

DISTRICT COURT, DENVER COUNTY  
STATE OF COLORADO  
Court Address: 1437 Bannock Street  
Denver, CO 80202

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Plaintiff(s):  
COLORADO CROSS-DISABILITY COALITION, a  
Colorado Corporation,  
JULIE REISKIN,  
PAMELA CARTER,  
DEBRA MILLER, as parent and guardian for her son,  
BRIAN MILLER,  
JOHN AND JANE DOES (yet to be determined)  
(on behalf of themselves and all others similarly  
situated)  
ET AL.,

v.

Defendant(s):  
JOAN HENNEBERRY, Executive Director of the  
Department of Health Care Policy and Financing, in her  
Official Capacity, and  
COLORADO DEPARTMENT OF HEALTH CARE  
POLICY AND FINANCING.

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Case Number:

Div.: Ctrm.:

**CLASS ACTION COMPLAINT**

**INTRODUCTION**

1. Plaintiffs, by and through their counsel, Carrie Ann Lucas and Kevin Williams of the Colorado Cross-Disability Coalition Legal Program, bring this Class Action Complaint (“Complaint”) against Joan Henneberry, in her official capacity as director and the Department of Health Care Policy and Financing (“Department”) for violations of the Due Process Clause of the United States Constitution, 42 U.S.C. § 1983, various provisions of the Medicaid Act, 42 U.S.C. § 1396, and state law regarding the Department’s obligations with respect to Medicaid services.

2. Plaintiffs Reiskin, Carter and Miller (“Individual Plaintiffs” or “Class Representatives”) are all individuals with disabilities and/or the parents and guardians of individuals with disabilities who receive Medicaid-funded home health care and need attendant care services in their homes. Plaintiffs John and Jane Does meet the same criteria as the Individual Plaintiffs, but their identities are yet to be determined. All Individual Plaintiffs and Plaintiffs John and Jane Does receive Medicaid-funded home health care services through the Colorado Consumer Directed Support Services (“CDASS”) program, *see* Colo. Rev. Stat. § 25.5-6-1101 *et seq.*, which is administered by the Department. Plaintiff Colorado Cross-Disability Coalition (“CCDC”) is a non-profit statewide disability rights advocacy organization with approximately three thousand members. The Individual Plaintiffs are CCDC members.

3. According to the Department’s website and training manual prepared for clients receiving services under the CDASS program, the purpose of the CDASS program is as follows:

Consumer Directed Attendant Support Services (CDASS) allow people with disabilities to manage their attendant care. In CDASS, you [the CDASS client] hire, train, supervise, manage, and if necessary, fire your attendants. You may also have an authorized representative direct your services on your behalf if you need that assistance, or if your doctor indicates that you require that assistance. In CDASS, you control your attendant care, rather than having an agency do it. You make attendant care decisions and take responsibility for them. CDASS gives you more flexibility in your daily routine, giving you the opportunity to take greater control of your life.

CDASS is intended to:

- Increase your independence and self-sufficiency
- Improve the quality of attendant support you receive
- Enable you to have a more healthy and productive life
- Allow you greater flexibility and control in managing your support needs
- Place you in the role of making decisions about attendant support

The Department of Health Care Policy and Financing (the Department) is responsible for the development and oversight of CDASS. For more information please visit the

Department's at this website: <http://www.colorado.gov/hcpf>.<sup>1</sup>

4. In or around September of 2009, as a result of statewide budget cuts in 2009, the Department, through its contracted case management agencies for CDASS clients, known as single entry point agencies ("SEP's"),<sup>2</sup> cut 1.5 percent of all CDASS clients' allocations ("September 2009 cuts") for payment. Under the CDASS program each client is provided an allocation of funds to pay attendants ("allocation"). This amount is determined based on an evaluation of need established by the Department related to the type and amount of attendant care services the client requires.<sup>3</sup> In or about December of 2009, CDASS' clients' allocations for services were cut again ("December 2009 cuts") by differing and inconsistent amounts.

5. The Department's method for making these cuts was arbitrary, capricious, and without a lawful basis or justification.

6. The Department failed to provide notice of the cuts to CDASS clients, failed to provide notice in a timely manner, failed to provide adequate notice to meet the requirements of due process, and failed to notify clients of their rights to appeal the cuts and to request a hearing.

7. CDASS clients in the proposed class fall into several categories, including but not limited to the following:

- a. Those who did not receive notice of the September 2009 reduction in allocation;
- b. Those who did not receive notice of the December 2009 reduction in allocation;
- c. Those who received improper notice of reduction of their allocations;
- d. Those whose notices reflected a greater allocation reduction than the state's represented budget cuts.
- e. Those who received notice by letter or by phone of the cuts but did not receive an explanation for the amount of the allocation reduction.

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<sup>1</sup> The Department's website regarding the CDASS program can be found at <http://www.colorado.gov/cs/Satellite/HCPF/HCPF/1210324172195>.

<sup>2</sup> See Colo. Rev. Stat. § 25.5-6-104(k) (definition of "single entry point").

<sup>3</sup> See description of CDASS program *infra*.

- f. Those who received some form of notification of the cuts after the allocation amount was already reduced.
8. Plaintiff Class Representatives and CCDC seek the following:
- a. A Court Order enjoining Defendants from implementing and maintaining all improper reductions of CDASS clients' allocations;
  - b. A Court Order enjoining Defendants to restore their allocation amounts to those that existed prior to the state's improper notice and implementation of allocation reductions;
  - c. Damages as appropriate for Class Members and CCDC; and
  - d. Recovery of Class Members' reasonable attorneys' fees and costs.

### **JURISDICTION AND VENUE**

9. This court has jurisdiction over this action pursuant to article 6, section 9 of the Colorado Constitution and section 24-34-505.6(1) of the Colorado Revised Statutes.

10. Venue is proper within this District pursuant to Rule 98 of the Colorado Rules of Civil Procedure.

11. This action is brought pursuant to 42 U.S.C. § 1983, the Due Process Clause of the United States Constitution, various federal statutes, including, without limitation, the Medicaid Act, 42 U.S.C. § 1396, various state statutes and the common law of Colorado.

12. Declaratory and ancillary relief is authorized pursuant to C.R.S. § 13-51-106 and Rule 57 of the Colorado Rules of Civil Procedure.

13. Injunctive relief is authorized pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

### **PARTIES**

14. Plaintiff Colorado Cross-Disability Coalition ("CCDC") is a Colorado non-profit corporation located in Denver, Colorado. CCDC has many members who are CDASS clients or the parents and guardians of CDASS clients.

15. Plaintiff Julie Reiskin currently resides in Denver, Colorado. Plaintiff Reiskin is eligible for and receives Medicaid-funded attendant care services through the CDASS program.

16. Plaintiff Pamela Carter currently resides in Denver, Colorado. Plaintiff Carter is eligible for and receives Medicaid-funded attendant care services through the CDASS program.

17. Plaintiff Debra Miller and her son Brian Miller currently reside in Thornton, Colorado. Plaintiff Miller is the parent and guardian of Brian Miller who is eligible for and receives Medicaid-funded attendant care services through the CDASS program.

18. Plaintiffs Jane and John Does are members of the class who reside in Colorado and who are eligible for and receive Medicaid-funded attendant care services through the CDASS program.

19. Defendant Joan Henneberry is Executive Director of the Department, the single state agency designated to administer the Colorado Medical Assistance Program under Title XIX of the Social Security Act and Colorado statutes. As such, she is responsible for general administration and supervision of the Colorado Medicaid Program and the CDASS program.

20. Defendant Department is the state agency responsible for insuring appropriate home health care and long term care services are provided to individuals who are eligible to receive Medicaid-funded long term care. The Department is responsible for the administration of the CDASS program. Defendant Department is located in Denver, Colorado.

### **CLASS ACTION ALLEGATIONS**

21. This is a class action brought by the Plaintiffs on behalf of themselves and on behalf of all others similarly situated, pursuant to Rules 23(a) and (b) of the Colorado Rules of Civil Procedure. This class is defined as follows:

All existing and future clients of the CDASS program.

22. Defendants' implementation and application of recent budget cuts and other reductions in class members' Medicaid benefits in the CDASS program presents questions of law and fact common to all Plaintiffs and class members, including, but not limited to, the following:

- a. Whether the September 2009 cuts as applied to CDASS client allocations violated Class Members' rights under the Due Process Clause of the United States Constitution, the Colorado Constitution and federal and state statutes and implementing regulations;

- b. Whether the December 2009 cuts as applied to CDASS client allocation violated Class Members' rights under the Due Process Clause of the United States Constitution, the Colorado Constitution and federal and state statutes and implementing regulations;
- c. Whether the implementation of either or both of the September 2009 cuts and December 2009 cuts violated Class Members' rights under the Due Process Clause of the United States Constitution, the Colorado Constitution and federal and state statutes and implementing regulations;
- d. Whether Defendant provided notice/s to Class Members' sufficient to meet the requirements of the Due Process Clause of the United States Constitution, the Colorado Constitution and federal and state statutes and implementing regulations.

23. The Individual Plaintiffs are members of the above-defined class. There are no conflicts between the interests of the named Plaintiffs and the class. The Individual Plaintiffs interests in this litigation are identical to the interests of all Class Members.

24. On information and belief, there are approximately one thousand CDASS clients currently, and it is unknown how many applicants there will be to the program during the pendency of this lawsuit. Defendants' improper implementation and maintenance of budget cuts and other benefit reductions as applied to the CDASS program and improper notices unlawfully reduce Medicaid benefits for all Class Members. Defendants' improper notice provides no mechanism for Class Members to appeal or request a hearing regarding the reductions in their allocations. The proposed class is, therefore, so numerous that joinder of all members would be impractical and impossible. Joinder is also impractical because class members -- who, by definition, are low-income and unlikely to be able to afford legal services -- lack the ability and financial means to maintain individual actions.

25. Common issues of law and fact predominate over any individual questions, and adjudication of the rights of the class is superior to other methods of adjudicating the controversies concerning the Defendants' policies and practices at issue in this action. Adjudicating the issues through means other than a class action could risk placing inconsistent obligations on the Defendants, varying interpretations of the common rights of the class members, and repetitive analysis and redress of a class-wide problem.

26. The claims of the Individual Plaintiffs are typical of the claims of the class in that each is an applicant for or recipient of CDASS services and each runs the risk of having those benefits wrongfully denied, reduced, suspended or terminated despite continuing eligibility

solely as a result of the improper implementation and maintenance of the state's budget cuts and other benefit reductions as applied to the CDASS program and improper notice of such reductions.

27. The Individual Plaintiffs will fairly and adequately protect the interests of the class they represent. They are represented by the CCDC Legal Program, a public interest law organization experienced in class action litigation and the law governing Medicaid benefits. At the time of the filing of this lawsuit, additional CDASS clients have contacted CCDC's Legal Program with complaints identical to those of the Class Representatives. When investigation of those complaints is completed, if necessary, these CDASS clients are expected to be added as Class Representatives.

28. The Defendants and their agents, employees, and successors in office have acted and will act on grounds generally applicable to the class that the Class Representatives represent, thereby making appropriate injunctive or declaratory relief with respect to the class as a whole.

29. The Individual Plaintiffs and the proposed Plaintiff class are directly and beneficially interested in the Defendants' performance of their mandatory duty to comply with the applicable provisions of the United States Constitution, the Colorado Constitution, and the applicable federal and Colorado statutes and implementing regulations. The Plaintiffs and the Class Members are directly and beneficially interested in and adversely affected by the Defendants' actions and those actions imminently threaten substantial and irreparable injury.

### **BACKGROUND**

30. The CDASS program was created in 2003 as a method for providing attendant care services to eligible Medicaid recipients in Colorado as an alternative to receiving those services through a designated home health care agency. *See generally* Colo. Rev. Stat. § 25.5-6-1102 *et seq.*

31. Immediately prior to the creation of the CDASS program, all Medicaid-eligible clients receiving long term care services outside of institutions like nursing facilities were required to receive services through a home health care agency. In the pre-CDASS system, the Department authorized and administered payments to SEP's who then authorized long term home health care agencies to administer all aspects of in-home attendant care service and to receive payment. Such administration, included, without limitation, the following: The screening and hiring of attendants, the training of attendants, all decision-making regarding the type of service attendants and/or nurses provided to clients, decision-making related to which attendants worked for which clients in their homes, scheduling of attendants in clients' homes, and the length of time for attendant care visits in clients' homes. Clients receiving in-home attendant care services from agencies were not satisfied *inter alia* with the lack of control they

had over the day-to-day management of attendants working in their homes, the inability to control when and which attendants were in their homes, and the hiring, termination, training and supervision of attendants who worked for them in their homes each day. Until the CDASS program began, clients had virtually no say in who would work for them doing extremely personal care in the clients' homes each day. Those who advocated for the CDASS did so in part because of serious quality of care and access issues within the home health care agency model system.

32. The CDASS program was designed to accomplish two important purposes: (1) To save the Department money by eliminating the overhead and payments made to home health care agencies for activities that Medicaid clients are capable of doing themselves (e.g., hiring, terminating, training and supervising attendants); and (2) to provide Medicaid clients with much greater control, flexibility and responsibility for their attendant care.

33. Under the CDASS program, the Department pays a fiscal intermediary service ("FIS") to process and administer employment applications for attendants and payroll for attendants. *See* 10 Colo. Code Regs. 2505-10-8.551.1 (definition of "Intermediary Service Organization"). CDASS clients are responsible for the hiring, supervision, training, management, termination, scheduling, tracking of attendant hours worked and submission of employee timesheets to the FIS, and arranging for backup attendant services if and when the scheduled attendant is unable to work. Under CDASS, there is no home health care agency involvement in the provision of client attendant care services. CDASS clients receive far better quality of services by managing their own care.

34. The Department contracts with SEP's throughout Colorado who, just as they do under the regular home health care system, continue to provide case management services to CDASS clients. CDASS clients contact their SEP case worker if there are any problems; otherwise, CDASS clients are required only to have twice yearly face-to-face meeting with their case worker to address any ongoing needs or concerns. *See generally* 10 Colo. Code Regs. 2505-10-8.393 (description of "single entry point" duties and functions).

#### **FACTUAL ALLEGATIONS PERTAINING TO PLAINTIFF CCDC**

35. CCDC has numerous members who are individuals with disabilities eligible for Medicaid-funded long term care services. Many CCDC members are CDASS clients.

36. CCDC has been involved in the creation, implementation and execution of the CDASS program. CCDC members actively worked with members of the General Assembly and personnel within the Department to create the CDASS program alternative to the home health care agency model of attendant care service delivery. Some of CCDC's staff members and board members are Medicaid recipients who use attendant care services who advocated for the creation

and implementation of the CDASS program and currently receive services under the CDASS program.

37. CCDC has been actively involved in the ongoing operation of the CDASS program including holding positions on the CDASS Advisory Committee, a committee of CDASS clients and Department personnel and, sometimes, a representative from the FIS, and other interested parties, which sets policy and advises the Department regarding continuing CDASS program issues and concerns. *See, e.g.*, Colo. Rev. Stat. § 25.5-6-1003(1) (establishing the advisory committee during the CDASS pilot program) and 10 Colo. Code Regs. § 8.551.4.D (setting requirements for the composition of the committee under the ongoing CDASS program).

38. CCDC has worked with the Department closely to insure the success and progress of the program and has been extremely active with advising the Department and the new FIS during the recent transition of the previous FIS to the new FIS.

39. Despite CCDC's expertise, representation of many members who are CDASS clients and extensive involvement in the creation, implementation and ongoing success of the CDASS program and advisement to the Department to notify CDASS clients regarding the budget cut process, the Department implemented the state budget cuts as applied to CDASS clients without notifying CDASS clients or the CDASS advisory committee.

40. The Department directed the SEP's to implement the budget cuts as applied to the CDASS program without input from CCDC or CDASS clients or the CDASS advisory committee.

41. In part, to determine what the exact amount of the allocation reductions for each CDASS client directly related directly to the portion of each allocation taken to pay the FIS and, apparently, included in the December 2009 cuts for each CDASS client, CCDC has requested that the Department provide CCDC with the contract for the new FIS. At this time, CCDC has not received that contract.

42. CCDC's purpose is to work for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities in the entire community. As part of that purpose, CCDC seeks to ensure that persons with disabilities have access to -- and do not encounter discrimination in -- publicly funded services like the Medicaid Program

43. CCDC's mission includes striving to ensure that no individual with a disability is isolated and segregated into an institution when appropriate services are available and can be funded to enable such individuals to live in their own homes.

44. CCDC engages in extensive outreach as well as advocacy and educational efforts

to promote access for and combat discrimination such as unlawful segregation against people with disabilities. This effort and this purpose have been and continue to be adversely affected by Defendants' violations of the ADA.

45. Defendants' actions have caused and continue to cause distinct, palpable, and perceptible injury to CCDC.

46. CCDC has devoted resources, which could have been devoted to its other outreach, advocacy, and educational efforts, to combating Defendants' discriminatory policies.

47. CCDC has devoted resources, which could have been devoted to its other outreach, advocacy, and educational efforts, to counseling members and others who have been injured by Defendants' discrimination.

48. Defendants' discrimination has been and continues to be a barrier to the full participation of persons with disabilities and, therefore, frustrates CCDC's ability to achieve full inclusion for persons with disabilities.

49. Defendants' discrimination has required and continues to require CCDC to make a greater effort -- and to allocate significant resources -- to educate the public that such discrimination is wrong and otherwise to counteract the adverse impact of such discrimination. This perceptibly impairs CCDC's counseling, advocacy, educational, and training missions.

50. CCDC also has devoted and continues to devote resources -- including but not limited to those devoted to the present lawsuit -- to identifying and counteracting the sources of discrimination in the community, including that of Defendant.

51. CCDC's injuries -- including, without limitation, those described herein -- are traceable to Defendants' discriminatory conduct alleged in this Complaint and will be redressed by the relief requested in it.

52. The participation of individual CCDC members in the lawsuit is not required either to resolve the claims at issue or to formulate relief.

53. Defendants acted intentionally or with reckless disregard or callous indifference to the federally protected rights of Plaintiffs, including CCDC.

54. CCDC has been damaged by Defendants' discriminatory practices as set forth in this Complaint.

#### **FACTUAL ALLEGATIONS COMMON TO THE CLASS**

55. According to representations made by the new FIS, there are approximately one thousand CDASS clients.

56. The recent reductions to CDASS clients' allocations apply to every single CDASS client, but, on information and belief, the application of the cuts to and the reduction of allocation for each CDASS client's allocation is different. As explained below, the Department has caused different percentage reductions of each CDASS client's allocation without an explanation to those clients as to how the department arrived at and applied the percentage reduction. The percentage reductions do not correspond with the 1.5 percent and 1 percent reductions allegedly required and imposed by the state budget cuts.

57. On information and belief, the September 2009 cuts decreased every CDASS client's allocation by approximately 1.5 percent.

58. In Colorado's home health care system, payment for home health care services are broken into three categories for purposes of determining the amount the Department pays for the service: (1) health maintenance, 10 Colo. Code. Regs. 2505-10-8.510.1 (*citing* 10 Colo. Code. Regs. 2505-10-8.552.1); (2) personal care, 10 Colo. Code. Regs. 2505-10-8.510.1 (*citing* 10 Colo. Code. Regs. 2505-10-8.489; and (3) homemaker, 10 Colo. Code. Regs. 2505-10-8.510.1 (*citing* 10 Colo. Code. Regs. 2505-10-8.490). Under Colorado's system, the Department pays a higher rate for services provided that fit into the category of health maintenance services as these services are considered to require a higher level of skill and knowledge to perform.

59. On information and belief, only CDASS clients received a 1.5 percent across-the-board reduction in their allocation, including services provided at the higher reimbursement rate for health maintenance tasks. On information and belief, no other non-CDASS Medicaid clients receiving long term care home health services who received such an across-the-board reduction. Instead, all non-CDASS clients receiving home health care services received a 1.5 percent reduction in the amount paid for personal care and homemaker services, but not health maintenance services. The reduction experienced by CDASS clients was a 1.5 percent decrease for all three services and was greater than reductions for all non-CDASS clients. CDASS clients did not receive any notice explaining the disparity in this reduction and were not provided a right to appeal or request a hearing regarding the disparate reduction. Some clients received email messages or were told by Department officials that the 1.5% cut was going to be only for personal care and homemaker and adjusted their budgets accordingly, only to find out after the fact that the cut was across the board.

60. In or about October, 2009, the Department contracted with a new FIS. On information and belief the Department is paying the new FIS more than it paid the former FIS

(“increased FIS payment”). In the June 17, 2009 CDASS Advisory Committee meeting minutes, the Department told the committee that the “new contract will not affect client allocations.” On information and belief, this increased FIS payment amount is taken directly from a percentage reduction in each CDASS client’s allocation and was implemented effective December 1, 2009 for all CDASS clients. CDASS clients did not receive any notice explaining the amount of this reduction and were not provided a right to appeal or request a hearing regarding this reduction.

61. On information and belief, all CDASS clients experienced the following with respect to the September 2009 cuts:

- a. Some Class Members received no notice of this reduction at all.
- b. Many Class Members did not receive any written explanation of the reasons or basis for this cut.
- c. Some Class Members received a written letter from their SEP’s explaining that the Department had cut 1.5 percent of their CDASS allocations. These letters did not explain that only CDASS clients’ allocations were reduced so that this reduction applied to their entire allocation rather than to personal care and homemaker services only.
- d. Some Class Members were informed of the this reduction by telephone and/or messages left by their SEP case workers, but not in writing.
- e. No Class Member received notice of this reduction prior to the reduction being implemented.
- f. No Class Member received notification that the Class Member had a right to appeal or request a hearing regarding this reduction.
- g. No Class Member received notification of the legal basis for this reduction or the disparity between the application of this reduction to CDASS clients and to those receiving other non-CDASS home care services.

62. On information and belief, CDASS clients experienced the following with respect to the December 2009 cuts:

- a. Some Class Members received no notice of this reduction at all.
- b. Many Class Members did not receive any written explanation of this reduction.

- c. Some Class Members received a written letter from their SEP's explaining that the Department had reduced 1.0 percent of their CDASS allocations and some unspecified amount to pay the increased FIS payment with no explanation of the amount of the increased FIS payment.
- d. Some Class Members were informed of the this reduction by telephone and/or messages left by their SEP case workers.
- e. No Class Member received notice of this reduction prior to the reduction being implemented.
- f. No Class Member received notification that the Class Member had a right to appeal or request a hearing regarding this reduction.
- g. No Class Member received notification of the legal basis for this reduction.
- h. No Class Member received an explanation for the increased FIS payment or the basis for its calculation.

63. Reports from the Department indicate that after the September 2009 cut, state budget cuts required an additional 1.0 percent across-the-board reduction for the total amount the Department spends for each Medical client's long term care home health services. According to Department reports, this reduction applied all Medicaid clients receiving long term care home health services -- CDASS clients and non-CDASS clients alike.

64. On information and belief, with respect to the December 2009 cuts, Class Members' allocation reductions differ widely and reflect a much larger reduction than 1.0 percent. For example, for the individual plaintiffs:

- a. Plaintiff Reiskin's allocation changed 4.06%.
- b. Plaintiff Carter's allocation changed 4.06%.
- c. Plaintiff Miller's allocation changed 2.14%.

65. If the Department is permitted to implement and continue to apply the September 2009 cuts and December 2009 cuts as it has, CDASS clients will suffer irreparable harm including, but not limited to, the following consequences and damages:

- a. Having funds that were available to pay for attendant care services improperly removed from their CDASS allocations;
- b. Being unaware of what their allocation amount is;
- c. Being unaware of the basis for what amount of their allocation is being used the pay the new FIS;
- d. Being forced to use allocation amounts that are insufficient to meet their needs;
- e. Risking over budgeting of their CDASS allocations for attendant care services based on inaccurate and improper allocation amounts.

66. Because the Department implemented these reductions without a legal justification, CDASS clients must have an opportunity to appeal the allocation changes.

67. Because the Department implemented reductions in allocations to CDASS clients that it did not apply to non-CDASS clients who receive long term care home health services, CDASS clients must have an opportunity to appeal the allocation changes.

68. The Department did not provide sufficient notice to CDASS clients regarding allocation changes to meet the requirements of due process.

#### **FACTUAL ALLEGATIONS PERTAINING TO INDIVIDUAL PLAINTIFFS**

69. Plaintiffs have been and will continue to be damaged by the Department's actions and will suffer irreparable harm if the Department's conduct does not change.

70. Plaintiff Julie Reiskin has been a CDASS client since 2003.

71. Plaintiff Reiskin received a letter dated October 13, 2009 informing her that her allocation had been reduced to \$1,460.66, effective September 1, 2009. This change in allocation applied to all types of services Plaintiff Reiskin's attendants -- health maintenance, personal care and homemaker -- performs. This letter did not provide an explanation of the disparity in the benefit reduction between the CDASS program and other home health care services programs. This letter did not provide Plaintiff Reiskin with a notice of her right to appeal the reduction in allocation. This letter provided no notice to Plaintiff Reiskin of her right to have a hearing conducted regarding the allocation reduction, how to request such a hearing, and that Plaintiff Reiskin may represent herself or use legal counsel or other spokesperson to assist with the hearing. This letter informed Plaintiff Reiskin that the reduction was already

effective as of September 1, 2009 “to comply with the provider rate reduction.” Plaintiff Reiskin was not provided with prior notice that her CDASS allocation would be reduced.

72. Plaintiff Reiskin received a letter December 2, 2009 informing her that her allocation amount had been reduced to \$1,410.30, a 4.06% reduction. This letter did not provide Plaintiff Reiskin with a notice of her right to appeal the reduction in allocation. This letter provided no notice to Plaintiff Reiskin of her right to have a hearing conducted regarding the allocation reduction, how to request such a hearing, and that Plaintiff Reiskin may represent herself or use legal counsel or other spokesperson to assist with the hearing. This letter informed Plaintiff Reiskin that the reduction was already effective as of December 1, 2009 “to comply with the provider rate reduction.” The letter also stated, “Your allocation has also been adjusted to allow for the new administration fee for Public Partnerships, LLC,” but does not explain what the amount of the fee is or how the allocation amount was “adjusted.” Plaintiff Reiskin was not provided with prior notice that her CDASS allocation would be reduced.

73. Plaintiff Reiskin has been harmed and will continue to be harmed until this Court orders a reinstatement of her pre-September 2009 CDASS allocation amount and orders Defendant to provide Plaintiff Reiskin with appropriate due process before attempting to reduce her CDASS allocation.

74. Plaintiff Pamela Carter has been a CDASS client since 2003.

75. Plaintiff Carter received a letter dated October 13, 2009 informing her that her allocation had been reduced to \$2,069.25, effective September 1, 2009. This change in allocation applied to all types of services Plaintiff Carter’s attendants -- health maintenance, personal care and homemaker -- performs. This letter did not provide an explanation of the disparity in the benefit reduction between the CDASS program and other home health care services programs. This letter did not provide Plaintiff Carter with a notice of her right to appeal the reduction in allocation. This letter provided no notice to Plaintiff Carter of her right to have a hearing conducted regarding the allocation reduction, how to request such a hearing, and that Plaintiff Carter may represent herself or use legal counsel or other spokesperson to assist with the hearing. Plaintiff Carter was not provided with prior notice that her CDASS allocation would be reduced.

76. Plaintiff Carter received a letter December 2, 2009 informing her that her allocation amount had been reduced to \$1,985.30, a 4.06% reduction. This letter did not provide Plaintiff Carter with a notice of her right to appeal the reduction in allocation. This letter provided no notice to Plaintiff Carter of her right to have a hearing conducted regarding the allocation reduction, how to request such a hearing, and that Plaintiff Carter may represent herself or use legal counsel or other spokesperson to assist with the hearing. This letter informed Plaintiff Carter that the reduction was already effective as of December 1, 2009 “to comply with

the provider rate reduction.” The letter also stated, “Your allocation has also been adjusted to allow for the new administration fee for Public Partnerships. LLC,” but does not explain what the amount of the fee is or how the allocation amount was “adjusted.” Plaintiff Carter was not provided with prior notice that her CDASS allocation would be reduced.

77. Plaintiff Carter has been harmed and will continue to be harmed until this Court orders a reinstatement of her pre-September 2009 CDASS allocation amount and orders Defendant to provide Plaintiff Carter with appropriate due process before attempting to reduce her CDASS allocation.

78. Debbie Miller as parent and guardian for Brian Miller has been a CDASS client since 2003.

79. Plaintiff Brian Miller received a letter dated October 13, 2009 informing him that his allocation had been reduced to \$6,813.20, effective September 1, 2009. This change in allocation applied to all types of services Plaintiff Miller’s attendants -- health maintenance, personal care and homemaker -- performs. This letter did not provide an explanation of the disparity in the benefit reduction between the CDASS program and other home health care services programs. This letter did not provide Plaintiff Miller with a notice of his right to appeal the reduction in allocation. This letter provided no notice to Plaintiff Miller of his right to have a hearing conducted regarding the allocation reduction, how to request such a hearing, and that Plaintiff Miller may represent himself or use legal counsel or other spokesperson to assist with the hearing. Plaintiff Miller was not provided with prior notice that his CDASS allocation would be reduced.

80. Plaintiff Miller received a letter dated December 2, 2009 informing him that his allocation amount had been reduced to \$6,667.45, a 2.14% reduction. This letter did not provide Plaintiff Miller with a notice of his right to appeal the reduction in allocation. This letter provided no notice to Plaintiff Miller of her right to have a hearing conducted regarding the allocation reduction, how to request such a hearing, and that Plaintiff Miller may represent herself of use legal counsel or other spokesperson to assist with the hearing. This letter informed Plaintiff Miller that the reduction was already effective as of December 1, 2009 “to comply with the provider rate reduction.” The letter also stated, “Your allocation has also been adjusted to allow for the new administration fee for Public Partnerships. LLC,” but does not explain what the amount of the fee is or how the allocation amount was “adjusted.” Plaintiff Miller was not provided with prior notice that his CDASS allocation would be reduced.

81. Plaintiff Miller has been harmed and will continue to be harmed until this Court orders a reinstatement of her pre-September 2009 CDASS allocation amount and orders Defendant to provide Plaintiff Miller with appropriate due process before attempting to reduce his CDASS allocation.

**STATUTORY AND REGULATORY FRAMEWORK**  
**The Medicaid Act**

82. Medicaid is a medical assistance program for the indigent, supported jointly by state and federal funds. 42 U.S.C. § 1396 *et seq.* States are not required to participate in the Medicaid program, but if a state chooses to participate, it must comply with the requirements of the federal Medicaid Act and its implementing regulations. State Medicaid programs are implemented according to comprehensive written plans for medical assistance. 42 U.S.C. § 1396. State plans must be submitted to the Secretary of U.S. Department of Health and Human Services (HHS) for approval, to ensure compliance with federal law.

83. The federal Medicaid program requires a state to establish or designate a single State agency that is responsible for administering or supervising the administration of the State's Medicaid program. 42 U.S.C. § 1396a (a)(5). Colorado has chosen to participate in the Medicaid program, and it accepts federal matching funds for its program expenditures. Colo. Rev. Stat. § 26-4-105. Colorado has designated Defendant Department as the single State agency that is responsible for administering and supervising the administration of Colorado's Medicaid program.

84. Through its participation in Medicaid, The Department is required to provide home health services to categorically needy recipients ages twenty-one and over. 42 C.F.R. § 441.15(b)(1); *see also* 42 C.F.R. § 441.70 (definition of home health services).

85. The CDASS program is a long term home health care services delivery option provided by the Department.

86. Applicants for and recipients of Medicaid have the right to an administrative hearing whenever the State agency "takes action to suspend, terminate, or *reduce*" services or eligibility. *See* 42 U.S.C. § 1396a-(a)(3); 42 C.F.R. § 431.200; *see also* 42 C.F.R. 431.201. The state Medicaid agency's fair hearing system "must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970) and any additional standards specified in this subpart." 42 C.F.R. § 431.205.

87. Before "denying, suspending, terminating or *reducing* benefits," the state Medicaid agency must "issue and publicize its hearing procedures" which inform every applicant or recipient in writing of: his right to a hearing; how to request a hearing; and that the beneficiary may represent herself or use legal counsel, a relative, a friend or other spokesperson." 42 C.F.R. § 431.206 (emphasis added). The notice required to be provided to recipients must be provided ten days prior to the date of the adverse action. 42 C.F.R. § 431.11. The notice must be provided "[a]t the time of any action affecting [the Medicaid client's] claim,"

42 C.F.R. § 431.206(c)(2).

88. The required notice must provide the following:
- a. The reasons for the intended action;
  - b. the specific regulations that support, or the change in Federal or State law that requires, the action;
  - c. an explanation of the individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or,
  - d. in cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
  - e. an explanation of the circumstances under which the Medicaid benefit is continued if a hearing is requested.

42 C.F.R. § 431.210.

89. In the case at bar, the Department failed to provide notice, or, in those cases where SEP's sent letters to CDASS clients, failed to provide notice in a timely manner, and failed to provide notice that complies with the requirements of due process as set forth in 42 C.F.R. § 431.210 above.

90. The Department's unlawful notice has caused CDASS clients harm and will continue to cause CDASS clients harm until the Department is ordered to provide CDASS clients with a notice that enables CDASS clients to manage their allocations and CDASS services as required under the program.

91. All CDASS clients were entitled to and are entitled to an opportunity for a hearing on the reductions of their allocations; however, the Department "need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients." 42 C.F.R. § 431.220(b).

92. With respect to the September 2009 cuts, the "sole issue" of the reduction in CDASS' clients was not a change in Federal or State law as CDASS clients and only CDASS clients had their allocations reduced across-the-board, including health maintenance services. No change in Federal or State law permitted the Department to cut services for this subset of long term care health services clients and no other.

93. With respect to the December 2009 cuts, the amount of allocation reduction devoted to the increased FIS payment was not related to any change in Federal or State law.

94. The Department unlawfully failed to provide CDASS clients with an opportunity to have a hearing.

95. CDASS clients were harmed and will continue to be harmed by the Department's failure to provide an opportunity for a hearing regarding their allocation reductions.

### **Consumer Directed Attendant Support System**

96. Under state law regarding the CDASS program, the Department:

shall implement a consumer-directed care service model that allows eligible persons to receive a direct payment through a voucher to purchase qualified services. . . . The state department shall design and implement the consumer-directed care service model with input from consumers of home- and community-based services or their authorized representatives. Colo. Rev. Stat. § 25.5-6-1102(1).

97. The Department implemented the September 2009 cuts and December 2009 cuts without the input of CDASS clients.

98. In order to qualify and to remain eligible for the consumer-directed care service model authorized by this section, a person shall: (a) Be eligible for home- and community-based services; (b) Be willing to participate; (c) Obtain a statement from his or her primary care physician or advanced practice nurse indicating that the person has sound judgment and the ability to direct his or her care or has an authorized representative; (d) Demonstrate the ability to handle the financial aspects of self-directed care or has an authorized representative who is able to handle the financial aspects of the eligible person's care; and (e) Meet any other qualifications established by the state board by rule. Colo. Rev. Stat. § 25.5-6-1102(2).

99. All class members meet the qualification and eligibility requirements for the CDASS program.

100. In the CDASS program, each client or authorized representative submits an Attendant Support Management Plan ("ASM") to the client's SEP caseworker in advance of acceptance into the program, receives training and must take a test regarding the ability to self-direct and manage attendant care, and must meet with an SEP caseworker twice a year to ensure the program is working effectively and to see if any changes in services are needed.

101. Individual Allocations for each CDASS client means the following:

[F]unds made available by the Department to Program Participants and administered by an Intermediary Service Organization. These funds shall be available each month that a Program Participant meets program eligibility and shall be calculated based on the Program Participant's history of attendant support utilization or on the personal care, homemaker, home health aide, and nursing services defined in the client's care plan. 10 COLO. CODE REGS. § 2505-10.8551.1.

102. The Department's reductions in CDASS clients' allocations were based on factors in violation of the CDASS regulations, including without limitation, the increased reduction of CDASS clients' allocations attributable to the increased FIS payment.

103. Covered services in the CDASS program shall be attendant support, which includes skilled nursing services and home health aide services, Long Term Home Health and Long Term with Acute Episode Home Health as defined under the Home Health Program at 10 COLO. CODE REGS. 2505-10, §8.520 et seq. and Personal Care and Homemaker Services, as defined under the Long-Term Care Program at 10 COLO. CODE REGS. 2505-10, §8.489 and §8.490. 10 COLO. CODE REGS. § 2505-10.8551.2.

**FIRST CLAIM FOR RELIEF**  
**(Violations of the Medicaid Act, 42 U.S.C. § 1396 et seq.)**

104. Plaintiffs incorporate by reference all allegations of this Complaint as if set forth in full herein.

105. Reducing Medicaid to eligible CDASS clients and applicants due to the Department's implementation of the budget cuts identified herein violates the Federal Medicaid Act and implementing regulations as more fully described in this Complaint.

106. As a direct and proximate result of the actions of Defendants and the implementation of budget cuts, Plaintiffs will suffer immediate and irreparable harm as described herein.

**SECOND CLAIM FOR RELIEF**  
**(Violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983)**

107. Plaintiffs incorporate by reference all allegations of this Complaint as if set forth in full herein.

108. Defendants' failure to provide adequate notice and grant Plaintiffs and Plaintiff class members an opportunity for a pre-termination administrative hearing violates the right of Plaintiffs and each and every member of the class are entitled to and were denied by the Department due process of law guaranteed by the Fourteenth Amendment of the United States Constitution in violation of 42 U.S.C. § 1983.

109. As a direct and proximate result of the actions and inactions of Defendants, Plaintiffs have suffered and will suffer immediate and irreparable harm as described herein.

### **THIRD CLAIM FOR RELIEF**

110. Plaintiffs incorporate by reference all allegations of this Complaint as if set forth in full herein.

111. Plaintiffs and Defendants have a real and actual controversy as to the implementation and maintenance of the allocation reductions as described herein and the consequences to Plaintiffs that will result from the implementation budget cuts.

112. A judicial determination as to the parties' rights and obligations under applicable law will fully and finally resolve the uncertainty and controversy between the parties.

113. This Court has authority to make such a determination pursuant to COLO. REV. STAT. § 13-51-106 and Rule 57 of the Colorado Rules of Civil Procedure.

### **FOURTH CLAIM FOR RELIEF**

114. Plaintiffs incorporate by reference all allegations of this Complaint as if set forth in full herein.

115. Plaintiffs will be irreparably harmed if Defendants are allowed to implement budget cuts without adequate safeguards to ensure that Plaintiffs do not suffer the wrongful reduction of allocations and medical assistance under the CDASS program. The wrongful reduction of allocations violates the right of Plaintiffs and each and every member of the class to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution, in violation of 42 U.S.C. § 1983. There exists no adequate remedy at law for the harm that Plaintiffs will suffer due to Defendants' actions.

116. Plaintiffs are entitled to a temporary restraining order, preliminary injunction and permanent injunction prohibiting Defendants from implementing the budget cuts in the CDASS program until such time as Defendants can demonstrate that they are able to ensure that timely and accurate allocation amounts and medical assistance will be provided to Plaintiffs and

members of the class and that applicable laws and statutes will not be violated as a result of the implementation of the budget cuts and allocation reductions in the CDASS program.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request:

1. Certify the proposed class and order that this action be maintained as a class action pursuant to Colorado Rule of Civil Procedure 23;
2. Declare that the implementation of the budget cuts and other reductions in allocations in the CDASS program will result in the wrongful reduction of assistance under the CDASS program and will violate the Due Process Clauses of the United States Constitution, federal statutes, the Colorado Constitution and statutes and implementing regulations;
3. Preliminarily and permanently enjoin Defendants from improperly applying the budget cuts in the CDASS program until such time as Defendants can demonstrate that they are able to ensure that timely and accurate benefits will be provided to Plaintiffs and members of the class and that applicable laws and statutes will not be violated as a result of implementation of budget cuts and allocation reductions;
4. Preliminarily and permanently enjoin Defendants from failing to continue to provide timely and accurate benefits to Plaintiffs and members of the class;
5. Award Plaintiffs actual damages, interest, costs and expert witness fees as provided by law;
6. Award Plaintiffs reasonable attorneys' fees, costs and disbursements pursuant to 42 U.S.C. § 1988 and applicable Colorado law; and
7. Grant such other and further relief as may be just and proper.

**JURY DEMAND:** Plaintiffs demand a jury on all issues which can be heard by a jury.

Dated: December 22, 2009

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION  
LEGAL PROGRAM

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