

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION

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SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

P.C. and T.C. on their own behalf and)
as next friends for S.P. #1; S.P. #2, and,)
S.P # 3, on their own behalf and on behalf)
of classes of persons similarly situated,)

Plaintiffs,)

v.)

DIRECTOR, Indiana Department of Child)
Services,)

Defendant.)

1 : 10 -cv- 038 1 LJM -DML

COMPLAINT-CLASS ACTION

**CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

Introduction

1. Title IV-E of the Social Security Act, 42 U.S.C. § 673, provides for adoption assistance payments to be made after special needs children are adopted and further provides that the amount of the payments is to be determined through agreement between the prospective adoptive parents and the state agency administering the program after taking into account the needs of the parents and the needs of the child being adopted. The law further provides that once established the amount may not be readjusted without the concurrence of the parents. Nevertheless, the Indiana Department of Child Services, the state agency in Indiana administering Title IV-E, has created a contract which prospective parents must sign before the adoption is finalized which states that the parents may not receive more than 75% of the standard foster care per diem in Indiana. No negotiation is involved in setting the per diem and there is no consideration of the

parents' circumstances or the needs of the children. As of January 5, 2010, the contract has been amended to provide that this amount will be automatically decreased proportionate to any decreases in the standard foster care per diem. The terms of the agreement may not be modified. If prospective adoptive parents refuse to sign the contract they risk removal of the children from their care and the children risk substantial disruption and harm in their lives and risk remaining in the foster care system. The defendant is violating his duty to determine the adoption assistance payment based on individual evaluations of the parent and children and not to lower that payment without the consent of the parents and appropriate injunctive and declaratory relief must issue.

Jurisdiction, venue, cause of action

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331.
3. Venue is proper in this district pursuant to 28 U.S.C. § 1391.
4. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.
5. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the laws of the United States. Alternatively, it is brought as a preemption claim for violation of the federal law which must prevail by virtue of the Supremacy Clause, U.S. CONST. Art. VI.

Parties

6. P.C. and T.C., who are proceeding by their initials to secure the privacy of the children-plaintiffs, are adult residents of Clark County, Indiana.
7. S.P. # 1, S.P. # 2, and S.P. # 3, are minor children who reside in Clark County, Indiana.

8. The Director of the Indiana Department of Child Services is the duly appointed head of this Indiana agency and is sued pursuant to Rule 17(d) of the Federal Rules of Civil Procedure.

Class action allegations

9. This action is brought on behalf of two classes of persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

Class 1

10. Class 1, represented by P.C. and T.C., is defined as:

all current and future persons with special needs children in their physical custody as a pre-adoptive placement who are seeking, or will seek, to adopt the children and who will receive adoption assistance payments pursuant to 42 U.S.C. § 673, and parents who have adopted special needs children since January 5, 2010, for whom adoption assistance payments are being made through 42 U.S.C. § 673.

11. As defined, the class meets all the requirements of Rule 23(a) of the Federal Rules of Civil Procedure. Specifically:

a. The class is so numerous that joinder of all members is impractical. At this point, the current size of the class is not known, but it is believed to be quite large, and is ever-increasing.

b. There are questions of law or fact common to the class: whether the contract terms imposed by defendant which do not reflect the individual determinations required by federal law are lawful.

c. The claims of the representative parties are typical of those of the class.

d. The representative parties will fairly and adequately protect the interests of the class.

12. The further requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure are met in this cause in that defendant, at all times, has acted or has refused to act in a

manner generally applicable to the class, thereby making final injunctive and declaratory relief appropriate with respect to the class as a whole.

Class 2

13. Class 2, represented by S.P. # 1, S.P. # 2, S.P. # 3, is defined as:

all special needs children who are, or will be, in the physical custody of persons who are, or will, seek to adopt them and who will be entitled to receive adoption assistance payments pursuant to 42 U.S.C. § 673, and special needs children who have been adopted since January 5 2010, for whom adoption assistance payments are being made through 42 U.S.C. § 673.

14. As defined, the class meets all the requirements of Rule 23(a) of the

Federal Rules of Civil Procedure. Specifically:

a. The class is so numerous that joinder of all members is impractical. At this point, the current size of the class is not known, but it is believed to be quite large, and ever-increasing.

b. There are questions of law or fact common to the class: whether the contract terms imposed by defendant which do not reflect the individual determinations required by federal law are lawful.

c. The claims of the representative parties are typical of those of the class.

d. The representative parties will fairly and adequately protect the interests of the class.

15. The further requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure are met in this cause in that defendant, at all times, has acted or has refused to act in a manner generally applicable to the class, thereby making final injunctive and declaratory relief appropriate with respect to the class as a whole.

Legal background

16. Title IV-E of the Social Security Act, 42 U.S.C. § 670, *et seq.*, provides for federal funds for the purposes of foster care and adoption assistance to states which have

submitted, and approved, state plans to the federal government.

17. Indiana has submitted such plans, agreeing to be bound by the requirements of Title IV-E, and has received the federal funding provided by Title IV-E.

18. The Department of Child Services is the single state agency responsible for administering the funds received under Title IV-E by the State of Indiana. IND. CODE § 31-25-2-8(a)(2).

19. 42 U.S.C. § 672 provides for foster care maintenance payments on behalf of eligible children who have been removed from relative homes and placed into foster care through a State agency, in Indiana the Department of Child Services.

20. 42 U.S.C. § 673 provides for adoption assistance payments to be made for special needs children with the payments continuing after the child's adoption.

21. Specifically, 42 U.S.C. § 673(a)(3) provides that:

(1)(A) Each State having a plan approved under this part shall enter into adoption assistance agreements (as defined in section 675(3) of this title) with the adoptive parents of children with special needs.

(B) Under any adoption assistance agreement entered into by a State with parents who adopt a child with special needs, the State—

(i) shall make payments of nonrecurring adoption expenses incurred by or on behalf of such parents in connection with the adoption of such child, directly through the State agency or through another public or nonprofit private agency, in amounts determined under paragraph (3), and

(ii) in any case where the child meets the requirements of paragraph (2), may make adoption assistance payments to such parents, directly through the State agency or through another public or nonprofit private agency, in amounts so determined.

* * *

(3) The amount of the payments to be made in any case under clauses (i) and (ii) of paragraph (1)(B) shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section, which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted

periodically, with the concurrence of the adopting parents (which may be specified in the adoption assistance agreement), depending upon changes in such circumstances. However, in no case may the amount of the adoption assistance payment made under clause (ii) of paragraph (1)(B) exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

22. A child with special needs is defined by Indiana regulation, 465 IAC 2-7-2, to be a child who meets the following criteria:

(1) The county office of family and children has determined that the child cannot or should not be returned to the home of the child's parent or parents and that the parent or parents have signed or will sign a consent to adoption regarding the child or that parental rights have been or will be terminated by a court in accordance with IC 31-35.

(2) One (1) of the following conditions exists:

(A) The child is two (2) years of age or older.

(B) The child is a member of a sibling group of two (2) or more children of which at least one (1) is two (2) years of age or older and who will be placed with the sibling group in the same home.

(C) The child has a medical condition or physical, mental, or emotional disability as determined by a physician licensed to practice in Indiana or another state or territory.

(3) Reasonable but unsuccessful efforts must be made to place the child in an appropriate adoptive home without providing adoption assistance. Reasonable efforts include, but are not limited to, the following:

(A) Photo listing the child with the Indiana adoption resource exchange for a minimum of six (6) months.

(B) Inability to recruit appropriate, interested adoptive parent or parents who are able to meet the child's needs without the use of adoption assistance.

Reasonable efforts need not be made to place the child without adoption assistance if to do so would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child.

Factual allegations

23. In order for an adoptive parent of a special needs child to receive an adoption subsidy from DCS, the parent, and a representative of DCS, must sign an adoption assistance agreement prior to the adoption.

24. A form of the standard adoption assistance agreement utilized by DCS as of January 5, 2010, is attached hereto as Exhibit 1.

25. The contract provides in Section I:

DCS shall pay the adoptive parent(s) \$ _____ per day beginning within 60 days of the date the Decree of Adoption is submitted to the DCS local office provided that this agreement is signed prior to the Date the Decree of Adoption is entered. This amount may not exceed up to 75% of the standard foster care per diem. This amount may be automatically increased or decreased proportionately to any across the board increase or decrease in the standard foster care per diem without affording you an opportunity for a fair hearing.

26. Prior to January 1, 2010, the standard per diem was \$18.75 based on a foster care rate of \$25.

27. However, in some instances DCS allowed the adoption assistance rate to be up to 100% of the foster care rate.

28. Effective January 1, 2010, DCS planned to lower the standard foster care per diem to \$22.50 and to lower the adoption assistance rate to \$16.88 per day.

29. However, on January 20, 2010, Judge Barker of this Court entered a preliminary injunction in *C.H., et al. v. Payne*, No. 1:09-cv-1574 SEB-JMS (U.S. Dist. Ct. So. Dist. of Ind.), which had the effect of preventing the reduction in the foster care and adoption assistance per diems.

30. In that case, the Court certified a class of adoptive parents and a class of their special needs children. However, there is no overlap between the classes sought in this

case and the classes of adoptive parents and children certified in *C.H.* which are defined as follows:

Class C:

all adoptive parents who are receiving adoption assistance payments through the Indiana Department of Child Services pursuant to 42 U.S.C. § 673, and whose payments were reduced 10% as of January 1, 2010.

Class D:

all adoptive children for whom adoption assistance payments are being made through the Indiana Department of Child Services pursuant to 42 U.S.C. § 673, and whose payments were reduced by 10% as of January 1, 2010.

31. As a result of the preliminary injunction in *C.H.*, at the current time DCS is utilizing a per diem of \$18.75 in the adoption assistance contracts, although it is planning to reduce the amount to \$16.88 if it prevails in the *C.H.* litigation.

32. However, the amount that is arrived at for the adoption assistance contract, whatever the current amount, is not determined through any discussion or negotiation process between the adoptive parents and DCS.

33. In arriving at the per diem amount there is no consideration of the particular circumstances of the parents and family or the needs of the child.

34. Instead, DCS pays the exact same maximum amount – 75% of the foster care per diem – regardless of the needs of the child and circumstance of the parent.

35. Not only does the contract utilized by DCS as of January 5, 2010, impose the figure of 75% of the foster care per diem without discussion and negotiation with the parent, but the contract establishes the right of DCS to unilaterally reduce the per diem amount in the future if the foster care rate is lowered.

36. When prospective adoptive parents have raised objections to the language of Section I of the adoption assistance agreement noted in paragraph 24, DCS representatives have indicated that no modifications can be made in the contract.

37. A number of prospective parents, with their pre-adoptive children in their care, have refused to go forward with planned adoptions, concerned that the needs of the children are such that they will not be able to be met given the per diem amount as articulated in Section I of the adoption assistance agreement, and its uncertainty. In some instances, the DCS has responded by removing the children from their pre-adoptive placement and placing them into another foster setting.

38. This is extremely damaging to the children.

39. P.C. and T.C. reside in Clark County.

40. P.C. and T.C. have the physical custody of S.P. # 1, S.P. # 2, S.P. # 3.

41. S.P. # 1, S.P. # 2, S.P. # 3 are wards of DCS after having been found to be Children in Need of Services pursuant to Indiana law.

42. S.P. # 1, S.P. # 2, S.P. # 3 have resided with P.C. and T.C. since October of 2007. P.C. and T.C. have served as their foster parents and have received a subsidy of \$25 per day for each child directly from DCS.

43. The children are classified as special needs children because they are a sibling group of older children. They also have other special needs. The mother of the children ingested narcotics while pregnant with the children. One of the children is diagnosed as having Attention Deficit Hyperactivity Disorder and is on medications. Another is manifesting mental health issues and the third child has sensory issues.

44. P.C. and T.C. intend to adopt S.P. # 1, S.P. # 2, S.P. # 3 and at the current time have a court date scheduled for the adoption for late April of 2010.

45. DCS has consented to the adoption.

46. P.C. and T.C. have adopted four other children who are in the home.

47. T.C. works outside of the home and P.C. stays in the home and provides full time care for the family.

48. P.C. and T.C. understand that when they adopt the children the subsidy will be reduced from the \$25 a day figure to \$18.75.

49. However, they cannot afford any cuts in that figure and believe that the cut from \$25 to \$18.75 will prove difficult. However, they have been informed by DCS that the adoption assistance amount was no more than 75 % of the foster care amount.

50. They want to adopt S.P. # 1, S.P. # 2, S.P. # 3 because they love the children and recognize that giving them the permanence of their home and their lives is the best thing for the children.

51. They anticipate that the expenses for S.P. # 1, S.P. # 2, S.P. # 3 will increase as they grow older, both because the costs of raising children increase as the children age and particularly because they anticipate that the emotional problems of S.P. # 1, S.P. # 2, S.P. # 3 will require increased attention as they grow older.

52. P.C. and T.C. have already been presented with the Adoption Assistance Agreement (Ex. 1) for S.P. # 1, S.P. # 2, S.P. # 3 and have signed it.

53. The Adoption Agreement provides that they are to receive \$18.75 per day, but no more than 75% of the standard foster care per diem which may be automatically

increased or decreased proportionately to any across the board increase or decrease in the standard foster care per diem.

54. No attempt was made by DCS to determine the needs of the children or the circumstances of the parents in arriving at the \$18.75 per diem. This is the figure for all special needs adoptions.

55. P.C. and T.C. object to the agreement which allows DCS to unilaterally reduce the per diem at uncertain times in the future. Also, they object to the adoption assistance agreement which caps the per diem at 75% of the foster care per diem, regardless of their circumstances and the needs of the children.

56. However, they have signed it after being informed that they had to sign the agreement in order to receive any subsidies.

57. They were unable to enter into any negotiation with DCS to change the contract terms as they were informed that the only amount being paid was the 75% of the foster care per diem.

58. If they refuse to go forward with the adoption DCS may remove the children from them which will cause great injury to S.P. # 1, S.P. # 2, S.P. # 3 and to P.C. and T.C.

59. At all times defendant has acted under color of state law.

60. The actions and inactions of defendant have caused, and are causing, irreparable harm for which there is no adequate remedy at law.

Legal claims

61. To the extent that Section I of the adoption assistance agreement mandated by DCS contains a standard per diem that is arrived at by DCS mandate, without any consultation with adoptive parents and without consideration of the needs of the child and

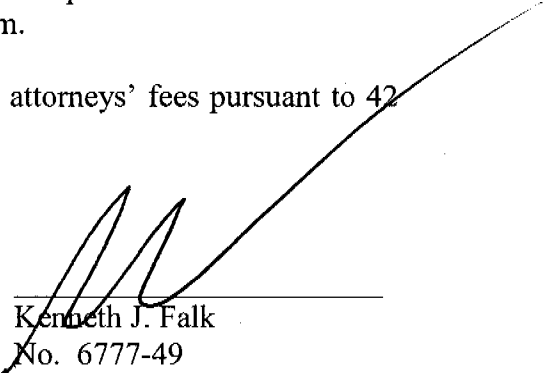
the circumstance of the parent, the per diems established are void as violating Title IV-E, 42 U.S.C. § 673(a)(3).

62. To the extent that Section I of the adoption assistance agreement mandated by DCS purports to allow DCS to unilaterally reduce the agreed upon per diem amount, the provision is void as violating Title IV-E, 42 U.S.C. § 673(a)(3).

Request for relief

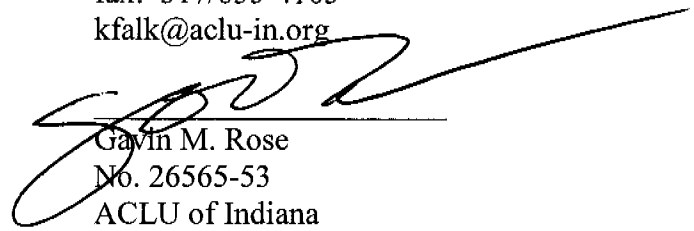
WHEREFORE, plaintiffs request that this Court:

- a. Accept jurisdiction of this case and set it for hearing at the earliest opportunity.
- b. Certify this case as a class action with the classes as defined above.
- c. Declare that the actions of the defendant violate federal law for the reasons specified above.
- d. Enter a preliminary injunction, later to be made permanent, enjoining the defendant's ability to enter into and/or enforce provisions of adoption assistance agreements:
 - i. to the extent they contain a standard per diem amount which is not the product of any consultation with parents and is not based upon consideration of the needs of the child and the circumstances of the parents and further enjoin defendant to utilize per diem amounts which are based upon such consideration.
 - ii. to the extent they contain any terms allowing for an automatic reduction of the per diem rate without the concurrence of the parents, except if a reduction is necessary to keep the per diem so that it is no greater than 100% of the foster care per diem.
- e. Award plaintiffs their costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.
- f. Award all other proper relief.



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A handwritten signature in black ink, appearing to read "Gavin M. Rose", is written over a horizontal line. The signature is stylized and extends to the right.

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