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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PATRICIA SHEEHEY, PATRICK SHEEHEY, RAYNETTE AH CHONG, individually and on behalf of the class of licensed foster care providers residing in the state of Hawai`i,

Plaintiffs,

vs.

RACHAEL WONG, DrPH, in her official capacity as the Director of the Hawai`i Department of Human Services,

Defendant.

Case No. CV13-00663 LEK-KSC

**PLAINTIFFS' REPLY  
MEMORANDUM IN SUPPORT OF  
THEIR [145] MOTION FOR  
SUMMARY JUDGMENT;  
DECLARATION OF CLAIRE WONG  
BLACK; EXHIBITS "22"- "23";  
CERTIFICATE OF SERVICE**

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR  
[145] MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Five undisputed material facts compel summary judgment for Plaintiffs.

**First**, Defendant (HDHS) calculated Hawaii's current, age-tiered foster board rate using outdated 2011 United States Department of Agriculture (USDA) cost estimates for expenditures on children in Urban West states for **only** three categories of costs: (1) food; (2) housing; and (3) miscellaneous personal items.<sup>1</sup>

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<sup>1</sup> Defendant's Concise Statement of Facts (Def. CSOF), Dkt. 172 (not disputing, and therefore admitting, Plaintiffs' Material Facts 12, 17 (Dkt. 146 PageID#:1924-

**Second**, HDHS’s board rate is intended to cover **only** those three out of the eight mandated categories of costs required to be covered by Title IV-E of the Child Welfare Act (CWA or Title IV-E).<sup>2</sup>

**Third**, HDHS’s “supplemental benefits,” which they claim cover the other CWA-required costs, are provided to only a fraction of foster families.<sup>3</sup>

**Fourth**, HDHS discounted the USDA cost estimates by 5% in setting the current age-tiered board rates. Dkt. 172, Def. CSOF9, Def. CSOF10 PageID#:2785 (“[H]DHS used 95% of the USDA figures...”).

**Fifth and critically**, HDHS *does not dispute* that the cost of goods and services is higher in Hawai`i than in other USDA Urban West states. *See* Dkt. 172 Def. CSOF (not controverting Plaintiffs’ Material Fact 20).<sup>4</sup>

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25)); *see also id.*, Def. CSOF10 (“[H]DHS used 95% of the USDA figures ...”); Def. CSOF9 (arguing that use of USDA Urban West states’ cost estimates is “appropriate”). *See generally* LR56.1(g) (“For purposes of a motion for summary judgment, material facts set forth in the moving party’s concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party.”)

<sup>2</sup> HDHS contends that it excluded USDA cost categories other than food, housing and miscellaneous expenses because the excluded costs were covered by other types of benefits made available by HDHS. Dkt. 172, Def. CSOF10. *See* Dkt. 172, Def. CSOF (failing to dispute and therefore admitting Plaintiffs’ Material Facts 6 (board rates “comprise food, housing and miscellaneous expense costs”) and 7).

<sup>3</sup> Dkt. 146-13 at PageID#:2048 (*e.g.*, reimbursements for transportation provided to only 4.51% of foster families).

<sup>4</sup> Pursuant to LR56.1(g), uncontroverted facts are deemed admitted. Even under a generous construction of that requirement, Plaintiffs’ Material Fact 20 is unequivocally uncontroverted. *Cf. Adwalls Media, LLC v. Ad Walls, LLC*, Civ.

These five undisputed material facts are dispositive. They inexorably compel the conclusion that HDHS’s board rate shortchanges foster families in three key cost categories by **ignoring** the undisputed reality that Hawaii’s cost of living is higher than the cost of living in both USDA-selected “Urban West” states and the mainland as a whole. Because HDHS’s minimum board rate fails to cover the costs of the three specified items—food, housing, personal miscellaneous expenses—it is insufficient for *all* foster families regardless of any supplemental “benefits” or “payments” made available by HDHS and regardless of whether those supplements are intended to reimburse for other categories of Title IV-E allowable costs.

It is no wonder, then, that HDHS’s opposition gives scant attention to proving that its board payment actually covers the costs of (and the cost of providing) the array of expenses specified in the Child Welfare Act and focuses instead on defending its rate-setting process. HDHS’s “facts” are not material, and its arguments are unavailing. Plaintiffs respectfully request that this Court grant summary judgment declaring Hawaii’s foster board rate insufficient and requiring HDHS to cover the costs of *all* the categories of CWA-required costs for *all* Title IV-E eligible foster children.

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No. 12-00614 SOM/BMK, 2015 WL 419659, at \*3 (D. Haw. Jan. 30, 2015) (scouring through plaintiff’s concise statement, which did not clearly admit or dispute facts, to determine what facts were admitted and what facts were disputed).

**II. HDHS’S BOARD RATE FAILS TO COVER THE COSTS OF (AND THE COST OF PROVIDING) FOOD, SHELTER, AND MISCELLANEOUS PERSONAL EXPENSES**

It is undisputed that the CWA requires HDHS to provide foster care maintenance payments sufficient to cover the costs of (and the costs of providing) food, clothing, shelter, daily supervision, school supplies, personal incidentals, liability insurance, and certain reasonable travel costs. 42 U.S.C. § 671(a)(1) (requirements of state plan); 42 U.S.C. § 675(4)(A) (required cost categories for foster care maintenance payments); Dkt. 144 at Def. Fact 1 (admitting that Hawai`i has a Title IV-E plan in place, which triggers Title IV-E obligations); Dkt. 145-1 (Plaintiffs’ MSJ) PageID#:1903, 1905. As a matter of law, this means HDHS must cover *all* the costs of the CWA-required items. *Cal. Alliance of Child & Family Servs. v. Allenby*, 589 F.3d 1017, 1018 (9th Cir. 2009) (“We disagree; **the natural meaning of ‘cover the cost’ is to pay in full, not in part.**”) (emphasis added).

HDHS’s current, age-tiered, foster board rate is intended *only* to cover three of those eight costs: (1) food; (2) shelter; and (3) personal incidental expenses. Dkt. 146, Plaintiffs’ Undisputed Material Facts (Pl. CSOF) 4, 5, 6, 7.<sup>5</sup> HDHS

<sup>5</sup> For the convenience of the Court—and because HDHS did not specifically dispute any of Plaintiffs’ Material Facts—Plaintiffs offer the following comparison of the parties’ facts:

PLAINTIFFS’ MATERIAL FACTS, DKT. 146	DEFENDANT’S FACTS, DKT. 172
Pl. CSOF4: HDHS increased its foster board rate in 2014 (PageID#:1927).	Undisputed (PageID#:2784-85).

allocates only 95% of the USDA 2011 estimates of child expenditures for food, housing, and miscellaneous personal expenses in Urban West states to cover these expenses. Dkt. 172 Def. CSOF9; Def. CSOF10 (“DHS used 95% of the USDA figures”). However, because the cost of goods and services is higher in Hawai`i than other USDA Urban West states (Dkt. 146, Pl. CSOF20), HDHS’s board rate is insufficient to cover those three costs. Rather than adjusting the Urban West cost estimates **higher** to reflect Hawaii’s higher costs, HDHS adjusted **down**, “us[ing] 95% of the USDA figures.” Dkt. 172, Def. CSOF10. Even the evidence HDHS cites to justify its rates **supports an upward adjustment** to account for Hawaii’s higher costs. Dkt. 172-9, HDHS Ex. H (Burke Expert Report), ¶ 51 PageID#:2951 (“The BEA Regional Price Parity Index is an exceedingly well-documented and modern index that estimates that in 2013 ... prices on [sic] Hawaii average 16.2%

Pl. CSOF5: the 2014 rate increase was indexed to costs contained in USDA’s 2011 Expenditures by Children by Families Report ( <i>id.</i> ).	Undisputed; <i>accord</i> Def. CSOF9 and 10 (admitting use of USDA Urban West figures at 95%) (PageID#:2785).
Pl. CSOF6: Foster board rates comprise food, housing and miscellaneous costs ( <i>id.</i> )	Undisputed (PageID#:2784-85).
Pl. CSOF7: HDHS excluded USDA cost categories other than food, housing and miscellaneous expenses because it claims that those costs were covered by other types of benefits made available by HDHS ( <i>id.</i> ).	Undisputed; <i>accord</i> Def. CSOF10 (justifying use of USDA figures at 95% because of “additional benefits”) (PageID#:2785).

higher than the national average,” and adjusting Plaintiffs’ experts’ Hawai`i-cost-of-living calculations using the 16.2% Regional Price Parity differential).

### **III. HDHS’S “SUPPLEMENTAL BENEFITS” DO NOT COVER THE COSTS OF THE REMAINING CWA-REQUIRED EXPENSES**

#### **A. Not all foster families receive HDHS “supplemental benefits”**

HDHS claims that CWA-required cost categories—other than food, housing, and personal incidentals—are covered by “payments and other benefits” made available to foster parents. Dkt. 172, Def. CSOF4 (citing Dkt. 172-7, Ex. A), Def. CSOF10, Def. CSOF12. However, it is undisputed that not all foster families receive the “supplemental benefits.” Dkt. 146 PageID#:1924, Pl. CSOF11; Dkt 146-13, Plaintiffs’ Ex. 11. In other words, HDHS does *not* cover the cost of (and the cost of providing) *all* CWA-required costs to *all* foster families. *See Allenby*, 589 F.3d at 1018 (“the natural meaning of ‘cover the cost’ is to pay in full, not in part”). And as a consequence, a large number of Hawaii’s foster families and children are shortchanged each month. For example, more than 95% of foster families **do not receive reimbursement for transportation**. Dkt. 146-13, HDHS supplemental interrogatory responses, PageID#:2048 (only 4.51% receive reimbursement for transportation costs).

**B. Most of the “supplemental benefits” do not apply to Title IV-E allowable costs**

Many of HDHS’s “supplemental benefits” do not cover Title IV-E allowable costs. *See* Black Decl. Ex. 22 (Federal Child Welfare Policy Manual) at 183, Section 8.3.B.3 Answer 3.2 (Respite care is not an allowable expenditure under Title IV-E foster care maintenance); *id.* at 184 Answer 3.5 (recreational activities are not reimbursable under Title IV-E foster care maintenance); *id.* at 189 Answer 6 (state may not include medical care allowance or payment in the Title IV-E foster care maintenance payment). “Supplemental benefits” outside the categories of Title IV-E allowable costs cannot be credited toward HDHS’s foster care maintenance payments.

Contrary to Defendant’s claim, Plaintiffs are not insisting that HDHS make one universal payment. Dkt. 173, PageID#:3076, Section II.C. (claiming that Plaintiffs’ argument “assum[es] that the single board rate must cover all costs”). What HDHS **must** do, however, is make foster care maintenance payments in amounts sufficient to cover *all* the costs required by the CWA to *all* foster parents. 42 U.S.C. § 675(4)(A).

HDHS’s payment scheme of board rate plus patchwork issuance of “supplemental benefits” to some foster families violates the CWA because (1) HDHS’s board rate is insufficient to cover the costs of food, shelter, and

miscellaneous personal expenses; and (2) HDHS’s “supplemental benefits”<sup>6</sup> fail to cover the costs of (and the cost of providing) the remaining five categories of costs required by the CWA:

TITLE IV-E COST CATEGORY	HDHS PAYMENT	INSUFFICIENT BECAUSE <sup>7</sup>
(1) food	Basic board payment	•Fails to adjust upward to account for Hawaii’s higher cost of living and inflation from 2011 to 2015
(2) shelter	Basic board payment	•Fails to adjust upward to account for Hawaii’s higher cost of living and inflation from 2011 to 2015
(3) miscellaneous personal incidentals	Basic board payment	•Fails to adjust upward to account for Hawaii’s higher cost of living and inflation from 2011 to 2015
(4) liability insurance	Automatically provided to all foster families	•\$3 million aggregate limit insufficient to insure 1000+ foster families against loss and wrongly excludes coverage for property damage caused by foster children to foster family properties. Dkt. 175 PageID#:3144, Pl. Addt’l Material Fact 13. <sup>8</sup>

<sup>6</sup> HDHS identified its supplemental benefits in Dkt. 172 Def. CSOF4 (citing Exhibit A), and Ex. A, Dkt. 172-7 at PageID#:2898-2903. None of those supplemental benefits are intended to cover the costs of food, shelter, or miscellaneous personal expenses, *id.* (listing “purpose” of each benefit), and cannot be applied toward the board rate’s shortfall.

<sup>7</sup> Dkt. 146 PageID#:1924, Plaintiffs’ Undisputed Fact 11 (not all foster families receive the additional benefits) (citing Ex. 11); Dkt. 146-13, Ex. 11 PageID#:2048.

<sup>8</sup> Plaintiffs incorporate by reference their opposition to Defendant’s Summary Judgment Motion, Dkt. 174, Counterstatement and Additional Material Facts, Dkt. 175, and the accompanying exhibits and declarations.

(5) clothing	Supplemental Clothing Allowance	<ul style="list-style-type: none"> <li>•\$600 annual stipend is even lower than 2011 USDA Urban West figures (Dkt. 146-16 PageID#:2133, annual clothing costs up to \$970)</li> <li>•Received by only 70.95% of foster families (Dkt. 146-13)</li> </ul>
(6) daily supervision	Difficulty of Care (DOC) Supplement	<ul style="list-style-type: none"> <li>•Only covers child care <i>above and beyond</i> the needs of a typical child</li> <li>•Received by only 31.7% of foster families (Dkt. 146-13) in amounts unchanged for 18 years</li> </ul>
(7) travel	Transportation Reimbursement	<ul style="list-style-type: none"> <li>•Received by only 4.51% of foster families (Dkt. 146-13)</li> </ul>
(8) school supplies	None	<ul style="list-style-type: none"> <li>•No payments made.<sup>9</sup></li> </ul>

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<sup>9</sup> HDHS mistakenly claims that Plaintiffs’ “only argument for incomplete reimbursement is the lack of school supplies.” Dkt. 173 PageID#:3078. To the contrary, Plaintiffs anticipated HDHS’s reliance on its “supplemental benefits.” Dkt. 145-1 at PageID#:1915-16 (Plaintiffs entitled to summary judgment because additional benefits are subject to eligibility requirements and availability of funds and because not all foster families receive the additional benefits).

HDHS also misleadingly represents to this Court that its expert “discussed the totality of DHS payments, which clearly include school supplies.” Dkt. 173, PageID#:3028 (citing Burke Rpt. Dkt. 172-9 Tables 4(a) and (b)). In fact, Tables 4(a) and 4(b)’s references to school supplies are Dr. Burke’s extraction of incremental expenditures based on the Consumer Expenditure Survey data—**not** HDHS’s payments. Dkt. 172-9 PageID#:2955 ¶ 63; *id.* at PageID#:2977-78 (tables).

<b>Non-Title IV-E allowed costs</b>	<b>HDHS SUPPLEMENTAL BENEFIT</b>	<b>INSUFFICIENT BECAUSE<sup>10</sup></b>
	Medical Costs	<ul style="list-style-type: none"> <li>•Not a Title IV-E allowed cost</li> <li>•Received by only 10.99% of foster families</li> </ul>
	Respite Care	<ul style="list-style-type: none"> <li>•Not a Title IV-E allowed cost</li> <li>•Received by only 18.74% of foster families</li> </ul>
	Group Activities for growth, development	<ul style="list-style-type: none"> <li>•Not a Title IV-E allowed cost</li> <li>•Received by only 3.14% of foster families</li> </ul>
	Completion Award: gift card to demonstrate appreciation for completion of licensure	<ul style="list-style-type: none"> <li>•Not Title IV-E allowed costs</li> <li>•Received by only 3.73% of foster families, Dkt. 146-13 Page ID#:2049 (“Other” category)</li> </ul>
	Project First Care Payments: enhancement payments when child is successfully reunified	
	Enhancement Funds for extracurricular and social activities	

**IV. HDHS IMPROPERLY IGNORED INFLATION AND MORE RECENT COST DATA IN SETTING ITS BOARD RATE**

It is undisputed that the CWA does not require any particular methodology for calculating costs. *See* Dkt. 143, HDHS MSJ, PageID#:1657; Dkt. 145-1, Plaintiffs’ MSJ, PageID#:1914. But, whichever method a state chooses, the federal

<sup>10</sup> Dkt. 146 PageID#:1924, Plaintiffs’ Undisputed Fact 11 (not all foster families receive the additional benefits) (citing Ex. 11); Dkt. 146-13, Ex. 11 PageID#:2048.

objective is for those costs to be **covered**. 42 U.S.C. § 475(4). This means HDHS must cover *all* the costs of the CWA-required items. *Allenby*, 589 F.3d at 1018.

HDHS's board rate is insufficient because it comprises 95% of the outdated 2011 Urban West USDA costs in only three of the eight CWA-enumerated categories. HDHS considered, but ultimately rejected, adjustments to reflect Hawaii's higher cost of living and inflation, despite repeated pleas from foster families. Dkt. 146-20, Foster Parent Feedback, PageID#:2170 (the "[Urban West expenditure] amount would not go far in Hawai`i. The COL here is high ... The rate hasn't increased in 23 years. COL has increased."); *id.* at PageID#:2173 ("[Urban West] numbers sound low"); *id.* at PageID#:2175 ("Basic COL should be taken into account first"); *id.* at PageID#:2177 (request to "look at overall expenditures a family has in HI-closer to COL").

As then-deputy (and sometimes acting) director of HDHS testified in the past few days, HDHS limited the board rate increase to the \$8.5 million budget increase requested in their department budget, which was submitted in October 2013. Black Decl. Ex. 23 (Yamashita Tr.:159:6-160:4, 161:7-162:17, 201:2-18). HDHS's rate increase was ultimately enacted through legislation in early 2014. *Id.* at Tr.:210:15-211:11, 219:7-220:5. At that time, 2012 USDA cost estimates were available. *Id.* at Tr.:221:18-222:16. Whether using 95% of 2011 USDA figures or 92.4% of 2012 USDA figures, in each scenario, the total foster board increase

would not cost HDHS more than its initial, pre-determined \$8.5 million budget increase. *Id.* As a result, HDHS's current board rates continue to stagnate at 95% of 2011 USDA cost figures and fail to account for inflation costs from 2011 to 2015 as well as Hawaii's higher cost of living.

And, while HDHS engaged in a "review" of its board rate in 2013-2014, that review failed to "assure the[ ] continuing appropriateness" of the foster rate. 45 C.F.R. § 1356.21(m). Therefore, summary judgment is also appropriate on Plaintiffs' claim regarding HDHS's failure to conduct adequate reviews of the foster care maintenance payments.

## V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment.

Dated: November 2, 2015

Respectfully submitted,

By: /s/ Claire Wong Black  
VICTOR GEMINIANI  
GAVIN THORNTON  
PAUL ALSTON  
J. BLAINE ROGERS  
CLAIRE WONG BLACK  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

PATRICIA SHEEHEY, PATRICK SHEEHEY, RAYNETTE AH CHONG, individually and on behalf of the class of licensed foster care providers residing in the state of Hawai`i;

Plaintiffs,

vs.

RACHAEL WONG, in her official capacity as the Director of the Hawai`i Department of Human Services,

Defendant.

Case No. CV13-00663 LEK-KSC

**DECLARATION OF  
CLAIRE WONG BLACK**

**DECLARATION OF CLAIRE WONG BLACK**

I, Claire Wong Black, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the following is true and correct:

1. I am an attorney licensed to practice before all courts in the State of Hawai`i and am one of the attorneys of record for Plaintiffs in this action.

2. I make this Declaration in support of Plaintiffs' reply memorandum in support of their Motion for Summary Judgment, Dkt. 145.

3. Attached for the Court's convenience as Exhibit 22 hereto is a true and correct copy of excerpts from the United States Department of Health and Human Services' Child Welfare Policy Manual, which is publicly available at: [https://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy.jsp?i\\_dFlag=8](https://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy.jsp?i_dFlag=8).

4. Attached as Exhibit 23 hereto is a true and correct copy of excerpts from the deposition testimony of Barbara Yamashita, taken a few days ago on October 29, 2015.

Executed in Honolulu, Hawai`i, on November 2, 2015.

/s/ Claire Wong Black  
CLAIRE WONG BLACK

## *Child Welfare Policy Manual*

Source: ACYF-CB-PIQ-89-01 (2/9/89)ACYF-CB-PIQ-89-01 (2/9/89)

Reference: Social Security Act - section 472 (a)(2) and (3)

### **8.3A.15 TITLE IV-E, Foster Care Maintenance Payments Program, Eligibility, When payments may begin**

**I Q:** At what point may the State begin to claim Federal financial participation (FFP) for title IV-E foster care maintenance payments?

**A:** States may claim FFP from the first day of placement in the month in which all title IV-E eligibility criteria are met.

Source: ACYF-CB-PIQ-91-05 (8/15/91)ACYF-CB-PIQ-91-05 (8/15/91)

Reference: Social Security Act - section 472

### **8.3B TITLE IV-E, Foster Care Maintenance Payments Program, Payments**

**I Q:** Under title IV-E, how is the term "foster care maintenance payments" defined?

**A:** Under title IV-E, the term "foster care maintenance payments" is defined (in section 475(4) of the Social Security Act) as: "...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 and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence."

The cost items listed in the first sentence apply equally to family foster care and institutional foster care. The costs of providing the items may include costs such as local transportation necessary for either a foster parent or institution to provide the items. However, allowable costs do not include reimbursement in the nature of salary for the exercise by the foster family of ordinary parental duties.

The second sentence applies only to institutional foster care. The reasonable costs of

## *Child Welfare Policy Manual*

- 3 Q: Are all costs for day care/baby-sitting services provided to title IV-E eligible children reimbursable as a title IV-E foster care maintenance cost?

If not, for which of the following purpose(s) may daycare/babysitting services be claimed for reimbursement: (1) illness of the foster parent; (2) respite care; (3) foster parent attendance at: administrative case review/judicial reviews, case conferences/team meetings, school conferences/ET (Pupil Evaluation Team), or foster parent training; (4) foster parent visits with a child who is temporarily out of the home, e.g. child hospitalized or at camp; (5) enhancement of a foster child's social skills/peer relationships/socialization; or, (6) special needs of foster child best met in a day care setting.

- A: The legislative history of Public Law 96-272 (p. 5, House of Representatives, Report No. 96-900, April 23, 1980) states that "payments for the costs of providing care to foster children are not intended to include reimbursement in the nature of a salary for the exercise by the foster family parent of ordinary parental duties." Since foster care maintenance payments are not salaries, foster parents must often work outside the home. Therefore, child care that provides daily supervision during a foster parent's working hours when the child is not in school is an allowable expenditure under title IV-E. Child care costs which facilitate the foster parent's attendance at activities which are beyond the scope of "ordinary parental duties" are allowable expenditures as well.

Child care provided to a foster child to facilitate a foster parent's participation in activities that are within the realm of "ordinary parental duties" or child care activities which are deemed a social service are not reimbursable under title IV-E. The items enumerated in the question were assessed based on these criteria.

(1) Illness of a foster parent: ensuring supervision for one's children during one's illness is an ordinary parental duty. Therefore, child care provided to a child in foster care due to the illness of the foster parent is not an allowable expenditure under title IV-E foster care maintenance.

(2) Respite care: respite care is defined in federal regulation as an allowable title IV-B child welfare service and is not an allowable expenditure under title IV-E foster care maintenance. States may use title XX to fund respite care services.

(3) Foster parent attendance at:

a. administrative case/judicial reviews: this activity is not an ordinary parental duty. Therefore, child care is an allowable expenditure under title IV-E foster care maintenance when the foster parent(s) is required to attend administrative case/judicial reviews without the foster child;

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b. case conferences/team meetings: when the foster parent is mandated by the court or the agency to attend case conferences or team meetings without the foster child, child care is an allowable expenditure under title IV-E foster care maintenance because this activity is beyond the scope of ordinary parental duties;

c. school conferences/ET (Pupil Evaluation Team): this activity is an ordinary parental duty and the cost of child care to provide for the foster parent's attendance at such is not an allowable expenditure under title IV-E foster care maintenance; or,

d. foster parent training: foster parent training required by the State agency is an activity beyond the scope of ordinary parental duties. Therefore, the cost of child care to provide for the foster parent's attendance at mandatory foster parent training is an allowable expenditure under title IV-E foster care maintenance.

(4) Foster parent visits with a child who is temporarily out of the home, e.g. child hospitalized or at camp: this is an ordinary parental duty. Child care provided to facilitate such is not an allowable expenditure under title IV-E foster care maintenance.

(5) Enhancement of a foster child's social skills/ peer relationships/socialization: child care that serves to enhance a child's social skills is typically a social service and/or recreational activity and, as such, is not reimbursable under title IV-E foster care maintenance. However, when recreational activities clearly substitute for otherwise necessary daily supervision, e.g., child care during the foster parent's working hours, they are allowable expenditures under title IV-E foster care maintenance.

(6) Special needs of a foster child best met in a day care setting: therapeutic child care is a social service and is not an allowable expenditure under title IV-E foster care maintenance.

Child care services for children in foster care must be rendered by a provider that is licensed, certified, or has some other formal status under State or local regulations in order for the State to claim reimbursement under title IV-E. This interpretation is consistent with the statute at section 472(c) which requires States to make placements in licensed or approved foster family homes and/or child care institutions. Since foster parents must be licensed or approved, child care providers that provide a foster child daily supervision in the foster parent's stead must also be licensed or approved in order for the State to claim reimbursement under title IV-E foster care maintenance. Informal, episodic child care need not have such status and is presumably included in the basic title IV-E foster care maintenance payment.

Source: ACYF-CB-PIQ-97-01 (3/4/97)ACYF-CB-PIQ-97-01 (3/4/97)

Reference: Social Security Act - sections 472, 474 and 475; 45 CFR 1356.60

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6 **Q:** Routine medical-related expenses are covered under our State's uniform foster care rate. However, when unexpected, expensive medical costs are incurred which are not covered by title XIX, can other Federal funds be utilized? May prescription drugs which are not covered by Medicaid or any other program be allowed as a personal incidental cost within the definition in section 475 (4) of the Social Security Act (the Act)? If so, would there be any special conditions which would have to be met (e.g. cost limits, documentation)? If not, is there any provision within title IV-E which would permit reimbursement of the costs of prescription drugs for children in foster care for which no other funding source is available?

**A:** Federal medical payments on behalf of title IV-E eligible children in foster care are provided under the State's title XIX, Medicaid program, in accordance with title XIX, Medicaid Program, and with section 472 (h) of the Act. The definition of "foster care maintenance payments" in section 475 (4) does not include medical expenses as an allowable cost in title IV-E.

A State may not include in the title IV-E foster care maintenance payment a specific allowance for medical care - nor may a State be reimbursed under title IV-E for direct expenditures of the types described in the questions. The "personal incidentals" item in the foster care maintenance payment under title IV-E, as provided by section 475 (4), may be used to meet incidental needs - and foster parents are not generally required to provide an accounting of specific expenditures, as long as the basic needs of the child are met and the maintenance payment is used for those needs.

*Source:* ACYF-CB-PIQ-84-01 (2/10/84)ACYF-CB-PIQ-84-01 (2/10/84)

*Reference:* Social Security Act - sections 472 (h) and 475 (4); Title XIX

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

PATRICIA SHEEHEY, PATRICK Case No. CV13-00663 LEK-KSC  
SHEEHEY, RAYNETTE AH CHONG,  
individually and on behalf  
of the class of licensed  
foster care providers residing  
in the state of Hawaii,

Plaintiffs, VOLUME II

vs.

RACHAEL WONG, in her official  
capacity as the Director of the  
Hawai'i Department of Human  
Services,

Defendant.

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CONTINUED VIDEOTAPED DEPOSITION

OF

BARBARA YAMASHITA

Taken on behalf of the Plaintiffs at Alston Hunt  
Floyd & Ing, American Savings Bank Tower, Suite 1800;  
1001 Bishop Street; Honolulu, Hawaii 96813, commencing at  
12:02 p.m., on Thursday, October 29, 2015, pursuant to  
Notice.

BEFORE: HEDY COLEMAN, CSR NO. 116  
Registered Merit Reporter

1 APPEARANCES:

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8 -- via teleconference --

9 and

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25

1 As.

2 Q Okay. All right. And I think I know what  
3 the issue now is.

4 The first Form A, what is the date on that?

5 A The first Form A is October 11, 2012.

6 Q Okay. So I'm going to ask you to look at the  
7 second Form A.

8 A Okay. And that's dated --

9 Q All right.

10 A -- 10-23-2013.

11 Q Okay. So I'm going to focus on that Form A,  
12 on the October 23, 2013 Form A.

13 A Okay.

14 Q And you've seen that document before,  
15 correct?

16 A Yes.

17 Q Do you know when you first saw it?

18 A I -- probably sometime around October of  
19 2013.

20 Q Okay. You mentioned -- in your earlier  
21 deposition, you mentioned a request being submitted to  
22 the Governor's office on a Form A. Is this what you  
23 meant by Form A?

24 A Yes.

25 Q Okay. Who prepared this Form A, the

1     October 23, 2013 Form A?

2             A     It would be -- it would have been generated  
3     by us at the Department of Human Services, us at that  
4     time.

5             Q     And specifically do you know what individuals  
6     would be involved in putting this together?

7             A     This is generally -- the Form A's are  
8     generally jointly done by the division, the budget  
9     office, and the director's office. Generally, those  
10    are the three entities that work on Form As.

11            Q     Do you remember who was involved -- the  
12    individuals involved in putting this specific Form A  
13    together?

14            A     It would be -- I'm not sure who at the  
15    division level exactly worked on it. It always has  
16    the name of the division, the division head or, I  
17    mean, you know, if it's -- if it was -- if the  
18    division. So -- so whether or not actually done by  
19    the division person, I cannot tell you because that's  
20    not uncommon to have the administrator of the  
21    division's name, but it could have been worked on by  
22    other people.

23                    In this case --

24            Q     Okay.

25            A     -- it would be the branch people maybe or

1 Child Welfare. And then it would be myself, Pat or  
2 others. But, I cannot -- I really cannot tell you who  
3 specifically worked on the 10-23-2013 document, but  
4 that would be the general three entities, the division  
5 and their appropriate staff, and then director's  
6 office, and budget office.

7 Q Was this the document by which DHS requested  
8 an increase in the -- in the budget so that the foster  
9 board rates to foster caregivers could be increased?

10 A Yes.

11 Q If you look at the middle of the first page  
12 of the document, it shows a FY15 request of  
13 \$8,502,936.

14 A Yes.

15 Q Do you see that?

16 A Yes, I do.

17 Q Okay. All right. And below that, that  
18 \$8.5 million seems to be broken down into two amounts,  
19 five-point -- or \$5,546,076, and \$2,956,860. Do you  
20 see those two numbers?

21 A I do.

22 Q But, do you have an understanding as to why  
23 the amount -- why the \$8.5 million is broken down into  
24 those --

25 A Yes.

1 Q -- two amounts?

2 A One is --

3 Q What's that?

4 A One is general funds and one is federal  
5 funds.

6 Q Okay. And how much is general funds and how  
7 much is Federal funds?

8 A The A funds are the -- I believe the A is  
9 general, N is Federal.

10 Q Okay. And when you say "general funds," what  
11 does that mean?

12 A General funds means funds that are associated  
13 with the State of Hawai'i, funding from the State.

14 Q Okay. And the Federal funds, is that an  
15 amount that the State expected to be reimbursed by the  
16 Federal government?

17 A Yes.

18 Q Okay. And how were those amounts determined?  
19 Let me ask the question a different way.

20 How did someone at the DHS know how much  
21 would be -- how much of the \$8.5 million would be  
22 reimbursed by the Federal government?

23 A There's a percentage that is provided -- that  
24 is calculated and provided to the State.

25 Q Okay. So there's -- this \$2.9 million is

1 just calculated by applying that percentage to the  
2 \$8.5 million, is that correct?

3 A By applying the percentage, yes, that's  
4 correct.

5 Q Okay. All right. And the next -- the next  
6 page under operating costs details, there seems to be  
7 an opportunity to break -- break these amounts down  
8 further, but it looks like the same two -- same two  
9 amounts there.

10 A Yes.

11 Q So let's turn to the fourth page, the -- of  
12 the Form A dated October 23, 2013.

13 Do you know who prepared these, of the  
14 various points under Roman numeral four, justification  
15 of request?

16 A This was done as a result of the work we did  
17 to come up with the methodology for how it we should  
18 get the increase. And that goes back to the -- using  
19 the USDA and all of that research that we -- we did to  
20 come up with the rate.

21 Q Is it fair to say that the points that are  
22 shown here under Roman numeral four is kind of a  
23 summary of the points that had been reflected in the  
24 Chandler reports that we looked at earlier in your  
25 deposition?

1 A (Witness nods head.)

2 Q The options that were being considered in  
3 late December, early January within DHS are should we  
4 use 95 percent of the 2011 USDA numbers or should we  
5 use 92.4 percent of the 2012 USDA numbers?

6 MS. KALAMA: Objection; vague.

7 A That's not correct. The budget request was  
8 95 percent of the USDA 2011. What this does is  
9 provide us some frame of reference of comparison where  
10 we were on the 2012. So, it shows -- you know, the  
11 budget request that went in was 2011, 95 percent,  
12 USDA.

13 2012 comes out, and we now have where we  
14 stand on the 2012, which comes out to the 92.4 percent  
15 or whatever. That's -- so that was now the  
16 discussion. That's what we had. The budget, though,  
17 was already at nine -- the budget request was at  
18 95 percent of 2011.

19 Q Well, the budget request was for  
20 \$8.5 million. It's -- part of the justification was  
21 that it was 95 percent of the 2011 USDA numbers,  
22 correct?

23 MS. KALAMA: Objection; the document speaks  
24 for itself, argumentative.

25 A Yes. It was for ninety -- was 95 percent was

1 Services does not have any copies, is that correct?

2 MS. KALAMA: You're making an assumption that  
3 there is such a thing.

4 MR. JOHNSTON: I'm asking whether you have  
5 any copies of such --

6 MS. KALAMA: I don't have any --

7 MR. JOHNSTON: -- transcripts.

8 MS. KALAMA: -- copies of non-existent  
9 transcripts.

10 MR. JOHNSTON: You're saying the transcript  
11 is non-existent.

12 MS. KALAMA: The Department of Human Services  
13 does not have any transcripts.

14 MR. JOHNSTON: Okay, thank you.

15 Q Miss Yamashita, you had already -- or  
16 Department of Human Services had already submitted a  
17 request for an increase in the budget through the  
18 legislature -- through the Governor's office to the  
19 legislature. What was the purpose of H.B. 1576?

20 A To increase the monthly board rate for foster  
21 care payments -- for foster care services, excuse me.

22 Q Okay. And was this a mechanism for  
23 increasing the foster board rate that was different  
24 from submitting a budget request through the  
25 Governor's office?

1 MS. KALAMA: Objection; calls for  
2 speculation.

3 A Legislators can introduce bills on their own.  
4 So, this was a bill introduced by a legislator.

5 BY MR. JOHNSTON

6 Q Okay. So it was another avenue for obtaining  
7 an increase in the budget for the foster board  
8 payment?

9 A Yes.

10 Q Is that right?

11 A Yes.

12 Q Take a look if you would at the -- it appears  
13 beginning on the third page of the exhibit, page SOH  
14 00541, entitled "Executive Summary." It looks like  
15 that runs through page SO-00555.

16 The Executive Summary appears to me to be  
17 similar to the December Chandler report, but it has  
18 some changes. Do you know who prepared the Executive  
19 Summary?

20 A I don't recall.

21 MR. JOHNSTON: Let me have marked as the next  
22 exhibit, we'll look at them in parallel, an email  
23 dated January 29, 2014, first page of which is SOH  
24 11548.

25 (Whereupon, Exhibit 15 was marked for

1 which document finally made it out. I can't answer  
2 that. I don't recall if it was this one or the Senate  
3 version, or the -- I'm not sure --

4 Q Well --

5 A -- which document finally made it out of the  
6 leg.

7 Q We'll look at the Senate version in a minute.

8 But, you have a recollection that the way that DHS got  
9 a budget increase to increase the foster board rate  
10 was through a specific bill introduced by a legislator  
11 as opposed to --

12 A Yes.

13 Q -- part of the Governor's executive budget  
14 being approved?

15 A Yes, I am aware of that. That's not uncommon  
16 for that to happen.

17 Q Right. I'm just -- I'm just --

18 A Yes.

19 Q -- asking whether in this case, did the  
20 budget increase come through the --

21 A I believe -- I believe it --

22 Q -- approval of the executive budget or did it  
23 come through a specific piece of legislation?

24 A No, I believe it came through a specific  
25 piece of legislation. Because we had legislators who

1 wanted to be a part of that increase, and be --  
2 because it was -- it was a few -- I mean, it's like  
3 legislators wanted to be a part of that increase and  
4 be credited for that effort. So I believe it was a  
5 bill that passed rather than executive budget.

6 MR. JOHNSTON: In the -- so I'd like to  
7 introduce as the next exhibit, a copy of a document  
8 that's entitled H.B. 1576, a bill for an act relating  
9 to foster care services. Do we have that, Claire?

10 MS. BLACK: Yes.

11 (Whereupon, Exhibit 16 was marked for  
12 identification.)

13 MR. JOHNSTON: By my count, this is  
14 Exhibit 16, is that correct?

15 THE REPORTER: Yes.

16 BY MR. JOHNSTON

17 Q Okay. Miss Yamashita, do you recognize  
18 Exhibit 16 to your deposition?

19 A Yes.

20 Q And is this H.B. 1576, this -- for which  
21 Exhibit 14 was submitted as testimony?

22 A Yes.

23 Q So Exhibit 16 does not specify either an  
24 amount of the foster board rate or an amount of the --  
25 to be appropriated. Those amounts are left blank?

1 A Yes.

2 Q How -- how did it get filled in?

3 A It goes all the way through the legislative  
4 session, and at the end, the -- the legislature  
5 decides -- the body decides on the amount. And they  
6 vote on it in each House and Senate, and then they --  
7 if they concur, then it passes as a bill. So, the  
8 amount gets deliberated through the legislative  
9 process.

10 Q Okay. And am I correct that the amount that  
11 was ultimately agreed upon was \$2.5 million, the  
12 amount that DHS had requested?

13 A I believe it turned out to be the same  
14 number. That's my recollection.

15 Q Do you remember any debate about whether  
16 within the legislature, whether the amount should be  
17 higher or lower than that amount?

18 A Yes. I -- we -- honestly, I don't believe  
19 there was any discussion about lower, but there was  
20 discussion, I think, about higher. Because I do  
21 recall one of the testifiers bringing up the 2012  
22 report in their testimony, and so I know it was  
23 brought before the body.

24 Because we work closely with our colleagues, and  
25 the people testifying, we knew people who were testifying

1 on the -- the updated USDA report. So it was discussed  
2 by the legislative body, and the body -- the legislators  
3 did have -- did -- was fully aware of the 2012 report as  
4 session progressed.

5 Q Was anyone from DHS asked in the course of  
6 discussions with the legislature why you had not used  
7 the 2012 numbers?

8 A Yes. We were clear that the budget process  
9 was such that at the time we submitted, and that's  
10 what that first paragraph -- the paragraph we  
11 discussed, not first paragraph but it was -- we were  
12 clear that at the time we prepared the budget for the  
13 legislature, the document that we used was 2011,  
14 because that's what was the -- the report that was out  
15 at the time that we were preparing our budgetary  
16 documents.

17 Q Were you asked by any of the legislators  
18 whether, given that the 2012 numbers had come out, it  
19 wouldn't be appropriate to update your request to use  
20 the 2012 numbers which reflected an increase in the  
21 cost of living?

22 A I think the discussion was more it is not the  
23 department's -- the departments usually do not divert  
24 from the administrative's budget, the budget that's  
25 submitted. However, we were very open about feeling

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PATRICIA SHEEHEY, PATRICK  
SHEEHEY, RAYNETTE AH  
CHONG, individually and on behalf of  
the class of licensed foster care  
providers residing in the State of  
Hawai`i,

Plaintiffs,

vs.

RACHAEL WONG, DrPH, in her  
official capacity as the Director of the  
Hawai`i Department of Human Services,

Defendant.

Case No. CV13-00663 LEK-KSC

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**CERTIFICATE OF SERVICE**

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DATED: Honolulu, Hawai`i, November 2, 2015.

/s/ Claire Wong Black  
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**Cassandra Crawford - Activity in Case 1:13-cv-00663-LEK-KSC Ah Chong v. McManaman  
Reply**

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U.S. District Court

District of Hawaii

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**Case Number:** [1:13-cv-00663-LEK-KSC](#)  
**Filer:** Raynette Ah Chong  
PATRICIA SHEEHEY  
PATRICK SHEEHEY

**Document Number:** [181](#)

**Docket Text:**

**REPLY re [145] MOTION for Summary Judgment by Plaintiffs filed by Raynette Ah Chong, PATRICIA SHEEHEY, PATRICK SHEEHEY. (Attachments: # (1) Declaration of Claire Wong Black, # (2) Exhibit 22 Excerpts from Federal Child Welfare Policy Manual, # (3) Exhibit 23 Excerpts from Yamashita Testimony, # (4) Certificate of Service)(Black, Claire)**

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**Document description:**Exhibit 22 Excerpts from Federal Child Welfare Policy Manual

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**Document description:**Exhibit 23 Excerpts from Yamashita Testimony

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