 671	16
§ 671(a)	16
§ 671(a)(1)	16
§ 672	16, 18
§ 672(a)(1)	16, 21
§ 673	16
§ 675(4)	18
§ 675(4)(A)	17, 19, 21
§ 675(A)	19
§ 1320a-2a(a)(3)	16
§ 1983	14, 15, 18, 19
§ 2000d	15

Welfare and Institutions Code

§ 4094(d)	12, 13
§ 11462	3
§ 11462 (f)(1)	4
§ 11462 (g)(4)	4
§ 11462 (g)(5)	4
§ 18250	5, 6

INTRODUCTION

Trade association plaintiff California Alliance of Child and Family Services seeks an order from this Court enjoining the State of California's Department of Social Services (CDSS) from implementing that portion of the newly enacted budget for fiscal year 2009-2010 that reduces by 10% the amount of payments made to foster care group homes effective October 1st.

According to plaintiff, the budget cuts facing foster care group homes will cause immediate and irreparable harm to plaintiff and the children served by plaintiff's group homes. However, a careful reading of plaintiff's moving papers and scrutiny of the contentions in them reveal that plaintiff's contentions are overstated and misleading. In fact, plaintiff's members received a five percent increase in funding in January 2008, the point system that determines the level of payment for group homes had been adjusted to favor them, and pending legislation is anticipated that will actually increase the payments the group homes receive.

In sum, plaintiff simply has no basis for a temporary restraining order under the circumstances, as will be set forth below.

For the reasons set forth below, plaintiff's motion for entry of a temporary restraining order and order to show cause regarding a preliminary injunction must be denied.

FACTUAL BACKGROUND

Although CDSS does not disagree with the entirety of the "Statement of Facts" contained in plaintiff's moving papers (see generally, Memorandum of Points and Authorities in Support of Ex Parte Motion for Temporary Restraining Order (Memorandum), at pp.4-13.), the "Statement" contains several assertions that need to be clarified or, in some instances, corrected.

The primary issue CDSS takes with plaintiff's Statement is the suggestion it makes that the 10 percent cut of October 1, 2009, represents a 10 percent cut from the level of foster care group homes funding that this Court addressed in the previous action involving these parties, the first "Alliance" case, *California Alliance of Child and Family Services v. Allenby*, No. C 06-04095 MHP (Alliance I). Plaintiff's Memorandum argues that the 10 percent reduction now facing group homes now crosses the threshold that this Court suggested might be crossed at some point given California's budget crisis. As plaintiff quotes this Court's decision: "The court is aware

1 that over time, given a multitude of years with budgetary constraints, the standard rate schedule
2 could become greatly out of synch with the costs of items enumerated in the [Child Welfare Act].
3 . . . [I]t is worth repeating that without further increases over time, the California system may
4 well be in violation of federal law.” (Memorandum, p. 2:9-13, emphasis by plaintiff.)

5 Interestingly enough, plaintiff’s quote replaces with ellipses *two full pages* of the Court’s decision.
6 (See Exhibit A to this Opposition, which is a true and correct copy of the Court’s decision, which
7 can also be found as Document in the electronic docket; the beginning of plaintiff’s quote is from
8 page 6, lines 22-24, the end of it comes from page 8, lines 22-24.) There is no need to explain to
9 this Court its own decision, suffice it so say that the first part of the excerpt used by plaintiff had
10 to do with whether “the rate may very well fall to a level that does not satisfy the State’s
11 obligation to ‘have a process for determining rates that takes into account the statutory criteria
12 mandated by the CWA.’” (*Id.*, at p. 6:24-26.)

13 Plaintiff’s conflation of the opinion to suggest that the issue is simply a matter of the
14 payment rate, alone, is disingenuous, for at least two reasons. First, as plaintiff knows, the 10
15 percent rate reduction of October 1st comes from a rate that was increased by five percent over
16 the rate that was considered by this Court in in March 13, 2008 decision (albeit by that time the
17 five percent increase was already in effect, having become effective on January 1, 2008).
18 Second, with the subsequent relaxation of the point system used by CDSS to set the rate levels for
19 group homes, of which plaintiff is also aware, the rate cut of 10 percent is further softened.

20 Rather than respond to plaintiff’s Statement of Facts item-by-item, CDSS offers the
21 following factual background. However, as is demonstrated below, many of plaintiff’s
22 contentions about the reasons for the cutbacks in services and outright closing of group homes by
23 its members are questionable, inaccurate, and misleading.

24 **A. The RCL System Has Been Changed to Favor Group Homes**

25 The Foster Care Rates Bureau of CDSS is responsible for overseeing statewide policies
26 related to applicable Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272) and Title
27 IV-E eligibility provisions, revisions, and maintenance of California’s State Plan under Title IV-
28 E, and providing technical assistance and oversight of eligibility and funding aspects of the foster

1 care program administration in all 58 counties of California. (Declaration of Debra Williams in
2 Support of Opposition to Motion for Temporary Restraining Order and Order to Show Cause
3 Regarding Preliminary Injunction (Williams Decl.), ¶ 2.)¹

4 The United States Department of Health and Human Services' (HHS) Administration for
5 Children and Families provides oversight of state child welfare services and foster care programs.
6 HHS develops and implements national policy by issuing regulations, overseeing states'
7 performance, and conducting compliance audits. It also allocates federal funds for child welfare
8 and related programs to state, county, city, and tribal governments, and to public and private local
9 agencies. (Williams Decl., ¶ 3.)

10 CDSS is California's state agency responsible for child welfare services. CDSS supervises
11 California's 58 counties' administration of child welfare services and foster care programs
12 through statutes, regulations, policies, and compliance reviews. CDSS also allocates federal and
13 state funds to all California's counties. (Williams Decl., ¶ 4.)

14 California's foster care group home rates are set by the the State's Legislature, as set forth
15 in Welfare and Institutions Code section 11462, and changes to those rates are made by the
16 Legislature by amendments to that statute. (Williams Decl., ¶ 5.)

17 The foster care group home payments rates system set by the Legislature is based on a Rate
18 Classification Level (RCL) point system that measures the number of "paid awake" hours worked
19 each month by a group home program's child care and social worker staff and their first-line
20 supervisors. The point system also counts the number of hours of mental health treatment
21 services received by the children in the program, although these services are funded by another
22 state agency, the Department of Mental Health, and do not have to be paid for by the provider.
23 These hours are then weighted to reflect the experience, formal education, and ongoing training
24 of the child care staff and the qualifications of the social work and mental health professionals.

25
26 ¹ Debra Williams is employed by CDSS as the Bureau Chief of the Foster Care Rates
27 Bureau, in the Foster Care Audits and Rates Branch, a position she had held since January 2008.
28 (Williams Decl., ¶ 1.)

1 These weighted hours are then divided by 90 percent of the program's licensed capacity (that is,
2 the number of foster children within a given group home) to compute the program's RCL points.
3 The higher the points, the higher the RCL reimbursement. Consistent with their program
4 statements, group homes can access additional funding sources such as the Early & Periodic
5 Screening & Diagnostic Treatment (EPSDT) Program, which is a Medi-cal program), and
6 education funds. Group homes may also apply for grants, and conduct fundraising. (Williams
7 Decl., ¶ 6.)

8 It is inaccurate to say, as claimed in the submissions of plaintiff, that there has been a 10
9 percent RCL rate decrease since the first "Alliance" case, *California Alliance of Child and Family*
10 *Services v. Allenby*, No. C 06-04095 MHP (*Alliance I*). (Williams Decl., ¶ 7.)

11 The rate schedule found at Welfare & Institutions Code section 11462 (f)(1) is the schedule
12 of rates paid at the time of the filing of the complaint in *Alliance I*, June 30, 2006. These were the
13 levels relied on by the Court in reaching its decision (dated March 12, 2008), which found that
14 CDSS's RCL rate schedule, which was noted by the court to be 80% of actual costs, was in
15 substantial compliance with the federal CWA. (Williams Decl., ¶ 8.)

16 Subsequent to the filing of that *Alliance I* complaint, Senate Bill (SB) 84, Chapter 177,
17 Statutes of 2007, provided a five percent increase in the wages and benefits for group home
18 providers, which became effective January 1, 2008. Then, Assembly Bill (AB) 4, Chapter 4,
19 Statutes of 2009, added section 11462 (g)(5) to the Welfare & Institutions Code, which decreased
20 the amount in section 11462 (g)(4) by 10 percent, which reflected the five percent increase
21 provided by SB 84, effective October 1, 2009. As a result, group home providers will not
22 experience a 10% decrease. Some may experience more or less than a five percent net decrease
23 depending on the provider's individual circumstances. However, the lesser decrease will not be
24 experienced until, November 1, 2009, since they are paid in arrears. (Williams Decl., ¶ 9.)

25 At the same time, AB 4 continued the adjusted rate schedule for 2009-2010. The adjusted
26 rate schedule is based on the same determination of points described above; however, the adjusted
27 rate schedule allows providers to more easily meet their RCL points by allowing them flexibility
28 to make a proportionate adjustment to their staff expenses. For example, a group home can

1 choose to reduce the number of hours spent by staff, or reduce the level of education and/or
2 experience of child care, social work, and mental health workers it employs, thereby offsetting
3 the statutory rate reduction. By such choices, a program can be funded at a higher RCL rate level
4 than is reflected by the degree of services it provides, thereby, as a practical matter, diminishing
5 or even negating altogether the effect of the budget cutbacks. In other words, the decrease
6 described above is offset by the extension of this rate adjustment schedule. This effectively
7 allows the group home providers to adjust services and reduce expenses while retaining the same
8 level of payment. The net result of these combined changes currently allows providers who take
9 advantage of this adjusted rate schedule to eliminate the fiscal impact of the net decrease
10 altogether. That current fiscal benefit is in the range of 5.76% to 6%. (Williams Decl., ¶ 10.)

11 In addition to the existing rate relief, which when utilized will ameliorate the decrease
12 described above, SB 597 will allow an even greater adjustment to points necessary to meet a
13 given paid RCL. This bill is enrolled but not yet signed into law. Unless it is vetoed by the
14 Governor prior to Oct. 11, 2009, which is not expected, it will become law. There is no reason to
15 believe that it will not become law since it was a cooperative effort of the Alliance (the plaintiff
16 in this case) and CDSS. At that time the potential fiscal benefit of the adjusted rate schedule
17 described above and SB 597 combined will be an increase in the range of 17% to 18%.
18 (Williams Decl., ¶ 11.)

19 Foster care payments are made in arrears, that is, no later than the 15th day of the month
20 following that in which the services were provided. Thus, the reductions effective October 1,
21 2009, will not be seen by the providers until November 1st at the soonest, and in some cases, not
22 until November 15th. (Williams Decl., ¶ 12.)

23 **B. The Wraparound Program Decreases the Need for Group Homes**

24 The SB 163 Wraparound Program is a state program in the child welfare services system
25 that authorizes the use of state and county foster care funds for “wrap-around services” as defined
26 in Chapter 4 of Part 6 of Division 9 of the Welfare and Institutions Code, commencing at Welfare
27 and Institutions Code Section 18250. The Legislature’s intent as stated in this section is to
28 authorize counties “to provide children with service alternatives to group home care through the

1 development of expanded family-based services programs. These programs shall include
2 individualized or ‘wrap-around’ services, where services are wrapped around a child living with
3 his or her birth parent, relative, adoptive parent, licensed or certified foster parent, or guardian.
4 The wrap-around services developed under this section shall build on the strengths of each
5 eligible child and family and be tailored to address their unique and changing needs.” (Welfare &
6 Institutions Code section 18250). Services are coordinated using the wraparound planning
7 process and are intended to enable the child to either remain at home or be placed in a foster care
8 setting that is less restrictive than a group home. Providers such as Families First (into which
9 Eastfield Ming Quong (EMQ) merged leaving Families First as the surviving entity, dba EMQ
10 Families First) – a provider that was included on the list of facilities attached as Exhibit B to the
11 declaration of Doug Johnson filed in this action, were early adopters of this model, which
12 transformed their agency’s function from primarily a provider of residential beds to a premiere
13 provider of community-based services. (Declaration of Cheryl Treadwell in Support of
14 Opposition to Motion for Temporary Restraining Order and Order to Show Cause Regarding
15 Preliminary Injunction (Treadwell Decl.), ¶ 2.)²

16 Since the implementation of the statewide program in 1998, the SB 163 Wraparound has
17 grown to 43 counties. The following additional counties are in an active planning stage of
18 developing their SB 163 wraparound programs: Calaveras, Imperial, Lake, Sierra, Sonoma,
19 Stanislaus, Tuolumne and Yuba. One of the driving forces behind this expansion is a provision of
20 the Mental Health Services Act, which makes part of the funding to a county contingent on the
21 county either having an SB 163 program or, after receiving technical assistance from CDSS,
22 providing an explanation as to why a wraparound program is not feasible for implementation in
23 their county. (Treadwell Decl., ¶ 3.)

24 According to data in the Child Welfare Services Case Management System (CWS/CMS),
25 group home caseloads have steadily decreased while the wraparound caseload has increased. As

26 ² Cheryl Treadwell is Chief of the Resource Development and Training Support Bureau
27 within the Child Protection and Family Support Branch of CDSS, a post she has held since May
28 1, 2009.

1 of January 1, 2009, the group home population in California (7,418) had declined by 33 percent
2 from its high point of having 11,160 children on January 1, 2003. In 2003, group home
3 placements represented 11.5 percent of the total foster care population; in 2009, they represent a
4 smaller proportion (10.4 percent) of a smaller overall foster care population. During this same
5 time period, the overall foster care population declined from 96,813 in January 2003 to 70,916 in
6 January 2009. At the same time that these group home caseloads have steadily decreased,
7 research shows that the number of children placed with foster families or kinship placements
8 continues to increase. (Treadwell Decl., ¶ 4.)

9 The decrease in the percentage of youth in group homes can at least in part be attributed to
10 an expanding array of services such as the wraparound program offered in counties to meet the
11 unique needs of children with complex and enduring problems that provide alternatives to group
12 care. In Los Angeles County, the wraparound program has proven to be quite effective. In its
13 2007 Wraparound Report, the Los Angeles Department of Child and Family Services (DCFS)
14 states that “as DCFS as moved to a greater focus on getting children out of foster care and back to
15 the care of their families as quickly as possible, Wraparound has served as a conduit for easing
16 this transition as evidenced by a comparison of wraparound vs group home enrolment.”
17 (Treadwell Decl., ¶ 5, and the exhibit thereto.)

18 The wraparound program is just one part of an array of services offered in counties that are
19 designed to meet the unique needs of children. Some of those other services offered include, but
20 are not limited to, Kinship Support Services, Family to Family programs, and Dependency Drug
21 Court and community-based prevention services. (Treadwell Decl., ¶ 6.)

22 **C. Plaintiff’s Contentions Regarding Group Home Service Cutbacks** 23 **and Closures is Misleading and Inaccurate**

24 In the Foster Care Program and Financial Audits Bureau of the CDSS, Cora Dixon is
25 responsible for overseeing provisional and non-provisional program audits performed on-site of
26 group home programs statewide; she is also responsible for overseeing the policy and support
27 regarding the audit activities of the Bureau which include policy development, coordination of
28 audit appeals filed, and the collection activities surrounding any assessed overpayments. I am also

1 responsible for overseeing the review of Financial Audit Reports (FARs) conducted and prepared
2 by independent Certified Public Accountants (CPAs) and submitted on behalf of non-profit
3 corporations who operate group home and foster family agency (FFA) programs. The review of
4 FARs is to assess the non-profit corporations' financial condition, ensure that FARs meet
5 required auditing and reporting standards, and to determine misuse and financial instability.
6 (Declaration of Cora Dixon in Support of Opposition to Motion for Temporary Restraining Order
7 and Order to Show Cause Regarding Preliminary Injunction (Dixon Decl.), ¶¶ 1-2.)³

8 California is designated as the single state agency authorized to administer a state system
9 for establishing foster care rates under the Aid to Families with Dependent Children-Foster Care
10 (AFDC-FC) program. Moreover, CDSS exercises its oversight responsibility by performing
11 audits of group home programs operated by non-profit corporations that receive funds under the
12 AFDC-FC program and by reviewing the FARs submitted by CPAs on behalf of non-profit
13 corporations that operate group home programs and/or FFA programs. (Dixon Decl., ¶ 3.)

14 In conjunction with setting the rates for group home programs, provisional and non-
15 provisional audits are performed on-site of group home providers. By state statute, a program
16 audit includes a review of data for either a two-month period for a provisional audit, or a 12-month
17 period for a non-provisional audit. If a provider does not meet the points for the paid RCL
18 established for a provisional program audit, the rate is reduced to the audited RCL. In addition,
19 an overpayment is assessed for the difference in the amount between the paid RCL and rate and
20 the audited RCL and rate. (Dixon Decl., ¶ 4.)

21 As a condition to receive an AFDC-FC rate, state law requires a non-profit corporation
22 operating a group home or foster family agency, to submit a Financial Audit Report (FAR) annual
23 or triennially, based on the corporation's combined federal revenues including, but not limited to,

24 ³Cora L. Dixon is employed by CDSS as position is Bureau Chief of the Program and
25 Financial Audits Bureau, in the Foster Care Audits and Rates Branch, a post she had held since
26 May 2000. Prior to that, she held a variety of positions within the Foster Care Audits and Rates
27 Branch of CDSS, such as the Unit Chief of the Rates Policy Unit and Unit Chief of the Rate
28 setting Unit. (Dixon Decl., ¶ 1.)

1 AFCD-FC, federal education funds, and mental health funds. Providers that receive more than
2 \$500,000 in federal revenues are required to submit a FAR annually and all others shall submit
3 one at least once every three years. (Dixon Decl., ¶ 5.)

4 Exhibit B to Doug Johnson's declaration consists of a list of non-profit corporations that he
5 asserts either closed or reduced their licensed capacity as a result of inadequate funding provided
6 by the AFDC-Foster Care rates. Ms. Dixon has reviewed documents related to the programs
7 operated by these non-profit corporations in the possession of the Foster Care Audits and Rates
8 Branch. (Dixon Decl., ¶ 6.)

9 A cursory review of the list of non-profit corporations mentioned by Mr. Johnson that Ms.
10 Dixon immediately draws out the inaccuracy of the statement that these entities closed or reduced
11 their licensed capacity due to inadequate foster care funding:

- 12 a) Sacramento Children's Home reduced its capacity because of low referrals and census.
- 13 b) Sierra Vista Child and Family Services indicated declining placements as the reason
14 along with increasing costs, for closure of one of its homes.
- 15 c) Redwood Children's Services closed a home because the placement referrals
16 diminished after Lake and Mendocino Counties changed their placement focus to
17 Intensive Foster Care rather than group home placement.
- 18 d) Phoenix House closed a program receiving an RCL 5 because "The County of Los
19 Angeles Probation Department and the Department of Children and Family Services
20 are just referring RCL12 clients to our program." In 2008, Phoenix House had
21 increased its RCL12 capacity from 45 to 60 beds. A review of their 2008 FAR reflects
22 significant losses attributable to investment losses not foster care rate underfunding.⁴

23 The assertions of closure or reduction due to asserted inadequate funding by Mr. Johnson
24 are questionable when their Financial Audit Reports reflect positive net assets and significant
25 revenue. For example:

- 26 a) Olive Crest Treatment -the FAR for 2006 showed net positive assets of \$3,206,709
27 (total revenue \$37,852,880).

28 ⁴ All enumerated points are detailed and supported by Ms. Dixon's declaration, and documents identified and produced thereto, at paragraph 7.

- 1 b) True to Life Children's Services (TLC) - the FAR for 2008 showed net positive assets
2 of \$22,222 (total revenue \$7,016,635).
- 3 c) Lincoln Child Center - the FAR for 2007 showed net positive assets of \$158,090 (total
4 revenue \$12,384,572).
- 5 d) River Oak Center for Children - the FAR for 2008 showed negative assets of
6 \$2,036,376, however total revenue of \$18,083,448.
- 7 e) Stanford Home for Children - FAR for 2006 showed net positive assets of \$5,964,956
8 (total revenue \$16,834,582).
- 9 f) Families First merged with EMQ and I can affirm that it retained its grandfathered rate
10 which is a rate that was in effect prior to the current rate setting methodology for FFAs
11 and is historically higher than rates paid to other FFA programs. The FAR for 2008
12 showed net positive assets of \$209,103 (total revenue \$40,485,519).
- 13 g) Five Acres - the FAR of 2007 showed net positive assets of \$268,004 (total revenues
14 \$25,125,479).⁵

15 Several of the group home programs listed by Mr. Johnson are or were operating
16 wraparound programs. For example:

- 17 a) River Oak Center for Children closed their group home, RCL 14 program with 18
18 beds; and while they may have closed their group home program, they continue to
19 operate a number of programs that serve more than 3000 families and children through
20 their community services program including a wraparound program, a differential
21 response services program, day treatment, therapeutic preschool and more. The last
22 available FAR indicates that the agency had net positive assets of 12.6 million as of
23 June 30, 2008.
- 24 b) ChildNet Youth and Family Services, Inc. closed its group home program in 2007, but
25 continues to operate a foster family agency. In addition, records reflect that the agency
26 implemented a wraparound program in 2007. The FAR of 2007 reports that ChildNet
27 had net positive assets of \$573,270, with total revenues of \$24,692,739.
- 28 c) Families First/EMQ is a leading provider of wraparound services throughout
California as well as one of the largest foster family agencies in the state.
- d) Five Acres records reflect its closure of a six-bed group home, with a remaining 92
group home beds. (Exh. P) However, I can attest that Five Acres is involved in the
development of a pilot project called Residentially Based Services (RBS) that will be
providing some wraparound services. This pilot project is expected to result in a new

⁵ All enumerated points are detailed and supported by Ms. Dixon's declaration, and documents identified and produced thereto, at paragraph 8.

1 type of residential program for foster youth, with a rate that is projected to be
2 significantly higher than a group home program's AFDC-FC rate.⁶

3 A review of the FARs of the various non-profits listed reflect that they had multiple sources
4 of funding that range as high as 47.5 percent from non-AFDC FC sources. For example, Phoenix
5 House's non-AFDC- FC funding is 47 percent of its total revenues. Olive Crest's non-AFDC-FC
6 funding is 47.5 percent of its total revenues. River Oak's was 30.2 percent of its total revenues.
7 These funds are in addition to the AFDC-FC rate funding received by these programs. (Dixon
8 Decl., ¶ 10, and exhibits thereto.)

9 **D. Alternative State Funding Sources for Group Homes**

10 In addition to the state and federal funding provided via CDSS to group homes serving
11 foster youth in California, these group homes also receive resources from county and other local
12 government entities, and from community-based organizations, including non-profit
13 organizations, in some cases as "matching funds" to the funding provided via CDSS.
14 (Declaration of Peter Crevinka in Support of Opposition to Motion for Temporary Restraining
15 Order and Order to Show Cause Regarding Preliminary Injunction (Crevinka Decl.), ¶ 3.)⁷

16 Many group homes serving foster youth in California also receive the funding from other
17 state departments, as follows:

18 The passage of Proposition 63, in November 2004, created the Mental Health Services Act
19 (MHSA) program, administered by the California Department of Mental Health. This program

20 ⁶ All enumerated points are detailed and supported by Ms. Dixon's declaration, and
documents identified and produced thereto, at paragraph 9.

21 ⁷ Peter Cervinka has been since January 2008 served as an Assistant Secretary for Program
22 and Fiscal Affairs with the California Health and Human Services Agency (Agency). Prior to
23 that, he assisted in the development of the Administration's positions on and amendments to
24 pending legislation affecting any part of the entire breadth of California's health and human
25 services programs, beginning June 2007, also with the Agency. His experience before June 2007
26 includes roughly nine years of state budget development, enactment, and implementation work,
27 with the most recent of that experience in the state budgets for the California Departments of
Health Care Services, Mental Health, Developmental Services, Public Health, Alcohol and Drug
Programs, and the Managed Risk Medical Insurance Board. His current responsibilities include
28 policy and fiscal direction and oversight for CDSS, which includes CDSS's Division of Children
and Family Services that administers and/or coordinates all of California's foster youth programs.
(Cervinka Declaration, ¶¶ 1-2.)

1 provides increased funding, personnel and other resources to support community-based county
2 mental health programs. The focus of these services is on underserved or previously unserved
3 populations including adults and youth. Specifically, and in part, the MHSA requires that
4 counties and cities receiving MHSA funds provide services to address the needs of transition-age
5 youth in the ages of 16 to 25. These youth served through MHSA programs may also be
6 receiving services through the foster care system. (*Id.*)

7 The federal Medicaid program, commonly known as Medi-Cal in California, provides
8 health care services to eligible persons in California. Most, if not all, foster youth meet the
9 eligibility requirements to receive health care services through this program. While this funding
10 is not provided directly to group homes, the Department of Health Care Services administers this
11 funding for the benefit and care of foster youth served by group homes in California in
12 collaboration with the Department of Alcohol and Drug Programs, Department of Developmental
13 Services, Department of Social Services, and the Department of Mental Health. (*Id.*)

14 The Early and Periodic Screening, Diagnosis, and Treatment Program (EPSDT) Program is
15 a federally mandated benefit under Medicaid (Medi-Cal). States receiving Medicaid dollars must
16 provide these services in order to comply with federal requirements and their federally approved
17 state plans if funding is to be continued. All Medi-Cal-eligible children and young adults in
18 California who are under 21 years of age, including youth served through the foster care system,
19 are entitled to receive any medically necessary mental health services that are needed to correct or
20 ameliorate the child/youth's condition. While these funds are not received directly by group
21 homes in California, the Department of Health Care Services and Department of Mental Health
22 collaborate to provide these mental health services to eligible foster youth served by group homes
23 in California. (*Id.*)

24 The Community Treatment Facility (CTF) supplemental rate is paid by the Department of
25 Mental Health to Mental Health Plans (MHPs) that distribute the funds to CTFs as required by
26 subdivision (d) of Section 4094 of the California Welfare and Institutions Code. The
27 supplemental rate provides funding necessary for CTFs to meet the mental health needs of
28 seriously emotionally disturbed (SED) children in Rate Classification Level 13 and 14 group

1 homes. There are four CTFs operating in California. (*Id.*)

2 **ARGUMENT**

3 **I. PLAINTIFF HAS NOT MET THE REQUIREMENTS FOR A TEMPORARY RESTRAINING**
 4 **ORDER OF A PRELIMINARY INJUNCTION BECAUSE IT HAS FAILED TO SHOW THAT**
 5 **IT IS LIKELY TO PREVAIL ON ANY OF ITS CLAIMS.**

6 “A plaintiff seeking a preliminary injunction must establish that [1] he is likely to succeed
 7 on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
 8 [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”
 9 *Winter v. Natural Resources Defense Council*, ___ U.S. ___, 129 S. Ct. 365, 374 (2008). The
 10 standard for a temporary restraining order is the same. *Granny Goose Foods, Inc. v. Brotherhood*
 11 *of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439. If the plaintiffs “show[] no chance of
 12 success on the merits,” the inquiry ends and “the injunction should not issue.” *Arcamuzi v.*
 13 *Continental Airlines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987); see also *Republic of the Philippines*
 14 *v. Marcos*, 818 F.2d 1473, 1490 (9th Cir. 1987) (quotations omitted) (“[W]e cannot even say that
 15 the Republic has the fair chance of success on the merits needed to remand for a balancing of the
 16 hardships.”). Even if a plaintiff can establish the threshold showing on the merits — i.e., a
 17 “strong likelihood” of success, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of*
 18 *America v. United States Department of Agriculture*, 415 F.3d 1078, 1092-93 (9th Cir. 2005) — it
 19 will be “entitled to a preliminary injunction motion only if the balance of the hardships tips
 20 sharply in [its] favor.” *Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (en banc)
 21 (quotations omitted).⁸ Speculative harm, or merely showing that future injury is possible, is
 22 insufficient to prove irreparable harm. See *Winter*, --- U.S. ---, 129 S. Ct. at 375-76 (quotations
 23 omitted) (preliminary injunction will not issue “simply to prevent the possibility of some remote
 24 future injury”).

24 ///

25 ///

26 _____
 27 ⁸ Even if “the strongest showing on the merits is made,” plaintiffs still must prove “at least
 28 a minimal tip in the balance of hardships.” *Los Angeles Memorial Coliseum Comm’n v. National*
Football League, 634 F.2d 1197, 1203-04 (9th Cir. 1980).

1 **A. The Question of a Private Right of Action Under Section 1983 is Not**
2 **Settled.**

3 Plaintiff's first argument that it has a likelihood of success on the merits is that it has a
4 federal right of action under 42 U.S.C. section 1983. This is not a foregone conclusion.

5 In order to maintain an action under 42 U.S.C. section 1983, a plaintiff must establish that
6 Congress unambiguously intended to confer a right of enforcement of the particular statutory
7 provision at issue. *Gonzaga University v. Doe*, 536 U.S. 273 (2002). "In legislation enacted
8 pursuant to the spending power, the typical remedy for state noncompliance with federally
9 imposed conditions is not a private cause of action for noncompliance but rather action by the
10 Federal Government to terminate funds to the State." *Gonzaga*, 536 U.S. at 280, quoting
11 *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981). Therefore, "unless
12 Congress 'speaks with a clear voice' and manifests an 'unambiguous' intent to confer individual
13 rights, federal funding provisions provide no basis for private enforcement by § 1983. (Citation
14 omitted)." *Id.* Because only *rights* may be enforced, the Court's implied right of action cases
15 "should guide the determination of whether a statute confers rights enforceable under § 1983."
16 *Gonzaga*, 536 U.S. at 283.

17 As *Gonzaga* explains, under the private right of action cases, the "text and structure" of the
18 statute must demonstrate that Congress unambiguously intended to grant individual rights. 536
19 U.S. at 286. Critical to this inquiry is whether the statutory provision uses "rights-creating"
20 language. 536 U.S. at 287; *Alexander v. Sandoval*, 532 U.S. 275, 288-289 (2001). Such language
21 must clearly impart an "individual entitlement," and have an "unmistakable focus on the
22 benefitted class." *Id.*; *Cannon v. University of Chicago*, 441 U.S. 677, 692, n. 13 (1979) (text of
23 statute must be "phrased in terms of the person benefitted.") "Statutes that focus on the person
24 regulated rather than the individuals protected create no implication of an intent to confer rights
25 on a particular class of person." *Gonzaga*, 536 U.S. at 287, quoting *Alexander v. Sandoval*, 532
26 U.S. at 289 (internal quotes and citation omitted). "If [the statute] provide[s] some indication that
27 Congress may have intended to create individual rights, and some indication it may not have, that
28 means Congress has not spoken with the requisite 'clear voice.' Ambiguity precludes enforceable

1 rights.” 31 *Foster Children v. Bush*, 329 F. 3d 1255, 1270 (11th Cir. 2003). The *Gonzaga* Court
2 invoked as exemplars of “rights-creating” language Title VI of the Civil Rights Act of 1964 (42
3 U.S.C. § 2000d) and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681(a)). Each
4 of those statutes provides: “No person in the United States shall . . . be subject to discrimination.”
5 According to *Gonzaga*, this language creates individual rights because it is phrased “with an
6 *unmistakable focus* on the benefitted class.” 536 U.S. at 284 (quoting *Cannon*, 441 U.S. at 691)
7 (emphasis in original).

8 Additional closely related principles relevant to determining whether the text and structure
9 of a statutory provision manifest a congressional intent to confer an enforceable right include: (1)
10 statutes that have an “aggregate” focus rather than a focus upon whether the needs of any
11 particular person has been satisfied do not give rise to individual rights; (2) statutes that speak
12 only in terms of institutional policy and practice do not evince an intent to create private rights of
13 enforcement; (3) a statutory provision that references the individual only in the context of
14 describing the type of policy or practice that will trigger a funding prohibition, does not reflect a
15 congressional intent to create a private right of action; and (4) a provision that allows a state
16 entity to avoid a loss of federal funds through substantial compliance reflects a congressional
17 intent to confer group rather than individual rights. *Gonzaga*, 536 U.S. at 288. Application of all
18 these principles demonstrates that the provisions of the Child Welfare Act (42 U.S.C. sections
19 670-679b) (CWA) here do not unambiguously confer rights on foster care group homes or
20 organizations that represent them.

21 Only twice has the Supreme Court found that Spending Clause legislation created privately
22 enforceable under section 1983. See *Wright v. Roanoke Redevelopment and Housing Authority*,
23 479 U.S. 418, 426, 432 (1987) (a rent-ceiling provision unambiguously conferred “a mandatory
24 [benefit] focusing on the individual family and its income”); and *Wilder v. Virginia Hosp. Ass'n*,
25 496 U.S. 498, 522-523 (1990) (provision required States to pay an “objective” monetary
26 entitlement to individual health care providers). The Supreme Court’s subsequent decisions,
27 however, have rejected attempts to infer enforceable rights from Spending Clause provisions
28 whose language did not unambiguously confer such a right upon the Act’s beneficiaries. See,

1 *e.g.*, *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (Adoption Assistance and Child Welfare Act
2 requirement that State have a “plan” to make “reasonable efforts” to keep children out of foster
3 care not actionable); *Blessing v. Freestone*, 520 U.S. 329, 340, 343 (1997) (Title IV-D
4 requirement that State “substantially comply” with requirements designed to ensure timely
5 payment of child support not actionable.

6 The purpose of the CWA is to enable “each State to provide, in appropriate cases, foster
7 care and transitional independent living programs for children who otherwise would have been
8 eligible for assistance under the State's [approved] plan” Under the CWA, the federal
9 government appropriates “sums as may be necessary to carry out the provisions of [the CWA].
10 The sums made available under this section shall be used for making payments to States which
11 have submitted, and had approved by the Secretary, State plans under [the CWA].” 42 U.S. C.
12 section 670. In order for a State to receive these funds – referred to as federal financial
13 participation (FFP) – it must submit for approval to the Secretary of the US Department of Health
14 and Human Services (HHS) a plan for foster care and adoption assistance. 42 U.S.C. section
15 671(a). That statute also requires the Secretary of HHS to promulgate regulations for use in
16 reviewing state programs to determine whether the programs are in “substantial conformity” with
17 the requirements of the CWA, its regulations, and a state’s approved State Plan. 42 sections
18 1320a-2a(a)(3). If the Secretary determines that a state is not in “substantial conformity,” there
19 are various actions that the Secretary must take, including withholding some or all of the FFP that
20 a state would be entitled to for providing benefits under the CWA. *Id.*

21 Section 671(a)(1) provides in pertinent part: “In order for a State to be eligible for
22 payments under [the CWA], it shall have a plan approved by the Secretary which . . . provides for
23 foster care maintenance payments in accordance with section [672] and for adoption assistance in
24 accordance with section [673].” This is just one of dozens of requirements for a State Plan. 42
25 U.S.C. section 671. Section 672 relates to the “foster care maintenance payments program.”
26 Specifically, section 672(a)(1) outlines the limitations for participation in the program:

27 ///
28

1 Each State with a plan approved under [the CWA] shall make foster
 2 care maintenance payments on behalf of each child who has been
 3 removed from the home of a relative . . . into foster care if – (A)
 4 the removal and foster care placement met, and the placement
 5 continues to meet, the requirements of paragraph (2); and (B) the
 6 child, while in the home, would have met the AFDC eligibility
 7 requirement of paragraph (3).

8 “Foster care maintenance payments” is defined as:

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

18 42 U.S.C. section 675(4)(A).

19 There are no regulations under the CWA that indicate how such costs are to be calculated or
 20 what “cover the cost of” means. The only regulation that applies to foster care maintenance
 21 payments is entitled “Foster care maintenance payments program implementation requirements.”
 22 (45 C.F.R. § 1356.21) Section 1356.21(a) sets forth the “[s]tatutory and regulatory requirements
 23 of the Federal foster care program”:

24 To implement the foster care maintenance payments program
 25 provisions of title IV-E State plan and to be eligible to receive
 26 Federal financial participation (FFP) for foster care maintenance
 27 payments under [the Act], a State must meet the requirements of
 28 this section, 45 C.F.R. § 1356.22, 45 C.F.R. § 1356.30, and sections
 [672, 675(1), 675(4), 675(5) and 675(6)] of the Act.

Section 1356.21(b) requires a State to “make reasonable efforts to maintain the family unit
 and prevent the unnecessary removal of a child from his/her home, as long as the child’s safety is
 assured” That provision also provides: “In order to satisfy the ‘reasonable efforts’
 requirements of section [671(a)(15)] (as implemented through section [672(a)(1)] of the Act), the
 State must meet the requirements of paragraphs (b) and (d) of this section.” A judicial
 determination must be made that “reasonable efforts were made, or not required, to prevent the

1 removal . . . no later than 60 days from the date the child is removed from the home” 45
2 C.F.R. § 1356.21(b)(1)(i). If such a judicial determination is not made within 60 days of removal,
3 “the child is not eligible under the title IV-E foster care maintenance payments program for the
4 duration of that stay in foster care.” 45 C.F.R. section 1356.21(b)(1)(ii).

5 Nothing in the “text and structure” of the CWA demonstrates that Congress unambiguously
6 intended to grant individual providers the right to enforce its provisions. None of the provisions
7 of the Act contain any “rights creating language,” nor do they have an “unmistakable focus” on
8 providers. In fact, the focus of the applicable statutory and regulatory provisions is on the State
9 and what it must do in order to recover FFP for the foster care maintenance payments that it
10 makes. There is nothing in the language that even mentions foster care providers, let alone that
11 demonstrates that these provisions are written for their benefit. Furthermore, a state need only be
12 in “substantial conformity” with these provisions – another indication under *Gonzaga* that
13 Congress did not intend to confer individual rights on providers to enforce these provisions of the
14 CWA. 536 U.S. at 288. In fact, there is nothing in any of these provisions that evinces a
15 Congressional intent that providers have enforceable rights here. Quite the opposite. As with
16 most Spending Clause legislation, Congress intended the Secretary of HHS to enforce the
17 provisions of the CWA and that they not be privately enforceable by providers or anyone else.

18 Here, section 672 does not enumerate any monetary benefits to which either providers or
19 foster children are entitled. This provision is focused on the state and what it must do in order to
20 participate in the foster care maintenance payments program: make reasonable efforts to keep
21 children in their homes, and ensure that a judicial determination that this is not possible has been
22 made within a certain time period. If a state does not comply with these requirements, it may not
23 recover FFP for the foster care maintenance payments that it may pay out.

24 Similarly, in a case brought by foster children challenging, in part, the amount of foster care
25 payments made on their behalf under the very provisions at issue here, the court held the
26 provisions were not privately enforceable under section 1983. *Foreman v. Heineman*, 240 F.R.D.
27 456, 540 (D. Neb. 2006). “With respect to ‘foster care maintenance payments,’ neither § 672
28 nor the definition of that term in § 675(4) provide any language for discerning how rates should

1 be set for paying foster care providers the ‘cost’ of caring for a foster child, and in the case of
2 institutional care, ‘the reasonable costs of administration and operation of such institution as are
3 necessarily required’ to care for a foster child.’ 42 U.S.C. § 675(4)(A).” The court noted that
4 plaintiffs had not cited to any regulations governing the calculation of foster care maintenance
5 payments and concluded that “plaintiffs’ asserted right to foster care maintenance payments is too
6 ‘vague and amorphous’ to support a federal right enforceable under § 1983. *Id.* See also *Olivia*
7 *Y. v. Barbour*, 351 F. Supp.2d 543, 562 (S.D. Miss. 2004) (plaintiffs have no enforceable rights
8 under section 675(A) [and other provisions]), citing *Charlie H.*, 83 F. Supp.2d at 490.

9 In *California Alliance of Child and Family Services*, 459 F. Supp.2d 919 (N.D. Cal. 2006)
10 (*Alliance I*), this Court held that “Congress unambiguously conferred a right to reimbursement of
11 the specific costs outlined in section 675(4)(A)” of the CWA. *Id.* at 924. However, in reaching
12 this conclusion, this Court did not look at the text and structure of the CWA, acknowledge that
13 the Secretary is charged with ensuring that a state substantially conforms with its provisions, or
14 examine the CWA’s implementing regulations. However, when this Court considered the parties’
15 motions for summary judgment, it concluded that, in fact, that “the process for determining foster
16 care payment rates is still substantially compliant with the statutory criteria outlined in the
17 CWA,” because the RCL provided for at least 80% of costs. (Exhibit A, p.7.) This Court also
18 noted that the statute is silent about “actual costs,” and refers to the “reasonable costs of
19 administration and operation” of group homes. *Id.* Thus, this Court’s ultimate decision in
20 *Alliance I* is at odds with its ruling that plaintiff had a private right of action under section 1983 to
21 challenge the rates its members receive.⁹

22 The *California Alliance* court also erred in finding that section 675(4)(A) “contains an
23 explicit and detailed provision for determining payments to foster care providers” such that the
24 provision is not too “vague and amorphous” to be judicially enforceable. Again, the Court
25 ignored the text and structure of the statute. This is a definitional provision that is not

26 ⁹The issue of whether there is a private right of action under the CWA to challenge the
27 payments received regarding “foster care maintenance costs” is currently on appeal in the
28 Ninth Circuit in *California State Foster Parent Ass’n v. Wagner*, Case No. 09-15025.

1 enforceable. See *31 Foster Children*, 329 F.3d at 1271 (definitional provisions “alone cannot and
2 do not supply a basis for conferring rights enforceable under § 1983”). There is nothing in the
3 regulations that indicates how these costs are to be calculated, whether individual providers are
4 entitled to recover their specific costs or whether the state is required to establish some sort of
5 standard for these costs.

6 As set forth above, the whole focus of the foster care maintenance payments program is on
7 the state and what it must do in order to recover federal reimbursement for its payments. For
8 these reasons, it is not foregone that the CWA provides plaintiff here with a right of action.

9 **B. Plaintiff’s Interpretation of What the CWA Covers is on Appeal.**

10 Plaintiff follows its private-right-of-action argument with arguments that essentially turn on
11 questions that are before the Ninth Circuit in the appeal of Alliance I (that is, whether “payments
12 to cover the cost of (and the cost of providing)” the enumerated items under the CWA means *all*
13 costs and how those would be determined, and whether “substantial compliance” or something
14 more than that is required with the provisions of the CWA). Given that these issues are set for
15 argument this very week before the Ninth Circuit, CDSS submits that to consider them here, in a
16 motion for temporary or preliminary relief, is premature.

17 **II. PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS UNDER THE SUPREMACY CLAUSE**
18 **BECAUSE THE BUDGET ACT DOES NOT CONFLICT WITH THE CHILD WELFARE ACT**

19 In an effort to capitalize on the recent decisions holding that state statutory provisions were
20 preempted by the Supremacy Clause, plaintiff here attempts to show that the Budget Act
21 provision regarding the 10 percent reduction in foster care group home rates is preempted by the
22 Child Welfare Act. That attempt should be rejected. Indeed, plaintiff bears a heavy burden in
23 pursuing its preemption claim that it cannot meet here. The Supreme Court has identified two
24 “cornerstones” of a preemption case. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). “First,
25 ‘the purpose of Congress is the ultimate touchstone in every pre-emption case.’” *Id.* (citation
26 omitted). “Second, [i]n all pre-emption cases, and particularly in those in which Congress has
27 legislated . . . in a field which the States have traditionally occupied, . . . we start with the
28 assumption that the historic police powers of the States were not to be superseded by the Federal

1 Act unless that was the clear and manifest purpose of Congress.” *Id.* at 1194-95 (internal
 2 quotations omitted). Plaintiff here is pursuing an “implied” or “conflict” preemption claim, as the
 3 CWA does not contain an “express” preemption clause. Accordingly, plaintiff must demonstrate
 4 either that it is “impossible for a private party to comply with both state and federal
 5 requirements,” or that state law “stands as an obstacle to the accomplishment and execution of
 6 the full purposes and objectives of Congress.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64
 7 (2002). This “obstacle” must be so great to Congressional purpose that Congress must have
 8 impliedly intended to preempt it. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jimeno v. Mobil*
 9 *Oil Corp.*, 66 F.3d 1514, 1526 n.6 (9th Cir. 1995). Because the Budget Act provision plaintiff
 10 challenges is entirely consistent with the CWA’s provisions governing the “foster care
 11 maintenance payments” program, it does not conflict with it in any way, and thus, plaintiff’s
 12 preemption claims fail as a matter of law.

13 As set forth above, section 672(a)(1) outlines the requirements for participation in the foster
 14 care maintenance payments program. Nothing in these requirements conflicts with the reduction
 15 to payments to foster care group homes. Nor does the definition of “foster care maintenance
 16 payments.” See 42 U.S.C. § 675(4)(A). Indeed, both provisions anticipate that the *State* will set
 17 the payments. There is simply no conflict here. Moreover, plaintiff ignores the additional
 18 funding that its members receive from the Departments of Mental Health and Health Care
 19 Services as well as the additional funding anticipated under SB 597 as well as the change in the
 20 point system used to determine the RCL. There is no conflict here.

21 **III. PLAINTIFF HAS NOT ESTABLISHED THAT IT WILL SUFFER IRREPARABLE HARM AS**
 22 **A RESULT OF THE REDUCTION IN THE GROUP HOME RATE SCHEDULES; IN FACT,**
 23 **THE EVIDENCE SHOWS THAT GROUP HOMES MAY ACTUALLY EXPERIENCE AN**
 24 **INCREASE IN THEIR FUNDING, EVEN EXCLUSIVE OF THE OTHER SOURCES OF**
 25 **GOVERNMENT FUNDING AVAILABLE TO GROUP HOMES**

26 Because plaintiff has not shown that it has any chance of succeeding on the merits, its
 27 motion should be denied on that basis alone. See *Arcamuzi v. Continental Airlines, Inc.*, 819 F.2d
 28 935, 937 (9th Cir. 1987). However, if this Court does reach the issue of harm, the injunctive

1 relief sought must be denied because plaintiff has merely submitted speculative evidence that is
2 not sufficient to establish “irreparable harm.” See *Caribbean Marine Services Co., Inc. v.*
3 *Baldrige*, 844 F.2d 668 (9th Cir. 1988) (injunction order held erroneous because district court
4 credited speculative evidence of harm that was contingent on unlikely future events); see also
5 *Goldie’s Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (“Speculative
6 injury does not constitute irreparable injury.”)

8 In fact, based on the relaxation of the adjusted RCL point system and the expected passage
9 of SB 597, the net result for group homes will be a 17-18% increase in funding. (Williams Decl.,
10 ¶ 12, and Exhibit B thereto.) Moreover, as demonstrated in the declaration of Cora Dixon, at
11 least some of the reduction in services and closing of group home alleged to be a result of the
12 funding issues in detrimental effect on plaintiff’s group homes as set forth by plaintiff in in
13 supporting documents potential benefit

15 Plaintiff contends that recent irreparable harm findings in *Independent Living Center v.*
16 *Maxwell-Jolly*, 572 F.3d 663 (9th Cir. 2009) and *Brantley v. Maxwell-Jolly*, No. 4:09-cv-03798-
17 SBA (Sept. 10, 2009) support this Court taking similar action. However, the fact that courts have
18 enjoined cuts to the Medi-Cal program does not absolve plaintiff of its burden to show irreparable
19 harm here.

21 In sum, plaintiff has not shown any harm whatsoever. Plaintiff submitted any evidence that
22 foster children are going without services. Just because one group home might close does not
23 mean that another one has not opened – and even if it did not, there is no right for group home
24 providers to stay in business under the CWA or otherwise, and no violation of the CWA by CDSS
25 if a group home does goes out of business.

26 Importantly, plaintiff has not demonstrated that any of its group homes have no source of
27 funding other than CWA funds; not all social service, health care, and educational agencies and
28

1 providers have the luxury of multiple sources of funding. Group homes are not the sole social
2 service providers suffering from the State's budgetary crisis.

3 As set forth above, given the five percent increase in funding in January 2008, the change in
4 the RCL point system audits, and the anticipated enactment of SB 597, plaintiff's members are
5 likely to see a continued increase in their rates, in the range of 17-18 percent, as noted above. Far
6 from being harmed, plaintiff's members have fared well during the State's unprecedented budget
7 crisis. Moreover, plaintiff does not acknowledge the additional funding its members receive from
8 the Department of Mental Health and Department of Health Care Services, or the philosophical
9 move from the group home model toward placing children in families or providing services
10 independent of a group home setting so that the children can remain in family settings.

11 CDSS disagrees: given that the degree of funding cutbacks that plaintiff's group homes are
12 to endure is not as great as they have suggested to the Court (see Dixon and Treadwell
13 declarations, generally), that the funding cuts they are to endure will not take place until
14 November at the sooner (see Williams declaration), and that RCL funding is not the only source
15 of funding that these homes receive (see Cervinka declaration), the irreparable harm posited by
16 plaintiff has not be sufficiently substantiated to support the entry of injunctive relief.
17
18
19
20
21
22
23
24
25

26 ///

27 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the reasons set forth above, plaintiff’s motion for a temporary restraining order and an order to show cause regarding a preliminary injunction should be denied.

Dated: October 5, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
SUSAN M. CARSON
Supervising Deputy Attorney General

/s/ George Prince
GEORGE PRINCE
Deputy Attorney General

Attorneys for Defendants