DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202 Plaintiffs: 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. Defendants: 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.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General JENNIFER L. WEAVER*, Assistant Attorney General JOAN E. SMITH*, Assistant Attorney General 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: 303-866-5136/5279 Facsimile: 303-866-5671 Registration Number: 28882/34605 *Counsel of Record Email: joan.smith@state.co.us; jennifer.weaver@state.co.us	Case No.: 2009 CV 11761 Courtroom: 3

REPLY IN SUPPORT OF DEPARTMENT'S MOTION TO DISMISS

The Defendants, by and through counsel, the Office of the Attorney General, pursuant to C.R.C.P. 12(b)(5), hereby submit the following Reply in Support of Department's Motion to Dismiss.

PLAINTIFFS' CITATIONS TO LEGAL AUTHORITY FOR SUPPORT OF THEIR POSITION ARE INAPPOSITE.

In support of their allegation that they should have been furnished notice and an opportunity for a hearing for the portion of the allocation reduction attributable to the increase in the FMS administration fee, (1% in December, 2009), Plaintiffs cite case law that is not authoritative. *Soskin v. Reinertson* concerned a reduction in "benefits," an agency action which is absent here. The *Harriman* case dealt with eligibility, also not at issue here.

Plaintiffs cite to the Code of Federal Regulations, Part 431, State Administration, Subpart E, Fair Hearings for Applications and Recipients for the proposition that the Department should reverse the rate cuts until it provides "each CDASS participant advanced notice of the cuts and an opportunity for a hearing." 42 C.F.R. §431.211. The cited regulation states, "The State or local agency must mail a notice at least 10 days before the date of action…" Subpart E defines "action" as, "a termination, suspension or reduction of Medicaid eligibility or covered services." 42 C.F.R. 431.201. Under state Medicaid rules, a recipient is entitled to notice and a hearing when the Department takes an "action." Action means a termination, suspension or reduction of Medicaid eligibility or covered services. 10 C.C.R. 2505-10, §8.057.1 (2009). The Department's reduction of provider services reimbursement rates is not a reduction in eligibility or covered services. There has, therefore, been no "action" for purposes of recipient appeal rights under any federal or state authority.

The second cited federal regulation addresses the circumstances under which the Department is required to afford the recipient a hearing. Under 42 C.F.R. §431.220,

> "The State agency must grant an opportunity for a hearing to the following:
>
> (1) Any applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness.
>
> (2) Any recipient who requests it because he or she believes the agency has taken an action erroneously."

But the Department's reduction in reimbursement rates for services in response to a state budget crisis is neither a denial of a claim for services nor an erroneous agency "action." (See definition of "action," above.) Plaintiffs citation to regulation 42 C.F.R. 431.205 (b) and (c) (2) is inapposite in that that it only pertains when there is an agency "action." Plaintiffs' argument that the incremental, system-wide reductions in reimbursement rates for Medicaid services is equivalent to a reduction of eligibility or services is incorrect, and is not supported by any legal authority.

Plaintiffs argue that because the service rate reductions reduced individual CDASS recipients' allocations, they are entitled to a hearing. The allocation amount is not a "covered service," but rather a fund from which the recipient can pay for services. The Allocation is based on a case manager's determination of the type of service(s) and number of units of service(s) that an individual recipient needs. EXHIBIT 1. Multiplying the total number of service units by the reimbursement rate

for that service results in the total allocation amount. When the rates factor decreases, the total allocation amount decreases even though the amount of units of approved services stays the same.

As participants in the Consumer Directed model, the Department has permitted these recipients to take over some of the responsibilities usually assumed by providers. (See CDASS Training Manual (available online at the Department's website under Clients & Applicants/Long Term Care); Section 5, attached as EXHIBIT 2, SECTION 5) Providers generally have no right to appeal a change in reimbursement rates.[1]

Plaintiffs further allege that CDASS recipients are entitled to a hearing because "there is no meaningful explanation for the amount of the allocation reductions." But this argument is specious when the Department has issued a written explanation to CDASS clients in the form of a letter dated September 11, 2009. This letter explains both the budget cuts and the changes in the Financial Management Services Agency. EXHIBIT 3.

PLAINTIFFS' ALLEGATION THAT THE DEPARTMENT HAS FAILED TO "EXPLAIN" THE CHANGES TO RECIPIENT ALLOCATIONS IS INCORRECT.

Plaintiffs also make much of the aggregate change in individual allocations over the time period from August, 2009 through December, 2009, alleging that the Department has

[1] Under 42 C.F.R. §447.15, "A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency …"

failed to "explain" why CDASS recipients experienced an overall reduction in the funds available to pay for care that exceeds the sum of each of the changes to allocations. The explanation is as follows: There were two rate reductions, one in September, 2009 of 1.5% and another in December, 2009 of 1%. The Financial Management Service (FMS) administrative fee, which is a proportion of the individual allocation also changed in December from 10% of total allocation to 11% of total allocation. However, these changes did not all occur at the same time.

The 1.5% reduction occurred in September, 2009. When the 1% December reduction is applied to the already reduced September allocation and the apportionment of the resultant total allocation is then changed from the previous 10% of total allocation to 11% of the total allocation. The cumulative effect of the two rate reductions and the 1% increase in the service fee is that allocations have changed by about 3.56%, overall (3.567 – 3.569%.)[2] Furthermore, both the 1.5% rate cut in September and the 1% rate cut in December had a negligible affect on the total allocation amount for each CDASS recipient. Three examples of allocation changes are set forth as they occurred over time at EXHIBIT 4.

The change in the FMS administration fee did not affect total allocations. The total allocation amount covers the recipient's costs for purchasing services and the FMS agency's administrative fee. Because the administrative fee is taken as a percentage of the total allocation for each recipient, a change in the administrative fee does not affect total

[2] The aggregate impact on the pre-September allocation is greater than simply adding 1% + 1.5% + 1% (or 3.5%) because the second rate cut was applied to the reduced allocation amount that resulted from the first rate cut. The change in administrative fee was then applied after the second rate cut.

allocation, but changes the proportion of the allocation available to the client to spend on care.

The FMS fee increase on December 1, 2009, occurred because the FMS function was assumed by a new contractor, Public Partnerships, Limited (PPL.) CDASS recipients had demanded that the Department hire a replacement FMS by competitive procurement. The cap on the administrative fee in this procurement was 12% of the total allocation, exactly the same cap placed on the previous FMS's administrative fees for the duration of its contract, in conformity with federal requirements under the waiver.[3] EXHIBIT 5, (Appendix E-1, 7, i, ii.)

Plaintiffs state that individual recipients have received comparatively disparate reductions and that some CDASS recipients saw changes in their allocation amounts that exceeded 3.56%. This is explained by the fact that, in September, 2009, when the 1% provider rate cut was implemented, (reducing rates for all services, including those utilized by CDASS participants), the Department forwarded an electronic worksheet to case managers to use to adjust each of their client's allocations. Unfortunately, there was a defect in the embedded formula that was part of the worksheet. Errors in the electronic worksheet resulted in erroneous adjustments statewide to some allocations. To correct these allocations, the Department is auditing allocations and recalculating those that were incorrectly adjusted.

[3] Accent charged 12% initially, but then 'ramped down' the fee over the term of the 5-year contract until, in June, 2009, Accent's fee was 10%. In the competitive procurement, the Department was able to work with PPL to reduce the administrative fee from the 12% cap set forth in the Waiver to 11%, in order to benefit CDASS recipients.

The Department will complete its audit and communicate the results of the approximately 1,035 audited client allocations that were reported within the next couple of weeks.

PLAINTIFFS' ALLEGATION THAT THE RATE CUTS ARE, IN EFFECT, A REDUCTION IN SERVICES IS INACCURATE.

In the traditional model for home and community based services, the Department pays the Provider who hires/pays an attendant to provide services to the recipient. For recipients who opt to participate in Consumer Directed Attendant Support Services, the recipient (consumer) takes the place of the provider and directs his/her own care. The client chooses to take responsibility for setting the hourly wage for recruiting, hiring, training and supervising his/her own attendants. In this sense, the recipient has chosen to eliminate the provider from the process and "stands in the shoes of" the provider.

Services available under the CDASS model include personal care services, homemaker services and health maintenance activities. In order to determine what dollar amount should comprise a CDASS recipient's allocation, a caseworker evaluates the recipient (this is an "assessment") to determine which services the recipient needs and the frequency and duration of those services. The caseworker determines the services needed by a client in a typical week using a task worksheet to calculate weekly hours. The manager inserts the hours into a monthly allocation worksheet broken down by the three types of services and calculates the weekly hours for services. Then the case manager submits a prior authorization request (PAR) to the Department. When the Department approves the PAR, the recipient's services are set forth in the PAR document.

The rate cuts do not have any effect on the amount or type of services that the recipient is authorized to receive. The number of units of service authorized on the PAR does not change when the maximum provider reimbursement rate for a service changes. While decreases in allocation amounts required recipients to be responsible for determining how best to obtain the services they required, the decreases did not require recipients to "change their services suddenly." (*See* Response to Motion to Dismiss, at I.A., fourth paragraph.)

Plaintiffs' assertion that "twice in the course of three months each of the CDASS participants were supposed to re-negotiate employee contracts with each of their attendants and/or advertised, recruited, interviewed, trained, submitted paperwork for approval and hired new attendants at lower wages" [sic] is also factually incorrect. At the time of the September rate cuts, when Accent was the FMS, the hiring agreement between the recipient and attendant did not require that the hourly wage be declared. So, recipients did not need to make any administrative changes. Nor would the December reductions have required recipients to submit change forms, because on December 1, 2009, the new financial management service, PPL, took over , so recipients had to start new contracts, anyway.[4]

While Plaintiffs make the argument that the reduction in rates necessitates that recipients will receive less services, the incremental change in rates spread over an array of service categories should not affect a recipient's ability to pay for services. A

[4] Indeed, the allocation reductions break down to such a small increase funds actually available to pay attendants that a CDASS recipient with even the barest amount of competence should have experienced only the most negligible of effects.

recipient/consumer who is properly directing their services and supports should experience very little impact from an incremental rate reduction.

Although the Department sets "maximum" reimbursement rates for each service authorized in the CDASS model, recipients who pay attendants to furnish their care are not required to pay each attendant the maximum rate. CDASS recipients are encouraged to bargain for and obtain attendant care at rates lower than the maximum, something a provider might do to attempt to maximize operating capital or profits. [CDASS MANUAL SECTION 7]. Bargaining for rates lower than the maximum allows CDASS recipients to set aside an amount for contingencies such as a day in which a particular service make take longer than the allotted time, or when the recipient wants to reward a loyal and conscientious attendant by raising the hourly rate. The Department's decrease in the reimbursement rate for services is just such a contingency. In the traditional reimbursement model, all of these contingencies would be managed by the provider.

Plaintiff's state that "CDASS participants do not have the flexibility to respond to the reduction in allocation." However, "flexibility" is part of the CDASS training and one of the skills required of a CDASS participation. The CDASS training and manual instructs recipients that they must adopt budget management strategies that will allow them flexibility to cope with changes in service delivery and the rates they pay their attendants. *See* EXHIBIT 2, CDASS MANUAL SECTION 7.

Plaintiffs argue that "[b]y virtue of a Medicaid recipient being enrolled in the CDASS program, the Department has agreed that CDASS is the appropriate service delivery

mechanism." In fact, while the Department may approve enrollment in CDASS for a given recipient based on that recipient's representations to the Department that he/she is competent to manage a CDASS budget independently and able to cope with the responsibilities of managing a staff of attendants, the Department's approval is not an irrevocable commitment that the recipient will forever be enrolled in CDASS in order to receive benefits. It does not, therefore, follow that an enrolled recipient who does not receive advance notice of a rate change would be forced to "simply choose to forgo Medicaid funding." Any CDASS recipient who finds that he/she is unable to manage the budget or staff, or who wishes to discontinue participation in CDASS may transition back to provider based services at any time. 10 C.C.R. 2505-10, §8.510.9.B. Because the recipient is already enrolled in an approved waiver program, the case manager just transitions the recipient to provider-furnished services.

PLAINTIFFS' ALLEGATION THAT THE DEPARTMENT PREVIOUSLY INFORMED RECIPIENTS THAT RATE CUTS WOULD NOT AFFECT ALLOCATIONS IS INCORRECT.

Plaintiffs allege that the reductions are improper because "the Department informed CDASS clients that an increased payment to the FMS would not be taken from the amount CDASS clients have available to pay their attendants." Plaintiffs have confused events that occurred at a CDASS advisory committee meeting on June 17, 2009. At the June meeting, the committee was actually discussing the rate cuts ordered by the Joint Budget Committee that were to take effect on July 1, 2009.

In June, 2009, the Department negotiated with the FMS in place at that time, (Accent Intermediary Services), to reduce their administrative fee from 10% to 8% until the inception of PPL's contract to offset the funding reductions imposed by the Joint Budget Committee, (and prevent any impact to the CDASS recipients.) In the June meeting, the Department stated that the budget cuts that took effect on July 1, 2009, would not be taken from the recipients' CDASS allocations because the deficiency was being offset by a 2% reduction in Accent's administrative fee. The Department made no such assertion with regard to the September and December rate cuts because it could not have known about the cuts at that time. EXHIBIT 6.

CONCLUSION

Plaintiffs have failed to proffer any legal authority to support that CDASS recipients are entitled to notice when the Department issues rate changes. Furthermore, Plaintiffs' factual assertions are largely specious and inaccurate. In whole, the Plaintiffs have failed to state any claim upon which relief can be granted.

WHEREFORE, for the reasons and authorities cited above, the Defendants respectfully request that the foregoing Motion to Dismiss be GRANTED.

Respectfully submitted this 5th day of April, 2010.

JOHN W. SUTHERS
Attorney General

S/Joan E. Smith
(original signature on file with the Office of the Attorney General)

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within REPLY upon the following via Lexis-Nexis/Courtlink on this 5th day of April, 2010.

Kevin W. Williams
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And by electronic mail
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S/ Connie Risser
(original signature on file with the Office of the Attorney General)