tory services in behavior management and one-on-one tutoring. For David, the school district agreed to conduct a special education evaluation over the summer and provide him with over ninety hours of compensatory services in behavior management and one-on-one tutoring.

Systemic Changes

Thanks to the team approach of a medical-legal partnership, Eric and David are both better off. However, the attorneys still have concerns about the same patterns of repeated suspensions that other students in the school district were having. The administrative hearing process is a poor forum for larger systemic issues. School district policy and practices were discussed during the negotiations in Eric's and David's cases, but the final agreement had no systemic changes.

To pressure the school district to make changes for other students, Legal Services of Eastern Missouri issued a press release in conjunction with the administrative complaints. The press release resulted in an article highlighting the complaints in a local newspaper (Elisa Crouch, *Confluence Academy Faces Complaint Over Suspensions*, STLTODAY.COM, July 9, 2010, http://bit.ly/f8iasv). The press release and the article turned attention to unmet special education needs in the school district but did not create large changes in the district's suspension practices.

Used successfully by the Southern Poverty Law Center, another option for resolving systemic special education issues is a state child complaint (Ronald K. Lospennato, *Multifaceted Strategies to Stop the School-to-Prison Pipeline*, 42 CLEARINGHOUSE REVIEW 528 (March–April 2009)). A state child complaint is filed with the state education agency (34 C.F.R. § 300.151 (2011)). The child complaint requires the education agency to investigate the claims in the complaint and issue a finding of compliance or noncompliance. A finding of noncompliance requires the state education agency to order corrective action, such as compensatory services or monetary reimbursement, as well as plan for appropriate future provision of services for children with disabilities (34 C.F.R. § 300.151(b)(1)–(2)(2011)). Filing a state child complaint for a class of similarly situated children is also possible. Eric's and David's attorneys considered filing a state child complaint in their cases but ultimately rejected this option due to the time required to complete the investigation, past results with the state complaint process, and the uncertainty of the outcome.

Through its work with Eric and David, Legal Services of Eastern Missouri learned three lessons for medical-legal partnerships to consider when resolving a legal issue. First, the strength of medical-legal partnerships lies in changing medical partners' approach to the issues. The training sessions that Legal Services of Eastern Missouri staff conducted for health care providers months before Eric and David met their attorneys were key to the positive outcome of the cases. Second, medical-legal partnerships based in legal aid organizations should use the in-house subject-matter expertise of the organization. The Legal Services of Eastern Missouri special education unit was a key partner in developing and resolving these cases. Third, medical partners should be used whenever possible to help produce larger systemic change. For example, medical partners should be invited to formal and informal negotiations with school districts and policymakers to discuss systemic change. Legal Services of Eastern Missouri is focused on partnering with its medical partners and other community agencies to work with school districts on systemic special education issues.

Lucas F. Caldwell-McMillan
Project Manager, St. Louis Children's Health Advocacy Project

Legal Services of Eastern Missouri
4232 Forest Park Ave.
St. Louis, MO 63108
314.256.8790
lfcaldwell-mcmillan@lsem.org

Litigation in Federal and State Courts in Hawaii Preserves Critical Health Care for Micronesians

Hawaii is the most isolated populated land mass in the world, but its isolation has not protected its population from U.S. mainland trends that too often apply a slash-and-burn approach to the fundamental needs of low-income people. When the approach occurs in paradise, it is perhaps even more painful: the aloha spirit, or treating people with care and respect, is central to defining Hawaiians. One of the most desperate efforts by the state government to reduce a projected $1 billion deficit over the next two years involves its repeated attempts to restrict health care services severely for people who live in Hawaii under the Compact of Free Association (COFA) agreements with the United States.

Over the past year and a half Lawyers for Equal Justice and the organization's pro bono law firm partners have obtained from the federal district court in Hawaii orders enjoining the state from restricting or eliminating health care services to COFA residents on the grounds that such actions would violate the state Administrative Procedure Act (HAW. REV. STAT. §§ 91-1 *et seq.* (2010)) and the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution (see *Sound v. Koller*, No. 09-00409 JMS/KSC (D. Haw. Sept. 1, 2009); *Sound v. Hawaii*, No. 09-1-2022-08 GWBO (D. Haw. Aug. 31, 2009); *Korab v. Koller*, No. 10-00483 JMS/KSC (D. Haw. Dec. 13, 2010)).

Basic Health Hawaii

Under the COFA agreements, citizens from the three Micronesian nations (Federated States of Micronesia, the Republic of the Marshall Islands, and the 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 nonimmigrant entry and need to present only a valid passport.

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

several other states, exercised this option and began giving COFA residents health care coverage identical to that for those eligible for Medicaid.

Responding to an order from the governor to cut costs, the state's Department of Human Services developed a plan during the summer of 2009 to restrict health care coverage for COFA residents by transferring them to a new medical plan called Basic Health Hawaii. The new program was to take effect on September 1, 2009; its coverage limited doctor visits to twelve and hospital stays to ten days per year, eliminated transportation costs, and limited drug coverage to four generic drugs at any one time. Most important, Basic Health Hawaii did not include any treatment for dialysis or chemotherapy. The state estimated that annual savings would be approximately $15 million.

Due Process Argument

Approximately two weeks before Basic Health Hawaii was to take effect, letters written in English were mailed to COFA residents who received benefits; the letters explained that beneficiaries would be transferred to the new Basic Health Hawaii program. English was used despite awareness that this population was largely limited- or non-English-speaking. A small box on the letter contained information in several Micronesian languages with a telephone number to call "to get help in your language," but the number connected callers to a computerized voice mail system offering options only in English. The letter listed the services that were covered by Basic Health Hawaii but did not mention the services, such as dialysis and chemotherapy, that were being eliminated. The elimination of these two critical services would immediately affect 110 people on life-sustaining dialysis and 150 who were receiving chemotherapy.

Lawyers for Equal Justice, working with the organization's local pro bono private law firm partner, Alston Hunt Floyd & Ing, filed companion cases in both federal and state courts on the day before the transfers to Basic Health Hawaii were to occur. The federal action alleged due process and equal protection violations, while the state court action claimed violations of the Hawaii Administrative Procedure Act due to the state's failure to follow the required rulemaking before creating the new program.

The following day federal court Judge Michael Seabright issued a temporary restraining order enjoining the state from transferring anyone to Basic Health Hawaii; Judge Seabright found that the state's failure to give recipients timely, clear, and understandable notice of their transfer into the new health program violated their right to due process. Immediately after Judge Seabright's order, the state conceded that it also had failed to comply with the Hawaii Administrative Procedure Act in that the state did not follow any rulemaking when it created Basic Health Hawaii to reduce medical coverage for COFA residents. The state court granted plaintiffs' motion for summary judgment (for more on this stage of the litigation, see Victor Geminiani et al., *Simultaneous Federal and State Court Actions Halt Health Care Cuts to Individuals Residing in Hawaii Under Compacts of Free Association with the United States*, 44 Clearinghouse Review 78 (May–June 2010)).

Battle for Equal Protection

On December 2, 2009, the state again formally announced its intention to reintroduce Basic Health Hawaii as the state-funded health initiative that would provide health coverage to COFA migrants. The "new" Basic Health Hawaii plan was virtually identical to the previous plan, with a few exceptions. Dialysis and chemotherapy were now included as an "emergency" service under the state's Emergency Medical Assistance Program rather than under Basic Health Hawaii. Coverage under the emergency plan requires extensive paperwork, must be renewed on a regular basis, is not guaranteed, and does not include essential medications. Most dialysis patients take up to a dozen prescription medications per month—an amount well above the Basic Health Hawaii's monthly limit of four. All 7,700 COFA residents receiving state-funded coverage would be transferred into the plan. The plan also called for capping Basic Health Hawaii enrollment at 7,000 and accepting no new enrollees until the enrollment dropped to 6,500, effectively denying any medical assistance to new residents for some time.

More than 100 people testified at public hearings on January 25 and 26, 2010. Notwithstanding testimony against the "new" Basic Health Hawaii, the state in May announced that the plan would begin on July 1, 2010. Despite the *Sound* ruling and continued concerns about the content of the notices to enrollees, the Department of Human Services informed recipients, in substantially the same written format it had used in the first attempt, that it would cut coverage.

Faced with the reimplementation of Basic Health Hawaii, the litigation team made a strategic decision not to "go to the well" again by challenging the state's failure to give the class notice that complied with due process. The victory in our first challenge, as well as the public hearings held in January, had created a vibrant network of COFA residents and their supporters, resulting in wide dissemination and understanding of the changes in coverage and the effective dates regardless of the obvious flaws in the state's new notice. The team decided to file in federal district court a single case challenging the legality of the new Basic Health Hawaii program. Judge Seabright had sought the parties' agreement to have referred to him any new case challenging reduction in health services for COFA migrants. The state reluctantly agreed.

We filed the new complaint on August 23, 2010, and alleged two causes of action. The first, and primary, claim was that the state's decision to reduce health benefit coverage for COFA residents was based on alienage and, as such, violated the equal protection clause of the Fourteenth Amendment. The second, relying on the "integration mandate" of the Americans with Disabilities Act, 42 U.S.C. § 12132, challenged Basic Health Hawaii's limitations on coverage in requiring many recipients to receive medical services in hospital emergency facilities rather than in their doctors' offices or in their homes.

The court's ruling on the equal protection challenge would be determined by whether it applied a "rational basis" or "strict scrutiny" standard. Previous case law made clear that if the court used the "rational basis" test, the fragile state economy would suffice to justify the state's decision. However, if the court found that the state's decision was based on alienage, a strict scrutiny standard would apply and the state's current

economic challenges would not be a defense. In *Graham v. Richardson*, 403 U.S. 365 (1971) the U.S. Supreme Court struck down, in two states, statutes that limited eligibility for public welfare based on alienage. *Graham* established that, under the U.S. Constitution, "classifications based on alienage, like those based on nationality or race,… are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority,… for whom such heightened judicial solicitude is appropriate" (*id*. at 372). Applying strict scrutiny the Supreme Court held that "a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify … making non-citizens ineligible for public assistance…" (*id.* at 374).

Only one federal court decision presented facts almost identical to those in our case. *Soskin v. Reinertson*, 353 F.3rd 1242 (10th Cir. 2004), found that a Colorado law depriving legal aliens of state-funded Medicaid coverage, which they had received, was subject to the rational basis test because the 1996 welfare law excluded legal aliens from federally funded Medicaid coverage. Like Hawaii, Colorado stopped covering legal aliens in 2003 to ease its budget shortfall. The Tenth Circuit found that this decision was subject to rational basis review because Colorado's exercise of discretion to limit benefits effectuated the Act's concern that "individual aliens not burden the public benefits system" (*id.* at 1255).

Several state court opinions with facts similar to ours supported our position, but *Soskin* was the only federal case directly on point. While we were preparing our complaint, we became aware of similar challenges being mounted in state courts in Massachusetts, Connecticut, and New Jersey. Although federal precedent did not support our position, our litigation team decided to pursue our claim in federal court. Our judgment was based on our victory in the *Sound* case and our confidence that the federal district court had the courage to chart its own course regardless of clear Tenth Circuit precedent in *Soskin*.

The state moved to dismiss, and our team moved for a preliminary injunction. The state's motion reiterated the *Soskin* opinion that the 1996 welfare law gave the states discretion to provide state-funded medical care for legal aliens. Exercising that discretion was appropriate, the state claimed, as long as the decision to do so passed the rational basis test. Our motion directly challenged the *Soskin* findings and relied on supportive state court opinions in New York, Maryland, and Connecticut. Our brief also cited a federal court opinion in *Sudomir v. McMahon*, 767 F.2d 1456 (9th Cir. 1985), distinguishing state policies that must have uniformity with federal policy from those where states had discretion to adopt policies differing from federal requirements.

Declarations were critical in telling our clients' stories and personalizing the human as well as economic consequences of reduction in health coverage. We obtained patient declarations that described the fragile medical condition of many of those affected by the changes. These declarations were carefully written to describe the patient's work history in Hawaii, the consequences of being denied life-sustaining medications and medical treatment, and the impact that the denial had on the patients' own confidence in themselves and their fears for their families. We also obtained declarations from doctors who provided services to COFA residents through nonprofit health clinics. The declarations stressed the high prevalence of serious illnesses among the affected population, the long-term economic costs to the state and health clinics of the failure to provide timely and appropriate services, and the inability to treat significant illnesses such as kidney failure and cancer within the limited doctor visits and hospital stays permitted under Basic Health Hawaii. Many of the declarations described the condition of specific patients whom the doctors were currently seeing and the consequences the patients were suffering because of the limitations imposed by the Basic Health Hawaii plan. Since the reduction in covered health services would drive many patients into emergency rooms, a number of the declarations from doctors emphasized the increased expense of providing care through those facilities rather than through traditional primary and preventive care providers.

A Courageous Decision

Three weeks after the filing of the cross motions, Judge Seabright ruled on the state's motion to dismiss. Relying heavily on *Graham*, Judge Seabright concluded that the state's decision to reduce health care significantly for COFA residents was based on their alienage and therefore subject to review using the higher strict scrutiny standard. Contrary to the court in *Soskin*, Judge Seabright found that the 1996 welfare law did not create a uniform rule or dictate any particular state action as to COFA residents; instead the law gave states a choice as to whether COFA residents should be eligible for any state public benefit. This broad grant of discretion creates neither a federal classification nor a uniform federal policy because the states may do as they please. Under the 1996 welfare law, states are free to provide legal aliens no benefits, some benefits, or the same benefits for citizens and qualified aliens. Applying the strict scrutiny test, Judge Seabright required the state to show that its classification "advances a compelling state interest by the least restrictive means available" (Order Granting Plaintiffs' Motion for Preliminary Injunction at 11, *Korab v. Koller*, No. 10-00483 JMS/KSC (D. Haw. Dec. 13, 2010), http://bit.ly/kQm1bx).

Judge Seabright also found that the state failed to identify any particular state interest that is advanced by its decision to exclude COFA residents from the full health coverage. Quoting from *Graham*, Judge Seabright stated that, "[w]hile the court recognizes that [Basic Health Hawaii] was created in response to the state's budget crisis, the 'justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens'" (*id.* at 12).

Judge Seabright stated that he was still drafting an order in response to plaintiffs' motion for injunctive relief and asked the parties to meet and confer to develop recommendations, time frames, and order of priority for reinstating eligible COFA residents in their prior medical plan. Within days we negotiated with the state a reenrollment process and time frame that gave priority to recipients who were most in need of immediate relief because of the severity of their illness, and we gradually completed reenrollment for everyone within two months. Using the time frames and priorities we had negotiated with the state, Judge Seabright issued a preliminary injunction two weeks later, ordering the state to reinstate full medical coverage for eligible COFA residents.

Postscript

The opinion, which we shared widely with advocates involved in similar cases in other jurisdictions, was immediately helpful in a successful challenge to a Washington state policy that eliminated a fully state-funded food assistance program for legal aliens. After the 1996 welfare law eliminated eligibility for SNAP (Supplemental Nutrition Assistance Program) benefits for legal aliens residing in the United States for less than five years, Washington State implemented a nearly identical, totally state-funded food assistance program. Using the *Korab* opinion, advocates obtained a federal court preliminary injunction requiring the state to reinstate the food assistance program.

Hawaii has appealed Judge Seabright's opinion to the Ninth Circuit. Although we still hope that the state's newly elected governor will reverse the previous administration's decision to appeal, that is unlikely. The state's economy continues to struggle with a two-year budget deficit projection of $1 billion, and political pressure to recreate the Basic Health Hawaii plan for COFA residents is still strong.

Lessons

These cases would not have been possible without a communitywide effort. Our program, Lawyers for Equal Justice, is a small nonprofit legal aid organization that focuses primarily on systemic advocacy. Our entire staff consists of an executive director and an AmeriCorps attorney. While these consecutive cases were active, our litigation docket also included four pending class actions and a number of nonlitigation activities directed at systemic reform.

Among the most critical partners in our collaboration were the two private law firms who took the lead in drafting the pleadings and presenting the oral arguments in court. During the first round of litigation involving our due process claims, Alston Hunt Floyd & Ing, a Honolulu-based law firm assisted in the case. Lawyers for Equal Justice's primary responsibilities were to connect with the COFA community and relevant medical providers, gather current information on the impact of the Basic Health Hawaii plan on COFA residents, inform the community and media of the evolving events, gather compelling declarations, and keep abreast of similar litigation under way in other jurisdictions. During the implementation stages of the two injunctive orders, Lawyers for Equal Justice interfaced with the state attorney general's office to resolve problems of individual COFA residents who encountered difficulties in reenrolling in their original plan with full medical coverage.

The medical staff members who served our clients were also critical partners. We received a continuous stream of referrals of patients who suffered from a variety of serious medical problems and received little or no service because of the restrictions within the Basic Health Hawaii plan. We interviewed each of these patients and prepared declarations for those with the most compelling stories. We had the privilege of working very closely throughout the litigation with five COFA community groups located on various islands in Hawaii. These groups used their networks to disseminate accurate and timely information to COFA residents throughout the state on the specifics of the Basic Health Hawaii plan, the status of our litigation, and the enforcement rights contained in the injunctions. During the second round of litigation, these groups also committed to raise $20,000 to support some of the expenses of the case. Contributions came from churches, individuals, a Micronesian basketball tournament, and a cultural festival. We became one team, accomplishing something meaningful together against substantial odds.

The cases reinforced our belief in the strengths of our judicial system. The clients we represented have neither power nor the ability to influence the powerful. Our clients are politically and socially marginalized, as are most new immigrants. As is true in most states today, our state's economy is in tatters. In grasping for solutions, politicians and voters are too often willing to shred services for those whom they do not yet consider part of the "American family." One courageous judge, educated about the severe impact that ill-informed and callous state policy will have on people, can do what is right. Judge Seabright also reminded us of the central place that aloha must have in our state and, we hope, in our nation.

Victor Geminiani
Executive Director

Deja Marie Ostrowski
AmeriCorps Advocate

Lawyers for Equal Justice
119 Merchant St.
P.O. Box 37952
Honolulu, HI 96837-0952
808.587.7605
Victor@lejhawaii.org
Deja@lejhawaii.org

Subscribe to Clearinghouse Review!

Clearinghouse Review: Journal of Poverty Law and Policy is the advocate's premier resource for analysis of legal developments, innovative strategies, and best practices in representing low-income clients. Each issue of the Review features in-depth, analytical articles, written by experts in their fields, on topics of interest to poor people's and public interest lawyers. The Review covers such substantive areas as civil rights, family law, disability, domestic violence, housing, elder law, health, and welfare reform.

Subscribe today!

We offer two ways to subscribe to Clearinghouse Review.

A **site license package** includes printed copies of each monthly issue of Clearinghouse Review and online access to our archive of articles published since 1967. With a site license your organization's entire staff will enjoy fully searchable access to a wealth of poverty law resources, without having to remember a username or password.

Annual site license package prices vary with your organization size and number of printed copies.

- Legal Services Corporation–funded programs: $170 and up
- Nonprofit organizations: $250 and up
- Law school libraries: $500

A **print subscription** includes one copy of each of six issues, published bimonthly. Annual rates for the print-only subscription package are as follows:

- Legal Services Corporation–funded programs: $105
- Nonprofit organizations: $250
- Individuals: $400

A print subscription for Legal Services Corporation–funded programs and nonprofit organizations does not include access to the online archive at www.povertylaw.org.

CUT HERE

Please fill out the following form to receive more information about subscribing to Clearinghouse Review.

Name _____

Organization _____

Street address _____ Floor, suite, or unit _____

City _____ State _____ Zip _____

E-mail _____

My organization is

- ☐ Funded by the Legal Services Corporation
- ☐ A nonprofit
- ☐ A law school library
- ☐ None of the above

What is the size of your organization?

- ☐ 100+ staff members
- ☐ 51–99 staff members
- ☐ 26–50 staff members
- ☐ 1–25 staff members
- ☐ Not applicable

Please e-mail this form to subscriptions@povertylaw.org.
Or fax this form to Ilze Hirsh at 312.263.3846.

Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602