

*v. lek*  
ORIGINAL

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

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

DEC 03 2013

at 3 o'clock and 15 min. P M.  
SUE BEITIA, CLERK

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](mailto:palston@afhi.com)  
[brogers@ahfi.com](mailto:brogers@ahfi.com)  
[cblack@ahfi.com](mailto:cblack@ahfi.com)

CV13 00663 LEK KSC

ALAN COPE JOHNSTON Pending *pro hac vice* application  
BRITTANY DEPUY Pending *pro hac vice* application  
MORRISON & FOERSTER LLP  
755 Page Mill Road  
Palo Alto, California 94304  
Telephone: 650-813-5600  
Facsimile: 650-494-0792  
Email: [acjohnston@mofo.com](mailto:acjohnston@mofo.com)  
[bdepuy@mofo.com](mailto:bdepuy@mofo.com)

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

Plaintiff,

vs.

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

Defendant.

Case No.

**CV 13 00663 LEK KSC**

Civil Action  
Class Action

**COMPLAINT FOR  
DECLARATORY JUDGMENT  
AND PERMANENT INJUNCTIVE  
RELIEF; SUMMONS**

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

**INTRODUCTION**

1. This is a class action for declaratory and injunctive relief brought on behalf of licensed foster parents 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. Plaintiff RAYNETTE NALANI AH CHONG has provided foster care services for over 100 children since the mid-1990s. She has not received

payments adequate to cover the costs of providing care to those foster children. She has been asked to, and desires to, continue providing care and comfort for foster children, but she wants to be compensated properly for the cost of providing their basic needs, as required by federal law.

3. Ms. Ah Chong seeks an injunction prohibiting Defendant from continuing to violate the rights of foster parents under The Child Welfare Act, Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679(b) (the “Child Welfare Act”) by failing to make foster care maintenance payments adequate to cover the costs of foster care.

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

6. This action seeks to prevent further violation of federal law by compelling the Defendant to ensure that adequate care payments are provided to foster

parents. Without that relief, foster children will be deprived of adequate support and foster parents 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**

7. Plaintiff RAYNETTE NALANI AH CHONG is a long-time licensed foster care provider.

8. Defendant PATRICIA McMANAMAN is the Director of the Hawai'i Department of Human Services ("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**

9. Ms. Ah Chong brings this action on behalf of herself and all those individuals similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure.

10. Ms. Ah Chong represents all licensed foster care providers in Hawai'i who shelter foster children entitled to benefits under the Child Welfare Act.

11. Ms. Ah Chong and her counsel will adequately represent the class.



12. The class is so numerous that joinder of all members is impractical. There are hundreds of licensed foster care providers being denied compensation as required by law.

13. 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.

14. Plaintiff's claims are typical of the claims of the members of the proposed class in that she has been denied adequate maintenance payments for the foster care services provided to the Defendant. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff intends to prosecute this action vigorously in order to secure remedies for the entire class. In addition, the putative class is represented by counsel who are experienced in federal civil rights litigation and class actions.

15. 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**

16. Plaintiff brings this civil action under 42 U.S.C. § 1983 and seeks 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.

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

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

### **RIPENESS**

19. There is currently an actual controversy between Plaintiff and Defendant that is ripe for adjudication as to whether the basic foster parent

maintenance payment rates fail to comply with federal law in setting rates for foster care maintenance payments.

### STATUTORY FRAMEWORK

20. 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.

21. 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.

22. 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 Plaintiff in this case.

23. 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.

24. 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).

25. 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).

26. 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 Plaintiff. 42 U.S.C. §§ 671(a)(2), 672(b)(1), 675(4); 45 C.F.R. § 1356.21(a).

27. 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).

### FACTS

28. HDHS currently pays foster care families maintenance of \$529 per month per child, regardless of age. This rate has remained unchanged since 1990.

29. 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.

30. 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.<sup>1</sup> 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 parent maintenance payment.

31. 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.<sup>2</sup> Since there was 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 child maintenance payments are grossly inadequate:

---

<sup>1</sup> 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>.

<sup>2</sup> 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](http://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 <sup>1</sup>			Foster Care MARCs <sup>2</sup>			To hit the Foster Care MARC, current rates must be increased by: <sup>3</sup>		
				Note: The Foster Care MARC does not include travel and child care expenses. Foster parents should be reimbursed for their actual expenses for these activities, in addition to the Foster Care MARC.					
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%

32. Both the 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.

33. 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.

34. The low payment has 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 (describing 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 online at [http://www.staradvertiser.com/news/20110102\\_Foster\\_families\\_in\\_decline.html](http://www.staradvertiser.com/news/20110102_Foster_families_in_decline.html).



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

36. 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.

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

37. Plaintiff incorporates Paragraphs 1-36 as though fully set forth herein.

38. Defendant has violated, and is continuing to violate, the Child Welfare Act by failing to pay adequate foster care maintenance payments, thereby depriving Plaintiff, the members of the class she represents and the foster children they care for their rights under color of state law in violation of 42 U.S.C. § 1983.

39. Plaintiff and the members of the class she represents 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, Plaintiff, individually and on behalf of all persons similarly situated, respectfully requests 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;
- 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) 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. Award Plaintiff the full costs of this action and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and other applicable laws; and
- f. Order such other relief as the court may deem just and proper.

DATED: Honolulu, Hawai'i, December 3, 2013.



VICTOR GEMINIANI  
GAVIN THORNTON  
PAUL ALSTON  
J. BLAINE ROGERS  
CLAIRE WONG BLACK  
ALAN COPE JOHNSTON  
BRITTANY DEPUY

Attorneys for Plaintiff