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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

Sep 16 2011

ALAN CARLSON, Clerk of the Court
by E. Veloz

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE**
9 **CIVIL COMPLEX CENTER**

10 RAELYN STOKES, an individual; MARCUS
11 STOKES, an individual; T.S., a minor, by and
through her guardian ad litem;

12 Plaintiffs,

13 vs.

14 COUNTY OF ORANGE; ORANGE
15 COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES; SOCIAL
16 WORKER SUNDAY PETRIE, in both her
official capacity and individually; SOCIAL
17 WORKER SUPERVISOR JAMES
WALDRON, in both his official capacity and
18 individually; INGRID HARITA, in her official
capacity as Director of the Orange County
19 Social Services Agency; SANDRA MURRAY,
M.D. in her official capacity as Child Abuse
20 Services Team Medical Director and as an
individual; SOCIAL WORKER SUSAN
21 AZADI, in both her official capacity and
individually; SOCIAL WORKER OSCAR R.
22 AGUIRRE, in his official capacity and as an
individual; SOCIAL WORKER JAKE
23 MICHEL, in his official capacity and as an
individual; SOCIAL WORKER SUSAN
24 HORN in her official capacity and as an
individual; CHILDREN'S HOSPITAL OF
25 ORANGE COUNTY; SUSPECTED CHILD
ABUSE AND NEGLECT TEAM; CHILD
26 ABUSE SERVICE TEAM; DAPHNE WONG,
M.D. in her official capacity and as an
individual; and DOES 1 through 50, inclusive,

27 Defendants.
28

Case No.: 30 - 2010 00351398
Judge: Hon. Nancy Wieben Stock
Department: CX 105

**REPLY REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF
PLAINTIFFS' JUDGMENT ON THE
PLEADINGS TO THE AMENDED
ANSWER FILED BY HOSPITAL
DEFENDANTS**

Date: September 23, 2011
Time: 9:00 a.m.

1 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL:**

2 Plaintiffs Marcus Stokes, Raelyn Stokes, and T.S. hereby request that this
3 Court take judicial notice of the following documents, pursuant to sections 450
4 through 460 of the California Evidence Code:

5 **Exhibit A:** United States Court of Appeals for the Ninth Circuit, *Circuit*
6 *Rules*, Rule 36-3. A true and correct copy of which is attached
7 hereto as **Exhibit A**.


8 **Exhibit B:** The full statutory text of 42 U.S.C. §5106a and the full
9 amendment history of 42 U.S.C. §5106a. A true and correct
10 copy of which is attached hereto as **Exhibit B**.

11 **Exhibit C:** Plaintiffs' Memorandum of Points and Authorities in Support
12 of Demurrer to the Amended Answer Filed by Hospital
13 Defendants - filed August 27, 2010. A true and correct copy of
14 which is attached hereto as **Exhibit C**.

15 I declare the foregoing is true and correct under penalty of perjury according
16 to the laws of the United States. Executed this September 16, 2011, in San Diego,
17 California.

18
19 Dated: September 16, 2011

THE LAW OFFICES OF SHAWN A. MCMILLAN, APC

20
21 

22 _____
Shawn A. McMillan, Esq.
Stephen D. Daner, Esq.
Attorneys for Plaintiff

EXHIBIT A

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*** CURRENT THROUGH CHANGES RECEIVED JUNE 29, 2011 ***

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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USCS Ct App 9th Cir, Circuit R 36-3

Review Court Orders which may amend this Rule.

Circuit Rule 36-3. Citation of Unpublished Dispositions or Orders

(a) Not Precedent: Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(b) Citation of Unpublished Dispositions and Orders Issued on or after January 1, 2007: Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with *Fed. R. App. P. 32.1*.

(c) Citation of Unpublished Dispositions and Orders Issued before January 1, 2007: Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(ii) They may be cited to this Court or by any other court in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

EXHIBIT B

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*** CURRENT THROUGH PL 112-28, APPROVED 8/12/2011 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 67. CHILD ABUSE PREVENTION AND TREATMENT AND ADOPTION REFORM
GENERAL PROGRAM

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42 USCS § 5106a

§ 5106a. Grants to States for child abuse or neglect prevention and treatment programs

(a) Development and operation grants. The Secretary shall make grants to the States, from allotments made under subsection (f) for each State that applies for a grant under this section, for purposes of assisting the States in improving the child protective services system of each such State in--

- (1) the intake, assessment, screening, and investigation of reports of child abuse or neglect;
- (2) (A) creating and improving the use of multidisciplinary teams and interagency, intra-agency, interstate, and intrastate protocols to enhance investigations; and
(B) improving legal preparation and representation, including--
 - (i) procedures for appealing and responding to appeals of substantiated reports of child abuse or neglect; and
 - (ii) provisions for the appointment of an individual appointed to represent a child in judicial proceedings;
- (3) case management, including ongoing case monitoring, and delivery of services and treatment provided to children and their families;
- (4) enhancing the general child protective system by developing, improving, and implementing risk and safety assessment tools and protocols, including the use of differential response;
- (5) developing and updating systems of technology that support the program and track reports of child abuse and neglect from intake through final disposition and allow interstate and intrastate information exchange;
- (6) developing, strengthening, and facilitating training including--
 - (A) training regarding research-based strategies, including the use of differential response, to promote collaboration with the families;
 - (B) training regarding the legal duties of such individuals;
 - (C) personal safety training for case workers; and
 - (D) training in early childhood, child, and adolescent development;
- (7) improving the skills, qualifications, and availability of individuals providing services to children and families, and the supervisors of such individuals, through the child protection system, including improvements in the recruitment and retention of caseworkers;
- (8) developing, facilitating the use of, and implementing research-based strategies and training protocols for individuals mandated to report child abuse and neglect;
- (9) developing, implementing, or operating programs to assist in obtaining or coordinating necessary services for families of disabled infants with life-threatening conditions, including--
 - (A) existing social and health services;
 - (B) financial assistance;
 - (C) services necessary to facilitate adoptive placement of any such infants who have been relinquished for adoption;

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and

- (D) the use of differential response in preventing child abuse and neglect;
- (10) developing and delivering information to improve public education relating to the role and responsibilities of the child protection system and the nature and basis for reporting suspected incidents of child abuse and neglect, including the use of differential response;
- (11) developing and enhancing the capacity of community-based programs to integrate shared leadership strategies between parents and professionals to prevent and treat child abuse and neglect at the neighborhood level;
- (12) supporting and enhancing interagency collaboration between the child protection system and the juvenile justice system for improved delivery of services and treatment, including methods for continuity of treatment plan and services as children transition between systems;
- (13) supporting and enhancing interagency collaboration among public health agencies, agencies in the child protective service system, and agencies carrying out private community-based programs--
 - (A) to provide child abuse and neglect prevention and treatment services (including linkages with education systems), and the use of differential response; and
 - (B) to address the health needs, including mental health needs, of children identified as victims of child abuse or neglect[;], including supporting prompt, comprehensive health and developmental evaluations for children who are the subject of substantiated child maltreatment reports; or
- (14) developing and implementing procedures for collaboration among child protective services, domestic violence services, and other agencies in--
 - (A) investigations, interventions, and the delivery of services and treatment provided to children and families, including the use of differential response, where appropriate; and
 - (B) the provision of services that assist children exposed to domestic violence, and that also support the caregiving role of their nonabusing parents.

(b) Eligibility requirements.

- (1) State plan.
 - (A) In general. To be eligible to receive a grant under this section, a State shall submit to the Secretary a State plan that specifies the areas of the child protective services system described in subsection (a) that the State will address with amounts received under the grant.
 - (B) Duration of plan. Each State plan shall--
 - (i) remain in effect for the duration of the State's participation under this section; and
 - (ii) be periodically reviewed and revised as necessary by the State to reflect changes in the State's strategies and programs under this section.
 - (C) Additional information. The State shall provide notice to the Secretary--
 - (i) of any substantive changes, including any change to State law or regulations, relating to the prevention of child abuse and neglect that may affect the eligibility of the State under this section; and
 - (ii) of any significant changes in how funds provided under this section are used to support activities described in this section, which may differ from the activities described in the current State application.
- (2) Contents. A State plan submitted under paragraph (1) shall contain a description of the activities that the State will carry out using amounts received under the grant to achieve the objectives of this *title* [42 USCS §§ 5101 et seq.], including--
 - (A) an assurance that the State plan, to the maximum extent practicable, is coordinated with the State plan under part B of title IV of the Social Security Act (42 U.S.C. 621 et seq.) relating to child welfare services and family preservation and family support services;
 - (B) an assurance in the form of a certification by the Governor of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes--
 - (i) provisions or procedures for an individual to report known and suspected instances of child abuse and neglect, including a State law for mandatory reporting by individuals required to report such instances;
 - (ii) policies and procedures (including appropriate referrals to child protection service systems and for other

appropriate services) to address the needs of infants born with and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants, except that such notification shall not be construed to--

- (I) establish a definition under Federal law of what constitutes child abuse or neglect; or
- (II) require prosecution for any illegal action;
- (iii) the development of a plan of safe care for the infant born and identified as being affected by illegal substance abuse or withdrawal symptoms, or a Fetal Alcohol Spectrum Disorder;
- (iv) procedures for the immediate screening, risk and safety assessment, and prompt investigation of such reports;
- (v) triage procedures, including the use of differential response, for the appropriate referral of a child not at risk of imminent harm to a community organization or voluntary preventive service;
- (vi) procedures for immediate steps to be taken to ensure and protect the safety of a victim of child abuse or neglect and of any other child under the same care who may also be in danger of child abuse or neglect and ensuring their placement in a safe environment;
- (vii) provisions for immunity from prosecution under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect;
- (viii) methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including requirements ensuring that reports and records made and maintained pursuant to the purposes of this Act [42 USCS §§ 5101 et seq.] shall only be made available to--
 - (I) individuals who are the subject of the report;
 - (II) Federal, State, or local government entities, or any agent of such entities, as described in clause (ix);
 - (III) child abuse citizen review panels;
 - (IV) child fatality review panels;
 - (V) a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury; and
 - (VI) other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose;
- (ix) provisions to require a State to disclose confidential information to any Federal, State, or local government entity, or any agent of such entity, that has a need for such information in order to carry out its responsibilities under law to protect children from child abuse and neglect;
- (x) provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality;
- (xi) the cooperation of State law enforcement officials, court of competent jurisdiction, and appropriate State agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse and neglect;
- (xii) provisions requiring, and procedures in place that facilitate the prompt expungement of any records that are accessible to the general public or are used for purposes of employment or other background checks in cases determined to be unsubstantiated or false, except that nothing in this section shall prevent State child protective services agencies from keeping information on unsubstantiated reports in their casework files to assist in future risk and safety assessment;
- (xiii) provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings--
 - (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and
 - (II) to make recommendations to the court concerning the best interests of the child;
- (xiv) the establishment of citizen review panels in accordance with subsection (c);
- (xv) provisions, procedures, and mechanisms--

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(I) for the expedited termination of parental rights in the case of any infant determined to be abandoned under State law; and

(II) by which individuals who disagree with an official finding of child abuse or neglect can appeal such finding; (xvi) provisions, procedures, and mechanisms that assure that the State does not require reunification of a surviving child with a parent who has been found by a court of competent jurisdiction--

(I) to have committed murder (which would have been an offense under *section 1111(a) of title 18, United States Code*, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of such parent;

(II) to have committed voluntary manslaughter (which would have been an offense under *section 1112(a) of title 18, United States Code*, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of such parent;

(III) to have aided or abetted, attempted, conspired, or solicited to commit such murder or voluntary manslaughter;

(IV) to have committed a felony assault that results in the serious bodily injury to the surviving child or another child of such parent;

(V) to have committed sexual abuse against the surviving child or another child of such parent; or

(VI) to be required to register with a sex offender registry under section 113(a) of the Adam Walsh Child Protection and Safety Act of 2006 (*42 U.S.C. 16913(a)*);

(xvii) an assurance that, upon the implementation by the State of the provisions, procedures, and mechanisms under clause (xvi), conviction of any one of the felonies listed in clause (xvi) constitute grounds under State law for the termination of parental rights of the convicted parent as to the surviving children (although case-by-case determinations of whether or not to seek termination of parental rights shall be within the sole discretion of the State);

(xviii) provisions and procedures to require that a representative of the child protective services agency shall, at the initial time of contact with the individual subject to a child abuse or neglect investigation, advise the individual of the complaints or allegations made against the individual, in a manner that is consistent with laws protecting the rights of the informant;

(xix) provisions addressing the training of representatives of the child protective services system regarding the legal duties of the representatives, which may consist of various methods of informing such representatives of such duties, in order to protect the legal rights and safety of children and families from the initial time of contact during investigation through treatment;

(xx) provisions and procedures for improving the training, retention, and supervision of caseworkers;

(xxi) provisions and procedures for referral of a child under the age of 3 who is involved in a substantiated case of child abuse or neglect to early intervention services funded under part C of the Individuals with Disabilities Education Act (*20 U.S.C. 1431 et seq.*);

(xxii) provisions and procedures for requiring criminal background record checks that meet the requirements of section 471(a)(20) of the Social Security Act (*42 U.S.C. 671(a)(20)*) for prospective foster and adoptive parents and other adult relatives and non-relatives residing in the household; and

(xxiii) provisions for systems of technology that support the State child protective service system described in subsection (a) and track reports of child abuse and neglect from intake through final disposition;

(C) an assurance that the State has in place procedures for responding to the reporting of medical neglect (including instances of withholding of medically indicated treatment from infants with disabilities who have life-threatening conditions), procedures or programs, or both (within the State child protective services system), to provide for--

(i) coordination and consultation with individuals designated by and within appropriate health-care facilities;

(ii) prompt notification by individuals designated by and within appropriate health-care facilities of cases of suspected medical neglect (including instances of withholding of medically indicated treatment from infants with disabilities who have life-threatening conditions); and

(iii) authority, under State law, for the State child protective services system to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, as may be necessary to prevent the withholding of medically indicated treatment from infants with disabilities who have life-threatening conditions;

(D) a description of--

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- (i) the services to be provided under the grant to individuals, families, or communities, either directly or through referrals aimed at preventing the occurrence of child abuse and neglect;
 - (ii) the training to be provided under the grant to support direct line and supervisory personnel in report taking, screening, assessment, decision making, and referral for investigating suspected instances of child abuse and neglect;
 - (iii) the training to be provided under the grant for individuals who are required to report suspected cases of child abuse and neglect;
 - (iv) policies and procedures encouraging the appropriate involvement of families in decisionmaking pertaining to children who experienced child abuse or neglect;
 - (v) policies and procedures that promote and enhance appropriate collaboration among child protective service agencies, domestic violence service agencies, substance abuse treatment agencies, and other agencies in investigations, interventions, and the delivery of services and treatment provided to children and families affected by child abuse or neglect, including children exposed to domestic violence, where appropriate; and
 - (vi) policies and procedures regarding the use of differential response, as applicable;
- (E) an assurance or certification that the programs or projects relating to child abuse and neglect carried out under part B of title IV of the Social Security Act (*42 U.S.C. 621 et seq.*) comply with the requirements set forth in paragraph (1) and this paragraph;
- (F) an assurance or certification that programs and training conducted under this title address the unique needs of unaccompanied homeless youth, including access to enrollment and support services and that such youth are eligible for under parts B and E of title IV of the Social Security Act (*42 U.S.C. 621 et seq., 670 et seq.*) and meet the requirements of the McKinney-Vento Homeless Assistance Act (*42 U.S.C. 11301 et seq.*); and
- (G) an assurance that the State, in developing the State plan described in paragraph (1), has collaborated with community-based prevention agencies and with families affected by child abuse or neglect.

Nothing in subparagraph (B) shall be construed to limit the State's flexibility to determine State policies relating to public access to court proceedings to determine child abuse and neglect, except that such policies shall, at a minimum, ensure the safety and well-being of the child, parents, and families.

(3) Limitation. With regard to clauses (vi) and (vii) of paragraph (2)(B), nothing in this section shall be construed as restricting the ability of a State to refuse to disclose identifying information concerning the individual initiating a report or complaint alleging suspected instances of child abuse or neglect, except that the State may not refuse such a disclosure where a court orders such disclosure after such court has reviewed, in camera, the record of the State related to the report or complaint and has found it has reason to believe that the reporter knowingly made a false report.

(4) Definitions. For purposes of this subsection--

(A) the term "near fatality" means an act that, as certified by a physician, places the child in serious or critical condition; and

(B) the term "serious bodily injury" means bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(c) Citizen review panels.

(1) Establishment.

(A) In general. Except as provided in subparagraph (B), each State to which a grant is made under this section shall establish not less than 3 citizen review panels.

(B) Exceptions.

(i) Establishment of panels by states receiving minimum allotment. A State that receives the minimum allotment of \$ 175,000 under section 203(b)(1)(A) [*42 USCS § 5116b(b)(1)(A)*] for a fiscal year shall establish not less than 1 citizen review panel.

(ii) Designation of existing entities. A State may designate as panels for purposes of this subsection one or more existing entities established under State or Federal law, such as child fatality panels or foster care review panels, if such entities have the capacity to satisfy the requirements of paragraph (4) and the State ensures that such entities will satisfy such requirements.

(2) Membership. Each panel established pursuant to paragraph (1) shall be composed of volunteer members who are

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broadly representative of the community in which such panel is established, including members who have expertise in the prevention and treatment of child abuse and neglect, and may include adult former victims of child abuse or neglect.

(3) Meetings. Each panel established pursuant to paragraph (1) shall meet not less than once every 3 months.

(4) Functions.

(A) In general. Each panel established pursuant to paragraph (1) shall, by examining the policies, procedures, and practices of State and local agencies and where appropriate, specific cases, evaluate the extent to which State and local child protection system agencies are effectively discharging their child protection responsibilities in accordance with--

(i) the State plan under subsection (b);

(ii) the child protection standards set forth in subsection (b); and

(iii) any other criteria that the panel considers important to ensure the protection of children, including--

(I) a review of the extent to which the State and local child protective services system is coordinated with the foster care and adoption programs established under part E of title IV of the Social Security Act (42 U.S.C. 670 et seq.); and

(II) a review of child fatalities and near fatalities (as defined in subsection (b)(4)).

(B) Confidentiality.

(i) In general. The members and staff of a panel established under paragraph (1)--

(I) shall not disclose to any person or government official any identifying information about any specific child protection case with respect to which the panel is provided information; and

(II) shall not make public other information unless authorized by State statute.

(ii) Civil sanctions. Each State that establishes a panel pursuant to paragraph (1) shall establish civil sanctions for a violation of clause (i).

(C) Public outreach. Each panel shall provide for public outreach and comment in order to assess the impact of current procedures and practices upon children and families in the community and in order to meet its obligations under subparagraph (A).

(5) State assistance. Each State that establishes a panel pursuant to paragraph (1)--

(A) shall provide the panel access to information on cases that the panel desires to review if such information is necessary for the panel to carry out its functions under paragraph (4); and

(B) shall provide the panel, upon its request, staff assistance for the performance of the duties of the panel.

(6) Reports. Each panel established under paragraph (1) shall prepare and make available to the State and the public, on an annual basis, a report containing a summary of the activities of the panel and recommendations to improve the child protection services system at the State and local levels. Not later than 6 months after the date on which a report is submitted by the panel to the State, the appropriate State agency shall submit a written response to State and local child protection systems and the citizen review panel that describes whether or how the State will incorporate the recommendations of such panel (where appropriate) to make measurable progress in improving the State and local child protective system.

(d) Annual State data reports. Each State to which a grant is made under this section shall annually work with the Secretary to provide, to the maximum extent practicable, a report that includes the following:

(1) The number of children who were reported to the State during the year as victims of child abuse or neglect.

(2) Of the number of children described in paragraph (1), the number with respect to whom such reports were--

(A) substantiated;

(B) unsubstantiated; or

(C) determined to be false.

(3) Of the number of children described in paragraph (2)--

(A) the number that did not receive services during the year under the State program funded under this section or an equivalent State program;

(B) the number that received services during the year under the State program funded under this section or an equivalent State program; and

(C) the number that were removed from their families during the year by disposition of the case.

(4) The number of families that received preventive services, including use of differential response, from the State

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during the year.

- (5) The number of deaths in the State during the year resulting from child abuse or neglect.
- (6) Of the number of children described in paragraph (5), the number of such children who were in foster care.
- (7) (A) The number of child protective service personnel responsible for the--
 - (i) intake of reports filed in the previous year;
 - (ii) screening of such reports;
 - (iii) assessment of such reports; and
 - (iv) investigation of such reports.
 (B) The average caseload for the workers described in subparagraph (A).
- (8) The agency response time with respect to each such report with respect to initial investigation of reports of child abuse or neglect.
- (9) The response time with respect to the provision of services to families and children where an allegation of child abuse or neglect has been made.
- (10) For child protective service personnel responsible for intake, screening, assessment, and investigation of child abuse and neglect reports in the State--
 - (A) information on the education, qualifications, and training requirements established by the State for child protective service professionals, including for entry and advancement in the profession, including advancement to supervisory positions;
 - (B) data on the education, qualifications, and training of such personnel;
 - (C) demographic information of the child protective service personnel; and
 - (D) information on caseload or workload requirements for such personnel, including requirements for average number and maximum number of cases per child protective service worker and supervisor.
- (11) The number of children reunited with their families or receiving family preservation services that, within five years, result in subsequent substantiated reports of child abuse or neglect, including the death of the child.
- (12) The number of children for whom individuals were appointed by the court to represent the best interests of such children and the average number of out of court contacts between such individuals and children.
- (13) The annual report containing the summary of the activities of the citizen review panels of the State required by subsection (c)(6).
- (14) The number of children under the care of the State child protection system who are transferred into the custody of the State juvenile justice system.
- (15) The number of children referred to a child protective services system under subsection (b)(2)(B)(ii).
- (16) The number of children determined to be eligible for referral, and the number of children referred, under subsection (b)(2)(B)(xxi), to agencies providing early intervention services under part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431 et seq.).

(e) Annual report by the Secretary. Within 6 months after receiving the State reports under subsection (d), the Secretary shall prepare a report based on information provided by the States for the fiscal year under such subsection and shall make the report and such information available to the Congress and the national clearinghouse for information relating to child abuse and neglect.

(f) Allotments.

- (1) Definitions. In this subsection:
 - (A) Fiscal year 2009 grant funds. The term "fiscal year 2009 grant funds" means the amount appropriated under section 112 [42 USCS § 5106h] for fiscal year 2009, and not reserved under section 112(a)(2) [42 USCS § 5106h(a)(2)].
 - (B) Grant funds. The term "grant funds" means the amount appropriated under section 112 [42 USCS § 5106h] for a fiscal year and not reserved under section 112(a)(2) [42 USCS § 5106h(a)(2)].
 - (C) State. The term "State" means each of the several States, the District of Columbia, and the Commonwealth of Puerto Rico.
 - (D) Territory. The term "territory" means Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(2) In general. Except as otherwise provided in this section, the Secretary shall make allotments to each State and territory that applies for a grant under this section in an amount equal to the sum of--

(A) \$ 50,000; and

(B) an amount that bears the same relationship to any grant funds remaining after all such States and territories have received \$ 50,000, as the number of children under the age of 18 in the State or territory bears to the number of such children in all States and territories that apply for such a grant.

(3) Allotments for decreased appropriation years. In the case where the grant funds for a fiscal year are less than the fiscal year 2009 grant funds, the Secretary shall ratably reduce each of the allotments under paragraph (2) for such fiscal year.

(4) Allotments for increased appropriation years.

(A) Minimum allotments to States for increased appropriations years. In any fiscal year for which the grant funds exceed the fiscal year 2009 grant funds by more than \$ 1,000,000, the Secretary shall adjust the allotments under paragraph (2), as necessary, such that no State that applies for a grant under this section receives an allotment in an amount that is less than--

(i) \$ 100,000, for a fiscal year in which the grant funds exceed the fiscal year 2009 grant funds by more than \$ 1,000,000 but less than \$ 2,000,000;

(ii) \$ 125,000, for a fiscal year in which the grant funds exceed the fiscal year 2009 grant funds by at least \$ 2,000,000 but less than \$ 3,000,000; and

(iii) \$ 150,000, for a fiscal year in which the grant funds exceed the fiscal year 2009 grant funds by at least \$ 3,000,000.

(B) Allotment adjustment. In the case of a fiscal year for which subparagraph (A) applies and the grant funds are insufficient to satisfy the requirements of such subparagraph (A), paragraph (2), and paragraph (5), the Secretary shall, subject to paragraph (5), ratably reduce the allotment of each State for which the allotment under paragraph (2) is an amount that exceeds the applicable minimum under subparagraph (A), as necessary to ensure that each State receives the applicable minimum allotment under subparagraph (A).

(5) Hold harmless. Notwithstanding paragraphs (2) and (4), except as provided in paragraph (3), no State or territory shall receive a grant under this section in an amount that is less than the amount such State or territory received under this section for fiscal year 2009.

HISTORY:

(Jan. 31, 1974, P.L. 93-247, Title I, § 106 [107][8], as added April 25, 1988, P.L. 100-294, Title I, § 101, 102 Stat. 103; Oct. 25, 1989, P.L. 101-126, § 3(a)(1), (2), 103 Stat. 764; May 28, 1992, P.L. 102-295, Title I, Subtitle B, § 114(a)-(c), 106 Stat. 192; Nov. 4, 1992, P.L. 102-586, § 9(b), 106 Stat. 5037; Oct. 3, 1996, P.L. 104-235, Title I, Subtitle A, §§ 107, 113(a)(1)(A), 110 Stat. 3071, 3079.)

(As amended June 25, 2003, P.L. 108-36, Title I, Subtitle A, § 114(a)-(d), 117 Stat. 808; Dec. 20, 2010, P.L. 111-320, Title I, Subtitle A, § 115, 124 Stat. 3467.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The semicolon in subsec. (a)(13) has been enclosed in brackets to indicate the probable intent of Congress to delete it.

Amendments:

1992. Act May 28, 1992 (effective on 10/1/93, or on October 1 of the first fiscal year for which \$ 40,000,000 or more is made available under 42 USCS § 5106h(a)(2)(B)(ii), whichever occurs first, as provided by § 114(d) of such Act, which

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appears as a note to this section), substituted subsec. (a) for one which read: "(a) Development and operation grants. The Secretary, through the Center, is authorized to make grants to the States for purposes of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs."; redesignated subsecs. (c)-(f) as subsecs. (d)-(g), respectively; and added a new subsec. (c).

Such Act further, in subsec. (d)(1), in the introductory matter, substituted "subsection (a)" for "this subsection" wherever appearing.

Act Nov. 4, 1992 substituted subsec. (b)(4) for one which read: "provide for methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians;".

1996. Act Oct. 3, 1996, substituted this section for one which read:

"Grants to States for child abuse and neglect prevention and treatment programs

"(a) Development and operation grants. The Secretary, acting through the Center, shall make grants to the States, based on the population of children under the age of 18 in each State that applies for a grant under this section, for purposes of assisting the States in improving the child protective service system of each such State in--

"(1) the intake and screening of reports of abuse and neglect through the improvement of the receipt of information, decisionmaking, public awareness, and training of staff;

"(2)

(A) investigating such reports through improving response time, decisionmaking, referral to services, and training of staff;

(B) creating and improving the use of multidisciplinary teams and interagency protocols to enhance investigations; and

(C) improving legal preparation and representation;

(3) case management and delivery services provided to families through the improvement of response time in service provision, improving the training of staff, and increasing the numbers of families to be served;

(4) enhancing the general child protective system by improving assessment tools, automation systems that support the program, information referral systems, and the overall training of staff to meet minimum competencies; or

(5) developing, strengthening, and carrying out child abuse and neglect prevention, treatment, and research programs.

Not more than 15 percent of a grant under this subsection may be expended for carrying out paragraph (5). The preceding sentence does not apply to any program or activity authorized in any of paragraphs (1) through (4).

"(b) Eligibility requirements. In order for a State to qualify for a grant under subsection (a), such State shall--

"(1) have in effect a State law relating to child abuse and neglect, including--

(A) provisions for the reporting of known and suspected instances of child abuse and neglect; and

(B) provisions for immunity from prosecution under State and local laws for persons who report instances of child abuse or neglect for circumstances arising from such reporting;

"(2) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child and of any other child under the same care who may be in danger of abuse or neglect;

"(3) demonstrate that there are in effect throughout the State, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such--

(A) administrative procedures;

(B) personnel trained in child abuse and neglect prevention and treatment;

(C) training procedures;

(D) institutional and other facilities (public and private); and

(E) such related multidisciplinary programs and services,

as may be necessary or appropriate to ensure that the State will deal effectively with child abuse and neglect cases in the State;

"(4) provide for--

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"(A) methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including methods to ensure that disclosure (and redisclosure) of information concerning child abuse or neglect involving specific individuals is made only to persons or entities that the State determines have a need for such information directly related to purposes of this Act; and

"(B) requirements for the prompt disclosure of all relevant information to any Federal, State, or local governmental entity, or any agent of such entity, with a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect;

"(5) provide for the cooperation of law enforcement officials, courts of competent jurisdiction, and appropriate State agencies providing human services;

"(6) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings;

"(7) provide that the aggregate of support for programs or projects related to child abuse and neglect assisted by State funds shall not be reduced below the level provided during fiscal year 1973, and set forth policies and procedures designed to ensure that Federal funds made available under this Act for any fiscal year shall be so used as to supplement and, to the extent practicable, increase the level of State funds which would, in the absence of Federal funds, be available for such programs and projects;

"(8) provide for dissemination of information, including efforts to encourage more accurate reporting, to the general public with respect to the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat instances of child abuse and neglect;

"(9) to the extent feasible, ensure that parental organizations combating child abuse and neglect receive preferential treatment; and

"(10) have in place for the purpose of responding to the reporting of medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions), procedures or programs, or both (within the State child protective services system), to provide for--

"(A) coordination and consultation with individuals designated by and within appropriate health-care facilities;

"(B) prompt notification by individuals designated by and within appropriate health-care facilities of cases of suspected medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions); and

"(C) authority, under State law, for the State child protective service system to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, as may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions.

"(c) State program plan. To be eligible to receive a grant under this section, a State shall submit every four years a plan to the Secretary that specifies the child protective service system area or areas described in subsection (a) that the State intends to address with funds received under the grant. The plan shall describe the current system capacity of the State in the relevant area or areas from which to assess programs with grant funds and specify the manner in which funds from the State's programs will be used to make improvements. The plan required under this subsection shall contain, with respect to each area in which the State intends to use funds from the grant, the following information with respect to the State:

"(1) Intake and screening.

(A) Staffing. The number of child protective service workers responsible for the intake and screening of reports of abuse and neglect relative to the number of reports filed in the previous year.

"(B) Training. The types and frequency of pre-service and in-service training programs available to support direct line and supervisory personnel in report-taking, screening, decision-making, and referral for investigation.

"(C) Public education. An assessment of the State or local agency's public education program with respect to--

"(i) what is child abuse and neglect;

"(ii) who is obligated to report and who may choose to report; and

"(iii) how to report.

"(2) Investigation of reports.

(A) Response time. The number of reports of child abuse and neglect filed in the State in the previous year where appropriate, the agency response time to each with respect to initial investigation, the number of substantiated and

unsubstantiated reports, and where appropriate, the response time with respect to the provision of services.

"(B) Staffing. The number of child protective service workers responsible for the investigation of child abuse and neglect reports relative to the number of reports investigated in the previous year.

"(C) Interagency coordination. A description of the extent to which interagency coordination processes exist and are available Statewide, and whether protocols or formal policies governing interagency relationships exist in the following areas--

"(i) multidisciplinary investigation teams among child welfare and law enforcement agencies;

"(ii) interagency coordination for the prevention, intervention and treatment of child abuse and neglect among agencies responsible for child protective services, criminal justice, schools, health, mental health, and substance abuse; and

"(iii) special interagency child fatality review panels, including a listing of those agencies that are involved.

"(D) Training. The types and frequency of pre-service and in-service training programs available to support direct line and supervisory personnel in such areas as investigation, risk assessment, court preparation, and referral to and provision of services.

"(E) Legal representation. A description of the State agency's current capacity for legal representation, including the manner in which workers are prepared and trained for court preparation and attendance, including procedures for appealing substantiated reports of abuse and neglect.

"(3) Case management and delivery of ongoing family services. For children for whom a report of abuse and neglect has been substantiated and the children remain in their own homes and are not currently at risk of removal, the State shall assess the activities and the outcomes of the following services:

"(A) Response time. The number of cases opened for services as a result of investigation of child abuse and neglect reports filed in the previous year, including the response time with respect to the provision of services from the time of initial report and initial investigation.

"(B) Staffing. The number of child protective service workers responsible for providing services to children and their families in their own homes as a result of investigation of reports of child abuse and neglect.

"(C) Training. The types and frequency of pre-service and in-service training programs available to support direct line and supervisory personnel in such areas as risk assessment, court preparation, provision of services and determination of case disposition, including how such training is evaluated for effectiveness.

"(D) Interagency coordination. The extent to which treatment services for the child and other family members are coordinated with child welfare, social service, mental health, education, and other agencies.

"(4) General system enhancement.

(A) Automation. A description of the capacity of current automated systems for tracking reports of child abuse and neglect from intake through final disposition and how personnel are trained in the use of such system.

"(B) Assessment tools. A description of whether, how, and what risk assessment tools are used for screening reports of abuse and neglect, determining whether child abuse and neglect has occurred, and assessing the appropriate level of State agency protection and intervention, including the extent to which such tool is used statewide and how workers are trained in its use.

"(C) Information and referral. A description and assessment of the extent to which a State has in place--

"(i) information and referral systems, including their availability and ability to link families to various child welfare services such as homemakers, intensive family-based services, emergency caretakers, home health visitors, daycare and services outside the child welfare system such as housing, nutrition, health care, special education, income support, and emergency resource assistance; and

"(ii) efforts undertaken to disseminate to the public information concerning the problem of child abuse and neglect and the prevention and treatment programs and services available to combat instances of such abuse and neglect.

"(D) Staff capacity and competence. An assessment of basic and specialized training needs of all staff and current training provided staff. Assessment of the competencies of staff with respect to minimum knowledge in areas such as child development, cultural and ethnic diversity, functions and relationship of other systems to child protective services and in specific skills such as interviewing, assessment, and decisionmaking relative to the child and family, and the need for training consistent with such minimum competencies.

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"(5) Innovative approaches. A description of--

"(A) research and demonstration efforts for developing, strengthening, and carrying out child abuse and neglect prevention, treatment, and research programs, including the interagency efforts at the State level; and

"(B) the manner in which proposed research and development activities build on existing capacity in the programs being addressed.

"(d) Waivers.

(1) General rule. Subject to paragraph (3) of subsection (a), any State which does not qualify for assistance under subsection (a) may be granted a waiver of any requirement under paragraph (2) of subsection (a) --

"(A) for a period of not more than one year, if the Secretary makes a finding that such State is making a good faith effort to comply with any such requirement, and for a second one-year period if the Secretary makes a finding that such State is making substantial progress to achieve such compliance; or

"(B) for a nonrenewable period of not more than two years in the case of a State the legislature of which meets only biennially, if the Secretary makes a finding that such State is making a good faith effort to comply with such requirement.

"(2) Extension.

(A) Subject to paragraph (3) of this subsection, any State whose waiver under paragraph (1) expired as of the end of fiscal year 1986 may be granted an extension of such waiver, if the Secretary makes a finding that such State is making a good faith effort to comply with the requirements under subsection (b) of this section--

"(i) through the end of fiscal year 1988; or

"(ii) in the case of a State the legislature of which meets biennially, through the end of the fiscal year 1989 or the end of the next regularly scheduled session of such legislature, whichever is earlier.

"(B) This provision shall be effective retroactively to October 1, 1986.

"(3) Requirements under subsection (b)(10). No waiver under paragraph (1) or (2) may apply to any requirement under subsection (b)(10) of this section.

"(e) Reduction of funds in case of failure to obligate. If a State fails to obligate funds awarded under subsection (a) before the expiration of the 18-month period beginning on the date of such award, the next award made to such State under this section after the expiration of such period shall be reduced by an amount equal of the amount of such unobligated funds unless the Secretary determines that extraordinary reasons justify the failure to so obligate.

"(f) Restrictions relating to child welfare services. Programs or projects relating to child abuse and neglect assisted under part B of title IV of the Social Security Act shall comply with the requirements set forth in paragraphs (1)(A), (2), (4), (5), and (10) of subsection (b).

"(g) Compliance and education grants. The Secretary is authorized to make grants to the States for purposes of developing, implementing, or operating--

"(1) the procedures or programs required under subsection (b)(10);

"(2) information and education programs or training programs designed to improve the provision of services to disabled infants with life-threatening conditions for--

"(A) professional and paraprofessional personnel concerned with the welfare of disabled infants with life-threatening conditions, including personnel employed in child protective services programs and health-care facilities; and

"(B) the parents of such infants; and

"(3) programs to assist in obtaining or coordinating necessary services for families of disabled infants with life-threatening conditions, including--

"(A) existing social and health services;

"(B) financial assistance; and

"(C) services necessary to facilitate adoptive placement of any such infants who have been relinquished for adoption."

2003. Act June 25, 2003, in subsec. (a), in para. (3), inserted ", including ongoing case monitoring," and "and treatment", in para. (4), substituted "developing, improving, and implementing risk and safety assessment tools and

protocols" for "improving risk and safety assessment tools and protocols, automation systems that support the program and track reports of child abuse and neglect from intake through final disposition and information referral systems", deleted para. (7) which read: "(7) developing, strengthening, and supporting child abuse and neglect prevention, treatment, and research programs in the public and private sectors;", redesignated paras. (5), (6), (8), and (9) as paras. (6), (8), (9), and (12), respectively, inserted new para. (5), in para. (6) as redesignated, substituted "including--

"(A) training regarding research-based strategies to promote collaboration with the families;

"(B) training regarding the legal duties of such individuals; and

"(C) personal safety training for case workers;"

for "opportunities and requirements for individuals overseeing and providing services to children and their families through the child protection system", inserted new para. (7), substituted para. (9) for para. (9) as redesignated, which read:

"(9) developing, implementing, or operating--

(A) information and education programs or training programs designed to improve the provision of services to disabled infants with life-threatening conditions for--

"(i) professional and paraprofessional personnel concerned with the welfare of disabled infants with life-threatening conditions, including personnel employed in child protective services programs and health-care facilities; and

"(ii) the parents of such infants; and

(B) programs to assist in obtaining or coordinating necessary services for families of disabled infants with life-threatening conditions, including--

"(i) existing social and health services;

"(ii) financial assistance; and

"(iii) services necessary to facilitate adoptive placement of any such infants who have been relinquished for adoption; or",

inserted paras. (10) and (11), in para. (12) as redesignated, substituted the concluding semicolon for a period, and added paras. (13) and (14); in subsec. (b), in para. (1)(B), substituted "provide notice to the Secretary--

"(i) of any substantive changes; and"

for "provide notice to the Secretary of any substantive changes", substituted "; and" for a concluding period, and added cl. (ii), in para. (2), in subpara. (A), redesignated cls. (ii)-(xiii) as cls. (iv), (vi), (vii), (viii), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi) and (xvii), respectively, and inserted cls. (ii) and (iii), in cl. (iv) as redesignated, inserted "risk and", and inserted new cl. (v), in cl. (viii)(II) as redesignated, substituted ", as described in clause (ix)" for ", having a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect", inserted new cl. (ix), in cl. (xiii) as redesignated, inserted "who has received training appropriate to the role, and" and "who has received training appropriate to that role", in cl. (xv) as redesignated, deleted "to be effective not later than 2 years after the date of enactment of this section", in cl. (xvi) as redesignated, in the introductory matter, deleted "to be effective not later than 2 years after the date of enactment of this section", and, in subcl. (IV), deleted "and" following the concluding semicolon, in cl. (xvii) as redesignated, substituted "clause (xvi)" for "clause (xii)" in two places, and added cl. (xviii)-(xxii), and added the concluding matter", and, in para. (3), substituted "With regard to clauses (vi) and (vii) of paragraph (2)(A)" for "With regard to clauses (v) and (vi) of paragraph (2)(A)"; in subsec. (c), in para. (4), in subpara. (A), in the introductory matter, substituted ", procedures, and practices" for "and procedures" and substituted "State and local child protection system agencies" for "the agencies", in cl. (iii)(I), substituted "State and local" for "State", and added subpara. (C), and, in para. (6), substituted "State and the public" for "public", and inserted "and recommendations to improve the child protection services system at the State and local levels." and the sentence beginning "Not later than 6 months after . . ."; and, in subsec. (d), added paras. (13) and (14).

2010. Act Dec. 20, 2010, substituted the section heading for one which read: "Grants to States for child abuse and neglect prevention and treatment programs"; in subsec. (a), in the introductory matter, substituted "from allotments made under subsection (f) for" for "based on the population of children under the age of 18 in", in para. (1), substituted "child abuse or neglect" for "abuse and neglect", in para. (2), in subpara. (A), inserted ", intra-agency, interstate, and

intrastate", and in subpara. (B)(i), substituted "child abuse or neglect" for "abuse and neglect", in para. (4), inserted ", including the use of differential response", in para. (6), in subpara. (A), inserted ", including the use of differential response,", in subpara. (B), deleted "and" following the concluding semicolon, in subpara. (C), substituted "workers; and" for "workers;," and added subpara. (D), substituted para. (8) for former paras. (8) and (9) which read:

"(8) developing and facilitating training protocols for individuals mandated to report child abuse or neglect;

"(9) developing and facilitating research-based strategies for training for individuals mandated to report child abuse or neglect;"

redesignated paras. (10)-(14) as paras. (9)-(13), respectively, in para. (9) as redesignated, in subpara. (B), deleted "and" following the concluding semicolon, in subpara. (C), added "and" at the end, and added subpara. (D), in para. (10) as redesignated, inserted ", including the use of differential response", in para. (12) as redesignated, deleted "or" following the concluding semicolon, substituted para. (13) for one which, as redesignated, read: "(13) supporting and enhancing collaboration among public health agencies, the child protection system, and private community-based programs to provide child abuse and neglect prevention and treatment services (including linkages with education systems) and to address the health needs, including mental health needs, of children identified as abused or neglected, including supporting prompt, comprehensive health and developmental evaluations for children who are the subject of substantiated child maltreatment reports.", and added para. (14); in subsec. (b), substituted para. (1) for one which read:

"(1) State plan.

(A) In general. To be eligible to receive a grant under this section, a State shall, at the time of the initial grant application and every 5 years thereafter, prepare and submit to the Secretary a State plan that specifies the areas of the child protective services system described in subsection (a) that the State intends to address with amounts received under the grant.

"(B) Additional requirement. After the submission of the initial grant application under subparagraph (A), the State shall provide notice to the Secretary--

"(i) of any substantive changes; and to any State law relating to the prevention of child abuse and neglect that may affect the eligibility of the State under this section; and

"(ii) any significant changes to how funds provided under this section are used to support the activities which may differ from the activities as described in the current State application.",

in para. (2), substituted the heading and introductory matter for ones which read: "Coordination. A State plan submitted under paragraph (1) shall, to the maximum extent practicable, be coordinated with the State plan under part B of title IV of the Social Security Act relating to child welfare services and family preservation and family support services, and shall contain an outline of the activities that the State intends to carry out using amounts received under the grant to achieve the purposes of this title, including--", redesignated subparas. (A)-(D) as subparas. (B)-(E), respectively, inserted new subpara. (A), in subpara. (B) as redesignated, in the introductory matter, substituted "Governor" for "chief executive officer" and "statewide" for "Statewide", substituted cl. (i) for one which read: "(i) provisions or procedures for the reporting of known and suspected instances of child abuse and neglect;", in cl. (ii), in the introductory matter, inserted "with" and "or a Fetal Alcohol Spectrum Disorder,", and in subcl. (I), inserted "or neglect", in cl. (iii), inserted ", or a Fetal Alcohol Spectrum Disorder", in cl. (v), inserted ", including the use of differential response,", in cl. (vi), substituted "a victim of child abuse or neglect" for "the abused or neglected child", and inserted "child" after "danger of", in cl. (ix), inserted "child", in cl. (xi), substituted "and neglect" for "or neglect", in cl. (xiii), in the introductory matter, substituted "a victim of child abuse or neglect" for "an abused or neglected child", and inserted "including training in early childhood, child, and adolescent development,", in cl. (xv)(II), inserted "child", in cl. (xvi), in subcl. (III), deleted "or" following the concluding semicolon, and added subcls. (V) and (VI), in cl. (xviii), substituted "abuse or" for "abuse and", in cl. (xxi), substituted "Act (20 U.S.C. 1431 et seq.);" for "Act; and", in cl. (xxii), deleted "not later than 2 years after the date of enactment of the Keeping Children and Families Safe Act of 2003," before "provisions", inserted "that meet the requirements of section 471(a)(20) of the Social Security Act (42 U.S.C. 671(a)(20))", and added "and" at the end, and added cl. (xxiii), in subpara. (C) as redesignated, substituted "infants with disabilities who have" for "disabled infants with" wherever appearing in the subparagraph, and in cl. (iii), substituted "life-threatening" for "life threatening", in subpara. (D) as redesignated, in cls. (ii) and (iii), deleted "and" following the concluding semicolon, and added cls. (iv)-(vi), in subpara. (E) as redesignated, inserted "(42 U.S.C. 621 et seq.)" and substituted the concluding semicolon for a period, inserted subparas. (F) and (G), and in the concluding

matter, substituted "subparagraph (B)" for "subparagraph (A)", and in para. (3), substituted "paragraph (2)(B)" for "paragraph (2)(A)"; in subsec. (c), in para. (2), inserted ", and may include adult former victims of child abuse or neglect", and in para. (4)(A)(iii)(I), inserted "(42 U.S.C. 670 et seq.)"; in subsec. (d), in para. (1), substituted "as victims of child abuse or neglect" for "as abused or neglected", in para. (4), inserted ", including use of differential response,", substituted para. (7) for one which read: "(7) The number of child protective services workers responsible for the intake and screening of reports filed in the previous year.", in para. (9), inserted "child", substituted para. (10) for one which read: "(10) The number of child protective services workers responsible for intake, assessment, and investigation of child abuse and neglect reports relative to the number of reports investigated in the previous year.", in para. (11), substituted "or neglect" for "and neglect", and added paras. (15) and (16); in subsec. (e), inserted "and neglect"; and added subsec. (f).

Redesignation:

This section, enacted as § 8 of Act Jan. 31, 1974, P.L. 93-247, was redesignated § 107 of Title I of such Act by Act Oct. 25, 1989, P.L. 101-126, § 3(a)(1), (2), 103 Stat. 764, effective Oct. 25, 1989, as provided by § 8 of such Act, which appears as 42 USCS § 5102 note; it was further redesignated § 106 of such Title by Act Oct. 3, 1996, P.L. 104-235, Title I, Subtitle A, § 113(a)(1)(A), 110 Stat. 3079.

Other provisions:

Effective date of subsecs. (a) and (c) as amended by Act May 28, 1992. Act May 28, 1992, P.L. 102-295, Title I, Subtitle B, § 114(d), 106 Stat. 195; Dec. 2, 1993, P.L. 103-171, § 9(a), 107 Stat. 1994 (effective Sept. 30, 1993, as provided by § 9(b) of such Act), provides: "The amendments described in subsections (a) and (b) [amending subsec. (a) and adding subsec. (c) of this section] are made upon the date of the enactment of this Act. Such amendments take effect on October 1 of the first fiscal year for which \$ 40,000,000 or more is made available under subsection (a)(2)(B)(ii) of section 114 of the Child Abuse Prevention and Treatment Act (as amended by section 117 of this Act) [42 USCS § 5106h(a)(2)(B)(ii)]. Prior to such amendments taking effect, section 107(a) of the Child Abuse Prevention and Treatment Act [subsec. (a) of this section], as in effect on the day before the date of the enactment of this Act [see 1992 Amendment note], continues to be in effect."

Amendment of Child Abuse Prevention and Treatment Act (42 USCS §§ 5101 et seq.); congressional findings. Act Nov. 4, 1992, P.L. 102-586, § 9(a), 106 Stat. 5036, provides:

"The Congress finds that--

"(1) circumstances surrounding the death of a young boy named Adam Mann in New York City prompted a shocking documentary focusing on the inability of child protection services to protect suffering children;

"(2) the documentary described in paragraph (1) showed the serious need for systemic changes in our child welfare protection system;

"(3) thorough, coordinated, and comprehensive investigation will, it is hoped, lead to the prevention of abuse, neglect, or death in the future;

"(4) an undue burden is placed on investigation due to strict Federal and State laws and regulations regarding confidentiality;

"(5) while the Congress recognizes the importance of maintaining the confidentiality of records pertaining to child abuse, neglect, and death, often the purpose of confidentiality laws and regulations are defeated when they have the effect of protecting those responsible;

"(6) comprehensive and coordinated interagency communication needs to be established, with adequate provisions to protect against the public disclosure of any detrimental information need to be established;

"(7) certain States, including Georgia, North Carolina, California, Missouri, Arizona, Minnesota, Oklahoma, and Oregon, have taken steps to establish by statute interagency, multidisciplinary fatality review teams to fully investigate incidents of death believed to be caused by child abuse or neglect;

"(8) teams such as those described in paragraph (7) should be established in every State, and their scope of review

should be expanded to include egregious incidents of child abuse and neglect before the child in question dies; and "(9) teams such as those described in paragraph (7) will increase the accountability of child protection services."

Requirement of notification by individuals within health-care facilities of cases of suspected medical neglect; report. Act June 25, 2003, P.L. 108-36, Title I, Subtitle A, § 114(e), 117 Stat. 812, provides: "Not later than 2 years after the date of enactment of this Act, the Secretary of Health and Human Services shall prepare and submit to Congress a report that describes the extent to which States are implementing the policies and procedures required under section 106 (b)(2)(B)(ii) of the Child Abuse Prevention and Treatment Act [subsec. (b)(2)(B)(ii) of this section]."

EXHIBIT C

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**ELECTRONICALLY
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CIVIL COMPLEX CENTER
Aug 27 2010
ALAN CARLSON, Clerk of the Court
by A. THAU

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE**
9 **CIVIL COMPLEX CENTER**

10 **RAELYN STOKES, an individual; MARCUS**
11 **STOKES, an individual; T.S., a minor, by and**
through her guardian ad litem;

12 **Plaintiffs,**

13 vs.

14 **COUNTY OF ORANGE; ORANGE**
15 **COUNTY DEPARTMENT OF CHILDREN**
16 **AND FAMILY SERVICES; SOCIAL**
17 **WORKER SUNDAY PETRIE, in both her**
official capacity and individually; **SOCIAL**
18 **WORKER SUPERVISOR JAMES**
19 **WALDRON, in both his official capacity and**
individually; **INGRID HARITA, in her official**
20 **capacity as Director of the Orange County**
21 **Social Services Agency; SANDRA MURRAY,**
22 **M.D. in her official capacity as Child Abuse**
23 **Services Team Medical Director and as an**
24 **individual; SOCIAL WORKER SUSAN**
25 **AZADI, in both her official capacity and**
26 **individually; SOCIAL WORKER OSCAR R.**
27 **AGUIRRE, in his official capacity and as an**
28 **individual; SOCIAL WORKER JAKE**
29 **MICHEL, in his official capacity and as an**
30 **individual; SOCIAL WORKER SUSAN**
31 **HORN in her official capacity and as an**
32 **individual; CHILDREN'S HOSPITAL OF**
33 **ORANGE COUNTY; SUSPECTED CHILD**
34 **ABUSE AND NEGLECT TEAM; CHILD**
35 **ABUSE SERVICE TEAM; DAPHNE WONG,**
36 **M.D. in her official capacity and as an**
37 **individual; and DOES 1 through 50, inclusive,**

38 **Defendants.**

Case No.: 30 - 2010 003561398
Judge: Hon. Nancy Wieben Stock
Department: CX 105

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
DEMURRER TO THE AMENDED ANSWER
FILED BY HOSPITAL DEFENDANTS**

29
Date: October 1, 2010
Time: 9:00 a.m.

I. INTRODUCTION

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2 This suit arises from the unjustifiable detention and removal of an infant, Plaintiff T.S.,
3 from her parents' care after they brought her to a pediatricians office. Plaintiffs (Marcus and
4 Raelyn Stokes) sought medical attention for T.S., because T.S. exhibited symptoms of an illness.
5 (First Amended Complaint, ¶24). Marcus and Raelyn contacted their advising nurse, who
6 thought T.S. might have an ear infection and should be seen by a pediatrician. (FAC, ¶24). Out
7 of concern for the health of their child, Marcus and Raelyn brought T.S to see her pediatrician at
8 Coastal Kids Pediatrics. (FAC, ¶25). As it turned out, their regular pediatrician was unavailable
9 so they were seen instead by Dr. Baron, also with Coastal Kids Pediatrics. (FAC, ¶25). Instead
10 of performing an examination to ascertain whether T.S. suffered from an ear infection, Dr. Baron
11 launched into an inquisition regarding some very light and minor bruising that she noticed on
12 T.S. (FAC, ¶25). Marcus and Raelyn told Dr. Baron that T.S. had always been sensitive to
13 bruising and that T.S.'s regular pediatrician could attest to this. (FAC, ¶25). Dr. Baron ignored
14 this information and had paramedics transport T.S. to a hospital emergency room for further
15 testing; she also notified Orange County Social Services. (FAC, ¶25).

16 An X-Ray and CT Scan were performed on T.S., at no time were the risks of radiation
17 associated with these procedures explained to Marcus and Raelyn. (FAC, ¶26). The tests
18 revealed no bone fractures, or evidence of previous bone fractures, but the CT Scan did reveal
19 tiny acute interhemispheric subdural hematomas. (FAC, ¶27). The neurosurgery department was
20 notified of the scan results, but prior to an examination being performed a hospital hold was
21 placed upon T.S. (FAC, ¶27). Soon thereafter, Dr. Muhonen (a Diplomate of the American
22 Board of Neurological Surgery, a specialist in Pediatric Neurological Surgery and the Medical
23 Director of the CHOC Neuroscience Institute) arrived to review the CT scan results, and
24 concluded that T.S. had a congenital condition referred to as benign communicating
25 hydrocephalus of infancy. (FAC, ¶27). This condition is not indicative of any form of child
26 abuse. (FAC, ¶28).

27 T.S. was not returned to the custody and control of her parents Marcus and Raelyn after
28 Dr. Muhonen's diagnosis. (FAC, 29). Rather, T.S. was removed from the custody and control of

1 her parents and was subjected to further testing, which included an MRI. (FAC, ¶31). Dr.
2 Muhonen reviewed the MRI results and concluded that there was no tear or other damage to
3 T.S.'s brain and that the MRI had been an unnecessary procedure in light of the earlier CT Scan.
4 (FAC, ¶30). Dr. Muhonen also stated in his report that even trivial, self inflicted, trauma could
5 have caused the leakage noticed in the CT Scan and MRI due to the earlier identified congenital
6 condition. (FAC, ¶30).

7 Despite Neurosurgeon Specialist Dr. Muhonen's well considered diagnosis of T.S.,
8 Defendants' Children's Hospital of Orange County and Daphne Wong, M.D. continued to detain
9 T.S. claiming she was suffering from serious intentional trauma. (FAC, ¶¶112 and 113). This
10 misdiagnosis furthered the separation of T.S. from her parents, and caused her to be subjected to
11 a series of unnecessary medical tests and procedures without any court order or parental consent.
12 (FAC, ¶¶112 and 113).

13 In response to Plaintiffs' Complaint, Defendants Children's Hospital and Daphne Wong,
14 M.D. filed their joint Answer which consisted of *Seventeen* affirmative defenses. As appears
15 more fully herein, the majority of the affirmative defenses are either inapplicable, inadequately
16 stated, or otherwise fatally defective. This demurrer should be sustained.

17 II. GOVERNING LAW

18 Code of Civil Procedure section 430.20 allows for objection to an answer by demurrer
19 (Code Civ. Proc. § 430.30). A demurrer should be sustained where (a) the answer fails to state
20 facts sufficient to constitute a defense; or (b) the answer is uncertain, ambiguous, or
21 unintelligible. (Code Civ. Proc. § 430.20). A demurrer to an answer may be taken to the whole
22 answer or to any one or more of the affirmative defenses therein. (Code Civ. Proc. §430.50).

23 In addition, while it is true that a demurrer admits all properly pleaded material facts,
24 California courts have consistently held that contentions, deductions, and conclusions of fact or
25 law are not considered in judging the sufficiency of a complaint. (*See, Barnett v. Fireman's Fund*
26 *Ins. Co* (2001) 90 Cal.App.4th 500, 505). To the extent the allegations in Defendants' Answer
27 are legal conclusions, they must be disregarded.

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1 **III. ARGUMENT**

2 **1. Defendants' Third through Sixth, Eighth through Tenth, Fourteenth, Sixteenth, and**
3 **Seventeenth Affirmative Defenses Are Not Applicable to the Causes of Action in**
4 **This Case**

5 **A. Mandated Reporter Immunity Does not Apply to Defendant Daphne Wong, M.D.,**
6 **Because She Played no Part in the Identification, Discovery, or Reporting of Child**
7 **Abuse and Only Participated in Subsequent Events.**

8 Defendants' sixth affirmative defense asserts that the Daphne Wong, M.D. is immune
9 from liability as a mandated reporter under *California Penal Code*, section 111172. (Answer,

10 ¶10). *i. Defendant Daphne Wong, M.D. is Not a Mandated Reporter*

11 *California Penal Code* §11172 provides "mandated reporter" immunity to any health care
12 professional that reports a suspected incident of child abuse. *California Penal Code* §11172.

13 Under the Child Abuse and Reporting Act, a report of suspected child abuse is to be made to any
14 police department or social services. *Cal. Penal Code* §11165.9.

15 "The [Child Abuse and Neglect Reporting] Act is a reporting statute and its protection
16 runs to *reporting,...*" *James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 253. "The statute
17 itself applies only to persons reporting child abuse to governmental authorities; it does not apply
18 to actions taken by officials who receive such reports of abuse." *Id.* at 256, citing *Newton v*
19 *County of Napa* (1990) 217 Cal.App.3d 1551, 1558 (emphasis in original). Once a report is
20 made, responsibilities shift and governmental authorities take over. *Id.* at 254. In fact, the role
21 of the reporting statute is to bring cases of suspected child abuse to the attention of public
22 authorities, so those authorities can investigate and intervene as early as possible. *Id.* at 253-254,
23 citing *Wooster, The California Legislative Approach to Problems of Willful Child Abuse* (1966)
24 54 Cal.L.Rev. 1805, 1809.

25 Dr. Wong had nothing to do with the reporting of suspected abuse. The purpose of the
26 Act was satisfied here on February 23rd, 2009, when Dr. Baron placed a telephone call to Social
27 Services to report a suspected incident of child abuse. (First Amended FAC, ¶25). The moment
28 social services became involved, all other parties were alleviated of any responsibilities. The
conduct of Daphne Wong, M.D. complained of here, took place after Social Services had taken

1 over responsibility for the case and had initiated an investigation. Dr. Wong merely assisted in
2 the investigation and search for a perpetrator.

3 ii. *Ferraro v. Chadwick and Krikorian v. Barry are Distinguishable From the*
4 *Facts Here*

5 The *James W.* court discusses the decisions in *Ferraro v. Chadwick* (1990) 221
6 Cal.App.3d 86, and *Thomas v. Chadwick* (1990) 224 Cal.App.3d 813, and distinguishes those
7 cases on the grounds that the reporting at issue involved restatements or republications of the
8 reporter's *original*, protected report. *James W.*, 17 Cal.App.4th at 255. The *James W.* court also
9 noted that in *Ferraro* and *Thomas* the courts went further than needed, and said the
10 republications were immunized as "authorized" (vs. "required") reports, on the basis that the
11 Legislature had envisioned follow-up communication between the *original reporter* and the
12 government agency. *Id.* at 255 (emphasis added). "That is *not* to say, however, that all post-
13 reporting conduct by *other* individuals is immunized." *Id.* at 255 (emphasis added).
14 "Identification of the abuse— not identification of the perpetrator— is the chief concern." *Id.* at
15 255.

16 The court in *James W.* also distinguished the "expanded immunity concept" delineated in
17 *Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, which resulted in absolute immunity for a
18 psychologist under Section 11172, not just for making the report, but also for the activities she
19 engaged in that led up to the report. *James W.*, 17 Cal.App.4th at 257. However, as illustrated in
20 *James W.*, the defendants in these cases were hired to determine *whether or not* the children were
21 victims of child abuse, rather than to ascertain the identity of the abuser. *James W.*, 17
22 Cal.App.4th at 257. Perhaps more importantly, the expanded immunity concept only addressed
23 the *original* reporting party's conduct that led to a report of suspected child abuse to social
24 services; post-report investigation by the non-original reporter was not included in this expanded
25 concept. *James W.*, 17 Cal.App.4th at 257.

26 Dr. Wong's involvement occurred after social services was notified of a suspected
27 incident of child abuse, and had already begun their investigation. Therefore, Dr. Wong's actions
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1 did not arise from, or even in relation to, any "reporting activity," and the Mandated Reporter
2 immunity statutes simply do not apply.

3 Regardless, the Defendants have failed to set forth sufficient facts to support the defense.
4 Therefore, Defendants' sixth affirmative defense is improper, and Plaintiffs' demurrer to this
5 defense should be sustained.

6 B. Defendants' Third and Fourth Affirmative Defenses of Comparative Fault and
7 Apportionment are Not Applicable to Causes of Action Sounding in Intentional
8 Tort.

8 Defendants' third and fourth affirmative defenses appear to assert comparative fault and
9 apportionment affirmative defenses (Answer, ¶¶7 and 8). These affirmative defenses are not
10 available where Plaintiffs allege that Defendants acted intentionally, maliciously, and/or with
11 deliberate indifference to, or in conscious disregard for the rights of the Plaintiffs.

12 Comparative fault, in general, is a defense only to actions grounded on negligence; it has
13 no place in the defense of an action based on intentional torts. *Kassouf v. Lee Bros., Inc.* (1962)
14 209 Cal.App. 2d 568, 572. An intentional actor cannot rely on someone else's negligence to shift
15 responsibility for his or her own conduct. *Weidenfeller v. Star & Garter* (1991) 1 Cal. App. 4th
16 1, 7. A party who commits intentional misconduct should not be entitled to escape responsibility
17 for damages based upon the negligence of the victim or a joint tortfeasor. *Id.* at 7.

18 Furthermore, principles of comparative fault and apportionment based on comparative
19 fault are inapplicable in the context where all tortfeasors act as part of a civil conspiracy to
20 commit an intentional tort (including false arrest and false imprisonment); each coconspirator is
21 equally liable for each coconspirator's share of the damages caused by the conspiracy irrespective
22 of whether or not he was a direct actor and regardless of the degree of his activity. *Kesmodel v.*
23 *Rand* (2004) 119 Cal.App.4th 1128, 1144-1145, fn. 37.

24 Moreover, Defendants failed to state sufficient facts to constitute these affirmative
25 defenses. Hence, Defendants' third and fourth affirmative defenses are improper, and Plaintiffs'
26 demurrer to this defense should be sustained.

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1 C. Defendants' Eighth Affirmative Defense for Witness Immunity is Not Applicable
2 Where a Party has not Testified in a Prior Judicial Proceeding

3 The Defendants' eighth affirmative defense attempts to assert common law witness
4 immunity. (Answer, ¶12). However, the common law only affords witnesses immunity from
5 civil suits for damages relating to their testimony at judicial proceedings. *Briscoe v. Lahue*, 460
6 U.S. 325, 326 (1983). Therefore, a defendant will only be immune from liability where (1) the
7 witness actually offered sworn testimony at a prior judicial proceeding, and (2) the civil suit was
8 brought for damages that directly relate to testimony made by the defendant at the prior judicial
9 proceeding.

10 Here, neither Daphne Wong, M.D., nor Children's Hospital of Orange County, testified at
11 any prior judicial proceeding against the Plaintiffs. Moreover, the Plaintiffs' civil suit is based
12 upon the Defendants Children's Hospital of Orange County and Daphne Wong, M.D.'s actions
13 that occurred *prior* to any judicial proceeding against the Plaintiffs. Therefore, the defense of
14 common law witness immunity is not applicable to the Defendants Children's Hospital of
15 Orange County and Daphne Wong, M.D. Regardless, the Defendants have failed to state
16 sufficient facts to constitute a defense. Defendants' eighth affirmative defense is improper, and
17 Plaintiffs' demurrer to this defense should be sustained.

18 D. Defendants' Fourteenth Affirmative Defense of Collateral Estoppel, as a Matter of
19 Law, Cannot be Established

20 Defendants' fourteenth cause of action alleges that Plaintiffs are collaterally estopped "by
21 reason of plaintiffs' plea of no contest to the petition under California *Welfare and Institutions*
22 *Code*, section 300." (Answer, ¶18).

23 This Court previously ruled on this exact issue in relation to the Plaintiffs' plea of no
24 contest in the dependency hearing. (See Request for Judicial Notice, **Exhibit A**). After
25 substantial briefing on the issues, and hearing oral argument, this Court determined that "this
26 case does not involve a direct challenge to the findings of the court either before the juvenile
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1 court, or on appeal.”¹ As such, the Defendants are unable to establish, as a matter of law, that
2 the “plea of no contest” to the petition in the dependency proceeding would serve to collaterally
3 estop the Plaintiffs from prosecuting the type of claims set forth in their Complaint. (See
4 Request for Judicial Notice, **Exhibit A**). As this Court has already made a determination on this
5 issue, the Defendants’ fourteenth affirmative is not proper, and Plaintiffs’ demurrer should be
6 sustained for the same reasons addressed in Plaintiffs’ earlier demurrer to the identical defense in
7 Orange County’s Answer.

8 E. Defendants’ Sixteenth Affirmative Defense is a Mere Denial and Improperly
9 Attempts to Apply Government Code Immunity to Private Actors

10 Defendants’ sixteenth affirmative defense alleges that Defendants Children’s Hospital of
11 Orange County and Daphne Wong, M.D. did not act as state actors; and alternatively alleges that
12 *Government Code* section 821.6 immunity applies. (Answer, ¶20).

13 *1. Denial of the Allegations of the Complaint is not new Matter, and Thus*
14 *not an Affirmative Defense*

15 There is a “critical distinction” between an affirmative defense, which constitutes “new
16 matter,” and a mere denial of the allegations of the complaint (also known as a traverse). *Code*
17 *Civ. Proc.* §431.30; *Alpha Mechanical, Heating & Air Cond., Inc. v. Travelers Cas. & Sur. Co.*
18 *of America* (2005) 133 Cal.App.4th 1319, 1330. “New matter” is matter alleged for the first time
19 in the answer, creating an issue in the case not presented by the complaint. *Rancho Santa*
20 *Margarita v. Vail* (1938) 11 Cal.2d 501, 543. If the answer, either directly or by implication,
21 admits the truth of the essential allegations of the complaint, but sets forth facts showing that,
22 notwithstanding the truth of the allegations of the complaint, no cause of action existed at the
23 time the action was brought, those facts are new matter. *Lever v. Garoogian* (1974) 41
24 Cal.App.3d 37, 39. But where the answer sets forth facts showing some essential allegation of
25 the complaint is not true, such facts are not “new matter,” but merely a traverse, or denial. *Alpha*

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27 ¹Defense counsel was present at the hearing when this issue was resolved. It is unclear why
28 the affirmative defenses appears in the Answer despite the Court’s previous ruling and Defendants’
notice thereof.

1 *Mechanical*, 133 Cal.App.4th at 1330. The allegation that Defendants are not state actors is not
2 an “affirmative defenses” at all, but rather, constitutes a mere denial of Plaintiffs’ allegations.

3 Moreover, to act “under color of” state law for §1983 purposes does not require that the
4 defendant be an officer of the State. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). It is enough that
5 a Defendant is a willful participant in joint activity with the State or its agents. *Id.* at 27 - 28.
6 Private persons, jointly engaged with state officials in the challenged action, are acting “under
7 color” of law for purposes of § 1983 actions. *Id.* at 28; citing *United States v. Price*, 383 U.S.
8 787, 794 (1966).

9 The Defendants’ assertions are put at issue by the filing of a general denial, and are not
10 properly pled as affirmative defenses. Plaintiff’s demurrer should be sustained.

11 *1. Government Code Immunity Does not Apply to Private Actors*

12 Government Code immunity, through its very language, is only available to a public
13 employee. *Government Code* §821.6. Defendants Children’s Hospital of Orange County and
14 Daphne Wong, M.D. are *not* public employees; therefore, Government Code, section 821.6
15 immunity does not apply. Regardless, the Defendants have failed to state sufficient facts to
16 support this affirmative defense. Defendants sixteenth affirmative defense does not apply, and
17 the Plaintiffs’ demurrer should be sustained.

18 F. Defendants’ Seventeenth Affirmative Defense is a Mere Denial

19 Defendants’ seventeenth affirmative defense appears to assert that the conduct of the
20 Defendants Children’s Hospital of Orange County and Daphne Wong, M.D. did not give rise to
21 punitive or exemplary damages. (Answer, ¶21).

22 This allegation does not raise “new matter” and, therefore, is not an “affirmative
23 defense.” Rather, Defendants’ seventeenth is merely a denial.

24 Defendants’ seventeenth affirmative defense further asserts that punitive damages are not
25 proper as to Plaintiffs’ eighth cause of action (negligent misdiagnosis) and ninth cause of action
26 (negligent infliction of emotional distress). (Answer, ¶21). However, the Plaintiff’s eighth and
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1 ninth causes of action do not include claims for punitive or exemplary damages. As such, the
2 affirmative defense is inapplicable.

3 The Defendants' assertions are put at issue by the filing of a general denial, and are not
4 properly pled as affirmative defenses. Plaintiff's demurrer should be sustained.

5 G. Defendants' Ninth and Thirteenth Affirmative Defenses of Good Faith Immunity,
6 are Not Applicable to Private Actors

7 Defendants' ninth and thirteenth affirmative defenses appear to assert the defense of
8 Good Faith Immunity, as created through Government Code §820.6. (Answer, ¶¶13 and 17).

9 However, good faith immunity of the Government Code, through its very language, is
10 only applicable to a public employee. *Government Code* §820.6. Defendants Children's
11 Hospital of Orange County and Daphne Wong, M.D. are *not* public employees; therefore, the
12 Government Code defense of good faith does not apply.

13 Regardless, the Defendants have failed to state sufficient facts to constitute these
14 affirmative defenses.

15 Defendants ninth and thirteenth affirmative defenses do not apply, and the Plaintiffs'
16 demurrer should be sustained.

17 G. Defendants' Tenth Affirmative Defense is Not an Affirmative Defense

18 Defendants' tenth affirmative defense states that, "the fifth cause of action (*Monell-*
19 *related claims*) is not directed towards these answering defendants as they are not municipal
20 entities. (Answer ¶14). The Plaintiffs' fifth cause of action does not name the Defendants
21 Children's Hospital of Orange County and Daphne Wong, M.D.; therefore, no defense is
22 necessary. (FAC, Pg. 23, ln. 23-24). As such, this defense is improper, and Plaintiffs' demurrer
23 should be sustained.

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1 **2. Defendants' Eleventh, Twelfth, and Fifteenth Affirmative Defenses Fail To State**
2 **Facts Sufficient to Constitute a Defense**

3 California's code pleading standard, requiring the pleading of "ultimate facts," applies to
4 causes of action alleged in the complaint and affirmative defenses stated in the answer. Weil &
5 Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2009), §6:459. The facts to
6 be pleaded in the Answer are those upon which the affirmative defense depends, i.e the essential
7 elements of the particular affirmative defense. Weil & Brown, *Cal. Prac. Guide: Civ. Pro.*
8 *Before Trial* (The Rutter Group 2009), §6:123 and 6:124. These are commonly referred to as the
9 "ultimate facts." *Id.* at §6:123.

10 Defendants must aver the "ultimate facts" to support each affirmative defense as carefully
11 and with as much detail as the facts which constitute the causes of action and alleged in the
12 complaint. *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384; see also Weil
13 & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2009), §6:459. Bare-
14 bones conclusory allegations are insufficient, and will not survive a demurrer. *FPI Development,*
15 *Inc.*, 231 Cal. App.3d at 384.

16 **A. Defendants' Fifteenth Affirmative Defense Fails to State Facts Sufficient to**
17 **State an Unclean Hands Defense**

18 In their Fifteenth affirmative defense, Defendants state that "plaintiffs are barred under
19 the doctrine of unclean hands from obtaining any relief against these answering defendants as
20 requested in their tenth cause of action (declaratory relief)." (Answer ¶19).

21 In order to assert the defense of unclean hands, Defendants must allege that Plaintiffs
22 engaged in some misconduct that violates the conscience, good faith, or some other equitable
23 standard of conduct. *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th
24 970, 979 (Internal citations omitted). The misconduct that invokes the doctrine of unclean hands
25 must directly relate to the cause at issue. *Id.* Defendant must set forth *facts* demonstrating the
26 acts and/or omissions on the part of the plaintiff that constitute unclean hands, and that it directly
27 relates to the cause of action; vague and conclusory allegations will not suffice. *Code Civ. Proc.*
28 §430.20.

1 Defendants' bare legal conclusion that Plaintiffs' action is barred by unclean hands is
2 utterly insufficient, and Plaintiffs' demurrer to this affirmative defense should be sustained.

3 B. Defendants' Eleventh Affirmative Defense Fails to State Facts Sufficient to
4 Constitute a Defense fo Failure to Mitigate Damages

5 Defendants assert through the conclusory statement that: "plaintiffs failed to mitigate
6 their alleged personal injuries and damages by taking the reasonable and prudent actions
7 available to them prevent and/or minimize the damages which they allege in the aforementioned
8 [fourth and sixth] causes of action." (Answer, ¶15). This is insufficient as a matter of law.

9 When pleading the defense of failure to mitigate, a distinction must be drawn between the
10 steps that plaintiffs have actually taken to mitigate their damages, and the steps that plaintiffs
11 could have taken, with the exercise of reasonable diligence, but did not. The former is a defense
12 implicated by filing a general denial, the latter must be affirmatively alleged. *Erler v. Five Points*
13 *Motors* (1967) 249 Cal.App.2d 560, 568.

14 If defendants are alleging that plaintiffs could have, through reasonable diligence, taken
15 steps to mitigate their damages, this is new matter, and defendants must plead facts in support of
16 their affirmative defense. See *Baruh v. Kuhl* (1963) 213 Cal.App.2d 266, 273; see also *Vitagraph*
17 *Inc. v. Liberty Theaters Co. Of Cal.* (1925) 197 Cal.694, 699. Specifically, defendants must
18 plead (1) the damage suffered by plaintiffs could have been avoided— in the sense that there were
19 in fact equivalent alternative courses of conduct available that plaintiff could have discovered
20 and taken advantage of, and (2) plaintiffs failed to exercise reasonable diligence and effort in
21 seeking an alternative arrangement. *Parker v. Twentieth Century Fox Film Corp.* (1970) 3
22 Cal.3d 176, 181-183, fn. 5.

23 Defendants conclusory statement that Plaintiffs failed to mitigate is utterly insufficient.
24 *FPI Development Inc., supra*, 231 Cal.App.3d at 384. Therefore, Defendants eleventh affirmative
25 defense is inadequately pled, and Plaintiff's demurrer should be sustained.

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C. Defendant's Twelfth Affirmative Defense of Consent Fails to State Facts Sufficient to Constitute a Defense

Defendants' twelfth affirmative defense asserts that Defendants' conduct was "proper and lawful pursuant to actual and/or implied consent." (Answer, ¶16).


Consent is a principle sounding in contract law. It is a basic precept of law that consent of a party must be freely given, and it is not free when obtained through duress or menace. *Tiffany & Co. v. Spreckels* (1927) 202 Cal. 778, 784. Defendant, in its answer, fails to set forth any facts whatsoever in support of its allegation that Plaintiffs' consented (either expressly or impliedly) to the wrongful acts of the Defendants. Therefore this affirmative defense is inadequately pled, and Plaintiffs' demurrer should be sustained.

IV. CONCLUSION

The conclusory allegations in the affirmative defenses discussed above fail to meet the minimum requirements for factual pleading. The targeted affirmative defenses set forth legal conclusions devoid of factual support to which Plaintiffs cannot adequately respond. Finally, Defendants assert several affirmative defenses that are not applicable to the causes of action in this case, and several other 'defenses' that are not really affirmative defenses at all. Therefore, Plaintiffs respectfully request that their demurrer be sustained in its entirety.

Dated: August 27, 2010

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