

# Clearinghouse REVIEW

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# Case Notes

## Simultaneous Federal and State Court Actions Halt Health Care Cuts to Individuals Residing in Hawaii Under Compacts of Free Association with the United States

A vague English-only notice targeting people who live in Hawaii under Compact of Free Association (COFA) agreements with the United States (citizens of the Federated States of Micronesia, Republic of the Marshall Islands, and Republic of Palau, all geographically part of Micronesia) for life-threatening reduction in health care benefits under Hawaii's Medicaid program, and received less than two weeks before the cuts' effective date, was likely to violate the due process clause of the U.S. Constitution. In *Sound v. Koller*, Civil Case No. 09-00409 (D. Haw. Sept. 1, 2009), the court granted plaintiffs' motion for a temporary restraining order and subsequently declared the attempt to reduce or eliminate health care benefits to COFA residents invalid for failure to follow the Hawaii Administrative Procedure Act's notice and public hearing procedures (HAW. REV. STAT. §§ 91-1 *et seq.* (2010)) (see *Sound v. Koller*, Civil Case No. 09-1-2022-08). These cases illustrate how quick legal action can respond to unconstitutional and otherwise unlawful acts that present vulnerable communities with life-threatening circumstances.

### Factual Background

Though considered by many to be a paradise, Hawaii suffers from the same economic pressures that many states have faced over the past several years. Hawaii is grappling with a \$1.2 billion budget deficit for the upcoming fiscal year and is scrambling to find ways to reduce expenditures as revenues plummet. None of its approaches has challenged our sense of aloha more seriously than the attempt to restrict critical health care severely for COFA residents.

### Hawaii's Most Recent "Nonimmigrant" Population

Under the COFA agreements citizens of the Federated States of Micronesia, Republic of the Marshall Islands, and Republic of Palau may "enter into, lawfully engage in occupations, and establish residence as a non-immigrant in the United States and its Territories and possessions..." (Pub. L. No. 99-239, art. IV, § 141(a), 99 Stat. 1770 (1986)). Citizens of these countries may enter the United States by applying for a nonimmigrant entry and need only present a valid passport.

Before 1996 COFA residents were eligible for federally funded health care under Medicaid, but the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1612(a)(1), reclassified them as "nonqualified aliens," who thus became ineligible for matching federal funds. States have discretion to continue health care coverage entirely with state funds.

A 2008 Census estimated that approximately 12,000 COFA residents live in Hawaii. As is often the case for new arrivals, Hawaii's COFA population, faced with discrimination, has faced challenges in integrating.

### Discriminatory Cost Cutting Not a Budget Fix

Ordered to cut costs, the Department of Human Services Med-QUEST Division, which administers Hawaii's Medicaid program, determined that restricting the availability of medical assistance to COFA residents would save approximately \$15 million a year. Although it had funded medical assistance to COFA residents under an informal policy since 1997, the state attempted to reduce substantially the level of medical assistance available to current enrollees by transferring them to a new plan, Basic Health Hawaii, that was scheduled to take effect on September 1, 2009. The state, it turned out, had also quietly been denying enrollment to all new COFA resident enrollees, on national-origin grounds, since July 2009.

Sometime in mid-August 2009, the Med-QUEST Division mailed to approximately 7,500 current benefit recipients an English-only notice explaining only that they would be transferred from their current plans to a new plan called "Basic Health Hawaii." Despite the Department of Human Services' awareness that this population was largely limited- or non-English-speaking, the notice letter contained only a small box with information in several Micronesian languages with a telephone number to call "to get help in your language." The telephone number connected callers to a computerized voice-mail system that offered options only in English. The notice said nothing about the change in services, nor did it explain the new plan in any detail.

That the transfer to Basic Health Hawaii meant denial of coverage for life-saving dialysis and chemotherapy treatments and associated drugs soon became apparent despite the veil of secrecy. Elimination of this critical care would have immediately affected at least 230 to 260 people. Faced with confusion and uncertainty, concerned legislators scheduled informational briefings to inform the public, including Lawyers for Equal Justice, of the cuts and their potentially devastating impact.

## The Lawsuits

Within hours of the legislative briefing, the press reported the imminent health care cuts, and community groups representing the affected population contacted us for assistance. In partnership with the local private law firm of Alston Hunt Floyd & Ing, we decided to file companion cases in both state and federal court. The federal action alleged violations of the due process and equal protection clauses of the U.S. Constitution; in state court we alleged violations of the Hawaii Administrative Procedure Act and the equal protection and right to life provisions of the Hawaii Constitution.

We obtained patient declarations describing the fragile medical condition of many of those affected by the changes, the confusion and fear that permeated the COFA community because of the lack of timeliness and clarity in the description of the new Basic Health Hawaii program, and the difficulties that recipients had in reading the English-only letter. We also obtained declarations from doctors who described the consequences of not continuing dialysis treatment for patients as a “slow poisoning of their body, drowning in their own fluids within 5–12 days” of ending treatment. Other declarations from providers of dialysis and chemotherapy services described the lack of notice that their companies had received from the state about the impending changes in coverage and a complete lack of planning for the inevitable consequences of the health care cuts.

We filed both actions, along with motions for temporary restraining orders, on August 31, 2009—the day before the cuts’ effective date. Both courts set hearings for September 1.

### Motion Denied on the Basis of Inadequate Showing of Imminent Harm and Proposed Plan Declared Invalid

The state court judge denied the motion for a temporary restraining order on the grounds that absent a patient whose health and life were imminently at risk—i.e., one who had already been denied critical medication or dialysis treatment and was on the road toward death or imminent bodily harm—such an order was not warranted. The court scheduled an expedited preliminary injunction hearing to determine whether plaintiffs were entitled to injunctive relief on the grounds that the state had violated the state administrative procedure act by failing to publish notice of the new Basic Health Hawaii plan and offer an opportunity for public comment. However, in light of the relief obtained in district court, as discussed below, a state court preliminary injunction was no longer needed.

Declaring the new health plan invalid because of the state’s administrative procedure act violation, the state court later granted plaintiffs’ motion for partial summary judgment. Subsequently the state sought a declaratory judgment that the plan did not violate the equal protection clause, but, in light of the relief already obtained in both the federal and state actions, the state court denied this motion as moot and granted plaintiffs’ motion to dismiss their constitutional claim voluntarily, without prejudice.

### Likely Due Process Violation Found and Temporary Restraining Order Granted

On September 1, 2009, immediately after the state court hearing, the parties rushed to federal court. Ruling from the bench, Judge J. Michael Seabright granted a temporary restraining order on due process grounds. The order required the state to

- stop disenrolling COFA residents and immigrants who had been in the United States for less than five years from the state-funded health programs in which these individuals were participating before August 1, 2009, and
- reenroll all COFA residents and immigrants who had been in the United States for less than five years and who were disenrolled on the basis of national origin.

Citing a host of federal cases, Judge Seabright (1) reasoned that individuals have a property interest in continuing to receive benefits under state-provided health care plans and other benefit programs and (2) concluded that “the Plaintiffs have shown a likelihood of success in proving that they have been denied adequate procedural safeguards in Defendants’ decision to reduce the level of their health care benefits.” The court’s due process holding obviated the need to reach the slightly more complex equal protection issue.

The court scheduled a preliminary injunction hearing, but within a few weeks the state stipulated to extend the temporary restraining order until it completed the rule making required by the Hawaii Administrative Procedure Act and timely provided constitutionally appropriate notice of any adverse changes in eligibility or benefits to all persons then participating in a health benefit program under defendants’ preexisting policies. The state also agreed to continue enrolling new participants whose applications had been denied on national-origin grounds.

With the state commencing the rule making to implement a new Basic Health Hawaii plan and the equal protection argument now moot, the parties entered into a stipulation for voluntary dismissal of the federal action without prejudice, conditioned upon any future case being assigned to Judge Seabright.

### “Prevailing Parties”

After the federal case, the parties, arguing that the temporary restraining order and stipulated extension thereof was tantamount to obtaining preliminary injunctive relief, moved for fees as “prevailing parties” pursuant to 42 U.S.C. § 1988. The court agreed and awarded fees and costs to plaintiffs as prevailing parties. In light of the decision’s potentially significant impact and the scarcity of case law on this issue, we anticipate that the state might appeal.

### Round Two

On December 24, 2009, the state formally announced its new Basic Health Hawaii plan; much like the first proposed plan, it would severely cut health care benefits and effectively preclude new enrollees by imposing a 7,000-person statewide

cap. While the state touts the new plan as a way to provide health care coverage to individuals ineligible for matching federal Medicaid funds, the low enrollment cap makes clear that the real purpose is to reduce health care coverage significantly or eliminate it.

We at Lawyers for Economic Justice believe that the new proposed plan continues to violate the equal protection clause because it gives COFA residents and legal permanent residents admitted to the United States for less than five years (and who are 19 and older and not pregnant) fewer health benefits, based upon their national origin, citizenship status, and duration of residency, than other Hawaii residents.

Although the state held public hearings on January 25 and 26, 2010, we believe that the state has continued to violate the Hawaii Administrative Procedure Act by, among other ways, failing to make the hearing notice available in languages spoken by the targeted population; failing, despite requests, to provide interpreters at the public hearing; and otherwise depriving COFA residents of a meaningful opportunity to participate in the rule making. State-issued press releases suggest that the new plan will cover dialysis, but the state has not publicly explained how it intends to provide this coverage. The Department of Human Services denied all requests for explanation at the public hearing.

Lawyers for Economic Justice and other members of the litigation team are looking at new constitutional and administrative procedure act challenges.

### Implications

Although the significant equal protection issue remains unresolved, for now, the federal and state court orders show that, even in a budget crisis, states cannot ignore benefit recipients' and the general public's right to know what cuts are being made and the impact of those cuts.

The federal court temporary restraining order is an important step for individuals who are of limited-English proficiency. In finding a likely due process violation, the court relied heavily upon the state's failure to give intelligible notice to COFA residents: "Despite that many COFA residents do not speak English, the notification letter was largely in English and a telephone number provided to receive foreign language assistance was similarly unhelpful because it did not provide assistance for all languages ...." This shows that in certain instances, while there is no longer a private right of action under Title VI, civil rights attorneys can look to the flexible due process test to protect the constitutional rights of limited- and non-English-speaking individuals.

### Lessons Learned

The work on this case underlines the importance of forming trustful and mutually supportive partnerships while engaging in complex advocacy. Our program, Lawyers for Equal Justice, is a small nonprofit legal aid program that primarily focuses

on systemic advocacy. We have a small staff of three full-time and one part-time lawyer. When the state announced the cuts, our litigation docket consisted of four pending class actions, including a very active case against the Hawaii Public Housing Authority for failing to maintain a 600-unit Honolulu project in a safe and sanitary condition and to accommodate disabled residents' needs. With barely a week left before the effective date of the health care cuts, developing strong partnerships with others was essential to our success.

We were fortunate to partner immediately with pro bono counsel from a remarkable firm in Hawaii, Alston Hunt Floyd & Ing. Sharing the legal work not only added critical resources for the task ahead but also brought together a variety of skills that proved essential to our victory. We were fortunate to find two organizations that served and advocated on behalf of the Micronesian community, giving us direct and ongoing contact with the individuals who would be directly affected by the health care cuts, a steady stream of potential declarants, and the translation services essential to serving this population.

Most important, these community groups gave the litigation team legitimacy within the Micronesian community so that trustful relationships could be immediately established. The effort was also supported by a small coalition of sympathetic state legislature representatives who coordinated efforts within the political system to telegraph support for the need to reverse the governor's decision.

Perhaps the key lesson was the importance of strong and compelling facts to help the courts and the public understand the need for immediate relief. The state's decision to eliminate all dialysis and chemotherapy treatment underlined for the courts the seriousness of the issues before them. The media repeatedly described elimination of those services as equivalent to a death sentence, especially for those facing certain death within seven days after cessation of dialysis treatment. By highlighting the state's ignorance of the overwhelming language barriers faced by the Micronesian community and the feeble and untimely attempt to inform those affected by the cuts, the litigation team created a compelling case for immediate injunctive relief.

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