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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11
12

13 **CALIFORNIA STATE FOSTER PARENT**
14 **ASSOCIATION, CALIFORNIA STATE**
15 **CARE PROVIDERS ASSOCIATION,**
16 **and LEGAL ADVOCATES FOR**
17 **PERMANENT PARENTING,**

18 Plaintiffs,

19 v.

20 **JOHN A. WAGNER, Director of the**
21 **California Department of Social Services, in**
22 **his official capacity; MARY AULT, Deputy**
23 **Director of the Children & Family Services**
24 **Division of the California Department of**
25 **Social Services, in her official capacity,**

26 Defendants.

C 07-05086 WHA

27 **OPPOSITION TO PLAINTIFFS'**
28 **SECOND MOTION FOR FURTHER**
RELIEF

Date: May 26, 2011
Time: 2:00 p.m.
Dept: Courtroom 9
Judge: The Hon. William H. Alsup

INTRODUCTION

1
2 Plaintiffs have again moved this Court for what they call, generally, "further necessary and
3 proper relief" against the Director of the California Department of Social Services (CDSS) and
4 the Deputy Director of CDSS's Child and Family Services Division. ("Plaintiff's [sic] Second
5 Motion for Further Relief" (Second Motion), p. 1:13-14.)
6

7 Specifically, with reference to plaintiffs' previous Motion for Further Relief (Electronic
8 Docket Document 154, filed November 10, 2010 (Initial Motion) – and their demand therein that
9 defendants be immediately required to increase California's monthly foster care reimbursement
10 payments to \$771 for children ages 0-4, \$879 for children ages 4-13, and \$962 for children ages
11 14-18 (*id.*, p. 15:2-5) -- plaintiffs insist that it "is now more apparent than ever that nothing short
12 of an order compelling Defendants to pay compliant rates will effectuate foster parents' rights."
13 (Second Motion, p. 2. 3-5.) Not so.
14

15 As explained in detail below, defendants have taken all the steps within their power to
16 comply with this Court's rulings and orders regarding foster care family home rates, and –
17 notwithstanding the unprecedented budget crisis facing the State of California -- the State is
18 moving forward to meet its obligation of not only permanently increasing the rate of monthly
19 payments made to foster family homes, but also ensuring that annual increases in those monthly
20 payments be incorporated into the new rate structure system.
21

PROCEDURAL BACKGROUND

22
23 Following briefing and a hearing on plaintiffs' Initial Motion on December 16, 2010, this
24 Court issued its Order Granting in Part and Denying in Part Plaintiffs' Motion for Further Relief
25 (Document 163). As part of that Order, the Court directed defendants to accelerate the
26 completion and publication of the report stemming from a study commissioned by CDSS for the
27 purpose of making recommendations toward implementing changes in the rate structure to be
28

1 used for funding foster family homes in California under the State's financial partnership with the
 2 federal government under the Child Welfare Act (CWA). The Court directed that the final
 3 written report from the study be completed by March 11, 2011, and a copy of it provided to
 4 plaintiffs. In accordance with the Court's Order, the report from the study was completed as
 5 scheduled and a copy provided to plaintiffs (Document 165-1) on March 11, 2011.

6
 7 At page six of the December 16, 2010 Order, the Court stated that defendants had "until
 8 April 8, 2011, at noon, to complete their implementation and submit a statement to the Court
 9 describing the new method for determining the rates of payments to foster parents that includes
 10 consideration of the cost factors requires by the CWA." Also in accord with the Court's Order,
 11 defendants timely submitted the statement. ("Statement to the Court Describing the New Method
 12 for Determining the Rates of Payments to Foster Parents" (Statement to Court), Document 166.)

13 **CDSS'S IMPLEMENTATION OF THE NEW RATES STRUCTURE**

14 **A. The CDSS Defendants' Compliance with the Court's December 16, 2010 Order.**

15
 16 In compliance with the directive of this Court's December 16, 2010 Order, defendants and
 17 their staff at CDSS have done all they can to seek and receive approval of implementation of the
 18 report's recommendations. CDSS reviewed the recommendations in the Alternative Proposals
 19 report and consulted with the Child Welfare Director's Association and counties in determining
 20 and making a final decision regarding the new rate methodology to be adopted. The new rates
 21 recommended are those described as Proposed Rate Structure #1 in the Alternative Proposals
 22 report (Document 165-1, pp. 10-11) (Statement to Court, pp. 5-6). That structure is as follows:
 23

24 Age range	Age 0-4	Age 5-8	Age 9-11	Age 12-14	Age 15-19
25 Current Rate Structure	\$446	\$485	\$519	\$573	\$627
26 Proposed New Rate Structure	\$609	\$660	\$695	\$727	\$761

1 In addition, as part of its review and recommendations, CDSS acknowledged the need for
 2 a measurement as a basis for making cost of living adjustments to this new rate. CDSS informed
 3 the Court that these adjustments to the new rate structure will be made annually, using the federal
 4 Consumer Price Index (CPI), commencing at the beginning of the next fiscal year July 1, 2012.

5
 6 **B. The CDSS Defendants' Work Toward Ensuring Legislative Compliance.**

7 Beyond their direct departmental-level efforts in implementing the new rate structure
 8 recommendations of the report, defendants have taken and continue to take all steps available to
 9 them in gaining full implementation of the Court's December 16, 2010 Order. However, given
 10 that the Director of CDSS and the Deputy Director of the Child and Family Services Division of
 11 CDSS do not have plenary powers over all matters involving the State's government, their efforts
 12 – described below – have not yet resulted in the immediate increase in foster family home rates
 13 that plaintiffs demand. However, it must be recognized that defendants' efforts to move the
 14 machine of state government have been extraordinary.

15
 16 1. CDSS Program Staff Efforts.

17 The Foster Care Rates Bureau within the Foster Care Audits and Rates Branch (FCARB) is
 18 responsible for overseeing statewide policies related to California's State Plan under Title IV-E of
 19 the CWA. Through the Foster Care Rates Bureau, CDSS supervises California's 58 counties'
 20 administration of child welfare services and foster care programs through statutes, regulations,
 21 policies, and compliance reviews. CDSS also allocates federal and state funds to all California's
 22 counties. (Declaration of Barbara Eaton in Support of Opposition to Plaintiffs' Second Motion
 23 for Further Relief (Eaton Decl.), ¶ 2.)¹ The Foster Care Rates Bureau also has primary

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 25
 26 ¹ Barbara Eaton is employed by CDSS as the Branch Chief, (FCARB), in the Children and
 27 Family Services Division (CFSD). She has held this position since November 2006. Prior to that,
 28 she held a variety of positions within the Division and in CDSS, including Assistant Deputy of
 CFSD and Northern Regional Manager for Children's Residential Programs in the Community
 Care Licensing Division. CDSS is the state agency responsible for child welfare services. CDSS
 (continued...)

1 responsibility for establishing the policies for foster care rates, funding, and eligibility in
2 California, and for administering the foster care maintenance payments rates as set by statute for
3 foster family homes (FFHs), foster care group homes, and foster family agencies (FFAs) in
4 California. (Eaton Decl., ¶ 3.) The responsibilities of the FCARB include overseeing the
5 development of statewide policy on issues related to foster care maintenance payments to FFHs in
6 California. (Eaton Decl., ¶ 4.)

8 Among the policy matters FCARB has overseen was the commission and preparation of a
9 the [Alternative Proposals report discussed above, Document 165-1] foster care rates study
10 conducted under contract for CDSS by the Center for Public Policy Research at the University of
11 California at Davis as mentioned above. This project began in May of 2010, under the direction
12 of Project Director Sylvia Sensiper, MA, PhD, who worked with Christi Bamford, PhD, and Jane
13 Mauldon, PhD, of the University of California at Berkeley to conduct a comprehensive review of
14 the structure of California's foster family home rates in general. The components of the study
15 included examinations of the Foster Care Rate Setting Report to the California Legislature, June
16 1981, the MARC Report, the McHugh Report, which was a study in Australia that was referenced
17 in the MARC Report, and a variety of other rate-setting mechanisms and systems, including other
18 states' rate setting methodologies. The final report was completed in March 2011 and was served
19 on the plaintiffs on March 11, 2011 as required by court order. (Eaton Decl., ¶ 5.)

22 CDSS evaluated the options for a rate methodology discussed in the aforementioned study
23 and chose a rate methodology for FFHs. CDSS then sought approval from its control agencies –
24 California's Health and Welfare Agency ("Agency") and the Department of Finance -- for the

26 (...continued)
27 supervises California's 58 counties' and Indian tribes' administration of child welfare services
28 and foster care programs through statutes, regulations, policies, and compliance reviews. CDSS
also allocates federal and state funds to all California's counties. (Eaton Decl., ¶ 2.)

1 rate methodology. CDSS received approval from Agency and the Department of Finance to
2 submit its proposed methodology to the Legislature for inclusion in the May revision of the
3 Governor's proposed fiscal year 2011-12 budget. CDSS also issued an All County Information
4 Notice (ACIN) on April 14, 2011 to inform the State's 58 counties of the proposed new FFH rate
5 methodology and the resulting new rates for FFHs. (Eaton Decl., ¶ 6.)
6

7 Notwithstanding CDSS's internal efforts, the legislative process is necessary to implement
8 the changes as a result of the establishment of a new FFH rate methodology. There is no simple
9 means of adopting the changes the study recommended because of the extensive statutory
10 changes required to effect the adoption of a new rate structure, and the Legislature, not CDSS,
11 enacts changes in statutory language. The existing rate-structure statute, California's Welfare and
12 Institution Code section 11461, does not provide for annual updates of the FFH rate. The rate
13 currently published in that section is the rate established in 1989. In order to bring the rate up to
14 date, it is necessary to apply a number of adjustments set forth in Welfare and Institution Code
15 section 11461 subsections (c) and (d). The new rate methodology renders these subsections
16 obsolete; therefore, new statutory language is necessary to reflect the new FFH rate and the use of
17 the Consumer Price Index as the annual inflationary adjustor. This Welfare and Institution Code
18 section also references the specialized care increment and the clothing allowance with an internal
19 cross-reference to the now obsolete subsections (c) and (d), which will need to be modified. (The
20 new rate methodology includes a clothing allowance so a supplemental clothing allowance in
21 addition to the basic rate is no longer necessary.) (Eaton Decl., ¶ 7.)
22
23

24 By California law, the FFH rate is the cornerstone of rate setting for many other programs.
25 It is the measurement used directly or indirectly in the setting of rates for these other programs.
26 These other programs include the Adoption Assistance Program (AAP); the current KinGap
27 Program; the new federal KinGap Program; and the Non-Related Legal Guardians (NRLG)
28

1 Program. Some of these programs use the FFH rate itself to set their basic rates, while others use
2 the FFH rate as a factor in the setting of basic rates. A change to the FFH rate methodology,
3 without legislative involvement, would impact the resulting rates of these other programs without
4 necessary consideration of public policy, incentives for permanency, or cost to the State.

5 Although CDSS, with proper approvals, may make recommendations it deems necessary to the
6 Legislature, only the Legislature can enact the changes. (Eaton Decl., ¶ 8.)

7
8 CDSS staff is, of course, familiar with the lawsuit entitled *California Alliance of Child and*
9 *Family Services v. John Wagner (Alliance)*, the case involving funding rates for foster care group
10 homes in California. The instant foster family home rate case presents a different situation than
11 that in *Alliance*, where the rate adjustments for foster care group homes was a simple matter of
12 implementing a percentage increase to an existing rate structure: in the instant foster family
13 homes case, the necessary creation of an entirely new rate methodology is best accomplished by
14 enactment of statutes, which requires legislative action. For foster care group homes, controlling
15 state law already contained an acceptable inflation adjustment mechanism based on the California
16 Necessities Index (CNI), and CDSS's compliance with the federal court orders requiring
17 increases to group home rates was based on simply bringing the rates up to the amounts required
18 under the existing CNI inflation index. CDSS took existing law and applied the math for an
19 annual CNI increase. By contrast, for the foster family homes at issue in the instant case, changes
20 to the rate structure require the creation and legislative adoption of a more complex statutory
21 structure and the impacts of that new structure on other programs that are tied by statute to the
22 foster family home rates. (Eaton Decl., ¶ 9.)

23 2. CDSS Legislative Staff Efforts.

24
25 The Office of Legislation within CDSS advises the director of CDSS and CDSS's executive
26 staff on legislative and political matters, providing communication and coordination support to
27
28

1 CDSS on issues related to legislation. In serving as the liaison between CDSS and the
2 Legislature, the Office of Legislation is responsible for -- and directs CDSS's response on -- state
3 and federal legislative matters, obtains successful passage of CDSS policies that require
4 legislative authority, and advocates before the Legislature on behalf of the Administration -- here,
5 comprised of CDSS, Agency, under which CDSS operates, and the Governor's Office --
6 including the communication of formal positions of support or opposition on bills that are
7 germane to CDSS's program areas. The Office of Legislation is responsible for coordinating the
8 trailer bill necessary to implement the Governor's Budget proposals affecting CDSS's program
9 areas. (Decl. of Robert Smith in Support of Opposition to Plaintiffs' Second Motion for Further
10 Relief (Smith Decl.), ¶ 2.)²

11
12 Statewide polices that affect the State's budget are enacted after an extensive deliberative
13 process, both within the Administration and during the legislative process. First, the Governor
14 releases his or her proposed budget in January, after an extensive discussion that includes
15 departments, agencies, the Department of Finance (which has final authority over budget
16 matters), and the Governor's Office. The Governor's proposed budget reflects his or her vision
17 for the myriad of state policies dependent on the receipt of funds through state government. The
18 Governor releases his or her revision to the proposed budget (the "May Revision") in May. (The
19 May Revision will be released on May 16th this year.) (Smith Decl., ¶ 3.)

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21
22 The May Revision is an update of the fiscal projections for the state after tax receipts are
23 calculated, and may reflect new policies proposed by the Governor. When the Governor releases
24 his Budget or the May Revision, draft trailer bill is also released. Each trailer bill item effectuates

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26 ² Robert Smith is employed by CDSS as State Legislative Coordinator, Office of
27 Legislation. He has held that position since May, 2009. From October, 2007 until he assumed
28 that position he was the Federal Legislative Coordinator for CDSS. Prior to joining CDSS, he
held a variety of positions within state government. (Smith Decl., ¶ 1.)

1 the statutory changes necessary to achieve the funding levels contained in the Budget. The
2 Legislature conducts public hearings and solicits public testimony on each proposal contained in
3 the Governor's Budget or the May Revise, and votes to either accept the proposal, modify the
4 proposal, or reject the proposal. The Legislature crafts its own version of the Budget, which may
5 include provisions as proposed by the Governor. A final trailer bill is developed to achieve the
6 final budget that is agreed upon by the Governor and the Legislature, but only with the passage of
7 the trailer bill does the budget become final and part of controlling state law. Additionally, the
8 contents of trailer bills are subject to critique and comment of public and private interest groups,
9 and the Legislature may make changes to the proposals in the trailer bills based on critiques by
10 such groups, and thus trailer bills remain part of the democratic process. (Smith Decl., ¶ 4.)

12 DISCUSSION

13
14 Defendants do not quarrel with the legal authorities plaintiffs cite in support of their
15 motion. This Court most certainly has the statutory power under 28 U.S.C. section 2202 to issue
16 orders to enforce a declaratory judgment. Nevertheless, this is also a Court of equity, and
17 equitable principles support a decision by the Court not to enter an order as sought by plaintiffs.

18 Plaintiffs set forth two arguments that warrant a response here.

19 First – in arguing that “Defendants’ continued attempt to tie rates to State legislative
20 approval is unavailing” (Second Motion, p. 8:8-9) – they contend that “CDSS, not the Governor
21 or State Legislature, is ‘the single organizational unit’ charged with the duty of ‘establishing rates
22 in [California’s foster care] program.’” (*Id.*, lines 13-15, internal brackets by plaintiffs.) They
23 add: “The CDSS is responsible for the administration, interpretation, and enforcement of, among
24 other things, the federal Child Welfare Act, 42 U.S.C. sections 680-679b, and the programs
25 related to that act in California, and California Welfare and Institutions Code section 11400 et
26 seq., which includes the administration of the new rate structure for foster family homes.”
27
28

1 (Second Motion, p. 8:15-19, quoting the declaration of CDSS Director Wagner in a previous
2 submission in this action.) Defendants stand by this statement, of course, but note that nowhere
3 in the statement does Director Wagner aver that he, or CDSS as an entity, has the power to enact
4 budgets or enabling legislation to bring about the final enactment of the statutes it deems required
5 to bring about the change in the law necessary to effectuate the new rate structure. As set forth at
6 pages 6-8 above, the funding and attendant legislative processes requires action beyond the
7 powers of CDSS or any named defendant in this action.

9 Second, and somewhat related to the first contention, plaintiffs attempt to compare the
10 instant action to the foster care group home litigation of *California Alliance of Child and Family*
11 *Services v. John Wagner*, 624 F.3d 974, 977 (9th Cir. 2010). Plaintiffs surmise that because the
12 State was able to, by order, “implement a specific set of rates immediately[,]” that ability should
13 also exist in the instant case. (Second Motion, pp. 9-10.) Plaintiffs are mistaken. As explained
14 above, the rate change in the group home litigation stemmed from a simple mathematical
15 adjustment to existing state law already found to be in compliance with the CWA; here, changes
16 to the foster family home rate structure require the creation and legislative adoption of a more
17 complex statutory structure that includes addressing the impacts of that new structure on other
18 programs that are tied by statute to the foster family home rates. (See *supra*, p. 6:8-24.)
19 Furthermore, as the Court is aware, the original grant of summary judgment to plaintiffs included
20 a component directing CDSS to create a rate structure that complied with the requirements of the
21 CWA, because the Court opined that such a statute had *never* been created for foster family
22 homes, in contrast to the case of foster care group homes, where a valid statute was in place.

23
24
25 Defendants have taken all the steps available to them in following this Court’s December
26 16, 2010: they (1) completed the study on an accelerated schedule, (2) chose a rates methodology
27 from the recommendations made in the report from the study, (3) informed the State’s 58 counties
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1 of the rate structure that was chosen, (4) sought and received from the Health and Human
2 Services Agency, the Department of Finance, and the Governor’s Office the approvals needed to
3 move the matter into the legislative arena, and (5) moved the process forward into that legislative
4 arena for enactment in conjunction with the political process that our system of government –
5 with its separation of powers – requires.
6

7 In short, defendants have complied with all of this Court’s Orders in good faith.

8 **CONCLUSION**

9 For the reasons set forth above, and in the previous submissions by defendants to the Court,
10 plaintiffs’ Second Motion for Relief should be denied.

11 Dated: May 5, 2011

Respectfully Submitted,

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15 /s/ George Prince

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