IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

C.H., *et al.*, Plaintiffs, v. JAMES W. PAYNE, in his official capacity as Director of the Indiana Department of Child Services, Defendant.	CASE NO. 1:09 cv-01574 SEB-MJD
THE INDIANA ASSOCIATION OF RESIDENTIAL CHILD CARE AGENCIES, INC. d/b/a IARCCA, an Association of Children and Family Services ("IARCCA") Plaintiff, v. THE INDIANA DEPARTMENT OF CHILD SERVICES and JAMES W. PAYNE, director, in his official capacity, Defendants.	CASE NO. 1:09-cv-1580 WTL-DML (Consolidated with 1:09-cv-1574)

AMENDED AND SUPPLEMENTAL VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

For its complaint against The Indiana Department of Child Services ("DCS") and James W. Payne ("Payne"), in his official capacity as director of DCS, Plaintiff, The Indiana Association of Residential Child Care Agencies, Inc. ("IARCCA"), states as follows:

Background: The Parties

1. IARCCA is a non-profit corporation, incorporated and with its principal place of business in Indiana, comprised of approximately 110 member agencies that provide residential treatment, foster care and home-based services to abused, neglected and delinquent Indiana children and their families ("Providers").

2. Approximately 80 of IARCCA's 110 members provide services that include a residential component ("Residential Providers"). Licensed Child Placing Agencies ("LCPAs") are focused on placing children in qualified foster care. Some IARCCA members are both Residential Providers and LCPAs. IARCCA represents the interests of its members relating to DCS's contracts with IARCCA member agencies.

3. According to Ind. Code § 31-25-2-8, DCS is the single State agency responsible for administering Title IV-E of the Federal Social Security Act (*see* 42 U.S.C. § 670 *et seq.*) ("Title IV-E").

4. Defendant Payne is Director of DCS.

Background: This Litigation

5. DCS pays each Provider a per diem rate for each child, based on the types of services that the child will receive.

6. IARCCA initiated this action in December 2009 against DCS and Payne, in his official capacity as director of DCS, after DCS announced that it was cutting the rates that DCS pays to Providers that provide treatment to abused, neglected and delinquent Indiana children and their families. IARCCA contended that the rate cuts were arbitrary and unlawful.[1]

[1] IARCCA originally filed the case in Marion County Superior Court, and the Defendants removed it, thereby waiving their Eleventh Amendment immunity. *C.H. v. Payne*, 683 F. Supp. 2d 865, 883 n. 19 (S.D. Ind. 2010) ("[R]emoval is a form of voluntary invocation of a federal

7. The Court entered a preliminary injunction enjoining DCS from implementing the rate cuts that were proposed at that time. Dkt. 49.

8. The parties entered into a settlement agreement in February 2011 for the resolution of all claims in the case. A true and accurate copy of the settlement agreement (with exhibits) is attached hereto as Exhibit A.

9. The settlement agreement required DCS to promulgate certain administrative rules and a provider manual to govern the setting of the rates that DCS pays to the Providers, and to issue rates consistent with those rules. *Id.* ¶ 2.

10. The settlement agreement also included agreement by the Providers to a five percent across-the-board rate cut with certain exceptions. *Id.* ¶ 1. Exceptions were for Providers being paid less than their IV-E claimable rates, and for those Providers that are Psychiatric Residential Treatment Facilities ("PRTFs") to be paid at the Medicaid rate. *Id.* ¶ 1(a)-(c).

11. The settlement agreement "[p]ermits either party to enforce any breach of this Agreement or applicable law in this court, without having to exhaust administrative remedies . . . ." *Id.* ¶ 4(c).

Background: The New Rules and Rates

12. DCS filed the new rules on or about April 26, 2011 (for Residential Providers) and May 25, 2011 (for LCPA Providers). *See* 465 IAC 2-16-1 et seq. (as to Residential Providers) and 2-17-1 et seq. (as to Placement Providers).

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court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum.") (quoting *Lapides v. Board of Regents of Univ. Sys. of Georgia,*535 U.S. 613, 624 (2002)).

13. To assist it with rate setting as contemplated by the rules, DCS sought, and the Providers submitted, cost reports on or about May 31, 2011. Cost reports are reports prepared annually by each Provider describing the costs they incurred during the prior year in providing services to their youth placements.

14. On October 17, 2011, DCS issued letters to Providers setting forth the rates that DCS would agree to pay beginning on January 1, 2012. Dkt. 94, Ex. C (sample rate letter).

15. Months after the cost reports were due – and three days after the rates based on those reports had been set – DCS published two provider manuals on or about October 20, and at that same time published Bulletins that set "caps" on rates. The provider manuals are attached hereto as Exhibit B; *see also* Dkt. 94, Ex. B (Bulletins). While the rules contemplated, in concept, some allowable maximums on certain categories of rates, the rules were silent on what those maximums would be or how they would be calculated. The Bulletins also do not explain how the rate caps were calculated.

16. While the submission of cost reports was not new in 2011, the information in the provider manuals about how certain costs must be allocated and which were reimbursable constituted significant changes from past practice. Because they lacked the manuals and Bulletins when cost reports were prepared, Providers understood belatedly that they had not necessarily "adhered" to some of the new guidelines (of which they were not aware) in their cost reporting. Nevertheless, DCS set rates based on the cost reports that had already been submitted, without an opportunity to revise them in accordance with the provider manuals.

17. The proposed 2012 rates represent drastic decreases to the amounts DCS has historically paid to reimburse Providers for the services they provide – in some cases, DCS

intends to cut rates by more than 50 percent. The rate cuts for most Providers are significantly greater than the cuts this Court previously enjoined in January 2010.

DCS did not comply with the settlement agreement, its own new rules, or other applicable law in developing the new rates.

18. DCS is a state agency subject to the rule-making provisions of Ind. Code Art. 4-22. These requirements apply to all children in a State's foster care program, whether or not they are financially qualified for funds administered under Title IV-E.[2]

19. DCS is required, under Ind. Code Art. 4-22, to promulgate administrative rules that set forth a method by which DCS will set per diem reimbursement rates for Providers.

20. In the Bulletins it issued in October, DCS published "Cost Caps" that would apply to various cost categories.

21. As noted above, although the rules contemplate that reasonable ceilings would be placed on certain costs, DCS set those ceilings outside of the rule-making process, in Bulletins. Providers had no input into those Bulletins, which were not subject to public comment. Thus, DCS has not promulgated administrative rules concerning the setting of rate caps on the rates it will pay to Providers, yet it has calculated rates based on these caps. And the existing Rules do not specify what the caps will be, yet it has informed Providers that those caps will apply across the board.

[2] For a state to receive funds under Title IV-E, the state must make foster care maintenance payments for qualified children, to cover the cost of food, shelter, clothing, daily supervision, school supplies, personal incidentals, liability insurance and reasonable travel to the child's home for visitation. Federal law requires that the rates be sufficient to cover the costs of items described in Title IV-E, including the administration costs involved with providing those items. By paying per diem rates to Providers, DCS receives federal matching funds to cover part of the costs for the services outlined in Title IV-E to children in Indiana. The rates paid by DCS to Providers also cover health-related, education-related and other services not covered by Title IV.

22. One such cap limits the amount of administrative costs DCS will reimburse, as a percentage of all costs. And DCS has included in its definition of "administrative" costs several non-administrative functions, counting them against the cap. 465 IAC 2-16-3. For example, the 2011 cost report format required that program management costs (including program directors, quality assurance, and case managers) be classified in the administrative column. These are program costs that should not be subject to an "administrative" cap and lead to improperly low rates under DCS's own rules.

23. By contrast, the rules contemplate some additional allowance for "indirect" costs incurred by Provider. Indirect costs are agency infrastructure-type costs, such as human resources staff, financial staff, management information systems, and recordkeeping. DCS failed to include an allowance for indirect costs in its methodology and Bulletin, resulting in these costs being disallowed for Providers. This is problematic because Providers are required to perform the tasks included in indirect costs, such as keep records, budget, conduct audits, adhere to personnel requirements and background checks, and have an administrative infrastructure that supports the direct administration of programs.

24. In addition to being arbitrary, the capped rates fail to reimburse Providers for certain costs that DCS requires Providers to incur, such as required staffing ratios needed to maintain licensing.

25. DCS's failure to promulgate administrative rules concerning the setting of rate caps for Providers violates Ind. Code Art. 4-22.

DCS has failed to adhere to its own administrative rules regarding rate setting.

26. As noted, DCS did promulgate rules for use in Provider rate-making. But it has failed to adhere to them in setting Providers' rates.

27. For example, DCS is applying staff ratios in an unlawful manner. Licensing regulations (*see e.g.* 465 IAC 2-9-48, 465 IAC 2-10-48, 465 IAC 2-12-48, and 465 IAC 2-13-48) require that child-caring institutions and group homes "employ staff to perform administrative, supervisory, service, and direct care functions," describing four separate, segregated functions. Yet despite this separation of supervisory staff from direct-case workers in DCS's own rules, DCS includes supervisors and case managers in the direct care staff ratio calculations in the new rates, in violation of the licensing provisions. In one instance, during the same week a Provider's reimbursement for staff was cut, DCS licensing personnel informed that same Provider that it needed additional staff to comply with DCS licensing rules under which the Providers are required to operate.

28. Approximately 80 percent of IARCCA's Provider members have filed requests for administrative review with DCS, as provided for by the new rules. DCS's responses to those requests are due on or about December 16, 2011.

29. DCS's proposed rates are set to go into effect on January 1, 2012. Based on the current billing and reimbursement system between DCS and Providers, they will experience the impact of those cuts immediately in January.

30. DCS's proposed rates will have a negative effect on the children in the Providers' care.

31. DCS's proposed rates will leave Providers with many unreimbursed costs. Some of IARCCA's members have already had to close programs and lay off staff because of the cuts. They are concerned that DCS's new staff ratios fail to provide for adequate supervision of children. Several anticipate losing their accreditation.

32. Unless restrained by this Court, the DCS's arbitrary and unlawful reduction of reimbursement rates to Providers will cause irreparable harm to the children served by the Providers.

Count I: Violation of Ind. Code Sec. 4-22

33. DCS's failure to set rate caps according to promulgated rules violates Ind. Code Art. 4-22.

34. The specific caps set by DCS, published only in "Bulletins," were not promulgated in accordance with any stated or written rules or criteria – beyond the fact that the rules contemplated that there would be maximums set for certain types of costs.

35. IARCCA is entitled to declaratory relief that DCS's use of arbitrary caps on per diem rates set other than pursuant to promulgated rules violates state law and to injunctive relief restraining DCS from setting current rates except pursuant to promulgated rules.

Count II: Violations of Indiana Administrative Code

36. DCS has violated its own rules in three principal areas: staff ratios, administrative costs, and fringe benefits.

37. First, in its Bulletins, DCS has set staffing ratios that do not comply with accreditation standards or even DCS's own licensing rules.

38. Many Providers are required to comply with accreditation standards to provide services, which call for no less than 5:1 staffing ratio.

39. Licensing rules require Providers "to employ a sufficient number of qualified persons to provide care and supervision for the children at all times." DCS's staffing ratios do not allow for children to be transported individually to school or counseling appointments and still sufficiently staff children who remain in the facility. For some Providers,

they do not allow compliance with 465 IAC 2-9-58(f) and 59(b), which require a second person be available to "continuously maintain direct observation" of a child being restrained or confined. Licensing rules require that facilities with three (3) or more children under the age of eight (8) to maintain a 1:4 staff ratio. DCS's new staffing ratios do not permit that.

40. The staffing ratios are inconsistent with DCS's own licensing rules, because they include supervisors and case managers in the direct care staffing ratio calculations. But licensing rules require that Providers employ staff to perform "administrative, supervisory, service, and direct care functions," and provide that "functions may be combined only upon the approval of the department." *See* 465 IAC 2-9-48, 2-10-48, 2-12-48 and 2-13-48. Furthermore, Providers must be fully compliant with their staffing ratios for the state to claim Title IV-E funds for the children in their care. Thus, if Providers adhere to DCS's staffing ratios, they put their own licenses and their Title IV-E eligibility in jeopardy.

41. Second, the Rules require that DCS cover "reasonable costs related to administration" of Providers. *See* 465 IAC 2-17-21(a). But DCS, as announced in its Bulletin, capped administrative costs at 20% of direct costs – without any regard to whether that percentage is reasonable. That cap fails to cover several costs that are required under licensing rules. Indiana's Rule includes costs associated with casework, case management, and quality assurance procedures. *See* 465 IAC 2-16-3. By capping allowable costs at an unreasonable number, DCS has effectively disallowed a range of costs that the Rule requires it to cover.

42. DCS has failed to allow for both indirect costs and direct administrative costs, as required by the rules – instead simply setting a cap on administrative costs. *See* 465 IAC 2-16-21(d)(5) and 2-17-23(d)(5) (disallowing costs exceeding "any indirect cost allocations as a percentage of total costs in excess of the maximum percentage of total costs established by

the department for allowable indirect costs") and (6) (disallowing costs exceeding maximum percentage of total administrative costs established by the department). This violation is especially egregious because DCS's cost report required that Providers list both direct and indirect administrative costs – leading Providers, reasonably, to expect that DCS would cover costs in both categories.

43. The cap that DCS chose for administrative costs also fails to cover several costs that are required under the licensing statute and rules that apply to Providers. These include costs to conduct a criminal history check for all employees and volunteers (required by Ind. Code 31-27-3-3); costs to maintain personnel records (required by 465 IAC 2-9-44, 48); costs to develop a written plan for the orientation, training and development of staff (required by 465 IAC 2-9-54); and costs to develop and administer health programs (required by 465 IAC 2-9-69).

44. Finally, the rules require that DCS set a maximum allowable variation from the median fringe benefit rate for all Providers. *See* 465 IAC 2-16-21(d)(2) and 2-17-23(d)(2). DCS did not do that. Instead, DCS capped the allowable fringe benefit at 25% of salaries and payroll taxes. This number is simply the mean fringe benefit as reported by Providers – it is not by any definition a range around the median, and it therefore violates DCS's own rule, and it by definition puts half of Providers over the cap.

45. DCS's failure to follow its own administrative rules has harmed Providers by negatively impacting their expected rates for 2012. IARCCA is entitled to a declaration that DCS's actions violate their own regulations and injunctive relief precluding DCS from continuing those violations.

Count III: Violation of Title IV-E

46. DCS's failure to set rates according to written criteria and methods violates Title IV-E.

47. The State's rate caps violate Title IV-E because they fail to reimburse Providers for all the reasonable costs enumerated in Title IV-E, including "food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement," and reasonable administrative costs pertaining to those items. 42 U.S.C. § 675(4)(A).

48. Because of the arbitrary and still unexplained nature of the caps on administrative costs, fringe benefits, and staffing, DCS cannot demonstrate its compliance with Title IV-E, which requires reimbursements to cover all of these costs.

49. By eliminating its former process of calculating separate rates for each program and provider upon which it would claim federal reimbursement, and choosing instead to claim reimbursement based only on the rates paid, DCS has designed a system that "leaves on the table" potential federal reimbursement. While DCS is not obligated to maximize federal reimbursement, eliminating the so-called IV-E claimable rate for each program and provider eliminates the other method for measuring whether DCS has complied with the substantive requirements of IV-E.

50. By failing to follow its own rate-making process, establishing arbitrary caps, and eliminating its separate system for measuring IV-E compliance, Indiana has eliminated any way to demonstrate its compliance with Title IV-E.

51. IARCCA is entitled to a declaration that DCS's actions violate Title IV-E and injunctive relief precluding DCS from cutting current rates without first demonstrating that they cover all costs required by Title IV-E.

Count IV: Breach of Settlement Agreement

52. The parties' settlement agreement provides that DCS will not "amend or Repeal the Rules, or otherwise . . . effect any significant changes in the rate-setting process that are inconsistent with the method in the Rules, without IARCCA's consent, until two (2) years from the date the Rules are enacted." Ex. A, ¶ 2.

53. By 1) failing to follow the rules that it did promulgate and 2) by adhering to rate caps that were set outside of the rules, DCS has violated its obligation not to effect changes in rate setting that are significant and inconsistent with the Rules.

54. IARCCA's members have been harmed by DCS's violation of the settlement agreement.

55. IARCCA is entitled to a declaration that DCS's actions violate the settlement agreement and injunctive relief precluding DCS from cutting current rates without adhering to its terms.

Count V: Violation of 42 U.S.C. § 1983

56. The DCS's failure to follow its rules for rate setting violates Title IV-E.

57. Payne, in seeking to enforce reimbursement rates set arbitrarily, is acting under color of state law and in violation of the requirements of Title IV-E. This conduct further violates 42 U.S.C. § 1983 because it is an action under color of state law that violates the rights under federal statute of IARCCA and its member agencies.

58. Payne is liable to IARCCA's members for violation of 42 U.S.C. § 1983.

59. IARCCA is entitled to relief under 42 U.S.C. § 1983 including recovery of attorneys' fees incurred in bringing this action under 42 U.S.C. § 1988.

WHEREFORE, IARCCA requests the Court:

(a) to enter declaratory judgment that DCS's setting of per diem rate payments to Providers other than pursuant to promulgated rules violates Indiana Code Art. 4-22;

(b) to enter declaratory judgment that DCS's cuts in per diem rate payments to Providers described in this Complaint violate Title IV-E of the Social Security Act;

(c) to enter declaratory judgment that DCS has breached its settlement agreement with IARCCA by failing to follow its own rules in setting rates;

(d) to enter preliminary injunctive relief precluding DCS from reducing rates until it adheres to its rules governing the establishment of per diem rates;

(e) to enter permanent injunctive relief requiring DCS to set rates and to increase or reduce rates only in accordance with written standards promulgated in accordance with federal and state law;

(f) to enter preliminary and permanent injunctive relief precluding DCS from taking any action concerning any children in the care of Providers, based solely on decisions about the rates to Providers;

(g) to award IARCCA its damages according to proof; and

(h) to award IARCCA its costs, attorneys' fees and all other appropriate relief.

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By*/s/Jon Laramore*

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VERIFICATION

I affirm, under the penalties for perjury, that the facts set forth in the foregoing paragraphs 1-2, 5, 13-17, 22-24, 27-32, 39-45 are true.

Cathleen Graham, MSW, LCSW
Executive Director, IARCCA

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on December 8, 2011. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. This document was also emailed to the following:

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