

William E. Morris Institute for Justice

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SEPTEMBER 2011 NEWSLETTER

For friends and supporters of the Institute, here is an update on some of our recent activities, as we celebrate our 15th year of advocacy on behalf of low-income Arizonans.

Litigation

Challenge to State's Freeze on Enrollment of Proposition 204 Persons from AHCCCS

Fogliano v. State - 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 this year, all persons eligible under Proposition 204 received AHCCCS. The legislative budget for 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 is needed for these changes. AHCCCS proposed to freeze enrollment for childless adults on July 1, 2011, and on parents with incomes between 75-100%

of the federal poverty level on October 1, 2011. The Institute believes both proposals violate Proposition 204 and the State Constitution. The freezes could 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 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 these changes. The Complaint seeks 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" which

will expedite the decision. The Appellate Court agreed to accept this case as a special action and oral argument is scheduled for October 19, 2011.

Challenge to Heightened and Mandatory AHCCCS Copayments

Newton-Nations v. Rodgers – This 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 (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. Judge Carroll and the Ninth Circuit denied our requests for a stay.

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 of 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 Court affirmed the district court’s decision that persons not in the state plan, even if they were in an optional Medicaid group, could be treated as expansion populations.

This decision is important because it reiterates the statutory requirements for demonstration projects and the analysis in the *Beno* case, which the Secretary has failed to comply with.

Co-counsel in this case is the National Health Law Program.

Administrative Advocacy with Federal Agencies

The Institute often addresses state agency issues with the federal government. Because of our work in the public benefits area, we are in a unique position to raise the legal and policy concerns of low-income Arizonans.

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, demonstration waiver request. This amended request included the following proposals:

1. Freeze enrollment for childless adults on July 1;
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 this letter.

Since April, AHCCCS has withdrawn some of these requests. CMS is reviewing the remaining requests.

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. These persons 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. The CMS approved the phase out plan.

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 are 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, these 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.

Civil Rights Complaint: 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 law requires government employees to report persons who are violating “federal immigration law” and the law 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.

Advocacy – Access to State Courts

The Institute has a major focus on eliminating barriers to access to justice and access to the courts.

TurboCourt

The Arizona Supreme Court is moving toward a statewide electronic 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 has agreed that a fee waiver and deferral process must be included in TurboCourt. We will continue to monitor TurboCourt’s implementation and expansion.

Limited English Proficiency Services

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

In response, the AOC drafted a sample LEP policy that we commented on. We will monitor this process.

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 throughout the state identify problems with the implementation of fee waivers and deferrals, the Institute addresses their concerns. Currently, the Institute is working to ensure fee waivers and deferrals in family law cases in Yuma County Superior Court and for Parenting Conferences in Maricopa County Superior Court.

Administrative Advocacy with State Agencies

The Institute works with legal services staff and community groups to improve the programs low-income persons rely upon. Legal services staff often identify policies and practices that violate federal and state laws, but because of their funding restrictions, they cannot file class actions. In those cases, they often seek the assistance of the Institute. Recently, we addressed the following policy and procedural matters with DES and AHCCCS:

Improper Unemployment Insurance Overpayments

Community Legal Services (“CLS”) asked MIJ to address a systemic issue with DES. The problem is that claimants receive Emergency Unemployment Compensation (“EUC”) benefits at a time DES determines they should have been receiving regular Unemployment Insurance benefits. The typical scenario begins when the claimant exhausts her regular benefits and then receives EUC benefits. During the time that the claimant collects regular and EUC benefits, she works on and off as a seasonal or

part-time worker. At some point, with the new earnings, the claimant becomes eligible for a new regular unemployment insurance claim. The claimant is unaware that he or she is now eligible for a new regular claim. At the same time that the claimant becomes eligible for regular benefits, DES determines she is ineligible for EUC benefits and sends the claimant an overpayment notice. This is an administrative issue totally in control of DES. DES has the authority to waive these overpayments but often does not. CLS assisted over 20 persons who had overpayment notices. We estimate there are at least one thousand persons who received the over-payments and had no legal assistance.

We sent DES a letter requesting that DES prevent those overpayments from occurring and correct any overpayments that were issued. We met with DES and DES agreed to correct this problem. We will monitor.

AHCCCS Proposed Rules on the MED and Proposition 204 Populations

The Institute submitted objections to AHCCCS' proposed administrative rule to eliminate the MED population from the AHCCCS program. We also submitted objections and comments for AHCCCS' proposed rule on the freeze on enrollment and/or termination of the Proposition 204 childless adult group from the AHCCCS program. The rules were adopted over our objections.

One-e Online Application

DES and AHCCCS started to use a joint online application for benefits. The application did not comply with federal requirements in several respects. A major concern was that the application required every person using the

application to designate themselves as a "citizen" or "legal resident." Under federal law it is unlawful for the application to ask these questions of non-applicants and persons applying for benefits where immigration status is not relevant. The application failed to give a person the option to not apply for themselves until after the person answered the citizenship and immigration questions. The questionnaire also required a person to answer the questions even if they were applying for a program, such as emergency medical services, where a certain immigration status is not required.

The Institute sent DES written comments and discussed this matter with DES staff. DES agreed to work on making the application compliant with federal law. DES and AHCCCS convened a work group to fix the application. With the new state verification law (House Bill 2008), this project took on urgency. Given the fear in the immigrant community, it was imperative that DES and AHCCCS remove any barriers to persons applying for public benefits and the Institute sent a letter to AHCCCS summarizing our concerns.

Initial changes were made to the application so that a person can identify themselves and others as a "citizen" or "immigrant status" with a drop down menu of choices including a category of "other." DES and AHCCCS agreed to remedy the other violations. We included this matter in the Civil Rights Complaint described above.

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 this summer, we submitted objections and comments to the federal government explaining DES' use of the unlawful restriction. We will see what action the federal government takes.

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 DES' implementation of the policy.

Monitoring

The Institute receives monthly reports from DES concerning its timeliness in processing claims 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 the unemployment insurance benefits; and the

number of persons affected by DES' drug testing policy.

Legislative Advocacy Update

Susan ("Susie") Cannata continued as the Institute's lobbyist for the 2011 Arizona Legislative Session. This was Susie's fifth year as our lobbyist. She lobbied for the interests of low-income Arizonans with a focus on the budget, as well as legislation related to housing, consumer affairs, public benefits and domestic relations.

The Institute provides hearing testimony and informational handouts to legislators on key bills and works with advocacy groups. We lobbied on the budget and specifically for programs that low-income Arizonans rely upon. It was a very difficult session for low-income Arizonans. The Temporary Assistance to Needy Families ("TANF") program was reduced from 36 to 24 months and AHCCCS' budget was reduced by \$540 million.

We opposed bills that were bad for low-income Arizonans. Here is a sampling of our activities:

House Bill 2675: 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: 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: This bill would have allowed the 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. Although this bill passed the Senate, after meetings with stakeholders, including the Institute and legal services staff, the sponsor pulled the bill. Over the summer, the domestic relations committee will address the issue.

Senate Bill 1045: This bill allows 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, yet the bill restricts the challenges a person can raise that the document was not received. Over our objections, the Governor signed this bill. We will monitor how this bill is implemented.

Senate Bill 1474: 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.

Other bills we worked against include: a bill that increased the statute of limitations for credit card collections from 3 to 6 years; a small loan bill to allow companies to charge more than the 36% APR for loans; a bill to make it harder to find a parent in contempt for child support arrearages; bills to impose cost sharing on AHCCCS recipients and reduce services; and several anti-immigrant bills including SB 1222 that 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.

One success was Senate Bill 1499: 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. Part of this 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.

Unemployment Insurance Guide

The Institute prepared the first ever comprehensive Arizona unemployment insurance guide for claimants and advocates to use. It is available in English and Spanish on the MIJ website, morrisinstituteforjustice.org, or by calling the Institute.

2011 Legal Services Directory

The September 2011 Legal Services Directory is available on the MIJ website, morrisinstituteforjustice.org, or by calling the Institute.

Continuing Legal Education

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.

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Jennifer and Milton recently joined our board and they will be great additions to the board.

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Ellen Sue Katz, Director
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Phoenix Fundraiser

The Institute’s annual Phoenix fundraiser will be on November 2, 2011, from 5:00 to 7:00 p.m. at Hanny’s Restaurant in downtown Phoenix. We will honor the Honorable Debbie

McCune Davis for her work against payday lenders.

Donations

Your support is needed to continue the many projects we have undertaken on behalf of low-income persons in Arizona. Please send your donations to the William E. Morris Institute for Justice, 202 East McDowell Road, Suite 257, Phoenix, Arizona 85004-4536.

Westlaw

A special thanks to Bryan Cave for providing the Institute with Westlaw.