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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

ARIZONA ASSOCIATION OF PROVIDERS
FOR PERSONS WITH DISABILITIES, an
Arizona nonprofit corporation; BEVERLY
HERMON, individually and as legal guardian
for Eric Hermon; TONI McCLEOD, as legal
guardian for E.K. and R.K.; REEVES
FOUNDATION, LLC, an Arizona limited
liability company; DOMINIC BARRERA;
ABRiO FAMILY SERVICES AND
SUPPORTS, INC., an Arizona corporation;
FAMILY PARTNERS, LLC, an Arizona
limited liability company; METRO CARE
SERVICES, INC., an Arizona corporation,

Plaintiffs,

vs.

STATE OF ARIZONA; LINDA BLESSING
in her official capacity as Director of the
Arizona Department of Economic Security,

Defendants.

NO. CV2009-006509

**PLAINTIFFS' PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
PRELIMINARY INJUNCTION**

Assigned to the Honorable Joseph B.
Heilman

1 In accordance with Rule 65, A.R.C.P. and the Court's instructions,
2 plaintiffs hereby submit their proposed findings and conclusions.

3 **SUMMARY OF RULING**

4 This case raises serious, indeed grave questions of law and public policy. These
5 questions need not all be resolved now to justify preliminary injunctive relief. Plaintiffs
6 have amply demonstrated a lack of procedural safeguards or any assessment by DES of
7 the impact of its reductions. Meanwhile, the threat to public safety and harm to our most
8 vulnerable citizens is overwhelmingly clear. A preliminary injunction is issued.

9 **BACKGROUND**

10 Plaintiffs are a coalition of individuals with developmental disabilities,
11 provider agencies and a state-wide association of provider agencies that serve persons
12 with developmental disabilities.

13 Developmental disabilities are defined by law and include cognitive
14 disabilities, autism, cerebral palsy and epilepsy, as well as strongly-demonstrated
15 potential in children under six years of age to become developmentally disabled. Many
16 program beneficiaries of DES-DDD also have other conditions that require constant
17 services and supervision.

18 In their Complaint, plaintiffs sought declaratory and injunctive relief,
19 including a temporary restraining order and a preliminary injunction, to restrain
20 defendants from implementing reductions in spending and services for the DES Division
21 of Developmental Disabilities (DES-DDD), its administration, operations, programs,
22 services to beneficiaries and payments therefor, including any reduction in the rates of
23 payment. The specific actions announced by defendants pertaining to DES-DDD and
24 that plaintiffs seek to enjoin are set forth in Hearing Exhibit #2, "Department of
25 Economic Security Fiscal Year 2009 Budget Reductions", and any actions analogous
26

1 thereto, and they request that this Court direct the injunction to defendants and their
2 officers, directors, employees and agents.

3 Plaintiffs allege that the actions of defendants in enacting SB 1001, First
4 Special Session, 2009 Arizona Legislature (Hearing Exhibit #1), and in implementing the
5 cuts and reductions as described in Hearing Exhibit #2, violate numerous federal and
6 state laws, the due process clauses of the Arizona and United States Constitutions, and
7 other provisions of the Arizona Constitution. Defendants deny that SB 1001 violates the
8 Arizona Constitution; deny any unconstitutional taking of plaintiffs' property or of any
9 disproportionate impact of the budget reductions on DES-DDD and its beneficiaries; or
10 that they have or will violate federal and state laws through the suspension and reduction
11 of services and payments.

12 On February 27, 2009, plaintiffs filed their Complaint and sought a
13 temporary restraining order. By agreement of the parties, this Court heard oral argument
14 on plaintiffs' request for a temporary restraining order that afternoon. This Court denied
15 the application and then set the matter for an evidentiary hearing on plaintiffs' application
16 for a preliminary injunction, which was conducted on March 2 and March 3, 2009 before
17 this Court.

18 **FINDINGS OF FACT**

19 1. The Defendants had little to no time to come up with a plan to
20 implement the DES budget reductions mandated by SB 1001 (Hearing Exhibit #1).

21 2. Defendants conducted an internal crisis decision-making process to
22 determine how they would reduce spending and services within the DES-DDD program
23 of services without guidance or priorities from the Legislature and without an open or
24 public process by which defendants disseminated any information about what was being
25 considered, or that afforded any public input from anyone, including stakeholders in the
26 DES-DDD program, such as beneficiaries, providers and taxpayers.

1 3. This internal decision-making process resulted in the announcement
2 of the service and spending reductions and suspensions on the DES website on February
3 23, 2009, the content of which is completely set forth in Hearing Exhibit #2 and states:

4 • *Operating* – In addition to reductions related to overtime, travel,
5 purchasing, and furloughs, the Division is reducing its staffing by
6 approximately 100 people. Case managers' caseloads will exceed the
7 1:39.5 ratio included in the Department's contract with AHCCCS. *The*
8 *Division will not be able to comply with case management, timeliness,*
9 *monitoring, medical, quality management, and business deliverable*
10 *requirements.* (Emphasis added)

11 • *Suspend Non-Residential State-Only Services* – Effective in March, the
12 Department will suspend all non-residential home and community based
13 services for individuals with developmental disabilities who do not qualify
14 for the ALTCS program. *93 percent of the children and adults receiving*
15 *state-only services – more than 4,000 individuals - will lose all of their*
16 *services such as therapies, habilitation, employment supports, after*
17 *school and summer programs, attendant care, respite and transportation.*
18 (Emphasis added)

19 • *Reduce Provider Rates* – Effective March 1, the Department will reduce
20 rates for 850 agency and 3,500 independent providers of home and
21 community-based (HCBS), institutional, and acute services by 10 percent.
22 Since fiscal year 2005, HCBS rates have increased by about 22 percent. In
23 addition, the Department will to address group-home capacity issues and
24 lower enhanced rates for specialized habilitation-communication,
25 specialized habilitation-music, community protection, behavioral health,
26 and day treatment and training.

21 4. This website publication was the first time that providers had any
22 notice of the reductions in rates and services, thus providing them with 2-3 weeks' notice,
23 at best, that they would lose 10% of their annual revenues due to the 10% across-the-
24 board rate cut, and that they would lose drastically more revenues, varying from one
25 provider to another, due to the complete suspension of services to some beneficiaries
26 served by DES-DDD.

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5. The 10% rate cut did not follow any studies, rate-setting process or any agency determination that the reduced rates are adequate, appropriate and equitable, as required by law, to assure that beneficiaries will have access to services that are reasonably available, and that providers can stay in business.

6. As of March 2, 2009, defendants had not notified any beneficiaries or providers about which beneficiaries' services would be suspended or reduced. This circumstance will likely cause many providers to provide significant amounts of unreimbursed services.

7. Indeed, the Court must infer from all the circumstances, which were created by defendants' actions, that the defendants are counting on service providers to continue providing a significant amount of unreimbursed services in order to prevent immediate and irreparable harm to multiple program beneficiaries, albeit without knowing whether or not that will be the case.

8. As of March 3, 2009, the evidence revealed there is still a great deal of confusion and uncertainty among defendants' agents, beneficiaries, service providers, including all the plaintiffs, as to which beneficiaries will be losing some or all of their services, and for how long. This uncertainty is caused by defendants.

9. As of March 3, 2009, beneficiaries still had not received notices regarding service suspensions that are to become effective within 10 days from delivery of the notice, and defendants did not present any evidence to the Court regarding the content of any notices, including what actions, if any, beneficiaries might take to avoid unjustifiable loss of essential services.

10. As of March 3, 2009, defendants admit that they have not notified any provider agencies regarding which consumers' services will be suspended or reduced.

1 11. Defendants will completely suspend all services to some 4,000
2 beneficiaries of DES-DDD.

3 12. The Court heard credible evidence that the DES budget reductions
4 will have a significant impact on other beneficiaries of DES-DDD whose services are
5 guaranteed by federal law, including Medicaid and the Individuals with Disabilities
6 Education Act with respect to Early Intervention Services programs, particularly for
7 infants and toddlers aged 0 to 3 years old. This impact will include significant and
8 lengthy interruptions in services due to closures of providers' businesses in some
9 instances and closures of provider programs in other areas. This is coupled with what are
10 likely to be inordinate delays in transitioning beneficiaries from one service provider
11 agency to another (assuming another is available), and with a complete lack of individual
12 planning.

13 13. Plainly, the DES-DDD grievance and appeals processes, which take
14 months to run their courses, will be overwhelmed by beneficiaries and providers who
15 may seek to grieve or appeal reductions and suspensions of services, including the
16 suspensions and reductions that were not even intended by the agency and that are likely
17 to occur.

18 14. All DES-DDD program beneficiaries have individual service plans
19 ("ISP"). ISPs are essential to plan for the highly individualized, home- and community-
20 based services for each program beneficiary. The ISP is developed by a team that
21 includes the beneficiary, the family and/or legal guardian, therapists and other provider
22 representatives, and DES-DDD itself. The ISP is the document through which services
23 are arranged, provided, evaluated and adjusted when necessary for every DES-DDD
24 beneficiary.

25 15. Defendants have not adhered to the ISP process for any program
26 beneficiaries in accordance with federal or state law and DES-DDD program

1 requirements. Defendants acknowledged that in not one instance (for approximately
2 29,000 DES-DDD beneficiaries) has DDD evaluated the individual needs of a beneficiary
3 before implementing these spending and service reductions and suspensions.

4 16. Defendants acknowledged they have not evaluated the impact of the
5 10% rate reduction and service cuts on any individual provider agencies, including by
6 locale, or determined the financial ability of its private provider network to absorb both
7 the loss of consumers and the rate reduction, and remain in business.

8 17. Defendants acknowledge they did not have adequate time to plan
9 and assess the consequences of their actions.

10 18. As to the State-Only funded beneficiaries, defendants admit they
11 will suspend all services, including DES case management services, and thus no one will
12 check on their welfare, although they are still eligible for program services. Indeed,
13 defendants admit (Hearing Exhibit #2) that due to DES staff layoffs, their own support
14 coordinators will have increased caseloads increased that will be in violation of AHCCCS
15 standards.

16 19. Plaintiffs, and many other program beneficiaries and provider
17 agencies like them, are likely to suffer immediate and irreparable harm. That harm to
18 plaintiffs includes *at least* the following:

- 19 a. The loss, suspension and/or reduction of essential services to individual
20 plaintiffs, their wards and many other beneficiaries like them of
21 essential services that are necessary to their immediate safety and
22 welfare;
- 23 b. That due to the sheer number of beneficiaries effected, including state-
24 only funded and Medicaid-eligible beneficiaries, defendants are entirely
25 unable to respond to all the individual emergencies that are likely to
26 arise due to these actions and reductions of service on short notice;

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c. That provider agencies will fail, and other provider agencies will close programs, leading to significant interruptions in essential services that are necessary for the safety and welfare of a very vulnerable population, and all to the serious financial harm to provider agencies and their owners;

20. That defendants have not provided any meaningful notice to beneficiaries or providers regarding cuts, reductions and suspensions, nor will defendants be able to afford any meaningful due process relief.

21. That while the circumstances regarding Plaintiff Dominic Barreras are in dispute between the parties, the Court has determined that defendants are not sufficiently aware of his circumstances and what continuing services he needs to survive, and that there is the danger of immediate and irreparable harm to him, including a possible inability to obtain food, medicine and to be safe.

22. That with respect to plaintiff Toni McCleod and the two brothers who are her wards, the Court finds that the “solution” to their individual circumstances was brought about by defendants solely due to the filing of this lawsuit; and, that the circumstance faced by these two wards is one of great public interest, likely of repetition yet evading review, and therefore the Court will not consider this plaintiff’s claims for relief as moot.

23. That with respect to individual plaintiff Beverly Hermon, as legal guardian for her son Eric Hermon, she has proven a likelihood of immediate and irreparable harm to her son, who is in services with The Centers for Habilitation, the CEO of which testified at great length to the likely closing of TCH’s programs, reductions in staff, reductions in staff compensation and benefits, likely turnover, and reduction of services to all TCH enrollees.

1 24. That with respect to plaintiff Family Partners, the Court finds that
2 Family Partners is likely to go out of business and close all of its programs, for children
3 and adults alike, State-Only and Medicaid beneficiaries, to the irreparable harm to the
4 company and to its owners, who have personally guaranteed the company's lease, and to
5 the hundreds of beneficiaries served by the company.

6 25. The Court further finds that there is a dangerous likelihood that the
7 state's four largest providers of Early Intervention Services to infants and toddlers will
8 close their programs, affecting hundreds of children statewide at a critical time in their
9 development. Furthermore, defendants are likely unable to prevent serious and lengthy
10 interruptions in such services.

11 26. The Court finds that defendants implementation of the 10% across-
12 the-board rate cut for all DES-DDD services, including Medicaid services, has been
13 implemented by defendants without any process or study to assure that the rates will be
14 appropriate, equitable or adequate regarding any and all particular services. Furthermore,
15 implementation of such rate cuts is likely to cause numerous provider agencies to close
16 programs or go out of business altogether, and to further reduce services as will likely
17 have impact on all beneficiaries served, regardless of eligibility categories.

18 27. Plaintiffs represent the interests of a very vulnerable population
19 statewide, the welfare of which is of great public interest.

20 28. Plaintiffs have demonstrated a strong likelihood of prevailing on the
21 merits.

22 29. The Court finds that the balance of the hardships tips
23 overwhelmingly in favor of the plaintiffs. Defendants acknowledged that the cost to the
24 State for delayed implementation of the cuts and suspensions would cost the State
25 approximately \$1 million per week. This amount, while not *de minimus*, is not
26 substantial in the context of a nearly \$1 billion DES annual budget.

1 30. This case involves matters of public interest. It concerns poverty
2 and disability programs for vulnerable people. The Court has heard testimony
3 concerning the financial hardships of some of the plaintiffs. DES admits that “the
4 reduction in (sic) \$19,953,300 in general fund monies, actually equated to a savings of
5 \$43,121,100 in total dollars.” Defendant’s Memorandum in Opposition to Plaintiff’s
6 Application for a Temporary Restraining Order and Preliminary Injunction at p.5 n.4. In
7 other words, the State will lose federal funds due to the actions challenged by plaintiff.
8 *See also* the examples of recent press coverage, attached as Exhibit A. Furthermore, if
9 the federal government determines that the administration of the State’s plan for
10 Medicaid enrollees fails to substantially comply with any of the provisions of 42 U.S.C. §
11 1396a, the federal government can cut off the state’s funding. 42 U.S.C. § 1396c. An
12 injunction may actually save money for the State.

13 31. At the time of the hearing, plaintiff Beverly Hermon testified about
14 defendant Linda Blessing’s remarks to a legislative appropriations committee just days
15 ago. Ms. Hermon testified that Blessing acknowledged her concerns about the safety of
16 DDD beneficiaries as a result of these cuts. The minutes of that meeting were
17 unavailable at the time of the evidentiary hearing, and are now available to the public.
18 The Court takes judicial notice of Dr. Blessing’s comments. Ms. Blessing’s comments
19 can be located at:

20 http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=4848&publish_id=&event_id=, and
21 her comments include:

22 1:51:00

23 Kavanaugh: There were some things that you don’t touch... we didn’t think
24 it necessary to put a verb in hands off CPS..., but what exactly did you do
25 to CPS?

26 Blessing: We had safety as one of the ...it was the top criterion for where
we would take cuts and we did not want to effect safety.... We had to look at

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DDD case workers and CPS case workers and try to minimize the damage by doing the lowest priority, the potential risk category of our CPS calls....it's called priority 4, the potential for risk to children. We had to hit that area. It is a safety area . It is a very risky thing to do. But we could not make the numbers without going to DDD and CPS.

Kavanaugh: Explain what you did to CPS and level 4

Blessing: Basically, We will be unable to investigate 100% of the CPS cases.

Kavanaugh: Isn't that required by statute to investigate, so you're going to be violating the statute.

Blessing: Yes sir. We do not have the resources to live up to that statutory commitment. Yes Sir

Representative Sinema: Earlier there was a reference that some people thought DES should have known not to cut certain areas..Where else could those cuts have come from

1:53:28 Blessing: Minimum Harm we feel we could do....Our criteria, safety being the top priority. ***And incidentally cutting services to individuals with developmentally disabled is a safety issue too. Because some pretty bad outcomes can happen. So, we had no choice.*** I frankly don't know where else we could have gone, because we did pick the least harm areas.

32. DES admits that 93 percent of the children and adults receiving state-only services – more than 4,000 individuals – will lose all of their services such as therapies, habilitation, employment supports, and other services. Ex. 2 at page 7.

CONCLUSIONS OF LAW

1. Plaintiffs have standing to bring this action and this matter is properly before this Court.

1 2. SB 1001, to the extent it is a valid legislative enactment, must be read in
2 harmony with existing state laws that pertain to the DES-DDD program. These
3 provisions are numerous. For example:

4 a. By statute, “developmentally disabled persons in this state shall not
5 be denied as the result of the developmental disability the rights,
6 benefits, and privileges guaranteed by the constitution and laws of
7 the United States and the constitution and laws of this state.” A.R.S.
8 36-551.01(A).

9 b. Also, “any developmentally disabled person or the parent or
10 guardian of a developmentally disabled person who believes that his
11 rights, as established by this chapter or by the Constitution of the
12 United States or the Constitution of Arizona, have been violated has
13 a right to petition the superior court for redress unless other remedies
14 exist under federal or state laws.” A.R.S. 36-551.01(S).

15 c. The ISP is a “written statement of services to be provided.” A.R.S.
16 36-551(26)(“Individual program plan’ means a written statement of
17 services to be provided to a person with developmental disabilities,
18 including habilitation goals and objectives, which is developed
19 following initial placement evaluation and revised after periodic
20 evaluations.”).

21 d. By statute, DDD “shall ensure that all contracted developmental
22 disabilities service providers rendering services pursuant to this
23 chapter are reimbursed in accordance with title XIX of the social
24 security act.” A.R.S. 36-557(H).

25 e. As a condition of contracts with any developmental disabilities
26 service provider, the DDD director “shall require terms that conform

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with state and federal laws, title XIX statutes and regulations and quality standards. The director shall further require contract terms that ensure performance by the provider of the provisions of each contract executed pursuant to this article.” A.R.S. 36-557(J).

f. Also, DDD “shall establish a rate structure that ensures an equitable funding basis for private nonprofit or for profit agencies for [community developmental disability services] pursuant to subsection B of this section and section 36-2943. In each fiscal year, the division shall review and adjust the rate structure based on the provisions of section 36-2959. A rate book shall be published and updated by the division to announce the rate structure that shall be incorporated by reference in contracts for client services.” A.R.S. 36-557(K).

g. “The department [DES] shall contract with an independent consulting firm for an annual study of the adequacy and appropriateness of title XIX reimbursement rates to service providers for the developmentally disabled program of both the Arizona long-term care system and the state only program. The consultant shall also include a recommendation for annual inflationary costs. Unless modified in response to federal or state law, the independent consulting firm shall include, in its recommendation, costs arising from amendments to existing contracts. The department may require, and the department's contracted providers shall provide, financial data to the department in the format prescribed by the department to assist in the study. A

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complete study of reimbursement rates shall be completed no less than once every five years.” A.R.S. 36-2959(A).

3. Defendants’ actions raise serious questions regarding non-compliance with numerous Title XIX (Medicaid) statutes and regulations. First, title XIX statutes have specific ISP requirements. Medicaid case managers are required to develop an ISP for each enrollee, ensure that services are being furnished in accordance with that plan, and make certain that the services in the ISP are adequate. 42 C.F.R. 440.169(d)(2) and (4); 42 U.S.C. § 1396a(a)(26) (stating that the state must develop a written ISP for Medicaid enrollees with inpatient mental hospital services); 42 U.S.C. § 1396a(a)(31) (ordering the State to develop an ISP for Medicaid enrollees with respect to their services in an intermediate care facility for the mentally retarded); *see also* A.R.S. § 36-551.01(C), (J)-(K); A.R.S. § 36-565; A.A.C. R6-6-601 and discussion in Plaintiffs’ Application for Temporary Restraining Order and Preliminary Injunction at 16. If providers are not able to provide all services covered under the State plan, DES-DDD cannot ensure that beneficiaries are receiving care in accordance with their ISPs. .

4. Second, the State must guarantee a grievance process, appeals process, and access to the State’s fair hearing process to Medicaid eligible beneficiaries. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. 438.402. Furthermore, the State plan is required to “provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.” 42 C.F.R. 438.400(a)(1). Title XIX defines action as a “failure to provide services in a timely manner.” C.F.R. 438.400(b)(4). During the grievance process, the State must continue all benefits to the enrollees. 42 C.F.R. 438.420. Furthermore, the State must arrange for medical services for a Medicaid enrollee whose services were terminated or who was disenrolled from a health program for any reason other than ineligibility for Medicaid. 42 C.F.R.438.62.

1 5. Section (13)(A) of title XIX imposes procedural notice and comment
2 requirements the State must follow when setting reimbursement rates to providers and
3 (30)(A) imposes for substantive findings the State must make when establishing rates. 42
4 U.S.C. §§ 1396a(a)(13)(A) & (30)(A). The regulation corresponding to (13)(A) requires
5 states to provide public notice of “any significant proposed change in its methods and
6 standards for setting payment rates and services.” 42 C.F.R. 447.205. The notice must
7 be published before the effective date of the change, appear as a public announcement in
8 the Federal Register or newspaper, describe the proposed change in methods and
9 standards, estimate the increase or decrease in expense to the state, explain why the
10 agency is changing its rates, provide a location where the proposal can be viewed by the
11 public, and give the hearing date and time, if any. 42 C.F.R. 447.205(c)-(d).

12 6. Under section (30)(A), when a state seeks to modify its reimbursement
13 rates, it must base its decision on responsible cost studies and consider efficiency,
14 economy, quality of care, and equality of access. *Orthopaedic Hosp. v. Belshe*, 103 F.3d
15 1491, 1496 (9th Cir. 1997) (invalidating California’s new rates because it did not
16 consider if payments were consistent with efficiency, economy, and quality of care
17 sufficient to ensure access, nor did it consider the cost of care to the providers, so the
18 rates were arbitrary and capricious). A State must “assure that payments . . . are
19 sufficient to enlist enough providers so that care and services are available under the plan
20 at least to the extent that such care and services are available to the general population in
21 the geographic area.” 42 U.S.C. § 1396a(a)(30)(A). “It is not justifiable . . . to reimburse
22 providers substantially less than their costs for purely budgetary reasons.” *Mission*
23 *Hosp.*, 85 Cal. Rptr.3d at 646 (quoting *Orthopaedic Hosp.*, 103 F.3d at 1499 n. 3).

24 7. Furthermore, the 10% rate cut is likely invalid because DES did not make
25 *any* substantive findings that a State must make when establishing rates as required by
26 Section (30)(A). Moreover, DES did not follow its own rate-setting process. *See A.R.S.*

1 § 36-2959. DES did not consider the cost to providers when it reduced rates across the
2 board, and under *Orthopaedic*, this alone is enough to render the cuts arbitrary and
3 capricious.

4 8. Plaintiffs have demonstrated a strong likelihood of success on four separate
5 causes of action against defendants . Defendants' cuts likely violate the Arizona
6 Constitution, federal and state laws, and DES rules.

7 9. The legislature has likely violated Article III of the Arizona Constitution by
8 ordering DES, an executive agency, to reduce its budget by roughly 35% without
9 providing any direction, principles or guidance as to which programs or categories of
10 services should be reduced or eliminated.

11 10. The separation of powers doctrine enshrined in Article III of the Arizona
12 Constitution requires that the legislative, executive and judicial branches be separate and
13 distinct. The legislature may delegate to an agency power to adopt rules and regulations
14 to provide for the execution and enforcement of legislation creating that agency.

15 *Hernandez v. Frohmler*, 68 Ariz. 242, 204 P. 2d 854, 863 (1949). But an agency has
16 no powers other than those the legislature has delegated to it. *Facilitec, Inc. v. Hibbs*,
17 206 Ariz. 486, 80 P. 3d 765 (2003).

18 11. It is also unconstitutional for the legislature to convey its essential
19 responsibility for making political choices. *See 3613 Ltd. v. Dep't of Liquor Licenses*
20 *and Control*, 194 Ariz. 178, 978P. 2d 1282, 1287 (Ariz. Ct. App. 1999) (citing *Lake*
21 *Havasu City v. Mohave County*, 138 Ariz. 552, 675 P. 2d 1371, 1378 (Ariz. Ct. App.
22 1983). State law defines DES's goals, programs, and operations. *See, e.g.*, A.R.S. § 41-
23 1941, *et seq.* and A.R.S. § 36-551, *et seq.* In enacting SB 1001, the Legislature
24 demonstrated that it either did not wish to take the time or did not have the will to select
25 specific programs for reduction or elimination. Instead, it inappropriately left those
26 decisions to DES. Because of the drastic change in the scope and substance of these

1 programs made by DES is an alteration of the fundamental mandates of the statutes, the
2 reductions are a political decision. The Legislature, not DES, is the governmental entity
3 with authority to decide which of these programs is to be reduced or eliminated. By
4 deciding to greatly reduce some programs to a greater extent than others, DES has
5 effectively rewritten the statutes and exercised the legislature's authority to make political
6 decisions.

- 7 12. DDD beneficiaries have certain rights under Arizona law, including:
- 8 A. the right to live in the least restrictive alternative, as determined after
9 an initial placement evaluation;
 - 10 B. the right to receive a written ("ISP"), developed by appropriate
11 department personnel with the participation of the client and the
12 client's parent or guardian;
 - 13 C. the right to periodic review of the ISP to measure progress; and
 - 14 D. the right for a developmentally disabled child to appropriate services
15 that are consistent with the child's written ISP.

16 A.R.S. § 36-551.01(C), (J) – (K), (R). Federal law refers to an ISP as an "individual care
17 plan". The ISPs are also required by federal law and the Arizona State Plan on Medicaid,
18 a federal contract. Defendants' actions will likely violate multiple rights of
19 beneficiaries.

20 13. In addition, the cuts to benefits and services is likely to cause a violation of
21 the State's obligations under Federal Medicaid law. In every type of provider, indeed,
22 every business entity, there comes a point when revenue reduction is so great that the
23 affected services can no longer be provided to anyone. DES must "continue to furnish
24 Medicaid regularly to all eligible individuals until they are found to be ineligible." 42
25 C.F.R. § 435.930(b), and Provider Plaintiffs are required by contract with Des-DDD to
26 provide all Medicaid services to Medicaid beneficiaries.

1 14. Medicaid is a joint federal-state program that provides medical services to
2 certain low-income individuals, *e.g.* those who are elderly, disabled, or children. 42
3 U.S.C. 1396 *et seq.* States can freely chose whether or not to participate in the Medicaid
4 program, but “[o]nce a State voluntarily chooses to participate in Medicaid, the State
5 must comply with the requirements of Title XIX and applicable regulations.” *Alexander*
6 *v. Choate*, 469 U.S. 287 n.1, 105 S.Ct. 712, 714 n. 1 (1985). Arizona has elected to
7 participate in the Medicaid program and has not obtained approval to reduce its services.

8 15. 42 C.F.R. 440.169(d) requires that case managers develop a specific care
9 plan for each Medicaid eligible individual that either resides in a community setting or is
10 transitioning to a community setting, and that a case manager monitor and ensure that
11 care is being provided according to the ISP. Here, the reductions to state agency funding
12 and general rate reductions will impact the ability to provide care so that care is not being
13 provided according to the ISP.

14 16. Related to this, Defendants have not given meaningful notice and hearing
15 rights to Medicaid beneficiaries related to the benefits reductions. This appears to violate
16 numerous federal and state laws. 42 U.S.C. § 1396a(3) states that a state plan must
17 “provide for granting an opportunity for a fair hearing before the State agency to any
18 individual whose claim for medical assistance under the plan is denied or is not acted
19 upon with reasonable promptness.” Moreover, due process clearly includes notice and an
20 opportunity for the beneficiary to appeal. *Mathews v. Eldridge*, 424 U.S. 319, 334-335
21 (1976); *see also Grijlva v. Shalala*, 946 F.Supp. 747 (D.Ariz. 1996), *aff’d*, 152 F.3d 1115
22 (9th Cir. 1998), *vacated and remanded*, 119 S.Ct. 1573 (1999), *remanded and judgment*
23 *vacated*, 185 F.2d 1075 (9th Cir. 1999), *settlement approved*, Order Re Class Action
24 Settlement Agreement, CIV 93-711 TUC ACM (D.Ariz. Dec. 4, 2000); *J.K. v.*
25 *Dillenberg*, 836 F.Supp. 694 (D.Ariz. 1993).

1 17. Arizona statutes and rules require that certain processes be followed before
2 any changes in the level of service being provided to an individual are implemented.
3 A.R.S. § 36-551.01(C), (J) – (K), (R) requires the development of an ISP for
4 developmentally disabled individuals. A.R.S. § 36-565(A) requires individual
5 evaluations to take place every six months, resulting in a new ISP. A.A.C. R6-6-601(40).
6 Only after evaluation may the Department recommend that a beneficiary be terminated
7 from a particular service. A.R.S. § 36-565(B). In addition, the beneficiary must receive
8 30 days advance written notice of any termination or substantial change to the services
9 being provided. A.R.S. § 36-565(C). If the beneficiary requests an administrative
10 review, the service may not be changed or terminated until a decision resulting from the
11 review is issued. *Id.*

12 18. DES Rule R6-6-602 describes the importance of the ISP. The rule provides
13 that the ISP should reflect the “best interest of the client”, and promote services that,
14 among other things, prevent deterioration of the family structure, alleviate abuse or
15 neglect, prevent the client from being a danger to himself or to others, and support a
16 client or family in temporary crisis.

17 19. DES-DDD “shall establish a rate structure that ensures an equitable funding
18 basis” for service providers serving the developmentally disabled A.R.S. § 36-557(K).
19 This rate structure “shall” be reviewed and adjusted according to the directives in A.R.S.
20 § 36-2959. A.R.S. § 36-2959 additionally mandates that DES “shall contract with an
21 independent consulting firm for an annual study of the adequacy and appropriateness of
22 title XIX reimbursement rates to service providers for the developmentally disabled
23 program of both the Arizona long-term care system and the state only program.” A.R.S.
24 § 36-2959(A). Those rates cannot be adjusted by DES “unless policy changes, including
25 creation or expansion of programs, have been approved by the legislature or are
26 specifically required by federal law or court mandate.” A.R.S. § 36-2959(B).

1 20. The Legislature made no policy changes with respect to the programs DES
2 has elected to reduce, nor has it approved the reductions. SB 1001 does not incorporate
3 an analysis of DES's programs and how the budget changes should be allocated
4 according to a formulated policy of the legislature. Moreover, DES does not have the
5 authority to change the rates paid to service providers without conducting a review of the
6 rates and including them in a report to the Legislature. Any attempt change the rates
7 without adherence to the correct process violates Arizona law.

8 21. Defendants' actions likely violate the "Takings Clauses" of the state and
9 federal constitutions.¹ First, Plaintiff Providers' private property—the use of its services,
10 facilities, supplies, and in some cases the entire business—will be taken, because, the
11 absence of planning by the State, will require providers to continue providing
12 uncompensated care based on the circumstances: they must comply with the ISPs,
13 corresponding federal and State laws, and their public responsibility, including not
14 allowing beneficiaries simply to be set adrift in the absence of provision for their health
15 and safety.

16
17 22. The Superior Court of Arizona may grant a preliminary injunction under
18 the principles of equity and "when, pending litigation, it appears that a party is doing
19

20
21 ¹ The "Takings Clause" of the Fifth Amendment to the U.S. Constitution provides "nor
22 shall private property be taken for public use, without just compensation." The Takings
23 Clause is "designed to bar Government from forcing some people alone to bear public
24 burdens which, in all fairness and justice, should be borne by the public as a whole."
25 *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978) (quoting
26 *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The Due Process Clause of the
Fourteenth Amendment makes the Fifth Amendment applicable to the states. *Id.* at 122;
see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007 (1992).
Article 2, Section 17 of the Arizona Constitution provides that "[n]o private property
shall be taken or damaged for public or private use without just compensation having first

1 some act respecting the subject of litigation, or threatens or is about to do some act” in
2 violation of the rights of the applicant that “would tend to render the judgment
3 ineffectual.” A.R.S. 12-1801(2)-(3).

4 23. The issuance of equitable relief is balanced upon four criteria:

- 5 1) A strong likelihood the plaintiff will succeed at trial on the merits;
- 6 2) The possibility of immediate and irreparable injury to it not
remediable by damages if the requested relief is not granted;
- 7 3) A balance of hardships favors the plaintiff; and
- 8 4) Public policy favors the injunction.

9 *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App.1990); *Burton v. Celentano*,
10 134 Ariz. 594, 595, 658 P.2d 247, 248 (App. 1982).

11 24. Traditionally, the parties seeking preliminary injunction were required to
12 show: “1) A strong likelihood that he will succeed at trial on the merits; 2) The
13 possibility of irreparable injury to him not remediable by damages if the requested relief
14 is not granted; 3) A balance of hardships favors himself; and 4) Public policy favors the
15 injunction.” *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). The
16 critical element is the relative hardship of the parties. To meet this burden, the plaintiffs
17 may establish either 1) probable success on the merits and the possibility of irreparable
18 injury; or 2) the presence of serious questions and ‘the balance of hardships tip sharply’
19 in his favor.” *Id.* (quoting *Justice v. Nat’l Collegiate Athletic Ass’n*, 577 F. Supp. 356,
20 363 (D. Ariz. 1983)). These two formulations represent two points on a sliding scale in
21 which the required degree of irreparable harm increases as the probability of success
22 decreases.” *Luckette v. Lewis*, 883 F. Supp. 471, 474 (D. Ariz. 1995) (quoting
23 *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir.1990)).
24
25

26 been made....” For purposes of this case, the analysis of the Takings Clause claim is the
same under both the Federal and Arizona Constitutions.

1 25. A preliminary injunction will be granted where there is a high probability
2 of success and the possibility of irreparable injury. It will also be granted where there is a
3 high degree of irreparable harm, even though there is a lessened probability of success.
4 *Luckette v. Lewis*, 883 F.Supp. 471, 474 (D. Ariz. 1995) (quoting *Diamontiney v. Borg*,
5 918 F.2d 793, 795 (9th cir. 1990)); *Smith v. Ariz. Citizens Clean Elections Com'n*, 212
6 Ariz. 407, 410-411, 132 P.3d 1187, 1190-1191 (2006). In this case, Plaintiffs can show
7 both likelihood of success and a high degree of irreparable injury. Moreover, they can
8 clearly show that public policy favors interim relief and that damages is inadequate relief.

9 26. Injunctive relief is appropriate against the government when there is
10 improper government interference in lawful business operations. *Pierce v. Society of the*
11 *Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535-36 (1925). The
12 Supreme Court held that businesses may go to the courts to seek injunctive relief “against
13 arbitrary, unreasonable, and unlawful [government] interference with their patrons and
14 the consequent destruction of their business and property.” *Id.* at 536.

15 27. The destruction of a going concern such as a family business would
16 constitute irreparable harm. Cf. *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898, 409 (App.
17 2003)(granting special action jurisdictions because allowing City to take “immediate
18 possession may cause irreparable harm--the destruction of a privately owned family
19 business. See *State ex rel. McDougall v. Superior Court*, 188 Ariz. 147, 148, 933 P.2d
20 1215, 1216 (App.1996).

21 28. This Court finds helpful the following preliminary injunction cases from
22 the federal courts:

23 A. The U.S. District Court in Arizona summarized the standard:

24 The Ninth Circuit has held that “[t]o obtain a preliminary injunction in
25 the district court, plaintiffs [are] required to demonstrate ‘(1) a strong
26 likelihood of success on the merits, (2) the possibility of irreparable injury
to plaintiff[s] if preliminary relief is not granted, (3) a balance of hardships

1 favoring the plaintiff[s], and (4) advancement of the public interest (in
2 certain cases).’ ” *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir.2004) (
3 quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th
4 Cir.1995)). “Alternatively, injunctive relief could be granted if the plaintiffs
5 ‘demonstrate[d] *either* a combination of probable success on the merits and
6 the possibility of irreparable injury *or* that serious questions are raised and
7 the balance of hardships tips sharply in [their] favor.’ ” *Id.*(quoting
8 *Johnson*, 72 F.3d at 1430)(internal quotation marks omitted). “These two
9 alternatives represent extremes of a single continuum, rather than two
10 separate tests....” *Id.* (quoting *Clear Channel Outdoor, Inc. v. City of Los*
11 *Angeles*, 340 F.3d 810, 813 (9th Cir.2003)). “Thus, the greater the relative
12 hardship to [the party seeking the preliminary injunction,]*887 the less
13 probability of success must be shown.” *Clear Channel*, 340 F.3d at 813. “In
14 cases where the public interest is involved, the district court must also
15 examine whether the public interest favors the plaintiff.” *Rodde*, 357 F.3d
16 at 994.

17 *Newton-Nations v. Rogers*, 316 F.Supp.2d 883, 886 -887 (D.Ariz. 2004).

18 B. Particularly pertinent, the Ninth Circuit has ruled that injunctive
19 relief is appropriate to assure fair procedures to the disabled:

20 [i]t is not only the harm to the individuals involved that we must
21 consider in assessing the public interest. Our society as a whole suffers
22 when we neglect the poor, the hungry, the disabled, or when we deprive
23 them of their rights or privileges. Society's interest lies on the side of
24 affording fair procedures to all persons, even though the expenditure of
25 governmental funds is required. It would be tragic, not only from the
26 standpoint of the individuals involved but also from the standpoint of
society, were poor, elderly, disabled people to be wrongfully deprived of
essential benefits for any period of time. It would be unfortunate, but far
less harmful to society, were the government to succeed in overturning the
preliminary injunction but be unable to recoup all or a portion of the funds.

Lopez v. Heckler, 713 F.2d 1432, 1437038 (9th Cir. 1983).

Indeed, the district court here granted plaintiffs a preliminary injunction
when they proved financial harm to beneficiaries due to AHCCCS Administration's

1 announcement that it was increasing beneficiaries' co-payments. *Newton-Nations v.*
2 *Rogers*, 316 F.Supp 2d 883 (D.Ariz.,2004)(courtesy copy attached for Judge Heilman).

3 29. Plaintiffs' Application for Preliminary Injunction should be granted
4 because: (1) Plaintiff Providers' will suffer irreparable injury if the preliminary injunction
5 is not granted; (2) Plaintiff Beneficiaries and their families will suffer irreparable injury if
6 the preliminary injunction is not granted because services that have not been rendered
7 cannot be replaced; and money is not a substitute; (3) the evidence shows that Plaintiffs
8 have a likelihood of success on the merits; (4) Plaintiffs have no adequate and speedy
9 remedy at law; (5) Defendants will not suffer substantial injury if they are enjoined from
10 implementing the statute, and therefore the balance of hardships weigh in Plaintiff's
11 favor; and (6) allowing providers to remain in business advances the public interest.

12 30. After considering all of the evidence and the record herein, the Court finds
13 that plaintiffs have demonstrated serious questions about the legality of DDD's actions
14 and that the balance of hardships tips sharply in plaintiffs' favor.

15 31. The Court therefore concludes that a preliminary injunction shall issue.
16 Plaintiffs have met the requirements of Rule 65, A.R.C.P.

17 32. Plaintiffs have no speedy and adequate remedy at law.

18 33. Waiver or Nominal Bond. Arizona Rule of Civil Procedure (65)(e) states
19 that "[n]o restraining order or preliminary injunction shall issue except upon the giving of
20 security by the applicant, in such sum as the court deems proper, for the payment of such
21 costs and damages as may be incurred or suffered by any party who is found to be
22 wrongfully enjoined or restrained." Following the interpretation of a parallel federal rule
23 given by the federal courts, Arizona does not require that a bond be posted in order for a
24 temporary restraining order or preliminary injunction to be valid. *In the Matter of Wilcox*
25 *Revocable Trust*, 192 Ariz. 337, 341, ¶¶ 19-20, 965 P.2d 71, 75 (App. 1998). Requiring a
26 nominal bond in public interest litigation is proper. *Save Our Sonoran, Inc. v. Flowers*,

1 408 F.3d 1113, 1126 (9th Cir. 2005). A court should “not set such a high bond that it
2 serves to thwart citizen actions.” *Id.* (listing many cases upholding this proposition). A
3 district court has discretion when setting the amount of a bond, and it is not required to
4 set bonds that “approximate actual damages.” *Id.*; *Barahona-Gomez v. Reno*, 167 F.3d
5 1228, 1237 (9th Cir. 1999). A trial court properly exercises this discretion when it
6 weighs the relative hardships of the parties, including the financial resources of the
7 petitioner. *Save Our Sonoran, Inc.*, 408 F.3d at 1126; *Barahona-Gomez*, 167 F.3d at
8 1237 (finding a nominal bond of \$1000 appropriate even though the government argued
9 costs accrued from being enjoined would be substantial when the legislation was in the
10 public’s interest and, although the petitioner’s did not show they were indigent, many
11 aliens are).

12 **PRELIMINARY INJUNCTION GRANTED**

13 This case raises serious, indeed grave questions of public policy and law.
14 The procedural violations have serious substantive impact. Sorting out the multiple legal
15 issues can await disposition on the merits. Preventing immediate and irreparable harm is
16 required.

17 In considering the evidence and legal arguments, including the various
18 funding streams that are funneled from one agency to another (*e.g.*, Medicaid-AHCCCS;
19 Medicaid-ALTCS-DDD; State-Only DDD, Special Education-DDD) this Court will not
20 “lose sight of the forest for the trees”. This case concerns the immediate welfare of
21 children and adults with severe disabilities, their families and guardians, and the interests
22 of the private provider network of services on which the State and DES depend to meet
23 their obligations under federal and state laws. As the result of SB 1001 and these
24 defendants’ plans to implement budget and service reductions within DES-DDD, this
25 Court finds there will be harm to some program beneficiaries and private providers,
26 including plaintiffs; that the defendants do not know to what degree their harm will arise

1 and have not had the opportunity to plan and prevent; that the harm that occurs will likely
2 be immediate and irreparable in some cases, including to the health and welfare of
3 individuals and the financial viability of providers, which correspondingly impacts the
4 availability and accessibility of services.

5 Therefore, with respect to the DES Division of Developmental Disabilities,
6 IT IS HEREBY ORDERED that these defendants, their officers, directors,
7 employees and agents, are enjoined from enforcing the spending cuts, service
8 suspensions and reductions, rate cuts and the like, as set forth in Hearing Exhibit #2, or
9 from taking any similar actions, for as long as this Preliminary Injunction shall remain in
10 force and effect.

11 IT IS FURTHER ORDERED, in accordance with Rule 65(e), A.R.C.P.,
12 that a nominal bond in the amount of \$10.00 is required from plaintiffs, which shall be
13 posted within one week from this date.

14 **FURTHER SCHEDULING**

15 Because this matter concerns issues of great public importance, the Court
16 will “fast track” the disposition of this matter on the merits, whether by dispositive
17 motions or by trial. Therefore, the parties shall submit a Comprehensive Case
18 Management Memorandum to the Court by _____, 2009;

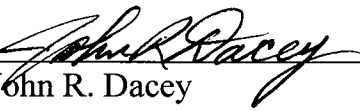
19 A comprehensive case management conference is hereby set for the
20 _____ day of _____, 2009 at _____ a.m./ _____ p.m.

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22 SO ORDERED this _____ day of _____, 2009.
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Respectfully submitted this 4th day of March, 2009.

GAMMAGE & BURNHAM P.L.C.

By 
John R. Dacey
Ryan J. Millecam
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Phoenix, Arizona 85004
Attorneys for Plaintiffs

ORIGINAL of the foregoing filed with the Clerk of the Superior Court
this 5th day of March, 2009.

COPY of the foregoing was sent via facsimile on the 4th day of March, 2009 and
hand-delivered the 5th day of March, 2009, to:

The Honorable Joseph B. Heilman
Superior Court of Arizona
East Court Building-814
101 W. Jefferson Avenue
Phoenix, AZ 85003-2243
Facsimile: 602.372.8661

COPY of the foregoing was sent via email the 4th day of March, 2009 and
hand-delivered the 5th day of March, 2009, to:

Juliet Peters
Fred Zeder
Robert Craig Salminen
Assistant Attorneys General
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1275 West Washington Street
Phoenix, AZ 85007-2926
Attorney for Defendants

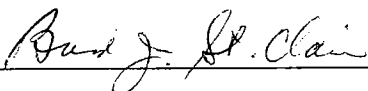


EXHIBIT 1

Brewer looking to stimulus money to save child care funding

JEREMY DUDA
jeremy.duda@azcapitoltimes.com

Gov. Jan Brewer plans to seek federal stimulus money for a DES program that took a \$25 million hit in the 2009 budget reductions, saying that it will not take a negative toll on the state's budget deficit, despite a recent assertion by the Joint Legislative Budget Committee that the state would have to restore the lost funding in order to be eligible for the stimulus dollars.

On Feb. 25, Brewer spokesman Paul Senseman said the governor has identified an opportunity in the American Recovery and Reinvestment Act that will provide \$50 million for a Department of Economic

Security subsidy that provides child care to the working poor.

The first half of that money, Senseman said, will be used to replace \$25 million that DES cut from the program when it lost \$100 million in the fiscal 2009 budget fix, while the second half will allow the program to continue through 2010. The American Recovery and Reinvestment Act requires the money to be spent by the end of the 2010 fiscal year, Senseman said.

In order to qualify for the federal funding, the Legislature must restore the \$25 million for the child care subsidy. Senseman said Brewer has asked Senate President Bob Burns and House Speaker

Kirk Adams to work with her on an appropriations bill that would restore the state funding, which they expect to, in turn, recoup from the federal stimulus money.

"Very few of the federal stimulus projects require legislative appropriation enactment. This is one of them. To that end, the governor has asked the speaker and the president to work with her in proposing an appropriation bill that would be sent to her in the next several weeks in order to make us eligible to apply for those," Senseman said.

Brewer's announcement of the plan comes just two days after JLCB said Arizona cannot supplant state funding for the DES program with federal dollars. Much of the language in the American Recovery and Reinvestment Act prohibits states from using federal stimulus money to supplant their own funding for a wide variety of programs and purposes.

But the Governor's Office and its budget arm, the Office of Strategic Planning and Budgeting, have concluded that passing the appropriation and offsetting it with stimulus money would fulfill federal requirements.

"Our understanding is it would be a replacement and that would fulfill the maintenance-of-effort requirements that would be under this federal legislation," Senseman said. "Technically, we wouldn't be (supplanting) because we'd be continuing the \$25 million appropriation and not ending it as was originally designed in the FY09 budget package."

Adams and Burns, however, weren't as confident as Brewer that the state will be permitted to use federal stimulus money in that manner.

"I guess on the first blush everything looked to be relatively straightforward, but then when we started talking to our membership and questions started popping up about

how this whole thing was going to work, things kind of turned in the opposite direction," Burns said the day after Senseman announced the governor's proposal. "So there's a lot of questions right now about how this would all fit into place and what the authority of the Legislature is relative to the stimulus money. So we've really got a number of questions yet that need to be answered."

JLCB is still researching whether the state can use federal money to cover a general fund appropriation, Adams said.

"It may even be that a bill isn't even required. All that stuff is being looked at. The problem is they passed this 1,000-page stimulus bill, but the federal agencies still have to promulgate the rules for the disbursement of these funds. It's not entirely clear yet what those rules are (or) exactly when these funds will arrive. There's still a lot of questions up in the air," he said. "We just don't have the complete information yet."

The continuation of funding for the DES child care program will affect about 20,000 children, Senseman said. About 15,000 children currently receive care under the subsidy, he said, and DES estimates that another 5,100 will be on the program's waiting list by the time the fiscal year ends in July.

The decision to cut funding for the child-care program was made by DES as part of a \$100 million lump sum budget reduction that was recently mandated for the department under a 2009 budget fix the Legislature approved in late January to alleviate an estimated \$1.6 billion deficit.

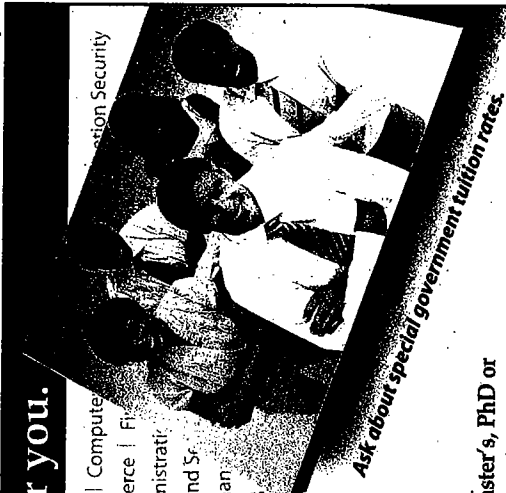
"When the governor learned that there was possible federal dollars available to prevent this cut from being exacted, she asked the department to hold off in cutting those services until we have confidence that we'll be able to continue with those dollars," Senseman said. ■

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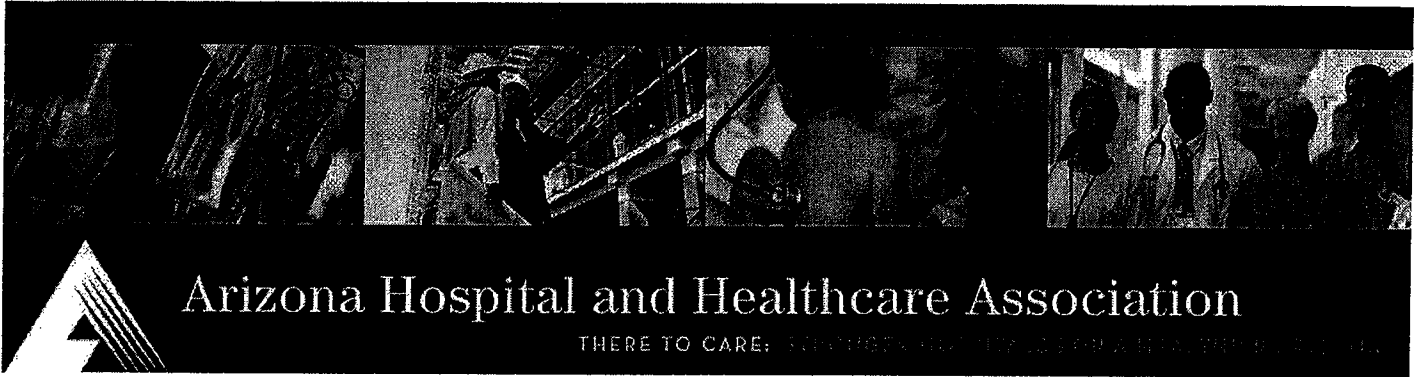


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Federal Economic Recovery Package Includes Funding to Restore Devastating FY 2009 Budget Cuts to Arizona’s Safety Net Hospitals

The American Recovery and Reinvestment Act (ARRA) the President just signed includes a **\$1.9 billion** increase in federal matching funds for the Arizona Health Care Cost Containment System (AHCCCS) over nine calendar quarters (October 1, 2008 through December 31, 2010). According to the Congressional Budget Office (CBO), Arizona will receive an *additional* \$620 million in FY 2009, \$910 million in FY 2010 and \$460 million in FY 2011 in federal matching funds for AHCCCS. Arizona stands to gain \$4 for every \$1 the state invests in AHCCCS, providing a strong economic incentive for lawmakers to use the additional federal funds for their intended purpose—to protect healthcare services. **The Arizona Hospital and Healthcare Association (AzHHA) urges lawmakers to accept this federal assistance and use the increased AHCCCS funding to restore devastating cuts made to safety net hospitals in the FY 2009 budget and avoid damaging hospital cuts proposed in the FY 2010 budget.**

As the chart below indicates, ARRA provides significantly more federal funding for AHCCCS than the Joint Legislative Budget Committee (JLBC) originally estimated. According to the CBO, the state will receive \$261 million more than was assumed in the FY 2009 budget fix and \$510 million more than is currently estimated in the Appropriations Chairmen’s option list for FY 2010.

Last legislative session Arizona hospitals sustained \$41.9 million in AHCCCS hospital payment and Graduate Medical Education (GME) budget cuts. This year, Arizona hospitals received an additional \$35.1 million in AHCCCS cuts. **AzHHA urges lawmakers to use \$35.1 million of the \$260 million in increased federal AHCCCS funding for FY 2009 to restore cuts lawmakers recently enacted to the Disproportionate Share Hospital payment and GME programs in the FY 2009 budget fix, as well as prevent cuts to rural hospitals threatened by the AHCCCS lump sum reduction. AzHHA also urges lawmakers to use the ARRA funding in FY 2010 to avoid proposed \$75.5 million in cuts to Arizona hospitals in FY 2010.** Overall, AzHHA’s proposal will save the state \$202.9 million in federal matching funds and eliminate \$254.3 million in devastating cuts to Arizona’s healthcare safety net.

Fiscal Year	Increased Federal Funding for AHCCCS	JLBC Estimate	Excess AHCCCS Funding Available to Restore/Avoid Cuts	Hospital Cuts That Can Be Restored in FY 2009 & Avoided in FY 2010	Funding Available After Hospital Cuts are Restored/ Avoided
FY 2009	\$620 M	\$360 M	\$260 M	\$13.1 M Disproportionate Share Hospital Payments \$ 7 M Graduate Medical Education \$15 M AHCCCS Lump Sum Cut (Rural Hospitals are impacted by this cut) + \$35.1 M Total Funding to Restore	\$224.9 M
FY 2010	\$910 M	\$400 M	\$510 M	\$21.4 M Rate Freeze \$34 M 5% Hospital Payment Rate Reduction \$13.1 M Disproportionate Share Hospital Payments \$ 7 M Graduate Medical Education + \$75.5 M Total Amount of Cuts to Avoid	\$434.5 M
FY 2011	\$460 M	N/A	\$460 M	N/A	\$460 M
TOTAL	\$1.9 B	\$760 M	\$1.2 M	\$110.6 M	\$1.1 B

Federal decision clears way for state to receive Medicaid stimulus money

ANJANETTE RILEY

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An uncharacteristically swift decision by the federal government has removed a major hurdle that threatened to prevent Arizona from collecting nearly \$2 billion in federal matching funds earmarked for Medicaid programs.

The Feb. 25 decision by the Centers for Medicare and Medicaid Services assures states that they will be eligible to collect Medicaid stimulus money regardless of changes to eligibility standards for state-run health care programs for children.

Arizona's portion of the nearly \$800 billion federal stimulus package includes as much as \$1.7 billion in matching funds for state-run health care programs. The feds. kick in approximately \$3 for every \$1 the state invests.

The level of funding the state ultimately receives is directly tied to the state's average monthly unemployment rate, which reached 6.9 percent at the end of the year. At that rate, Arizona would receive an additional \$487 million to help cover costs in fiscal 2009, \$703 million for fiscal 2010

and \$380 million for fiscal 2011.

Unemployment, though, is expected to increase above current levels as the economy continues to fall, according to an analysis by the Joint Legislative Budget Committee. If unemployment tops 7.1 percent, an additional \$2 million would be available to the state to cover costs from Oct. 1, 2008, to Dec. 31, 2010.

In addition, the stimulus will provide money to county governments to reduce their portion of the state Medicaid match. The federal match to counties has been set at 3-to-1, instead of the previous rate of 2-to-1. That means counties would receive an additional \$48 million in fiscal 2009, \$73 million in fiscal 2010 and \$41 million in fiscal 2011 if the unemployment rate hits the 7.1 mark.

Until the Feb. 25 announcement, it was unclear whether Arizona would be eligible to receive the full amount of available stimulus money. And prior to the snap decision, the Centers for Medicare and Medicaid Services had indicated it would take at least 60 days to clarify eligibility requirements.



FILE PHOTO

Eligibility questions hinged on a recently enacted state law that was intended to allow the Arizona Health Care Cost Containment System (AHCCCS) to offset budget cuts by raising the level of premiums required for coverage under the KidsCare program.

KidsCare — also known as the State Children's Health Insurance Program (SCHIP) — was created in 1997 to subsidize health care programs for children of low-income families. KidsCare members receive coverage for wellness care, vaccinations and vision in exchange for premiums ranging from \$25 for single-child families to as much as \$35 per month.

dollars was made contingent on states agreeing to maintain the same level of individual eligibility standards as the ones on the books in July 2008.

The language in the stimulus package left it unclear whether Congress intended to require states to maintain eligibility standards for Medicaid only or whether states were also barred from creating more restrictive standards for KidsCare.

After President Obama signed the American Recovery and Reinvestment Act on Feb. 17, AHCCCS officials sent a written request to CMS requesting permission to go forward with plans to increase KidsCare premiums. Existing arrangements between the state and fed-

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(SCHIP) — was created in 1997 to subsidize health care programs for children of low-income families. KidsCare members receive coverage for wellness care, vaccinations and vision in exchange for premiums ranging from \$25 for single-child families to as much as \$35 per month.

On Jan. 31, when lawmakers approved revisions to the state budget that closed a \$1.6 billion gap, they included a provision to double the monthly premium costs for the nearly 60,000 KidsCare participants for the remaining five months of fiscal 2009. If the premiums stay at that level next year, the increase is expected to generate \$5.6 million in fiscal 2010, according to estimates provided by officials at AHCCCS.

But the state would only keep a small portion of that money. More than \$1 million generated by premium rate hikes would be deposited in the general fund. State agreements with Centers for Medicare and Medicaid Services would require all remaining funds to be transferred to the federal government.

KidsCare programs are not funded by state or federal Medicaid dollars. But officials at AHCCCS were worried that lawmakers' decision to raise the monthly premiums for KidsCare beneficiaries would jeopardize the state's ability to qualify for stimulus dollars earmarked for Medicaid.

The dispersal of Medicaid-stimulus

STIMULUS FOR KIDS CARE

After President Obama signed the American Recovery and Reinvestment Act on Feb. 17, AHCCCS officials sent a written request to CMS requesting permission to go forward with plans to increase KidsCare premiums. Existing agreements between the state and federal government require CMS to sign off on changes to state-run health care programs.

Even though the CMS response cleared the way for Arizona to receive federal stimulus money, the federal agency stopped short of giving the state permission to increase the KidsCare premiums. Approval by CMS is still pending, and AHCCCS officials said they were unsure when to expect a final decision.

But some state lawmakers said the complications caused by KidsCare premiums are proof that they are too restrictive. Rep. Ed Ableser, a Democrat from Tempe, said Arizona should "take the hint" from the federal government and terminate all KidsCare premiums.

"What the feds are doing is giving Arizona a nice little kick in the butt for us to help families even more," Ableser said. "Arizona has been hoarding these premiums over families. It makes it very difficult for some kids to get health care." ■