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MEMORANDUM

TO: Interested Persons

FROM: Ellen Sue Katz
William E. Morris Institute for Justice

DATE: February 22, 2012

RE: Major Projects, Litigation and Accomplishments for the Institute in 2011

The William E. Morris Institute for Justice was established in 1996 to handle the work that legal services programs could no longer perform because of Congressional restrictions. We work closely with legal services programs and most of the issues we work on are brought to us by these programs. We represent the interests of low-income Arizonans in litigation, administrative advocacy with state and federal agencies, advocacy with the courts and legislative advocacy. Since November 1, 2011, the Institute has had one staff attorney/director. Prior to that date, during 2011 the Institute had an additional part-time attorney. The Institute also has a secretary that works part-time at night and a volunteer accountant and a volunteer IT person.

1. Litigation:

a. *Fogliano v. State* (state court)

Fogliano v. State **- Challenge to State's Freeze on Enrollment of Proposition 204 Persons from AHCCCS** - In 2000, Arizonans voted by initiative in Proposition 204 to include all persons up to 100% of the federal poverty level in the Arizona Healthcare Cost Containment System ("AHCCCS"), our state Medicaid program. The largest group of persons added by Proposition 204 are adults without minor children in the household ("childless adults"). Until 2011, all persons eligible under Proposition 204 received AHCCCS. The legislative budget for fiscal year 2012 reduced AHCCCS funding by about 540 million dollars from 2011. It also gave AHCCCS discretion on how to manage this funding cut and operate the system with "available" funds.

In March 2011, the Governor submitted to the Centers for Medicare and Medicaid Services ("CMS") an amended request for the State's demonstration waiver that included many cuts in services and reductions in eligibility. The federal government's approval was needed for these changes. AHCCCS proposed to freeze enrollment for childless adults on July 1, 2011. The Institute believed the proposal violated Proposition 204 and the State Constitution. The freeze was expected to affect 300,000 low-income persons.

In April, AHCCCS published a proposed administrative rule that gave it complete discretion whether to provide AHCCCS to childless adults and to freeze enrollment or terminate or reduce AHCCCS coverage for childless adults depending on its monthly review of revenues. The federal government approved the freeze on enrollment for childless adults and AHCCCS implemented the freeze on July 8, 2011. AHCCCS expects that at least 100,000 childless adults eligible under Proposition 204 will be denied coverage in the first year of the freeze.

The Institute, the Arizona Center for Law in the Public Interest and the Arizona Center for Disability Law filed *Fogliano et al. v. State et al.*, in Maricopa County Superior Court on June 27, 2011, challenging the freeze on enrollment and the failure to fund all of the Proposition 204 population. The Complaint sought declaratory and injunctive relief. Judge Brain ruled against Plaintiffs on August 10 and we filed an appeal to the Appellate Court. We requested the Court accept the appeal as a "Special Action" to expedite the decision and the court agreed. On December 6, the court ruled that our statutory construction argument that funding health care to the Proposition 204 population was a mandatory obligation was indeed correct but concluded that whether the state had appropriated available sources of funds was a non-justicable question. We filed a petition for review to the Arizona Supreme Court on December 16, 2011.

(Previously, we filed an initial special action to the Arizona Supreme Court in *Roach v. Brewer* in May 2011, challenging the impending freeze on enrollment for childless adults in the AHCCCS program but the Supreme Court did not accept jurisdiction of the case.)

b. *Newton-Nations v. Betlach* (federal court)

Newton-Nations v. Betlach – **Challenge to Heightened and Mandatory AHCCCS Copayments** - This class action case challenges the heightened and mandatory copayments AHCCCS imposed on 100,000 persons in 2003 for prescription medications and office visits. These persons were added to AHCCCS, the state Medicaid program by Proposition 204 which provided AHCCCS to persons with incomes up to 100% of the federal poverty level and the state law allowing coverage for persons who "spend down" their medical expenses so their incomes are 40% of the federal poverty level. Over the last 8 years, the class has grown to approximately 300,000 persons.

Plaintiffs claimed the federal government's approval of the challenged copayments violated the Medicaid Act, the Human Participants Protections provision, the Administrative Procedures Act, and the demonstration project waiver provision. We also claimed AHCCCS' notices violated the federal constitution and the Medicaid Act.

For over 6 years, there was a statewide injunction that prohibited AHCCCS from imposing the copayments on the certified class. The injunction saved low-income persons several million dollars each month and ensured access to medical services necessary to maintain the class' health and well-being.

In March 2010, Judge Carroll ruled against Plaintiffs and we filed an appeal to the Ninth Circuit Court of Appeals. On August 24, 2011, the Ninth Circuit reversed in part. The Ninth Circuit found the Secretary of Health and Human Services' approval of the copays violated the Administrative Procedures Act, and the Ninth Circuit's prior decision in *Beno v. Shalala.* The court noted the only purpose for the waiver was to save money, a reason not sufficient for a demonstration project. The court also accepted Plaintiffs' expert's statement that copayments have been heavily studied the last 35 years and are not novel or experimental. The court reversed the district court's decision, remanded to the district court to vacate the Secretary's approval of the copayments and remand to the Secretary for further consideration consistent with the opinion.

Concerning the notice claim, the court questioned whether the notices satisfied constitutional due process requirements. The court remanded the matter back to the district court to determine if AHCCCS was still using defective notices and if the issue of the notices was moot.

The Secretary and AHCCCS filed motions to dismiss and we are waiting for the district court to rule. The Ninth Circuit's decision is important because it reiterates the statutory requirements for demonstration projects and that the Secretary must follow Ninth Circuit precedent, which the Secretary had not done. Co-counsel in this case is the National Health Law Program.

2. Administrative Advocacy with Federal Agencies:

a. Objections to Amended AHCCCS Demonstration Waiver Request

On March 31, 2011, the Governor submitted a request to the Center for Medicare and Medicaid Services ("CMS") to amend the State's September 2010, AHCCCS demonstration waiver request. This amended request included the following proposals:

1. Freeze enrollment for childless adults on July 1 and authority to reduce enrollment after that date;
2. $50 annual penalty for adult smokers;

3. $50 annual penalty for the obese and persons with chronic medical conditions who do not adhere to a care plan;
4. Six month redeterminations, instead of 12 months, for all childless adults and for parents between 75-100% of the federal poverty level ("FPL");
5. Eliminate EPSDT services for older youth ages 19-20 without children;
6. Freeze enrollment for parents between 75-100% of FPL on October 1, 2011;
7. Eliminate emergency medical services for immigrants;
8. Mandatory copayments for all adults except long term care recipients;
9. Mandatory copayments for children who do not meet well exam requirements; do not follow obesity care plan; or do not manage their chronic diseases;
10. Penalty for all missed appointments; and
11. Eliminate non-emergency transportation for non-disabled adults in Pima and Maricopa Counties. All other non-disabled adults would pay a transportation copayment.

The Institute submitted detailed objections and comments to CMS for all the requests listed above on behalf of the Institute, the Arizona Center for Law in the Public Interest and the National Center for Law and Economic Justice. We also testified against the waiver request at a public meeting. Subsequently, we submitted a separate letter to CMS objecting to Arizona's continued demonstration project and how that may affect health care reform requirements in Arizona. In addition to the groups above, the National Health Law Program joined in the second letter.

Subsequently, CMS denied requests 2, 3, 4, 6, 7 and 9 and the potential reduction in childless adult enrollment in request no. 1. CMS approved a $3 missed appointment fee for persons outside Pima and Maricopa Counties and a $4 copayment for taxis in Pima and Maricopa Counties. We will monitor implementation of the missed appointment fee and the taxi copayment.

b. Objections to AHCCCS Request to Eliminate Medical Expense Deduction Program

In March 2011, the Governor sent a proposal to the federal government to eliminate the Medical Expense Deduction ("MED") population by imposing a freeze on applications as of May 1, 2011, and eliminating the program September 30. These are persons who "spend down" their medical bills so their incomes are below 40% of the federal poverty level. They are class members in the copay case. They are covered by Arizona law, are not in the state plan and are not part of Proposition 204.

In April 2011, the Institute submitted objections to the phase out plan to CMS and to AHCCCS. CMS approved the phase out plan.

c. Objections to Immigration Regulation

Southern Arizona Legal Aid staff contacted the Institute because they were concerned a recent federal regulation would adversely impact their work. The regulation requires an attorney to submit a notice of appearance in the immigration administrative process whenever an attorney assists a person to fill out paperwork or provides legal assistance beyond advice.

The University of Arizona law school clinic and the Florence Immigrant Project also were concerned about the regulation. Florence staff routinely assist persons to fill out forms and if they had to file notices of appearances in each case, their programs would either be forced to change their systems or assist fewer persons. The Institute submitted objections to the U. S. Department of Homeland Security concerning this interim regulation.

d. Federal Civil Rights Administrative Complaint: Arizona Verification and Reporting Law

As part of the budget bills passed in 2009, the legislature passed House Bill 2008, Sections 1 and 2, that "to the extent allowed by federal law" required persons applying for state and federal public benefit programs to present a document from an arbitrary list of 12 documents to establish citizenship or immigration status. No federal law allows the use of this limited group of documents. The state law requires government employees to report persons who are violating "federal immigration law" and has criminal sanctions for local and state employees who do not follow the law. The law caused confusion and fear and deterred persons from applying for public benefits and services.

Both AHCCCS and the Arizona Department of Economic Security ("DES") implemented policies in response to HB 2008. The Institute commented on these policies and sought to ensure the rights of immigrant applicants and recipients were protected. Unfortunately, either HB 2008 or the agencies' implementation of the law, violated federal law.

The Institute, working with the ACLU of Arizona and the National Immigration Law Center, filed a Civil Rights Complaint against DES and AHCCCS with the Office for Civil Rights/U. S. Department of Health and Human Services ("DHHS"). We claimed the law and the agencies' policies and practices violated various federal laws including Title VI of the Civil Rights Act of 1964 by using a restrictive group of acceptable documents to show citizenship or immigration status, and the reporting requirements conflicted with federal law and guidance. We claimed DES and AHCCCS policies did not take sufficient steps to protect immigrants' rights to apply for benefits without the threat of the agencies reporting persons to the federal government; relied

improperly on SAVE responses for reporting; violated the confidentiality requirements in federal law; and improperly allowed immigration-related questions to be asked in interviews and on the online multi-program application, One-e Application. DHHS began but has not completed its investigation. We provided DHHS with many documents, policies and written statements. This case is on-going.

e. Child Care Assistance Restriction

Arizona uses federal Child Care and Development Funds ("CCDF") to provide child care assistance to low-income families. Under federal law, only the immigration status of the child is relevant for eligibility. State law unlawfully limits child care assistance to parents and guardians lawfully in the country. DES policy implements state law. The Institute sent a letter to DES objecting to its policy.

Although DES should have disclosed this restriction to the federal government, DES' prior application for child care funds failed to inform the federal government of the unlawful policy. When DES filed its renewal of its CCDF state plan in the summer of 2011, we submitted objections and comments to the federal government explaining DES' use of the unlawful restriction. The federal government is investigating.

3. Advocacy – Access to Courts:

a. TurboCourt

The Arizona Supreme Court is moving toward a statewide electronic court filing system referred to as "TurboCourt." The Institute, on its own behalf and on behalf of legal services, sent a letter to the Arizona Supreme Court regarding our concerns about TurboCourt, including that there is no fee waiver or deferral for the additional TurboCourt fees; any fees must be paid with a credit card; the TurboCourt pleadings and instructions are not in Spanish; and there is no suppression of fees for legal services programs. We are concerned TurboCourt may be a barrier to access to the courts.

In response, the Administrative Office of the Courts ("AOC") has agreed that a fee waiver and deferral process must be included in TurboCourt. We continue to monitor TurboCourt's implementation and expansion.

b. Limited English Proficiency Services

Under Title VI of the Civil Rights Act, courts must provide qualified translators, translation of vital documents, website accessibility and other translation services to non-English speakers. The Institute sent a letter to the AOC concerning courts in Arizona that do not provide language assistance to non-English speakers as required by Title VI. We requested that the courts develop Limited English Proficiency ("LEP") plans.

In response, the AOC drafted a sample LEP policy that we commented on. All courts were required to submit LEP plans to the AOC by the end of 2011. We will monitor this process.

c. Fee Waivers and Deferrals

Low-income Arizonans are entitled to fee waivers and deferrals to ensure access to the courts under state law and the state and federal constitutions. As legal services staff through-out the state identify problems with the implementation of fee waivers and deferrals, the Institute addresses those concerns. Currently, the Institute is working to ensure fee waivers and deferrals in family law cases in Pinal and Yuma County Superior Courts and for Parenting Conferences in Maricopa County Superior Court.

A problem in Santa Cruz County concerning denials of fee waivers and deferrals was resolved.

d. Debt Buyer Cases in Justice Court

There has been a growing concern about litigation often referred to as "debt buyer" cases. This type of litigation occurs when a person defaults on credit card debt. The original creditor writes off the debt on its books and sells the debt for pennies on the dollar to "debt buyers." These debt-buyers may in turn resell the debt or sue on the debt.

Legal services staff requested that the Institute conduct a study of debt buyer cases in justice court similar to the Eviction Court Study. Legal services staff raised concerns that when companies who buy consumer debts sue on those debts in justice court, the "debt buyers" typically fail to disclose the particulars of the underlying debt or any documentation of the debt. The debt buyers often have no proof of the debt. They may possess a spreadsheet with data on it. They do not have the underlying contract or paperwork showing the last payment and the terms of the credit card. They prove up their cases with affidavits purporting to establish the business records exception to hearsay. Of course, they cannot establish the business records exception for the underlying creditor. Regardless, justices award significant judgments based on this lack of evidence.

The Institute reviewed justice court files in Phoenix and started to prepare a memo on what we discovered.

4. Administrative Advocacy with State Agencies:

Americans with Disabilities Act Enforcement at DES

Legal services staff informed us that DES was not providing reasonable accommodations and auxiliary services, such as sign language interpreters, to clients, in violation of the Americans with Disabilities Act ("ADA"). We reviewed DES' policies and wrote a letter to DES requesting that it develop effective ADA policies. DES agreed. We obtained the services of a national ADA expert, Cary La Cheen with the National Center for Law and Economic Justice in New York to assist DES. DES finalized its ADA policy and procedures. Ms. LaCheen and the Institute are monitoring and working with DES on its implementation of the policy and the development of adequate procedures, notices and complaint forms.

5. Legislative Advocacy:

The Institute advocates at the Arizona legislature on bills that affect low-income Arizonans. We are often the only group preparing informational handouts and testifying against bills that impact low-income Arizonans. Here is a sampling of our activities during the 2011 legislative session:

House Bill 2675 (opposed): This bill would have required a person using an electronic benefits transfer ("EBT") card for food stamps to show identification that the person using the card was the person whose name was on the card. The bill would have denied use of food stamp cards to persons authorized to use the card such as caretakers for the elderly or disabled, family members or even spouses. The Institute prepared a handout explaining how the bill violated federal law. Prior to the committee hearing, these provisions were deleted from the bill.

Senate Bill 1306 (opposed): This bill added a new section to the Arizona Residential Landlord and Tenant Act that pertained only to "bedbugs." The purpose of the bill was to shift bedbug mitigation costs to tenants. The Institute opposed the bill, prepared a handout explaining the ways the bill would undercut tenant rights and testified against the bill. The bill was drastically curtailed and we became neutral on the bill.

Senate Bill 1083 (opposed): This bill would have allowed a non-custodial parent to object to any move by the custodial parent. We were very concerned this bill would make it harder for victims of domestic violence to move and give abusers another tool to maintain control over their victims. Although this bill passed the Senate, after meetings with stakeholders, including the Institute and legal services staff, the sponsor pulled the bill.

Senate Bill 1045 (opposed): This bill allowed DES to send documents by e-mail. We objected to and testified against this bill. Although DES made some changes to the bill, we continued to have concerns primarily because DES has no way of knowing if an e-mail was received. Despite this, the bill restricts the challenges a person can raise to show that he or she did not receive the document. Over our objections, the Governor signed this bill. We will monitor how this bill is implemented.

Senate Bill 1474 (opposed): This bill initially eliminated the requirement that landlords maintain rental housing in a "fit and habitable" condition. We testified against the bill and prepared a memo. Although the fit and habitable requirement was put back into the bill, the bill was amended to change the minor repair provision, making it harder for tenants to make minor repairs. Over our objections, the Governor signed the bill.

Senate Bill 1222 (opposed): This bill would have required public housing authorities to violate federal law and evict mixed immigrant status families from public housing and report them to federal authorities. We prepared a memo on this bill and testified against it at a hearing. This bill died.

Senate Bill 1499 (support): Two times in the last six years the guardianship statute was changed and courts interpreted the changes to restrict which immigrant minors could get guardianships. At the Institute's urging, part of the bill addressed this problem and clarified that the restrictive guardianship provision only applied to immigrant adults. We will monitor this change to ensure immigrant children can get guardianships when needed.

6. Monitoring:

The Institute receives monthly reports from DES concerning its timelines in processing applications for food stamps, cash assistance, and medical assistance; the number of persons who get hardship exemptions for the TANF program; the timeliness of processing claims for unemployment insurance benefits; and the number of persons affected by DES' drug testing policy.

We also get monthly reports from DES and AHCCCS concerning the number of persons reported to ICE by each agency under HB 2008.

7. Unemployment Insurance Guide:

The Institute prepared the first ever comprehensive Arizona unemployment insurance guide for claimants and advocates to use to process claims. It is available in English and Spanish at morrisinstituteforjustice.org, or by calling the Institute at (602) 252-3432.

8. Continuing Legal Education/Task Forces:

The Institute coordinates task force meetings for the substantive areas of domestic relations, public benefits and housing. Often these meetings qualify for CLE credits. On June 10, 2011, the Institute sponsored a CLE on the Americans with Disabilities Act ("ADA") and rights of persons with disabilities to benefits and services by state and local agencies under Title II of the ADA. The presenter was Cary LaCheen, a national expert on the ADA, who works for the National Center for Law and Economic Justice.