

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

C.H., R.H., D.S., and T.S., on their own behalf)
behalf and on behalf of a class of those similarly)
situated; S.H. #1, S.H. # 2, A.H., and B.H, minor)
children, by their parents and next friends C.H.)
and R.H, and N.M.S and N.J.S, minor children, by)
their parents and next friends D.S. and J.S., on)
their own behalf and on behalf of a class of those)
similarly situated; H.K., on her own behalf and on)
behalf of a class of those similarly situated; and)
S.D. and C.W., minor children, by their mother and)
next friend H.K., on their own behalf and on behalf)
of a class of those similarly situated,)

Plaintiffs,)

v.)

JAMES W. PAYNE, in his official capacity)
as Director of the Indiana Department of)
Child Services,)

Defendant.)

No. 1:09-cv-01574-SEB-JMS

COMPLAINT-CLASS ACTION

FIRST AMENDED CLASS ACTION COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. The State of Indiana, through the Department of Child Services, receives money from the federal government through Title IV-E of the Social Security Act, 42 U.S.C. § 670, *et seq.*, under which, among other things, monthly payments in the form of foster care assistance and adoption assistance are given to, respectively, foster parents and adoptive parents. Defendant, the director of the Department of Child Services, has recently enacted a 10% reduction in these payments, effective in January of 2010. These reductions violate federal law and are unlawful.

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.
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 Constitution and laws of the United States.

Parties

6. C.H. and R.H. are adult persons living in Marion County, Indiana.
7. D.S. and T.S. are adult persons living in Marion County, Indiana.
8. H.K. is an adult person living in Marion County, Indiana.
9. S.H. #1, S.H. # 2, A.H., and B.H. are the adopted minor children of A.H. and R.H.
10. N.M.S. and N.J.S. are the adopted minor children of D.S. and T.S.
11. S.D. and C.W. are foster children who are wards of the State of Indiana pursuant to adjudications in Child in Need of Services Proceedings who have been placed with H.K. as foster parent.
12. James W. Payne is the duly appointed Director of the Indiana Department of Child Services, and is sued in his official capacity.

Class action allegations

13. This action is brought on behalf of four (4) classes of persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

Class A

14. Class A, represented by foster parent H.K., is defined as:

all foster parents who are receiving, or will receive, foster care maintenance payments directly from the Indiana Department of Child Services pursuant to 42 U.S.C. § 672.

15. 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 large, consisting of hundreds if not thousands of foster parents.
- b. There are questions of law or fact common to the class: whether the unilateral reduction of foster care maintenance payments violates federal law.
- 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.

18. The further requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure are met in this cause in that the 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 B

19. Class B, represented by foster children S.D. and C.W., is defined as:

all children in foster care, or who will be in foster care, for whom foster care maintenance payments are being made, or will be made, directly from the Indiana Department of Child Services pursuant to 42 U.S.C. § 672.

20. 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 large, consisting of hundreds if not thousands of children in foster care.

- b. There are questions of law or fact common to the class: whether the unilateral reduction of foster care maintenance payments violates federal law.
 - 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.
21. The further requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure are met in this cause in that the 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 C

22. Class C, represented by adoptive parents C.H., R.H., D.S. and T.S., is defined as:
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 by 10% as of January 1, 2010.

23. 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 large, consisting of hundreds if not thousands of adoptive parents.
 - b. There are questions of law or fact common to the class: whether the unilateral reduction of adoption assistance payments violates federal law.
 - 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.
24. The further requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure are met in this cause in that the 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 D

25. Class D, represented by adoptive children S.H. #1, S.H. # 2, A.H., B.H, N.M.S., and N.J.S., is defined as:

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.

26. 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 large, consisting of hundreds if not thousands of adoptive children.
- b. There are questions of law or fact common to the class: whether the unilateral reduction of adoption assistance payments violates federal law.
- 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.

27. The further requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure are met in this cause in that the 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

28. 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.

29. 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.

30. 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).

31. 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.

32. The foster care maintenance payments, defined by 42 U.S.C. § 675(4), are defined as, among other things, payments “to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the child’s home for visitation.”

33. 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.

34. 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.

35. 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

36. In December of 2009, defendant Payne sent notices to all persons receiving foster care payments as foster parents or adoption assistance payments as adoptive parents that their monthly payments would be reduced 10%, effective January 1, 2010. The notice is attached as Exhibit 1.

37. On information and belief this planned reduction is because of budgetary constraints and is not the product of any individual assessment of the families receiving the payments or any assessment of the general costs of providing care for the children in question and whether those costs have decreased by 10% since the beginning of 2009.

38. In fact, defendant Payne engaged in no such individual assessment prior to imposing the reduction and the cost of living and providing care for the children in Class B and D has not decreased since 2008.

39. S.H. #1, S.H. #2, A.H. and B.H., are children adopted by C.H. and R.H.

40. The children were adopted after being found to be Children in Need of Services and being made wards of the state.

41. Because of the children's situations they are special needs children under Indiana law.

42. Therefore, at the time of their adoptions, which occurred prior to December 31, 2009, C.H. and R.H. entered into an agreement with the Department of Child Services that the Department would provide the children a monthly adoption assistance payment.

43. That payment has been provided and is used by C.H. and R.H. to care and provide for the children.

44. C.H. and R.H. have now received Exhibit 1, informing them that their payments will decrease 10% effective January 1, 2010.

45. No individual assessment has been done to determine if the children's expenses have decreased. In fact they have not and the loss of 10% of the payments will make it much more difficult for C.H. and R.H. to provide for the children.

46. N.M.S. and N.J.S. are the adoptive children of D.S. and T.S. The adoption was completed prior to January 1, 2010.

47. Prior to their adoption the children were wards of the Department of Child Services after being found to be Children in Needs of Services.

48. Because of the children's situations, they are special needs children under Indiana law and therefore, at the time of the adoption, D.S. and T.S. entered into an agreement with the Department of Child Services that the Department would provide the children a monthly adoption assistance payment.

49. That payment has been provided and is used by D.S. and T.S. to care and provide for the children.

50. D.S. and T.S. have now received Exhibit 1 and have been informed that the adoption assistance payment will be cut 10% effective January 1, 2010.

51. No individual assessment has been done to determine if the children's expenses have decreased. In fact they have not and the loss of 10% of the payments will make it much more difficult for D.S. and T.S. to provide for the children.

52. H.K. is the foster parent of S.D. and C.W., who are both wards of the Department of Child Services after being found to be Children in Need of Services.

53. As such, H.K. receives foster care maintenance payments directly from the Department of Child Services on behalf of both S.D. and C.W.

54. No individual assessment has been done to determine if the children's expenses have decreased. In fact they have not and the loss of 10% of the payments will make it much more difficult for H.K. to provide for the children.

55. H.K. has now received Exhibit 1, informing her that her payments would decrease 10% effective January 1, 2010.

56. None of the adoptive parents have agreed or consented to the 10% reduction in their monthly adoption assistance payments.

57. With the 10% reduction in foster care maintenance payments, these payments are insufficient to cover the cost of (and the cost of providing) the foster children's food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation.

58. The actions and inactions of defendant are causing plaintiffs irreparable harm for which there is no adequate remedy at law.

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

Legal claims:

For Classes A and B:

60. Defendant's actions in unilaterally reducing foster care maintenance payments for 10% solely because of budgetary concerns, without a proper methodology, and without taking into consideration any of the cost factors noted in 42 U.S.C. § 675(4), and the individual circumstances of foster parents and children in foster care, violates the requirements of Title IV(E), 42 U.S.C. § 672(a) and 42 U.S.C. § 675(4), which require that these foster care payments be sufficient to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies and a child's personal incidentals, among other costs.

61. Defendant's actions in unilaterally reducing foster care maintenance payments 10% reduces the payments below the level where they will cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies and a child's personal incidentals, among other costs and therefore violate the requirements of Title IV(E), 42 U.S.C. § 672(a) and 42 U.S.C. § 675(4).

For Classes C and D:

62. The unilateral and non-consensual 10% reduction of adoption assistance payments violates the explicit terms of Title IV-E, 42 U.S.C. § 673(a)(3), which states that the amount of such payments "may be readjusted periodically, with the concurrence of the adopting parents" and to the extent that the reduction is based on the unlawful reduction of foster care payments, it is similarly unlawful.

63. The unilateral and non-consensual 10% reduction of adoption assistance payments, solely because of budgetary concerns, violates the explicit term of Title IV-E,

42 U.S.C. § 673(a)(3), which states that such payments must “take into consideration the circumstances of the adopting parents and the needs of the child being adopted.”

Request for relief

WHEREFORE, plaintiffs request that this Court:

- a. Accept jurisdiction of this cause 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 defendant has violated federal law for the reasons noted above.
- d. Enter a preliminary injunction, later to be made permanent, enjoining the defendant’s planned 10% reduction in foster care and adoption assistance payments.
- e. Award plaintiffs their costs and reasonable attorneys’ fees pursuant to 42 U.S.C. § 1988.
- f. Award all other proper relief.

/s/ **Gavin M. Rose**

Gavin M. Rose
No. 26565-53
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059 ext. 106
fax: 317/635-4105
grose@aclu-in.org

Kenneth J. Falk
No. 6777-49
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059 ext. 104
fax: 317/635-4105
kfalk@aclu-in.org

*Attorneys for Plaintiffs and
the Proposed Classes*

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2010, a copy of the foregoing was filed electronically with the Clerk of this Court. The parties may access this filing through the Court's system:

David Christoff
Office of the Attorney General
<david.christoff@atg.in.gov>

James Hutton
Office of the Attorney General
<james.hutton@atg.in.gov>

Betsy M. Isenberg
Office of the Attorney General
<betsy.isenberg@atg.in.gov>

/s/ Gavin M. Rose
Gavin M. Rose
Attorney at Law

EXHIBIT 1

Mitchell E. Daniels, Jr., Governor
James W. Payne, Director

Indiana Department of Child Services
Room E306 – MS47
302 W. Washington Street
Indianapolis, Indiana 46204-2739

317-234-5437
FAX: 317-234-4497

www.in.gov/dcs

Child Support Hotline: 800-840-8757
Child Abuse and Neglect Hotline: 800-800-5556



December 1, 2009

RE: Reduction in Your Monthly Adoption Assistance Payments

The Department of Child Services (DCS) has finalized the 2010 foster care per diem rates and corresponding maximum monthly payments for new adoption assistance agreements. After difficult deliberations, DCS has determined that a ten percent (10%) reduction in all current foster care rates and adoption payments is necessary. The maximum monthly adoption payments are required by law to be based on a percentage of the applicable foster care per diem rate. Therefore, we are reducing all monthly adoption payments by ten percent (10%) of the amount that we are currently paying under existing adoption assistance agreements or subsidy orders. This reduction will begin with your next payment for the 1st of January 2010.

In arriving at these decisions, we considered many factors in addition to the need to reduce overall program expenses. Those factors include an analysis of current costs and a comparison of Indiana's foster care rates to those of other states. Indiana's standard foster care per diem, after the 10% reduction, still remains among the highest in the United States.

While it is of little comfort in these stressful times, please know that you are not alone. Like other government agencies and business entities, DCS has spent countless hours trying to find ways to reduce expenses. These have been incredibly difficult deliberations and everyone involved recognizes the magnitude of the decisions being made. We understand the stress involved and we appreciate your continued commitment to children. DCS will evaluate the foster care per diem rates and adoption payments as economic conditions warrant.

I am confident we will get through these difficult times by partnering together. DCS remains committed to our mission to protect Indiana's abused and neglected children and to partner with you and others to provide safe, nurturing and stable homes for our children. I appreciate your commitment to Indiana's families and look forward to our continued collective work to keep children safe.

Very truly yours,

James W. Payne,
Director



Protecting our children, families and future