



## State Claims Board of Wisconsin

### ABC for Health Inc vs. Wisconsin Office of the Commissioner of Insurance

**Submitted July 14, 2011**  
**A Claim for \$176,250 Plus Expenses**

#### **Introduction**

In July 2010,<sup>1</sup> the Wisconsin Office of the Commissioner of Insurance (OCI) solicited ABC for Health (ABC) assistance to apply for a federal Consumer Assistance Program (CAP) grant through the US Department of Health and Human Services (HHS). OCI encouraged ABC to partner on the grant due to ABC's consumer-related expertise in Medicaid/ BadgerCare programs and certain self-funded private insurance issues that OCI lacks. Moreover, OCI does not intervene in consumer and insurance conflicts with factual disputes. ABC does have this capacity and has an established, successful history of assisting consumers in these types of cases.

In well over 100 email communications back and forth, ABC facilitated the drafting of the application to HHS and collaborated on the narrative and budget portions of the proposal,<sup>2</sup> planned and coordinated proper procedures for client referrals, client confidentiality, accounting, IT development, and staff trainings for OCI staff.

In the early stages of the grant planning, ABC and OCI collaborated on the grant application specific grant objectives that required participants to:

- Assist with the filing of complaints and appeals, including filing appeals with the internal appeal or grievance process of the group health plan or health insurance issuer involved and providing information about the external appeal process;
- Collect, track, and quantify problems and inquiries encountered by consumers;
- Educate consumers on their rights and responsibilities with respect to group health plans and health insurance coverage;
- Assist consumers with enrollment in a group health plan or health insurance coverage by providing information, referral, and assistance; and
- Resolve problems with obtaining premium tax credits under section 36B of the Internal Revenue Code of 1986.

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<sup>1</sup> See Exhibit 1: "Timeline of Contacts for the Consumer Assistance Grant", beginning with a July 21, 2010 communication between Jennifer Stegall at OCI and Bobby Peterson at ABC where OCI was asking ABC to partner on the CAP grant with OCI.

<sup>2</sup> See Exhibit 2: McKinney Austin, OCI Program and Policy Analyst, email correspondence with Brynne McBride August 23 – August 26, 2010.



Upon notice of award from HHS, OCI signed a contract with ABC effective November 16, 2010 to complete the grant objectives. ABC worked closely with OCI staff and attorneys to create a memorandum of understanding and project workplan that captured the cooperative nature of the project. ABC also worked closely with OCI staff to create a client referral process that was carefully choreographed<sup>3</sup> to maximize efficiency while reducing redundancies of service. As of the contract's effective date, ABC assisted Wisconsin consumers with public benefits and private insurance matters. Pursuant to grant requirements, ABC tracked contacts in its comprehensive client database system.

Within 20 days of Ted Nickel's appointment as the new Commissioner of Insurance entering office (under the new executive administration) OCI inquired with HHS on how to terminate the grant.<sup>4</sup> Meanwhile, OCI staff was continuing to rely on ABC's service, making referrals and pursuing additional requests for service and training. In a letter dated February 9, 2011, Commissioner Ted Nickel, mailed ABC his decision to terminate the 100% federally-funded Consumer Assistance Program, effective March 12.<sup>5</sup> OCI's decision to terminate the project contract with ABC, however, occurred before OCI received any information from ABC on the progress of the grant, or even before OCI sent a letter to HHS requesting termination of Wisconsin's Consumer Assistance Project.<sup>6</sup> On February 14, 2011, OCI staff emailed ABC asking for help as they completed their final report to HHS on what the grant accomplished from November 16, 2010-March 12, 2011.<sup>7</sup>

The terminated grant funded a valuable program that addressed unmet needs of Wisconsin consumers as identified by HHS and the Wisconsin State Bar. In fact, the full impact of such a termination to Wisconsin's public remains unknown, as OCI did not evaluate the impact prior to terminating the contract with ABC. The resultant harm to ABC and the clients we help prompted this claim.

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<sup>3</sup> See Exhibit 3: "Client Referral Flow Chart."

<sup>4</sup> See Exhibit 4: Jennifer Stegall email correspondence to Michelle Feagins of The Department of Health and Human Services January 23, 2011 and subsequent correspondence.

<sup>5</sup> See Exhibit 17: Letter from Wisconsin Office of Insurance Commissioner Ted Nickel to ABC for Health terminating the Consumer Assistance Grant, dated February 9, 2011.

<sup>6</sup> See Exhibit 1: "Timeline of Contacts for the Consumer Assistance Grant," and Exhibit 5: Letter from Wisconsin Office of Insurance Commissioner Ted Nickel to Michelle Feagins of The Department of Health and Human Services Office of Consumer Information and Insurance Oversight sent February 10, 2011

<sup>7</sup> See Exhibit 6: Email from Barbara Belling at OCI to Bobby Peterson at ABC (and Erin McBride, ABC; Eileen Mallow, OCI; Jennifer Stegall, OCI; Julie Walsh, OCI; Danielle Rogacki, OCI) relaying the data elements that OCI wanted from ABC to be able to complete their final report to OCIO/HHS. Barbara asked for the data by April 26, 2011.



ABC maintains that OCI abused its power as a state agency and unfairly terminated the contract and the grant. ABC should receive damages for all contract funds lost in the grant termination and any other associated legal and staffing expenses related to the contract termination.

### **The Consumer Assistance Grant Project:**

The Consumer Assistance Program began as HHS established independent offices of health insurance consumer assistance and ombudsman programs in 39 states and the District of Columbia. Wisconsin's former Insurance Commissioner Sean Dilweg secured over \$600,000 of federal money to establish the Office of the Commissioner of Insurance (OCI) based Consumer Assistance Program (CAP). The purpose of the program, supported by a U.S. Department of Health and Human Services Consumer Assistance Grant, was to "educate consumers about their health coverage options, empower consumers, and ensure access to accurate information." In Wisconsin, OCI proposed to add additional staff with the funds and selected ABC for Health to provide certain consumer assistance and education strategies and services. The majority of the \$637,114 grant to Wisconsin went to OCI and supported the following initiatives:

- Upgrade and enhance data systems, including consumer inquiry complaint and referral tracing systems, web-based intake forms, and data reporting and analysis systems.
- Develop greater ability to conduct sophisticated analysis of complaints, grievances, appeals, and external review reports.
- Develop and upgrade consumer assistance publications, including translation when appropriate, and increase community outreach and public relations activities.

At the time HHS awarded the Consumer Assistance Grant, Wisconsin had an established, but greatly underfunded consumer assistance presence. In Wisconsin, certain people over age 60 and certain people with disabilities are eligible for health benefits assistance. For the vast majority of people under age sixty, no such services are available. ABC has the ability and the expertise to handle matters relating to federal health care coverage laws, including ERISA, HIPAA, COBRA, and federal HIRSP; state private insurance laws and regulations; Medicaid eligibility and appeals; preservation of due process rights in administrative hearings; and challenges of private insurance denials in state and federal courts. ABC advocates on behalf of consumers at various stages of internal grievance proceedings in state and federally regulated private insurance disputes, in Medicaid fair-hearings, and in state and federal court, and guides consumers in navigating appeals and grievances. Further, HHS officials identified consumer assistance as an essential part of the emerging health care exchanges. In addition to the federal Consumer Assistance Grant award, HHS also awarded Wisconsin a \$1 million grant to plan for health insurance exchanges, and an additional \$37 million "Early Innovator Exchange" grant to enhance and improve exchange planning in Wisconsin. The two projects-Consumer Assistance



Grants and Exchange Grants are designed to work together, to ensure that states are “providing information to help consumers better understand their health coverage options.”<sup>8</sup>

### Summary of the Argument

- **OCI solicited ABC as a grant contractor then terminated the grant for invalid reasons.** OCI based termination of the grant on inaccurate and irrelevant health complaint statistics that fail to accurately measure ABC’s progress in this project.
- **OCI terminated the grant for political and not policy reasons.** Internal documents show the decision to terminate the contract was made before any meaningful evaluation of the project, project impact, efficiency or progress was ever considered. After the appointment of Ted Nickel as Commissioner, OCI leadership simply stopped cooperating and communicating with ABC and made misleading and unfounded statements to the press.
- **The OCI contract termination violated due process of law.** ABC was sought out a grant partner, expended agency resources to develop the grant proposal and developed a reasonable expectation of a property interest in the grant.
- **The State Claims Board should correct the inequitable contract termination by OCI.** OCI established an expectation for funds with ABC. These actions diminish bargaining positions between both contract parties and tarnish the credibility and reputation of the state contracting process.

### Discussion

#### I. OCI SOLICITED ABC AS A GRANT CONTRACTOR THEN TERMINATED THE GRANT FOR INVALID REASONS.

During the summer of 2010, OCI purposefully sought out ABC, beginning July 21, 2010<sup>9</sup> with a communication by Jennifer Stegall at OCI.<sup>10</sup> From that communication forward, OCI created an expectation in ABC and fully relied on ABC to invest time, resources and energy in the planning, drafting and preparation for the federal grant. ABC’s director Bobby Peterson attended a meeting with Commissioner Sean Dilweg and Jennifer Stegall on August 5, 2010 to discuss the CAP grant partnership, elements and demonstration of existing services and successes of ABC. Six days after that meeting, on August 11, 2010, Jennifer Stegall called ABC and requested ABC complete major portions of the grant including the grant narrative, budget, budget narrative and client examples, and asking that ABC return those to OCI within one week. ABC emailed those

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<sup>8</sup> The effect the termination of the Consumer Assistance Program grant will have on the Early Innovators grant or future grants is unknown and was not evaluated publicly by OCI.

<sup>9</sup> See Exhibit 1: “Timeline of Contacts for the Consumer Assistance Grant.”

<sup>10</sup> See Exhibit 13: Communications between Jennifer Stegall, Brynne McBride, Kelli Banks, Bobby Peterson and Commissioner Sean Dilweg from July 21, 2010-August 5, 2010.





materials to Jennifer Stegall on August 18, 2010. On August 19, 2010, ABC sent *additional* information to Jennifer Stegall and Sue Ezalarab including a comprehensive grant workplan document and a grant objective and referral document. This was followed by an extensive email exchange between OCI and ABC preparing the grant materials and finalizing the project from August 20, 2010 through September 10, 2010, the date the proposal was actually submitted to HHS. Even then, ABC provided additional requested materials and budgets, meeting with OCI staff in preparation for the anticipated award. From that point on, the timeline of events is summarized as follows:

- **November 16, 2010:** OCI signed a contract with ABC for approximately \$235,000 to complete the grant objectives.
- **November 16, 2010:** ABC immediately began working with Wisconsin consumers on the project, assisting with public benefits and private insurance matters.
- **November 16, 2010-February 3, 2011:** Extensive communications between OCI staff and ABC on grant objectives, processes, making referrals, accounting, database/IT, and pursuing additional requests for service and training of OCI staff by ABC.
- **January 3, 2011:** Ted Nickel is appointed Commissioner of Insurance; Dan Schwartzer is appointed Deputy.
- **January 23, 2011:** OCI inquired with HHS on how to terminate the grant.
- **January 25, 2011:** OCI receives a specially requested progress report on ABC's work.
- **February 9, 2011:** Letter drafted by Commissioner Ted Nickel to ABC, giving his decision to terminate the 100% federally-funded Consumer Assistance Program
- **February 10, 2011:** OCI sent a letter to HHS requesting termination of Wisconsin's Consumer Assistance Project.
- **February 14, 2011:** OCI staff emailed ABC asking for help as they completed their final report to HHS on what the grant accomplished from November 16, 2010-March 12, 2011.
- **April 26, 2011-present:** OCI refuses to pay balance due in owing to ABC for work performed on the grant, obfuscates the request after over two months of excessive demands for expense detail, and then claims OCI would like to seek recovery of funds from ABC.

On February 11, 2011 ABC requested the documents, emails and other communications related to the termination of the CAP grant.<sup>11</sup> ABC for Health's open records request to the OCI reveals details surrounding the OCI's decision to terminate the federally funded Consumer Assistance Program. OCI decided to terminate the program on or before January 23, 2011. On that day, Jennifer Stegall of OCI sent an email to the Department of Health and Human Services (HHS) mentioning the OCI's desire to terminate the grant. Wrote Stegall, "Wisconsin is interested in ending its participation in the consumer assistance grant program. I am looking for specific steps for terminating the relationship between the state of Wisconsin and HHS in working on this

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<sup>11</sup> See Exhibit 7: Open records request letter to Commissioner Nickel dated February 11, 2011.



program."<sup>12</sup> Note that this January 23rd communication occurred two days before OCI first obtained an unscheduled and rushed initial report of ABC for Health's work on the project.<sup>13</sup> An OCI document dated January 26, 2011 lists "arguments in favor of terminating CAP."<sup>14</sup>

- A. OCI claims there have been a reduction in total health complaints made to their office yet individual health insurance complaints have risen. ABC is one of the only organizations serving people with individual health insurance.

OCI claims, "Health related complaints, overall, declined last year compared to 2009. OCI received 4,198 health complaints in 2009 compared to 3,393 in 2010, an overall reduction of 19%." However, an internal OCI email shows that while the total number complaints declined by 19%, individual health insurance complaints *increased* by 13%.<sup>15</sup> Additionally, ABC had about 2,000 requests for assistance last year, up about 15% from 2009. OCI statistics distort the actual number of health related complaints. Therefore, these statistics are cannot be a valid excuse for terminating the grant.

- B. OCI received a progress report from ABC only one day before they terminated the grant. This is not adequate time to accurately evaluate the progress of the consumer assistance program.

An internal email from OCI dated January 23, 2011 exposed OCI's plan to terminate the program before reviewing ABC's progress report.<sup>16</sup> OCI leadership never asked to meet with ABC about the program. OCI could not make a valid assessment of the grant without any progress information from ABC. Yet, the evidence indicates OCI terminated the grant *before* fully analyzing program results or services. OCI claims, "ABC has resolved 16 Consumer Assistance Program cases and has 24 in progress. Only 2 cases were referred from OCI. A review of these case summaries indicates alternative resources are available to assist these consumers." OCI's numbers were incorrect, as the progress report showed, and also supports ABC's claim that OCI receipt of ABC's progress report one day before they terminated the grant was not enough time for a comprehensive review or analysis of the report.

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<sup>12</sup> See Exhibit 4: Jennifer Stegall email correspondence to Michelle Feagins of The Department of Health and Human Services January 23, 2011.

<sup>13</sup> See Exhibit 8: ABC for Health Consumer Assistance Program Grant Progress Report sent to OCI on January 25, 2011.

<sup>14</sup> See Exhibit 9: Jennifer Stegall email to Kitty Rhoades, Dennis Smith, Brett Davis, and Kevin Moore of Department of Health Services and copied to Dan Schwartzer of OCI on February 9, 2011.

<sup>15</sup> See Exhibit 10: Sue Ezalarab of OCI email correspondence to Jennifer Stegall sent January 25, 2011.

<sup>16</sup> See Exhibit 4: Jennifer Stegall email correspondence to Michelle Feagins of The Department of Health and Human Services January 23, 2011.



In fact, since opening the Consumer Assistance Program in December, ABC received more than 80 requests for direct help in the short time the program operated. Our planned education and outreach events would reach thousands more. ABC was on track<sup>17</sup> to serve the target 500<sup>18</sup> clients ABC agreed upon with OCI prior the grant termination. There is an increase in consumer inquiries due to the implementation of federal health care reform. ABC provides services via toll-free hotline, email, and website or walk-in appointments at one of their offices in Madison, Balsam Lake and Milwaukee. The terminated grant would have enabled ABC to serve the increased client base resulting from health care reform and provide the type of in-depth service OCI is unable to perform. The need for this consumer assistance service was quantified by OCI in its initial proposal for funding.<sup>19</sup>

OCI did not suggest a meeting with ABC to discuss options to revise services. Instead, OCI staff canceled ABC's regularly scheduled meetings with the Commissioner and trainings for OCI staff. Again, OCI's decision to terminate the contract lacked a reasonable basis.

## II. OCI TERMINATED THE GRANT FOR POLITICAL AND NOT POLICY REASONS.

OCI lacked a foundation for the decision to terminate the grant. In fact, OCI's January 23, 2011 email to HHS indicates as much. OCI made the baseless decision even before they reviewed ABC's progress and before ABC was given any opportunity to review or revise the program.<sup>20</sup> The January 26, 2011 document, which lists explanations for grant termination, does not even include information about the merits of helping and educating consumers.<sup>21</sup> Instead, the evidence shows that the OCI decision to terminate the grant was purely political and failed to consider the needs of consumers in Wisconsin. For example, Commissioner Nickel made false and misleading comments in the press about the Consumer Assistance Program, for example:

- FALSE: "...the program is largely duplicative and unnecessary."<sup>22</sup>
- MISLEADING: "We believe that saving taxpayers, whether they are federal or state taxpayers, from unnecessary spending is in everyone's best interest,"<sup>23</sup>

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<sup>17</sup> See Exhibit 8: ABC for Health Consumer Assistance Program Grant Progress Report (especially "Term of Agreement 7(a)") sent to OCI on January 25, 2011.

<sup>18</sup> See Exhibit 11: 2010-2011 Sub-Grant Agreement Between State of Wisconsin Office of Commissioner of Insurance and ABC for Health, Memorandum of Understanding (especially, Term of Agreement 7(a)).

<sup>19</sup> See Exhibit 12: Consumer Assistance Grant Project Narrative.

<sup>20</sup> See Exhibit 4: Jennifer Stegall email correspondence to Michelle Feagins of The Department of Health and Human Services January 23, 2011.

<sup>21</sup> See Exhibit 9: Jennifer Stegall email to Kitty Rhoades, Dennis Smith, Brett Davis, and Kevin Moore of Department of Health Services and copied to Dan Schwartzer of OCI on February 9, 2011.

<sup>22</sup> See Exhibit 14: David Wahlberg, Wisconsin State Journal, *New State Insurance Commissioner Terminates \$637K Federal Health Care Grant*, February 10, 2011.

<sup>23</sup> See Exhibit 14: David Wahlberg, Wisconsin State Journal, *New State Insurance Commissioner Terminates \$637K Federal Health Care Grant*, February 10, 2011.



The Commissioner of Insurance's goal is to help consumers understand their insurance and correctly appeal denials. However, apparently, Commissioner Ted Nickel's only consideration is to "save taxpayers money" by not helping them with insurance and Medicaid appeals or to better understand their health care coverage. Commissioner Nickel's claim is false, as the Consumer Assistance Program would both save taxpayer money and assist health care consumers by promoting competition in the health insurance marketplace and generating resources for local economies. Consumers need accurate and timely information to make educated decisions about health care. ABC provides this type of information along with advocacy tools, legal services, and expert support that goes beyond what the Office of Consumer Information and Insurance Oversight provides. Pro-active consumer assistance related to correctly navigating public and private health care coverage programs return health care dollars to local economies and are required in the emerging Health Care Exchanges.

Despite a carefully crafted MOU with OCI's staff to eliminate duplication, Commissioner Ted Nickel described the program to the press and through spokespersons as "unnecessary" and a "waste of taxpayer money," but ABC and millions of people across Wisconsin can attest to the need for consumer assistance. The baseless termination of the Consumer Assistance Program means virtually no assistance for over half our insured population in self-funded ERISA health plans and much more limited assistance for individuals recently laid off from work, families facing bureaucratic hurdles with the BadgerCare programs or other health coverage programs, and for families facing an illness simply trying to understand and coordinate public and private coverage red tape.

With or without health care reform, both public and private health care coverage is complicated and bureaucratic, even for the healthiest of consumers. Consumer assistance helps Wisconsin families navigate difficult, confusing issues surrounding public and private benefits and eligibility. Since opening the Consumer Assistance Program in December, ABC for Health received more than 80 requests for direct help in the short time the program operated. Our planned education and outreach events would have reach thousands more.

Commissioner Nickel's concern for taxpayer money did not extend to another \$1 million awarded to the Insurance Commissioner's Office to review insurance rate increases. Instead of returning this money to the federal government, he called it "an important tool in maintaining the competitive health insurance marketplace in Wisconsin."<sup>24</sup> These statements along with the uncooperative actions OCI displayed during the termination process reveal that OCI's motivations for terminating the grant were unfounded. The OCI decision lacked any meaningful investigation into clients that ABC served or materials under development, nor did OCI suggest a

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<sup>24</sup> See Exhibit 14: David Wahlberg, Wisconsin State Journal, *New State Insurance Commissioner Terminates \$637K Federal Health Care Grant*, February 10, 2011.





meeting with ABC to discuss options to revise services. Instead, OCI staff canceled ABC's regularly scheduled meetings with the Commissioner and trainings for OCI staff. The January 26 document included no information about the merits of helping and educating consumers and appeared to be the rapid execution of a *fait accompli*. The decision included sign off from Governor Walker's Deputy Chief of Staff, Eric Schutt,<sup>25</sup> a former insurance industry executive with UnitedHealth Group, and Department of Health Services Deputy Secretary Kitty Rhoades who simply signed off on the January 26 document, "Works for me."<sup>26,27</sup>

In summary, the Consumer Assistance Program is not Democratic or Republican; it is not for or against the insurance industry. The Program provides consumers with assistance so they can make well-informed choices in the insurance marketplace and protect their rights as consumers. ABC for Health assists anyone who seeks help, regardless of political affiliation, and helps clients make the best financial and healthcare decisions for themselves and their families.

### III. THE TERMINATED GRANT FUNDED A VALUABLE AND UNIQUE UNDUPLICATED PROGRAM THAT ADDRESSED UNMET NEEDS OF WISCONSIN HEALTH CARE CONSUMERS.

#### A. The Consumer Assistance Program helped Wisconsin consumers navigate the health care marketplace.

There is a considerable need for consumer assistance in Wisconsin. Consumers need help understanding and navigating the complex health coverage programs available to them and their families all across Wisconsin. Low-income consumers face even greater hazards. The statistics for 2009 from both ABC and for OCI speak for themselves. For example, in 2009, OCI received 4,293 complaints and inquiries about individual and group health insurance that resulted in recoveries of \$1,039,346 for Wisconsin consumers. Additionally, independent review organizations received 149 review requests and completed 137 reviews. In those cases, the insurer's denial was reversed, either in whole or in part, 39 percent of the time. In 2009, ABC responded to 2030 individual requests for assistance, and has delivered health benefits counseling services to more than 32,500 consumers requesting services since 1994. Additionally, the Wisconsin State Bar documented that public benefits and unpaid medical bills are the top unmet legal needs for low-income Wisconsin consumers. A survey of 1,122 low-income

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<sup>25</sup> See Exhibit 15: Eric Schutt, Deputy Chief of Staff Office of the Governor, email to Jennifer Stegall sent on February 9, 2011.

<sup>26</sup> See Exhibit 16: Kitty Rhoades, Department of Health Services Deputy Secretary, email to Jennifer Stegall sent on February 9, 2011.

<sup>27</sup> OCI refused to provide other documents to ABC for Health, claiming protection under attorney-client privilege.



Wisconsin households, conducted in conjunction with the 2007 Wisconsin State Bar Legal Needs Assessment Report, found that the loss or reduction of public benefits is the legal problem most frequently faced by the poor, particularly people with disabilities. Nearly 20% of respondents experienced a problem getting or keeping benefits, including food stamps, Medicaid, Social Security, or Supplemental Security Income. The second most frequently reported legal problem involved financial or consumer-related issues. Disputes about unpaid medical bills were the top issues. A collection agency had contacted about 15% of respondents regarding unpaid medical bills. While ABC recognizes that the grant did not address legal needs, the consumer issues the grant did address would become legal issues if left unattended. Through this grant, ABC was to help Wisconsin consumers avoid legal battles through benefits counseling and advocacy. Nonetheless, the legal needs highlighted in the Wisconsin State Bar Needs Assessment Report quantify the great need for consumer assistance in the area of health insurance and benefits.

Termination of the Consumer Assistance Program and the return of over \$500,000 in federal funds mean limited assistance for individuals facing bureaucratic hurdles with both public and private health coverage programs. More and more consumers will contact legislative staff that may not be equipped to provide appropriate and timely advice. The result is more medical debt, bankruptcy and the redistribution and socialization of medical debt to everyone else in Wisconsin. Many across Wisconsin face these risks including: low-income families, recently laid off individuals, and families dealing with seriously ill children. Other vulnerable populations like senior citizens have access to consumer protection assistance programs such as the Senior Benefits Specialist Program and The Board on Aging & Long Term Care Ombudsman Program. These programs are not accessible to most of the clients that ABC proposed to serve under the Consumer Assistance Program.

Low-income and working families deserve access to consumer assistance related to health care coverage challenges. Families receiving public benefits in Wisconsin face administrative challenges, obstacles and gaps in service. New confusion resulting from healthcare reform<sup>28</sup> will only increase the burden on families trying to navigate complex programs. As of March 2011, just over 776,000 individuals (including pregnant women) enrolled in various BadgerCare Plus programs.<sup>29</sup> More can be done to ensure that individuals and families get and remain enrolled in the programs.<sup>30</sup> Studies demonstrate that nationally 20%-27% of children eligible for Medicaid

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<sup>28</sup> See Exhibit 18A: The March 2011 Kaiser Poll shows 53% of people are confused about the health reform law, with higher numbers among low-income populations and the uninsured. <http://www.hr3590.com/tag/kaiser-health-care-reform-poll>

<sup>29</sup> See Exhibit 18B: BadgerCare+ State Report, available: [www.dhs.wisconsin.gov/badgercareplus/enrollmentdata/pdf/BC+State311.pdf](http://www.dhs.wisconsin.gov/badgercareplus/enrollmentdata/pdf/BC+State311.pdf)

<sup>30</sup> See Exhibit 18C: Holahan, J. et al., "Which Children are Still Uninsured and Why," *Health Ins. for Children*, Vol. 13, No. 1, 2003.



or SCHIP are not enrolled in those programs. Despite enrollment improvement over the last few years in Wisconsin, still 13% of Wisconsin eligible children are not enrolled<sup>31</sup>, and some 65,000 children in Wisconsin are completely uninsured.<sup>32</sup> In addition, 55% of survey respondents from families presumed eligible for Medicaid or CHIP reported that they did not understand basic eligibility requirements or had never heard of the programs.<sup>33</sup> The under- and uninsured and those eligible for Medicaid still face barriers in accessing quality, stable coverage. Consider the growth in the number of un- or underinsured children with disabilities. Nearly half the 15.3% of Wisconsin children identified as having or at risk for special health care needs lack health insurance.<sup>34</sup> 34% of children with special health needs have inadequate insurance.

The terminated grant would have enabled ABC to serve the increased client base resulting from health care reform and provide the type of in-depth service OCI is unable to perform.

B. ABC provided consumer help with self-funded health care plans that OCI cannot regulate.

In fact, our program addressed a severe market inequity in Wisconsin by helping consumers in self funded plans- a market virtually unregulated by OCI. Ending this program deprived consumers of individual advocacy assistance and essential information they needed about the insurance and health care coverage market. The insurance commissioner does not and cannot legally regulate "self-funded" health plans offered by employers who pay the medical bills of employees and family members. The federal government regulates these plans, which account for about 50% the commercial insurance market in Wisconsin. While OCI does not have the ability to assist these individuals, ABC can help consumers with employer-sponsored plans by providing information and identifying appropriate contacts. Termination of the Consumer Assistance Program means virtually no assistance for over half of Wisconsin's insured population in self-funded ERISA health plans. Ending this program seriously undermines the ability of even-handed market forces to help lower costs and improve the quality of health insurance and health care. Quizzically, Commissioner Ted Nickel's decision to kill the program directly contradicts his stated preferred policy of using market forces and strengthening the marketplace as the primary means to lower health care costs and improve quality.

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<sup>31</sup> See Exhibit 18D: Reports and Data, available at: <http://www.insurekidsnow.gov/professionals/reports/index.html>

<sup>32</sup> See Exhibit 18E: Kaiser State Health Facts (data from 2009)  
<http://www.statehealthfacts.org/profileind.jsp?cat=3&sub=193&rgn=51>

<sup>33</sup> See Exhibit 18F: Kenney, G., Dubay, L., and Haley, J., "How Familiar are Low-Income Parents with Medicaid and SCHIP?" *New Federalism: National Survey of America's Families*, Series B, No. B-34, May, 2001.

<sup>34</sup> See Exhibit 18G: Wisconsin Department of Health and Family Services, "Annual Maternal and Child Health Report" (2007) p. 20 and HRSA: National Survey of Children with Special Health Care Needs, "Adequacy of Current Insurance Coverage."



OCI claims they have already “received training” on how to work with clients with individual health insurance, and therefore have the ability to assist these consumers, citing it as a “duplication” in the reason for terminating the grant. However, the gathering OCI is referring to was not a training, but instead a “meet and greet” with the Department of Labor. An internal OCI email dated January 26 indicates that the OCI staff did not in fact receive any training from the Department of Labor.<sup>35</sup> In the email, an OCI staff member asks a colleague, “Did the complaints staff recently get training from DOL staff? Dan [Schwartzter] is asking.” The colleague replies, “No, more like a meet and greet to give us an overview of what they can do for consumers.” Again, it was inappropriate for OCI to use this reason as an excuse for termination of the grant.

C. ABC is uniquely qualified to help consumers with a variety of federal and state health coverage law and policy expertise that OCI cannot provide

ABC has the experience, qualifications and opportunity to help consumers in health plans that OCI is legally prohibited from regulating. ABC has expertise in federal health care coverage laws, including the Employee Retirement Income Security Act (ERISA), Health Insurance Portability and Accountability Act (HIPAA), Consolidated Omnibus Budget Reconciliation Act (COBRA), and federal Health Insurance Risk Sharing Plan (HIRSP). ABC has the capability to handle Medicaid eligibility and appeals; preservation of due process rights in administrative hearings; and challenges of private insurance denials in state and federal courts. ABC has expertise in public benefits including BadgerCare Plus; Medicaid for elderly, blind and people with disabilities; Medicaid Purchase Plan; Katie Beckett Medicaid; supplemental Security Income; Social Security Disability Insurance; and chronic care coverage programs. All of this expertise go beyond the capabilities of OCI and show the level of skill ABC brought to the partnership between OCI and ABC under the grant. This level of expertise was acknowledged by OCI in the proposal for federal funding for these services:

“Consumers requiring advocacy or advice beyond what OCI is able to offer will be referred to ABC. For example, while OCI lacks statutory authority to regulate self-funded health plans, ABC has the ability to pursue consumers’ rights and interests in these plans. ABC can serve consumers with public, private, and blended sources of health care coverage. ABC has the ability and the expertise to handle matters relating to federal health care coverage laws, including ERISA, HIPAA, COBRA, and federal HIRSP; state private insurance laws and regulations; Medicaid eligibility and appeals; preservation of due process rights in administrative hearings; and challenges of private insurance denials in state and federal courts. ABC advocates on behalf of consumers at various stages of internal grievance proceedings in state and federally

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<sup>35</sup> See Exhibit 19: Sue Ezalarab email correspondence to Jennifer Stegall regarding Department of Labor Meeting sent on January 26, 2011.





regulated private insurance disputes, in Medicaid fair-hearings, and in state and federal court, and guides consumers in navigating appeals and grievances.”<sup>36</sup>

#### IV. THE SUMMARY TERMINATION OF THE CONTRACT BY OCI REFLECTS A DANGEROUS ABUSE OF CONTRACT POWER BY A STATE AGENCY THAT MUST BE KEPT IN CHECK.

OCI summary action creates a distrustful business and contracting environment in Wisconsin. OCI solicited help from ABC to submit the Consumer Assistance grant. ABC expended agency resources in good faith as it planned for the project, responded to numerous request for information from OCI staff, drafted significant portions of the grant application for OCI when their staff requested ABC’s expertise and experience in grant writing, including narratives, summaries, abstracts, budgets, budget narratives, budget justifications, case examples, workplans, client referral protocols, data tracking protocols, client releases of information samples, timekeeping protocols, and also assisted in the extensive coordination to produce a staff training for a substantial number of OCI staff.<sup>37</sup> ABC had a reasonable expectation that the contract would not be summarily terminated without just cause. The Insurance Commissioner’s actions in this case broadly diminish the trust and credibility of the state of Wisconsin and specifically diminish the trust and credibility of OCI.

OCI’s actions are unconscionable; that the state would establish an expectation with a contractor, in this case ABC, to complete specific grant objectives, release funds to accomplish these objectives and then ask for the funds back after the state terminated the grant invalidly and unilaterally. This type of action hinders the bargaining position of other contractors who work under grants administered by the state and sets a bad precedent for anyone wishing to contract with the state. Contractors will hesitate to rely on grant funds because they will never know if the state will terminate their contract at the whim of an administrator and send their funding back to the federal government with no valid explanation or recourse. The slippery tactics and back-handed actions employed by OCI harms Wisconsin’s business environment by creating uncertainty and mistrust between contractors working under grant funds and the state.

#### V. THE OCI CONTRACT TERMINATION VIOLATED DUE PROCESS OF LAW.

OCI’s actions fulfill the elements of a due process violation of a property right in this situation. OCI violated ABC’s due process rights when OCI terminated the grant without allowing ABC the opportunity to challenge the decision. More specifically, ABC has a property interest in the money allocated to them through the grant because they relied on the grant to fund its projects

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<sup>36</sup> See Exhibit 12: Consumer Assistance Grant Project Narrative page 4, paragraph 1 and 2.

<sup>37</sup> See Exhibit 1: “Timeline of Contacts for the Consumer Assistance Grant.”



and staff. ABC was deprived of that property interest when OCI terminated the grant. These facts meet the requirements established by the court in *Hudson v. City of Chicago*, which outlines the requirements a party must meet to demonstrate a procedural due process violation of a property right has occurred.<sup>38</sup> According to *Hudson*, the aggrieved party must establish that there is "(1) a cognizable property interest; (2) a deprivation of that property interest; and (3) a denial of due process." In the facts of the *Hudson* case, the city of Chicago denied police officers the opportunity to justify or challenge their unexplained absents before the city fired them. The court stated that the police officers have a property interest in their employment and that this property interest outweighs the public's interest in an expeditious administrative process. Therefore, the city violated the police officers' due process rights by failing to provide a pre-deprivation notice and an opportunity to respond to the allegations before the city fired them. By analogy to *Hudson* to the present situation, ABC responded to OCI requests to develop a project to use grant funds to assist clients that OCI could not effectively help. Thus, the termination of the grant was a violation of ABC's due process rights by OCI. Therefore, the state claims board should award damages to ABC to help remedy the violation.<sup>39</sup>

## Conclusion

The State Claims Board should correct the inequitable contract termination by OCI. OCI unfairly and inequitably terminated the consumer assistance grant. OCI sought and established a partnership with ABC to fulfill the grant objectives. ABC is uniquely qualified to perform services under the grant including legal services, consultations for clients with self-funded health insurance and in-depth advocacy and benefits counseling. OCI cannot provide evidence to show that ABC was not meeting the grant objectives. In fact, there is evidence that OCI made the decision to terminate the grant before OCI received a progress report from ABC. OCI's decision to terminate the grant was inappropriate. We request that the claims board find in favor of ABC and award full reinstatement of the balance of the contract award<sup>40</sup> of \$176,250 plus

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<sup>38</sup> See Exhibit 20: *Hudson v. City of Chi.*, 374 F.3d 554, 559 (7th Cir. 2004).

<sup>39</sup> See Exhibit 21: *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). An analysis of the fact under the US Supreme Court test found in *Mathews v. Eldridge* would likely favor ABC as well. The sliding scale test weighs the following four factors: (1) the private interest at stake; (2) the risk of an erroneous deprivation of that interest under the challenged procedures; (3) the probable value of additional safeguards; and (4) the cost to the government of such additional safeguards. Here, (1) ABC had a private interest in the terminated grant because OCI explicitly invited participation and the grant funds made up a large part of ABC's annual budget; (2) ABC was erroneously deprived of the grant because OCI never gave ABC a chance to challenge the termination and OCI has not given a reasonable explanation for terminating the grant; (3) additional safeguards would be valuable because OCI actions corrode the contracting process and that process would be more transparent and arbitrary terminations would be prevented; (4) requiring OCI to provide a reasonable explanation for termination would not be a significant expense to the government. Therefore, a court could find OCI actions resulted in a due process violation against ABC for Health.

<sup>40</sup> The original contract award for ABC was \$235,000. OCI pre-paid \$58,750 to ABC, leaving a balance of award as \$176,250. ABC has already invoiced OCI for \$11,295.50 of the balance of the award to cover unreimbursed expense



consequential damages such as costs related to this action and all costs expended in preparation of the original grant.

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of the grant. OCI is refusing to pay this. ABC seeks the unpaid amount due in owing of \$11,295.50 plus the balance of the contract in the amount of \$164,954.50; a total of \$176,250.