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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

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.
23

CV 09-4398 MHP

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Date: November 13, 2009
Time: 10:00 a.m.
Courtroom: 15, 18th floor
Judge The Hon. Marilyn Hall Patel

Action Filed: September 18, 2009

24 **INTRODUCTION**

25 Having secured a temporary restraining order enjoining the State of California's
26 Department of Social Services (CDSS) from implementing that portion of the budget for fiscal
27 year 2009-2010 reducing by 10 percent the amount of payments made to foster care group homes,
28 trade association plaintiff California Alliance of Child and Family Services seeks an order from

1 this Court supplanting that temporary restraining order (TRO) with a preliminary injunction. For
2 the reasons set forth below, plaintiff's motion for a preliminary injunction should be denied.

3 **FACTUAL BACKGROUND**

4 The primary factual matters underlying this action have been set forth in detail in the
5 parties' papers regarding the TRO and supplemented by materials presented in conjunction with
6 the two hearings that took place prior to issuance of the temporary restraining order on November
7 4, 2009. (See, generally, Documents 7, 25, 30, 35, 36, and 41 -- and those items in support of
8 those documents -- in the electronic record of this action.)
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10 However, at least one statement in plaintiff's new moving papers needs clarification.
11 Plaintiff appears to contend that Senate Bill 597 (SB 597) is of little or no practical benefit for
12 group homes, a contention with which CDSS disagrees. Plaintiff's papers state as follows:

13 For example, under current RCL rates, if a home is at an RCL level 14,
14 it would receive \$6,025. Had the RCL rates kept pace with the CNI, the home
15 would receive \$8,835. Even if the home reduces its number of points based on
16 SB 597 to the lowest amount permitted in order to stay in RCL level 14 (348
17 points), it will still only receive \$6,025 -- less than what an RCL 9 would
18 receive if the homes were given increases consistent with the CNI. Put another
way, if the RCL had kept pace with the CNI, a group home with 348 points
would be an RCL 11 and receive \$7,274 -- an amount significantly greater than
the \$6,025 it is receiving now. (See Johnson Supp. Decl., Ex. C.)

19 Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary
20 Injunction (Plaintiff's Memo), at p. 13:9-16. CDSS submits that this analysis is incorrect.

21 As plaintiff correctly states, a group home receiving funding at the RCL 14 would receive
22 \$6,025.00 per child per month under the budget adjustment that became effective October 1st.
23 However, it does not matter what an RCL 14 would get with the increases under SB 597, because,
24 as a practical matter, there is no RCL 14 under SB 597; SB 597 allows the a nominal RCL 14
25 home to operate at an RCL 11 service rate. If the home reduces its number of points based on SB
26 597 to the lowest amount permitted in order to remain an RCL 14 (348 points), the current rate of
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1 \$6,025.00 it would receive while operating as an RCL 11 represents 85.29 percent of the RCL 11
2 rate, factoring in all the CNI increases that would have accrued to an RCL 11.

3 Moreover, using plaintiff's and Mr. Johnson's numbers, a group home now receiving
4 \$6,025.00 (that is, under current circumstances, an RCL 14 home operating now at an RCL 11
5 home level) would, if all CNIs had been awarded, be receiving \$7,274.00; the \$6,025.00 figure
6 represents nearly 83 percent of the \$7,274.00, which exceeds – on the basis of costs paid for
7 services provided – the 80 percent level that this Court found to be within substantial compliance
8 of the Child Welfare Act in its March 12, 2008 opinion. (Mr. Johnson's figures differ slightly
9 from those CDSS calculated; using CDSS's figures, the percentage increases to over 85 percent.)

10 Although the parties' figures do deviate slightly, the point here is that the effect of SB 597
11 is more than just a meaningless RCL points reduction: it effectively reduces the costs a group
12 home faces, and thus provides the homes with palpable relief from the 10 percent budget
13 reduction. Rather than resulting in funding that represents but 68 percent of CNI levels, SB 597
14 serves to keep the levels above 80 percent.

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17 **THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED**

18 Plaintiff introduces its argument for the entry of a preliminary injunction with a recitation
19 of three recent cases in which federal judges have enjoined the State of California from
20 implementing budget cuts that have been enacted for pure economic reasons: the State is in dire
21 financial straits (as this Court made clear it recognized in one of its initial statements at the first
22 hearing regarding the motion). However, all three cases plaintiff cite to support the entry of an
23 injunction against CDSS involve the Medi-Care, a program distinct from the Child Welfare Act.

24 Moreover, plaintiff bears a heavy burden with its motion, and cannot simply rely on the fact
25 that other courts have issued injunctions in reaction to the State's budget reductions. Plaintiff
26 must show a "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable
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1 injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the
2 plaintiff, and (4) advancement of the public interest (in certain cases).” *Guzman v. Shewry*, 552
3 F.3d 941, 948 (9th Cir. 2009) (internal quotation marks omitted). If plaintiff “shows no chance of
4 success on the merits,” the inquiry ends, and “the injunction should not issue.” *Arcasmuzi v.*
5 *Continental Airlines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). Obtaining a preliminary injunction,
6 also requires a showing “that irreparable injury is *likely* in the absence of an injunction.” *Winter v.*
7 *Natural Resources Defense Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365, 375 (2008) (emphasis
8 added). “Issuing a preliminary injunction based only on a possibility of irreparable harm is
9 inconsistent with our characterization of injunctive relief as an extraordinary remedy that may
10 only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.*, at 375-376.

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12 In this case, plaintiff’s motion must be denied because plaintiff has little likelihood of
13 success on the merits. Further, plaintiff has not demonstrated a likelihood of irreparable injury;
14 and the balance of hardships strongly favors the State.

15 16 **I. Plaintiff Has Little Likelihood of Success on the Merits**

17 **A. Plaintiff Has Failed to Establish the Most Basic Requirement under the Act:** 18 **That the Children for Whom Its Members Provide Care are “Federally Eligible”**

19 Plaintiff contends that the Child Welfare Act “requires that ‘[e]ach State with a plan
20 approved . . . shall make foster care maintenance payments on behalf of each child who has been
21 removed from the home of a relative’” 42 U.S.C. §672(a)(1) (emphasis added). Plaintiff
22 also cites the definition of “foster care maintenance payments.” 42 U.S.C. §675(A)(4).
23 (Plaintiff’s Motion at 17-18.) Plaintiff then contends that because the 2009 Budget “fails to cover
24 these costs, it is invalid and preempted under the Supremacy Clause of the United States
25 Constitution.” (*Id.*, at 18:3-4.) To arrive at these conclusions, plaintiff incorrectly and
26 inaccurately portrays the Child Welfare Act as well as the Supremacy Clause.
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28 Rather than constitute a “mandate” as plaintiff has claimed, section 672 merely outlines

1 the conditions under which the State may claim federal payments for the foster care maintenance
2 payments it makes on behalf of foster children. Indeed, payments under section 672 are expressly
3 conditioned on certain events: “Each State with a plan approved under this part shall make foster
4 care maintenance payments on behalf of each child who has been removed from the home of a
5 relative specified in section 606(a) ... into foster care if (A) the removal and foster care placement
6 met, and the placement continues to meet, the requirements of paragraph (2); and (B) the child,
7 while in the home, would have met the AFDC eligibility require of paragraph (3)” (*Id.*)

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9 Subparagraph (2) outlines the “removal and foster care placement requirements”: “a
10 voluntary placement agreement entered into by a parent or legal guardian of the child . . . or “a
11 judicial determination to the effect that continuation in the home from which removed would
12 contrary to the welfare of the child” In other words, all these requirements must be met
13 before foster care maintenance payments will be made by the federal government. Other
14 requirements include the child being AFDC eligible, and a court of competent jurisdiction having
15 made a determination within the first 180 days of placement that the foster care placement is in
16 the best interests of the child. 42 U.S.C. §§672(a)(3); 672(e). If these requirements are *not* met,
17 no payments will be made under the Child Welfare Act by the federal government to the State for
18 foster care maintenance payments that the State has already made.

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21 In California, only some 56 percent of group home children are “federally eligible.” For
22 those, all requirements of section 672 have been met and the State is entitled to federal payments
23 for the foster care maintenance payments that on their behalf. For the other children in the system
24 – about 44 percent of the total number -- the State does not receive *any* federal payments.¹ That
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26 ¹ Data that CDSS uses for purposes of its current budget indicate that of the 9,583 foster
27 children in group homes, 5,683 are “federally eligible” and the other 3,924 are not. These data
28 and numbers will be attested to and authenticated in a supplemental declaration CDSS will file as
soon as possible.

1 is, the conditions under section 672 for federal payments to the State have *not* been met for these
2 foster children, and the *only* money available for those payments is State and county money. In
3 other words, the federal Child Welfare Act is not implicated at all for nearly half of the group
4 home foster care population. Plaintiff has utterly failed to address this disparity, and has not
5 submitted any evidence regarding the children that its members serve as to whether they are
6 “federally eligible” or not. Plaintiff has failed to make the most fundamental of showings: that
7 the Child Welfare Act applies at all. This failure is fatal to its claim that it is likely to prevail on
8 its claim that the State has failed to make foster care maintenance payments required under the
9 Child Welfare Act.

11 **B. The 2009 Budget Is Not Preempted Under the Supremacy Clause**

12 Plaintiff ’s moving papers re-iterate almost verbatim the Supremacy Clause argument they
13 set forth in their original moving papers for the temporary restraining order (Plaintiff’s Memo, pp.
14 17-20.) Absent any new authority, plaintiff’s argument is as flawed now as it was several weeks
15 ago, for the same reasons as set forth in defendants’ opposition to that motion. As noted then, the
16 Supreme Court has identified two “cornerstones” of a preemption case. *See Wyeth v. Levine*, 129
17 S. Ct. 1187, 1194 (2009). “First, ‘the purpose of Congress is the ultimate touchstone in every
18 pre-emption case.’” *Id.* (citation omitted). “Second, [i]n all pre-emption cases, and particularly
19 in those in which Congress has legislated . . . in a field which the States have traditionally
20 occupied, . . . we start with the assumption that the historic police powers of the States were not
21 to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”
22 *Id.* at 1194-95 (internal quotations omitted). Plaintiff is pursuing an “implied” or “conflict”
23 preemption claim, as the Child Welfare Act does not contain an “express” preemption clause.
24 Accordingly, plaintiff must demonstrate either that it is “‘impossible for a private party to comply
25 with both state and federal requirements,’” or that state law “‘stands as an obstacle to the
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1 accomplishment and execution of the full purposes and objectives of Congress.’’ *Sprietsma v.*
2 *Mercury Marine*, 537 U.S. 51, 64 (2002). This “obstacle” must be so great to Congressional
3 purpose that Congress must have impliedly intended to preempt it. *Hines v. Davidowitz*, 312 U.S.
4 52, 67 (1941); *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n.6 (9th Cir. 1995). Because the
5 Budget Act provision plaintiff challenges is entirely consistent with the Child Welfare Act’s
6 provisions governing the “foster care maintenance payments” program, it does not conflict with it
7 in any way, and thus, plaintiff’s preemption claims fail as a matter of law.

9 **C. This Court Cannot Determine Whether the State is in Substantial**
10 **Conformity with the Child Welfare Act**

11 Contrary to plaintiff’s contention, it is not this Court that must determine whether the
12 State is in “substantial conformity” with the Child Welfare Act, but rather it is the Secretary of
13 the United States Department of Health and Human Services who makes that determination. 42
14 U.S.C. § 1320a-2a. That provision specifically provides:

15 The Secretary, in consultation with the State agencies administering the State programs
16 under parts B and E of subchapter IV of this chapter, shall promulgate regulations for the
17 review of such programs to determine whether such programs are in substantial
18 conformity with--(1) State plan requirements under such parts B and E, (2) implementing
regulations promulgated by the Secretary, and (3) the relevant approved State plans.

19 (42 U.S.C. § 1320a-2a (a).) In other words, it is the Secretary who must determine if a state has
20 complied with the relevant statutory and regulatory provisions of the Child Welfare Act.

21 Moreover, the Secretary’s determination is not a simple matter, but involves a detailed and
22 precise system of directives, as a review of the remainder of 42 U.S.C. section 1320a-2a shows:

23 **(b) Elements of review system.**

24 The regulations referred to in subsection (a) of this section shall--

25 (1) specify the timetable for conformity reviews of State programs, including--

26 (A) an initial review of each State program;

27 (B) a timely review of a State program following a review in which such program
28 was found not to be in substantial conformity; and

1 (C) less frequent reviews of State programs which have been found to be in
2 substantial conformity, but such regulations shall permit the Secretary to reinstate
3 more frequent reviews based on information which indicates that a State program
4 may not be in conformity;

5 (2) specify the requirements subject to review (which shall include determining
6 whether the State program is in conformity with the requirement of [section 671\(a\)\(27\)](#)
7 of this title), and the criteria to be used to measure conformity with such requirements
8 and to determine whether there is a substantial failure to so conform;

9 (3) specify the method to be used to determine the amount of any Federal matching
10 funds to be withheld (subject to paragraph (4)) due to the State program's failure to so
11 conform, which ensures that--

12 (A) such funds will not be withheld with respect to a program, unless it is
13 determined that the program fails substantially to so conform;

14 (B) such funds will not be withheld for a failure to so conform resulting from the
15 State's reliance upon and correct use of formal written statements of Federal law or
16 policy provided to the State by the Secretary; and

17 (C) the amount of such funds withheld is related to the extent of the failure to so
18 conform; and

19 (4) require the Secretary, with respect to any State program found to have failed
20 substantially to so conform--

21 (A) to afford the State an opportunity to adopt and implement a corrective action
22 plan, approved by the Secretary, designed to end the failure to so conform;

23 (B) to make technical assistance available to the State to the extent feasible to
24 enable the State to develop and implement such a corrective action plan;

25 (C) to suspend the withholding of any Federal matching funds under this section
26 while such a corrective action plan is in effect; and

27 (D) to rescind any such withholding if the failure to so conform is ended by
28 successful completion of such a corrective action plan.

(c) Provisions for administrative and judicial review.

The regulations referred to in subsection (a) of this section shall--

(1) require the Secretary, not later than 10 days after a final determination that a
program of the State is not in conformity, to notify the State of--

(A) the basis for the determination; and

(B) the amount of the Federal matching funds (if any) to be withheld from the
State;

(2) afford the State an opportunity to appeal the determination to the Departmental
Appeals Board within 60 days after receipt of the notice described in paragraph (1)
(or, if later, after failure to continue or to complete a corrective action plan); and

(3) afford the State an opportunity to obtain judicial review of an adverse decision of
the Board, within 60 days after the State receives notice of the decision of the Board,
by appeal to the district court of the United States for the judicial district in which the
principal or headquarters office of the agency responsible for administering the
program is located.

(42 U.S.C. section 1320a-2a (b), (c).) As is obvious from the statutory scheme set out above, the
Secretary has detailed and well-defined directives from Congress as to how determinations of

1 conformity with the Child Welfare Act are to be made; those determinations should be left to the
2 Secretary.

3 **II. Plaintiff Cannot Overcome the Other Hurdles It Faces in Seeking an Injunction**

4 As noted above, to achieve its objective of a preliminary injunction plaintiff must show a
5 “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to
6 plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and
7 (4) advancement of the public interest (in certain cases).” *Guzman*, 552 F.3d at 948 (internal
8 quotation marks omitted). While any showing of a strong likelihood of success on the merits is
9 precluded, as detailed above, the other requirements for obtaining a preliminary injunction are
10 equally out of plaintiff’s grasp.

11 **A. There is No Evidence that Foster Children Have Been Deprived of Services**

12 Despite its repeated claims, even if substantiated, that its members may be required to
13 reduce their programs, cut staff, or even close down some of the group homes they operate,
14 plaintiff has yet to offer *any* evidence that *any* foster child has gone without services.

15 Notwithstanding the way plaintiff has cast this case, the Child Welfare Act exists to benefit foster
16 children, not service providers, and there is no right for a foster care group home, or the operator
17 of such a home, to remain in business. Absent a valid showing that services are not being
18 provided to foster children, there is no basis for a finding of irreparable injury to entitle plaintiff –
19 which represents the operators of group homes -- to a preliminary injunction.

20 **B. The Balance of Hardships Does Not Tip in Plaintiff’s Favor**

21 Plaintiff’s cries of protest as to the hardship it says its member face are telling. In its memo,
22 plaintiff declares that the harms faced – “decreased care, decreased housing, decreased services,
23 pay cuts to their staff, turnover of staff, etc.” (Plaintiff’s Memo, p. 23: 14-15) – outweighs the
24 hardship to the State, which consist of “at most, temporary financial costs” (*id.*, lines 15-16). But
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1 plaintiff protests too much. It has produced no evidence that foster children are going without
2 services, but simply evidence that its member providers are suffering budgetary woes. Plaintiff
3 has not shown that children have been deprived of services – in contrast, say, to the specific
4 finding they cite from the *Independent Living Center* case that Medi-Cal beneficiaries would be
5 forced to go without medical care (Plaintiff’s Memo, p. 24:1-4) if no injunction issued there – but
6 only that such a result *could* stem from the reductions of funding to its members providers.
7 However, that result remains conjectural; the State’s budgetary crisis is not conjectural at all.

9 Plaintiff will not be denied the opportunity to prove its case if this Court does not issue a
10 preliminary injunction. However, given the fact that nearly half the foster care children in group
11 homes are not even federally eligible, plaintiff’s likelihood of success on the merits is slim.²

12 CONCLUSION

13 For the reasons set forth above, and for the reasons previously set forth in defendants’
14 briefing and arguments in opposition to the motion for a temporary restraining order, plaintiff’s
15 motion for a preliminary injunction should be denied.
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17 Dated: November 9, 2009

Respectfully submitted,

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20 SUSAN M. CARSON
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21 /s/ George Prince

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24 Attorneys for Defendants

25 _____
26 ² In addition, oral argument is set for December 7, 2009, in the Ninth Circuit on the issue
27 of whether a private right of action exists under the Child Welfare Act in a similar case involving
28 foster care parents (*California State Foster Parent Assoc., et al., v. Wagner, et al.*, case no. 09-
15051). That issue never became an appellate question in the instant case as this Court ruled in
favor of defendants on March 12, 2008, on the parties’ cross-motions for summary judgment.