

VICTOR GEMINIANI 4354
GAVIN THORNTON 7922
HAWAII APPLESEED CENTER FOR
LAW AND ECONOMIC JUSTICE
119 Merchant Street, Suite 605
Honolulu, Hawai`i 96813
Telephone: (808) 587-7605
Email: victor@hiappleseed.org
gavin@hiappleseed.org

PAUL ALSTON 1126
J. BLAINE ROGERS 8606
CLAIRE WONG BLACK 9645
ALSTON, HUNT, FLOYD & ING
1001 Bishop Street
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
Email: palston@afhi.com
brogers@ahfi.com
cblack@ahfi.com

ALAN COPE JOHNSTON *Pro hac vice*
JOSEPH K. KANADA *Pro hac vice*
MORRISON & FOERSTER LLP
755 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 813-5600
Facsimile: (650) 494-0792
Email: acjohnston@mofocom
jkanada@mofocom

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.

PATRICIA MCMANAMAN, in her
official capacity as the Director of the
Hawai'i Department of Human
Services,

Defendant.

Case No. CV13-00663 LEK-KSC

Civil Action

Class Action

**FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT
AND PERMANENT INJUNCTIVE
RELIEF; CERTIFICATE OF
SERVICE**

**FIRST AMENDED COMPLAINT FOR DECLARATORY
JUDGMENT AND PERMANENT INJUNCTIVE RELIEF**

INTRODUCTION

1. This is a class action for declaratory and injunctive relief brought on behalf of caregivers residing in Hawai'i who care for abused and neglected children who have been removed from the custody of their parents by operation of state law.

2. Plaintiffs PATRICIA SHEEHEY, PATRICK SHEEHEY, and RAYNETTE NALANI AH CHONG are long-time foster care providers. They

have not received payments adequate to cover the costs of providing care to their foster children. Ms. Ah Chong also has received inadequate adoption assistance and permanency assistance payments to support former foster children she has adopted, or of which she has permanent custody, because those payments are limited by law to the amount of the inadequate foster care maintenance payments.

3. Plaintiffs seek a declaratory ruling regarding the proper amounts owed to foster and adoptive parents in Hawai'i under The Child Welfare Act, Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679(b) (the "Child Welfare Act" or "CWA") as well as an injunction prohibiting Defendant from continuing to violate the rights of foster and adoptive parents under the CWA by failing to make foster care maintenance payments adequate to cover the costs of foster care (the amount of which payment limits adoption assistance and permanency assistance payments), and by failing in the future to (a) employ a proper methodology for determining foster care maintenance rates that takes into account statutorily prescribed criteria, and (b) update the amount periodically to be in compliance with law.

4. The Child Welfare Act requires states that receive federal funds for foster care to provide foster care maintenance 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.”

5. The Child Welfare Act further requires “periodic review of the ... amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness.”

6. Hawai`i applied for and willingly accepts this federal funding, but the payments it makes to Hawaii's foster parents fall far short of covering the costs incurred by them, in violation of the Child Welfare Act. Hawai`i has not increased the monthly maintenance payments to foster parents since 1990.

7. These violations also impact the adoption assistance payment rates and permanency assistance payment rates received by parents who adopt or have permanent custody of foster children. Both adoption assistance payments and permanency assistance payments are capped by statute and administrative rule at a maximum level set by Hawaii's inadequate foster care maintenance payment rate.

8. This action seeks to prevent further violation of federal law by compelling the Defendant to ensure that adequate care payments are provided to caregivers of abused and neglected children who have been removed from the custody of their parents by operation of state law. Without that relief, foster children, and foster children who have been adopted or are in permanent custody, will be deprived of adequate support and their caregivers will be

forced to choose between providing inadequate care or closing their doors to foster children, to the great detriment of the affected children.

PARTIES

9. Plaintiffs PATRICIA SHEEHEY, PATRICK SHEEHEY, and RAYNETTE NALANI AH CHONG, are long-time licensed foster care providers. They all have current foster care licenses from the Hawai'i Department of Human Services ("HDHS") that, in accordance with HDHS rules, have been renewed within the past two years. Plaintiffs all desire to continue providing care and comfort for foster children, but want to be compensated properly for the cost of providing the children's basic needs, as required by federal law.

10. Plaintiffs PATRICIA SHEEHEY and PATRICK SHEEHEY are currently caring for a foster child in their home, for whom they receive foster care maintenance payments.

11. Plaintiff RAYNETTE NALANI AH CHONG has provided foster care services for over 100 children since the mid-1990s. HDHS renewed Ms. Ah Chong's license to be a foster care provider on September 13, 2013, at which time she was certified to provide boarding care for up to two children through September 13, 2015. She continues to be asked by HDHS to care for foster children. In early April 2014, HDHS asked Ms. Ah Chong to be "on standby" to foster a boy who attends kindergarten in Ms. Ah Chong's hometown. Ms. Ah

Chong agreed. Ultimately, Ms. Ah Chong was informed by HDHS that the boy was placed with another foster family.

12. In light of Ms. Ah Chong's experience as a long-time foster parent, and given her current household composition, she will not take a child of any age or sex into her home: Ms. Ah Chong believes her current household composition is best suited to boys between the ages of 5 and 9. When offered such a placement Ms. Ah Chong expects take a foster child under her care again. At the time of filing this First Amended Complaint, Ms. Ah Chong has no current foster children living in her home, but she has two children in her home under her permanent custody and two more who she adopted, all of whom came into her care through the foster care system. Ms. Ah Chong receives monthly payments from HDHS for each of those children. Each of these monthly payments is limited by a \$529 cap to the state's basic foster care maintenance payments because the Child Welfare Act and HDHS rules cap the payments for "permanency assistance" and "adoption assistance" at the foster care maintenance payment rates. Indeed, HDHS has acknowledged to the legislature that any increase of the foster care maintenance payments will also necessitate an increase of the permanency and adoption assistance payments as well (thus entitling Ms. Ah Chong to additional monies for children now in her care).

13. Defendant PATRICIA McMANAMAN is the Director of HDHS and is sued in her official capacity. Defendant McManaman is responsible for assuring that HDHS calculates and distributes foster care payments in conformity with federal law.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action on behalf of themselves and all those individuals similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure.

15. Plaintiffs represent all natural persons providing care to children in Hawai`i and receiving inadequate payments as a result of Defendant's failure to employ a methodology for determining foster care maintenance rates that takes into account statutorily prescribed criteria.

16. Plaintiffs bring this case on behalf of a subclass consisting of all licensed foster care providers in Hawai`i who shelter foster children entitled to receive foster care maintenance payments under the Child Welfare Act.

17. Plaintiffs also bring this case on behalf of a subclass consisting of those class members who receive payments from HDHS for care of children which are limited by the amount of the foster care maintenance payments paid by HDHS.

18. Plaintiffs and their counsel will adequately represent the class and the subclasses.

19. The members of the class and the subclasses are so numerous that joinder of all members is impractical. There are hundreds of licensed foster care providers being denied compensation as required by law and also hundreds of recipients of adoption assistance and permanency assistance whose payments are limited by the inadequate and improperly determined foster care maintenance rates.

20. Common questions of law and fact exist, including whether Defendant is failing to provide foster care maintenance payments to class members adequate to cover costs as required by the Child Welfare Act, whether Defendant is failing to employ a methodology for determining foster care maintenance rates that takes into account statutorily prescribed criteria, and what actions are needed to ensure that the payments will be adjusted to appropriate levels in the future.

21. Plaintiffs' claims are typical of the claims of the members of the proposed class and subclasses in that they have been denied adequate maintenance payments for the foster care services provided to the Defendant and have received inadequate adoption assistance and permanency assistance payments that are

capped at the inadequate and improperly determined rate of foster care maintenance payments.

22. Plaintiffs will fairly and adequately represent and protect the interests of the class and subclasses. Plaintiffs intend to prosecute this action vigorously in order to secure remedies for the entire class and subclasses. In addition, the putative class and subclasses are represented by counsel who are experienced in federal civil rights litigation and class actions.

23. A class action is appropriate in this case because:

- a. The prosecution of separate actions by individual members of the class would create a risk of adjudications which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.
- b. Defendant has acted on grounds generally applicable to the class, making appropriate injunctive or declaratory relief with respect to the class as a whole.
- c. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

JURISDICTION

24. Plaintiffs bring this civil action under 42 U.S.C. § 1983 and seek declaratory and injunctive relief because the payments Defendant gives the class members are too low to satisfy the Child Welfare Act and its implementing

regulations, Defendant has no methodology for determining foster care maintenance rates that takes into account statutorily prescribed criteria, and Defendant does not periodically adjust the amounts owed by law to the Class Members.

25. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

26. Venue is proper to the District of Hawai'i pursuant to 28 U.S.C. § 1391(b) because the events giving rise to Plaintiffs' claims occurred in this District.

RIPENESS

27. There is currently an actual controversy between Plaintiffs and Defendant that is ripe for adjudication as to whether the basic foster parent maintenance payment and adoption assistance payment rates fail to comply with federal law in setting and adjusting rates for foster care maintenance payments.

STATUTORY FRAMEWORK

28. Congress enacted the Child Welfare Act, Title IV-E of the Social Security Act, 42 U.S.C. §§ 670 –679(b), in 1980 to assist states in providing appropriate foster care for children removed from the custody of their parents or guardians. 42 U.S.C. § 670.

29. The Child Welfare Act establishes a cooperative federal-state program that assists states in meeting the costs of providing foster care to foster children. Pursuant to this cooperative program, the federal government and state and county governments share the cost of providing funds for licensed third parties (*e.g.*, foster parents) who care for these children.

30. The Child Welfare Act and related federal regulations require states receiving federal aid to provide foster care and transitional independent living programs for a child when a court has determined that it is necessary under applicable law that the child be removed from his or her home and placed in out-of-home care. Part of the foster care program includes foster care maintenance payments provided to licensed foster parents, such as those represented by Plaintiffs in this case.

31. To become eligible for federal funding, a state must submit a plan for financial assistance to the Secretary of the U.S. Department of Health and Human Services (“DHHS”) for approval. As a prerequisite for DHHS approval, the submitting state must agree, among other conditions, to administer its foster care program pursuant to the Child Welfare Act, related regulations, and policies promulgated by the Secretary of DHHS. 42 U.S.C. § 671(a); 42 C.F.R. §§ 233.110, 1355.21, 1356.20, 1356.21.

32. Pursuant to the Child Welfare Act, a state must designate a state agency to administer and/or supervise the administration of the approved state plan. 42 U.S.C. § 671(a)(2).

33. Pursuant to the Child Welfare Act, a state must also amend its approved plan by appropriate submission to the Secretary of DHHS whenever, among other instances, necessary to comply with alterations to the Child Welfare Act and/or federal regulations or policies. 45 C.F.R. § 1356.20(e)(1).

34. The Child Welfare Act requires that states participating in the cooperative program provide “foster care maintenance payments” to licensed foster parents such as those represented by Plaintiffs. 42 U.S.C. §§ 671(a)(2), 672(b)(1), 675(4); 45 C.F.R. § 1356.21(a).

35. According the Child Welfare Act, the “term ‘foster care maintenance payments’ means 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.” 42 U.S.C. § 675(4)(A).

36. The Child Welfare Act also requires participating states to provide monthly adoption assistance payments under Title IV-E to support eligible special needs children. Eligible children are those in the foster care system with special factors or conditions which, among other requirements, make it reasonable to

conclude that they cannot be adopted without adoption assistance. 42 U.S.C. §§ 673(a)(1)(B), 673(a)(1)(2), 673(c).

37. The adoption assistance payment amount is determined through agreement between the adoptive parents and the state, based upon the needs of the child and the circumstances of the family. Participating states are required to “take into consideration the circumstances of the adopting parents and the needs of the child being adopted.” 42 U.S.C. § 673(a)(3). However, the adoptive payment rates may not exceed the amount set for foster care maintenance payments. 42 U.S.C. § 673(a)(3).

38. Permanency assistance payments are provided through either Title IV-E of the Social Security Act or through state funds to facilitate the placement of children into permanent homes when return home and adoption are not the appropriate permanency goal. The payment amount is based on an assessment of the care and supervision required by the child. However, these payments “shall not exceed the foster care maintenance payment” rate. Haw. Code R. §§ 17-1621-1, 17-1621-4, 17-1621-10(b).

FACTS

39. HDHS currently pays foster care families a basic maintenance rate of \$529 per month per child, regardless of age. Defendant concedes that “[t]he current monthly foster care board rate of \$529 has not been raised since 1990 and

is insufficient due to increased costs for food, housing, utilities, clothing and other necessities in raising a child.” HDHS Executive Supplemental Budget Fiscal Year 2015 available at: <http://budget.hawaii.gov/wp-content/uploads/2013/12/21-Department-of-Human-Services-FY-15-SUPP.pdf>

40. According to HDHS, the \$529 monthly payments are intended to cover the following expenses: food; shelter and utilities; use of household furnishings and supplies; expenses involved in household operations; personal essentials, such as but not limited to toothpaste, soap, comb, haircuts, sanitary supplies, replacement of milk bottles and nipples, disposable diapers; reading and educational supplies, including school supplies; recreation and community activities for the children, such as but not limited to parties, picnics, church money, movies, and excursions; transportation expenses for the foster parent to shop for the foster child or deliver the child to school events, church or other recreational activities; non-prescribed medication such as aspirin and cough syrup or first-aid materials such as Band-Aids and first-aid cream; allowances; babysitting expense incurred by foster parents for their own recreational purposes; other requirements for infant care, including such “basic sub-items” as vitamins generally recommended by doctors for children up to five years of age.

41. In a 2012 report, the United States Department of Agriculture estimated that the average lower income family spends between \$9,290–\$10,230

per year, per child, which amounts to \$774–\$852 per month, per child.¹ Middle income families spend between \$12,710–\$14,700 per year, per child (\$1059–\$1225 per month, per child)—more than double Hawaii’s monthly foster care maintenance payment.

42. A 2007 report (“Hitting the MARC”) calculates the real expenses of caring for a child in foster care based on expenditures that are allowable under the Title IV-E Foster Care Maintenance Program of the Social Security Act.² Since the authors of the report had no cost-of-living adjustment available for Hawai‘i, the minimum adequate rate listed is the national average. Even using national averages and 2007 dollars, Hawaii’s foster care maintenance payments are grossly inadequate:

¹ Based on pre-tax income of less than \$60,640 and average husband-wife family income of \$38,790. *See Expenditures on Children by Families Estimated Annual Expenditures on a Child by Husband-Wife Family, Overall United States, 2012*, available at <http://www.cnpp.usda.gov/Publications/CRC/crc2012.pdf>.

² HITTING THE M.A.R.C., ESTABLISHING FOSTER CARE MINIMUM ADEQUATE RATES FOR CHILDREN, October 2007, University of Maryland School of Social Work, Children’s Rights, and the National Foster Parent Association, available at www.family.umaryland.edu. Costs were calculated by analyzing consumer expenditure data reflecting the cost of caring for a child; identifying and accounting for additional costs particular to children in foster care; and applying a geographic cost-of-living adjustment, thereby developing specific rates for each state. The study did not include travel and child care expenses, which are to be reimbursed by the states, because of the case-to-case variability of these costs.

	Current Foster Care Rates ^a			Foster Care MARC ^b			To hit the Foster Care MARC, current rates must be increased by: ^c		
	2	9	16	2	9	16	2	9	16
Child's Age:	2	9	16	2	9	16	2	9	16
US Average:	488	509	568	629	721	790	29%	41%	39%
Hawaii	529	529	529	629	721	790	19%	36%	49%

43. Both the U.S. Department of Agriculture 2012 estimates and Hitting the MARC calculated child care costs based on nationwide averages. The cost of living in Hawai'i, however, far exceeds national averages: the U.S. Commerce Department's Bureau of Economic Analysis released a report in June 2013 that showed Hawaii's cost of living as 16 percent higher than the national average.

44. The monthly maintenance payment of \$529 for each child regardless of age fails to cover the basic costs of board as spelled out by HDHS.

45. Defendant also makes "difficulty of care" payments and other reimbursements to caregivers, but these too have not been properly updated and are insufficient to cover the costs of care.

46. The inadequate foster care maintenance payment amounts have contributed to a steep decline in the number of foster families in Hawai'i. *See Foster Families in Decline*, Honolulu Star Advertiser, Jan 2, 2011 (reporting drop in number of new foster families from 157 in 2010 to 100 in 2011 because

potential foster parents “may not have the extra money to care for another person”), available at: http://www.staradvertiser.com/news/20110102_Foster_families_in_decline.html.

47. If the basic maintenance payment rate had simply been adjusted to keep up with inflation, the current payment would exceed \$950 per month.

48. In determining adoption assistance payment rates, HDHS is required to consider the circumstances of the adopting parents and the needs of the child being adopted. However, adoption assistance payments are capped at a maximum level set by the foster care maintenance rate. They can never exceed the inadequate amount paid to foster parents. Thus HDHS’s failure to set adequate foster care maintenance rates prevents full and fair consideration of the needs of adoptive parents and children, as required by law.

49. Permanency assistance payment rates are similarly based on an assessment of the care and supervision required by the child. However, they can never exceed the inadequate foster care maintenance payment rates. Thus HDHS’s failure to set adequate foster care maintenance rates prevents full and fair consideration of the children’s needs, as required by law.

50. Despite the fact that HDHS depends on foster families to serve as the primary source of care for these children, the agency has shown little interest in abiding by the law and covering the costs of basic care for those children for

which it is responsible. Bills to increase the monthly maintenance payment have failed in the Hawai`i Legislature during each of the past three bienniums. Until the 2013 session, HDHS opposed increased payments; in 2013, HDHS requested the Legislature to defer any increase because HDHS allegedly needed time to “assess the feasibility” of an adjustment, even though this problem has persisted for years and the rate has not been raised since 1990. The Legislature acceded to HDHS’s request.

51. During the 2014 legislative session, bills were introduced that would have increased the amount of the foster care maintenance payment, adoption assistance payment, and permanency assistance payment. None of the proposals introduced during the session, however, address Defendant’s obligation to periodically adjust the foster care maintenance rate.

52. At the time of the filing of this First Amended Complaint, the bills that would have set new payment rates have not passed. Instead, the legislature made an additional appropriation intended to provide for an increase in the payments. But the inadequate \$529 basic payment remains in place, and the amount appropriated for increased payments to caregivers in the future is insufficient, on its own, to bring the payments to an appropriate level. Further, no steps have been taken to address Defendant’s obligation to periodically adjust the foster care maintenance rates. Without a clear rate-setting methodology, there is

no way to ensure that HDHS will consider the actual cost of the items required under Title IV-E in determining foster care maintenance payments or that HDHS will adjust the payment rates to ensure continued compliance.

**FIRST CLAIM FOR RELIEF: FAILURE TO COMPLY
WITH THE CHILD WELFARE ACT**

53. Plaintiffs incorporate Paragraphs 1-52 as though fully set forth herein.

54. Defendant has violated, and is continuing to violate, the Child Welfare Act by failing to employ a methodology for determining and updating foster care maintenance rates that takes into account statutorily prescribed criteria, thereby depriving Plaintiffs, the members of the class and subclasses they represent, and the children they care for their rights under color of state law in violation of 42 U.S.C. § 1983.

55. This failure has resulted in inadequate foster care maintenance payments, in further violation of the Child Welfare Act, and inadequate adoption assistance and permanency assistance payments, thereby depriving Plaintiffs, the members of the class and subclasses they represent, and the foster children they care for their rights under color of state law in violation of 42 U.S.C. § 1983.

56. Plaintiffs and the members of the class and subclasses they represent have suffered injury that is irreparable in nature as the proximate result of Defendant's failure to establish lawful foster care maintenance payments in a

manner that complies with the Child Welfare Act. There is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all persons similarly situated, respectfully request that this Court:

- a. Assume jurisdiction over this action;
- b. Declare that Defendant is violating the Child Welfare Act by failing to pay amounts sufficient to cover the costs of (and the costs of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, and reasonable travel costs that are incurred by licensed foster parents in accordance with federal and state laws and regulations and by failing to employ a methodology for determining and updating foster care maintenance rates that takes into account statutorily prescribed criteria;
- c. Enjoin Defendant temporarily and permanently from failing to pay foster care maintenance payments that satisfy the requirements of the Child Welfare Act;
- d. Order Defendant to forthwith prepare and implement a payment system that complies with the Child Welfare Act by paying licensed foster parents the costs of (and the costs of providing) the items specified in Section 675(4)(A) of the Child Welfare Act, such as

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, in an amount subject to proof, and by adjusting that amount each year;

- e. Order Defendant to forthwith base adoption assistance payments and permanency payments on foster care maintenance payments prepared and implemented in accordance with Prayer ¶d, above;
- f. Award Plaintiffs the full costs of this action and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and other applicable laws; and
- g. Order such other relief as the court may deem just and proper.

DATED: Honolulu, Hawai`i, April 30, 2014.

/s/ Claire Wong Black

VICTOR GEMINIANI
GAVIN THORNTON
PAUL ALSTON
J. BLAINE ROGERS
CLAIRE WONG BLACK
ALAN COPE JOHNSTON
JOSEPH K. KANADA

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused a true and correct copy of the foregoing document to be served on the following persons by hand-delivery, electronic CM/ECF filing or U.S. mail, postage prepaid (as indicated below) to their respective addresses:

	HAND- DELIVERED	CM/ECF FILING	MAILED
DAVID M. LOUIE, ESQ.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
CARON M. INAGAKI, ESQ.			
JOHN F. MOLAY, ESQ. <i><u>John.F.Molay@hawaii.gov</u></i>			
DONNA H. KALAMA, ESQ. <i><u>Donna.H.Kalama@hawaii.gov</u></i>			
DANA A. BARBATA, ESQ. <i><u>Dana.A.Barbata@hawaii.gov</u></i> Dept. of the Attorney General 425 Queen Street Honolulu, HI 96813 Attorneys for Defendant PATRICIA MCMANAMAN, in her capacity as the Director of the Hawai`i Department of Human Services			

DATED: Honolulu, Hawai`i, April 30, 2015.

/s/ Claire Wong Black
VICTOR GEMINIANI
GAVIN THORNTON
PAUL ALSTON
J. BLAINE ROGERS
CLAIRE WONG BLACK
ALAN COPE JOHNSTON
JOSEPH K. KANADA
Attorneys for Plaintiffs