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

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.

▲ COURT USE ONLY ▲

Case Number: 2009 CV 11761

Ctrm.: 3

Attorney or Party Without Attorney:
Kevin W. Williams
Carrie Ann Lucas
Colorado Cross-Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203
Phone Number: 303.839.1775
Fax Number: 303.839.1782
E-mail: kwilliams@ccdconline.org
E-mail: clucas@ccdconline.org
Atty. Reg. #: 28117
Atty. Reg. #: 36620

RESPONSE TO MOTION TO DISMISS

Plaintiffs, by and through undersigned counsel, hereby respond to Defendants' Motion to

Dismiss, filed February 18, 2010.

INTRODUCTION

Plaintiffs seek to have the reductions in their Consumer Directed Attendant Support Services ("CDASS") allocation amounts reversed until Defendants provide each CDASS participant advanced notice of the cuts and an opportunity for a hearing pursuant to 42 C.F.R. § 431.211 and 42 C.F.R. § 431.220[1]. Defendants Motion to Dismiss (hereinafter "the Motion") must be denied for the following reasons:

- The Motion incorrectly asserts that Plaintiffs were not entitled to advance notice of the reductions in their allocation amounts and "were not entitled to an administrative hearing because there was no termination, suspension, or reduction of Medicaid eligibility or services." To the contrary, as set forth in the Class Action Complaint,[2] Plaintiffs have all had the funds they had available to pay for in-home attendant care services cut by amounts at least 3.64% (and often as much as 5.57% or more than this amount) from September through December of 2009. Defendants claim that these cuts were the result of "system-wide *provider* rate reductions pursuant to the Governor's Executive Orders." Motion at 2 (emphasis added).
- Defendants claim that Plaintiffs were not entitled to advance notice of these reductions or

---

[1] Advanced notice under 42 C.F.R. § 431.211 when there has been an adverse change in medicaid services. See also 10 Colo. Code Regs. 2505-10-8.057. A hearing is required under 42 C.F.R. § 431.220 because there is no meaningful explanation for the amount of the allocation reductions.

[2] It is Plaintiffs' intent to file a motion pursuant to Colo. R. Civ. P. 23 asking this Court to certify a class of all clients of the Colorado Consumer Directed Support Services ("CDASS") program who have had their monthly service allocation amounts decreased improperly.

to the opportunity for a hearing based on the exception to the advanced notice and hearing requirements found in 42 C.F.R. § 431.220(b). The regulation states, "The opportunity for a hearing is not required if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients." This regulation, on its face, applies to a change in state law.[3] As set forth in the Complaint, the allocation reductions were based, in part, on the Executive Orders cited by Defendants, *see* Motion at 2 & Defendant's Exhibits B & E, but were larger in amount than what the Executive Orders called for and were based on factors having nothing to do with a change in state law affecting some or all Medicaid beneficiaries.

- The rest of the allocation reduction amounts cannot be deemed to have any relationship to a change in state law and were not applied to CDASS recipients in a uniform way. A "reduction" in services occurs when the state agency administering Medicaid causes the benefit received to be less than it was before. In this case, each CDASS client's available allocation of money to pay for long term care services was reduced by an amount equal or greater to at least 3.64% or more. Complaint ¶¶ 57 & 64.
- Defendants' recitation of the facts and application of law tell only a part of the story. The Motion leaves out that the Complaint alleges the Department cut more than the 2.5% it claims would have been applicable if only the amount directed to be reduced by the Governor's Executive Orders implementing state budget cuts had been removed from

---

[3] No federal law change is alleged to have occurred in this case.

Plaintiffs' allocations.[4] *See* Motion at 8-9, and Executive Orders, Defendant's Exhibits B & E, reducing "long-term care providers" payments by 1.5% and 1% respectively.

- Although the Executive Orders may rise to the level of a change in law adequate to obviate the need for a hearing, the additional unexplained reductions in CDASS allocations do not.
- Also, CDASS clients are not "service providers" as suggested by the Motion and within the meaning of the Executive Orders.
- Apparently, part of the reduction, approximately 1%, for each Plaintiff, was due to an increased payment by the Department to a new fiscal intermediary service ("FIS"), which came about solely as the result of a contract negotiated between the Department and the FIS. *See* Motion at 10. This contract was not an issue of "Federal or State law requiring an automatic change adversely affecting some or all recipients," but a negotiated agreement between the Department and a contractor who administers receipt of employee time sheets and payroll. This occurred <u>after</u> the Department informed CDASS clients that an increased payment to the new FIS, if any, would <u>not</u> be taken from the amount CDASS clients have available to pay their attendants. *See* Complaint ¶ 60.
- Even if reductions from the Executive Orders and contract change could be deemed changes in state law affecting all or some Medicaid recipients, the amounts CDASS clients' allocations were reduced were all more than the 2.5% budget cuts and more than the 1% payment to the new FIS combined. As noted, the minimum allocation change

---

[4] Plaintiffs will assume for purposes of this Motion that the Executive Orders would constitute an issue of state law requiring an automatic change adversely affecting some or all recipients under 42 C.F.R. § 431.220(b).

Plaintiffs sustained was 3.64% and many clients sustained decreases in allocation amount of over 5.5% without any explanation.[5]

For these reasons, Plaintiffs were entitled to advanced written notice of (1) the reductions; (2) a right to a hearing; (2) the method by which to obtain a hearing; and (3) that the client may represent himself or use legal counsel, a relative, a friend, or other spokesman "[a]t the time of any action affecting his or her claim." 42 C.F.R. § 431.206(b) & (c)(2). Clearly, reducing the amounts available for Plaintiffs to spend on attendant care services constitutes an action "affecting [the client's] claim." No Plaintiff received advance notice of the allocation reductions, and those who received "notice" received it after the benefit reductions had occurred, which does not meet the due process requirements for advanced notice and an opportunity for a hearing.

ARGUMENT

A description of the Colorado Consumer Directed Attendant Support Services ("CDASS") program is provided in the Complaint at ¶¶ 96-103 and in Defendants' Motion at pp. 5-8. All requirements for the program can be found at Colo. Rev. Stat. § 25.5-6-1101 *et seq*. and 10 Colo. Code Regs. 2505-10-8.551. Additional description of the CDASS program pertinent to

---

[5] In footnote 3 of the Motion, the Department alludes to "calculation errors" it received from case managers for CDASS clients. The Department admits it reviewed the calculation worksheets; nevertheless, each CDASS client had his or her allocation amount decreased in excess of 3.64%. The Department explains that it is "in the process of making corrections to the calculations," that "should" result in clients having an allocation reduction no greater than 3.55%. On its face, 3.55% is greater than 2.5%, which, even if the Department's state law change argument is accurate, is unlawful without advanced notice and an opportunity for a hearing. In addition, the Department has not indicated how long it intends to continue denying CDASS clients funds that were available, when or how it intends to apply these corrections, or that it has provided any notice of the errors or intended corrections to CDASS clients.

Defendants' motion is provided in this Response.

Under the Colorado Medical Assistance Act, the Department provides CDASS services to Medicaid-eligible individuals. *See* Colo. Rev. Stat. §§ 25-5-6-304, 305, 307(1)(j) & 311. CDASS services are provided by the Department under its obligations pursuant to statutory provisions covering Home and Community Based Services for the Elderly, Blind and Disabled. *Id.* All services provided by the Department under the CDASS program and all other long term care service programs are handled in the form reimbursements to service providers.

Defendants bring their Motion pursuant to Colo. R. Civ. P. 12(b)(5), alleging Plaintiffs failed to state a claim upon which relief can be granted. Motions to dismiss pursuant to Colo. R. Civ. P. 12(b)(5) test the sufficiency of the complaint. *Lobato v. State*, 218 P.3d 358, 367 (Colo. 2009). A reviewing court must accept all averments of material fact as true and view allegations in the light most favorable to the plaintiff. *Id.* The court cannot grant a motion to dismiss unless it appears beyond doubt that no set of facts can prove that the plaintiff is entitled to relief. *Id.*

I. Executive Orders and Obligations of Due Process

Plaintiffs seek to clarify an ongoing misconception perpetuated by Defendants: CDASS recipients understand that all long term care services recipients in Colorado -- including CDASS clients -- are subject to budget cuts imposed by the state that are applicable to all Medicaid long term care recipients; Plaintiffs disagree, however, that CDASS recipients -- Medicaid recipients who have disabilities and receive attendant services in their homes -- should be treated like Medicaid providers when such cuts are imposed. As a matter of due process under *Goldberg v. Kelly*, 397 U.S. 254 (1970), CDASS recipients must have advanced notice when allocation cuts are imposed (1) to be able to address errors in those reductions; and (2) to be able to budget for

attendant care appropriately consistent with the rules of the CDASS program. *See also Nededog v. Colorado Dept. of Health Care Policy and Financing*, 98 P.3d 960, 963 (Colo. App. 2004) (the advance notice requirement affords a recipient of public benefits a pretermination opportunity to be heard, consistent with procedural due process rights inherent in receipt of public benefits). Due process protects the recipient against an erroneous termination of public benefits. *Nededog*, at 963 (citing *Goldberg v. Kelly, supra*).

The Executive Orders cited by Defendants cut "Medicaid Provider Reimbursement Rates" 1.5% in August (effective September) and 1% in November (effective December). *See* Motion & Defendant's Exhibits B and E. According to the Motion, the Department issued "notice" to all Medicaid *providers* of these cuts again in a notice to all "Medicaid Fee-For-Service Provider Reimbursement Rates" published in the Colorado Register on August 29, 2009 (September cut) and on November 10, 2009 (December cut). *See* Motion, Defendant's Exhibits C & F. It is clear from these notices that they were directed to Medicaid providers and not to Medicaid recipients.

Defendants argue that somehow this "notice" was sufficient to inform Medicaid *recipients* in the CDASS program that the money available to pay their attendants previously available in their Individual Allocations would be reduced.[6] Motion at 11. Defendants cite 42

---

[6] The definition for "Individual Allocation" for CDASS recipients is found at § 8.551.1. (All references to the Colorado Code of Regulations will be made to 10 Colo. Code Regs. § 2505-10, unless otherwise indicated.) The methods for determining each CDASS recipient's Individual Allocation is done at the time the CDASS recipient enters the program and are explained at § 8.551.6. If a CDASS recipient's attendant care needs change, the Individual Allocation can be changed if a reassessment is conducted by the CDASS recipient and case manager following the rules set forth in § 8.551.6.B. None of the factors for reassessment in § 8.551.6.B was considered or applied when the September and December cuts to CDASS recipient allocations were cut.

C.F.R. § 447.205, "Public notice of changes in Statewide methods and standards for setting payment rates," as the regulatory authority for this alleged adequate notice. This regulation has nothing to do with the due process rights of Medicaid recipients, it is designed for and targeted at Medicaid service providers, which is why the notice is directed to "Medicaid Fee-for-Service Providers." If the Department expected CDASS recipients to follow the rules governing notice to Medicaid service providers, including the notice provisions for providers, it should have made this explicit in the rules governing the CDASS program and in the Program Participant responsibilities form all CDASS recipients must sign in order to enroll in the program. *See* §§ 8.551.5.A.8 ("Conditions for Services") & 8.551.8.A ("Health and Attendant Management"). No such requirement has ever existed in the program. Defendants' Motion is the first time CDASS recipients have heard they are supposed to review Medicaid provider notices to determine if their services will be cut.

A. CDASS Participants Are <u>Not</u> Medicaid Fee-for-Service Providers

Defendants raise several arguments built on the erroneous premise that CDASS recipients are Medicaid Fee-for-Service Providers. *See, e.g.*., Motion at 13: "Plaintiffs, acting as service providers under CDASS, should not be given special treatment by being immune from Colorado's budget crisis solely because they voluntarily opted to receive services through CDASS rather than through a provider chosen by the Department." The Department is clearly confused: CDASS participants are Medicaid *recipients*, not providers. CDASS recipients cannot simply switch back and forth between CDASS services and another provider. The steps to getting on the CDASS program are time-consuming, *see, e.g.*, § 8.551.3, and, until this Motion was filed, CDASS recipients were unaware the Department intended that CDASS

recipients receive services "through a provider chosen by the Department." CDASS is one of several available long term care service delivery options. *See, e.g.*, Colo. Rev. Stat., Title 25-5, Article 6, identifying long term care service options and eligibility.

"Providers" means any person, group or entity that renders services or provides items to a medical assistance recipient. 10 Colo. Code Regs. § 2505-10 8.012.1.A. Providers are paid by the Department to render services to Medicaid recipients. Providers have numerous regulatory rights and responsibilities. *See generally* 10 Colo. Code Regs. § 2505-10, *et seq*. Providers include doctors, hospitals, home health care agencies, durable medical equipment providers, etc.

CDASS recipients are individuals with disabilities who qualify for Medicaid whose disabilities are severe enough that they require the need for attendant care so they can live independently in their homes. The entirety of the state CDASS regulations can be found at 10 Colo. Code Regs. 2505-10-8.551. CDASS recipients cannot and do not receive money from the Department to pay for attendant services. CDASS recipients must be Medicaid-eligible, meaning they meet strict income qualification criteria. CDASS clients' disabilities are sometimes significant enough that they require an authorized representative to manage their services. CDASS recipients <u>do not</u> provide services or items to medical assistance recipients.

The Department inaccurately analogizes CDASS participants to Medicaid Service Providers and argues "Thus, when the rates were reduced pursuant to the Governor's Executive Orders, it was the Plaintiffs' responsibility to figure out how best to obtain the services they need at the allocated amount." CDASS recipients cannot simply change their services suddenly as the result of an allocation reduction.

First, Plaintiffs' allocation amounts are strictly determined and cannot be changed

without an extensive re-assessment process. §§ 8.551.6 & 8.551.6.B.

Second, Medicaid recipients in the CDASS program must enter into an employment agreement with the FIS and each attendant the CDASS participant hires. *See* Affidavit of Julie Reiskin ¶ 2 & Plaintiffs' Exhibit 1. This Agreement sets forth the conditions of employment including the compensation rate. CDASS participants are required to use this Agreement and had no negotiating powers in its terms. *Id.* ¶ 3. Once an attendant is hired, the attendant has an ongoing expectation of being paid at the rate specified. The Department's theory that Plaintiffs "could have reduced their employees' wages or could have hired less expensive employees," suggests that attendants would agree to work with a sudden reduction in pay despite the rate set in the employment contract. The Department's position also means 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 (and presumably replaced the attendants with whom they had a working relationship). The paperwork process alone for a CDASS participant to hire a new attendant takes longer than this. *See id.* ¶ 4, and CDASS clients must ask the FIS to change rates seven days in advance. *Id.* The FIS, not the CDASS participant, is the employer of record for the attendants. § 8.551.7.B. CDASS participants must submit and have approved an Attendant Support Management Plan, which includes a budget for payment of attendants, including wages, which must be approved by the single entry point case manager before the CDASS participant can be enrolled in the program. § 8.510.6.B.2.

Plaintiffs acknowledge providers who accept Medicaid are impacted detrimentally by budget cuts and reductions to reimbursement to those providers is difficult, but providers are

businesses that bill the Department for services. They have staffs and employees that can make the adjustments needed to address cuts imposed by the Executive Orders and provider notices involved and, as the Department acknowledges, can choose not to be a Medicaid service provider. CDASS recipients need Medicaid assistance and are medical assistance recipients who take on the responsibilities of hiring, supervising and training attendants (prior to CDASS, these responsibilities were handled by home health care agencies), but CDASS participants do not have the flexibility to respond to the reductions in allocation suggested by the Department.

The allocation amount is fixed until agreement is reached by the single entry point agency and Department to change it. The allocation amount represents an agreed-upon determination about how much the CDASS recipient needs to have available to pay for attendant care each month. CDASS recipients must prepare a monthly budget for paying for these services. §§ 8.510.6.A.8 & 8.510.6.B.3.

CDASS recipients must have adequate advance notice of changes in allocation to be able to budget for the program. An individual can be terminated from the program for spending over the allocation amount. §§ 8.510.10.A.4 & 8.510.10A.7.

Most telling of the Department's confusion over CDASS recipients' entitlement to notice in this case is the following:

> [J]ust as other providers dissatisfied with the rate reductions have the option not to participate in the Medicaid program, Plaintiffs could choose to opt out of CDASS and receive services from a Medicaid provider who accepts the reimbursement rates. Plaintiffs, acting as service providers under CDASS, should not be given special treatment by being immune from Colorado's budget crisis solely because they voluntarily

opted to receive services through CDASS rather than through a provider chosen by the Department.

Plaintiffs are not suggesting they are "immune" from state budget cuts, but rather that they are entitled to notice of such cuts and an opportunity for a hearing as individual Medicaid recipients. A service provider, e.g., a hospital, choosing not to accept Medicaid payments as a result of rate reductions is completely unrelated to a CDASS recipient's ability to receive services from the CDASS program or some other service delivery mechanism. By virtue of a Medicaid recipient being enrolled in the CDASS program, the Department has agreed that CDASS is the appropriate service delivery mechanism. CDASS recipients cannot simply choose to forego Medicaid funding.

III. A Reduction in CDASS Allocation Equates to a Reduction In Services Sufficient to Trigger Due Process Obligations

As set forth in the Complaint ¶¶ 4 & 101, under CDASS, each CDASS recipient has an established allocation of funds with which to pay for attendant care each month. § 8.551.6 (method for calculating allocation). Each dollar of the allocation amount that is taken away is one less dollar available to the CDASS participant to pay attendants for services. Such reductions in available resources for services obviously equate to a reduction in services. The Department is the entity that pays for such services. Without the money to pay for the service, there is no service. The Department pays for, and as a result, provides numerous services under Medicaid. *See, e.g.*, Colo. Rev. Stat., Title 25.5, Art. 5, Pt. 5 (prescription drugs); Title 25.5, Art. 6 (long term care and home and community based services). The list of funded services is

lengthy.

IV. Even if the Budget Reductions Permitted the Department to Avoid Notice Requirements, Payments to the FIS Are Not a Change in State Law Sufficient to Avoid Obligations of Due Process.

The Department was required to provide advance notice and an opportunity for a hearing in this case because Plaintiffs challenge the reduction for reasons other than the change in law automatically affecting their benefits. *See Soskin v. Reinertson,* 353 F.3d 1242, 1262-63 (10th Cir. 2004) (if change in law is not the only reason for termination or reduction of benefit, state agency must provide advanced notice and opportunity for a hearing); *see also*, *Harriman v. Department of Children and Families*, 867 So.2d 1264 (Fla. App. 1 Dist. 2004) [check cite].

As set forth in the Complaint, Plaintiffs' allocation amounts were reduced not only by the 2.5% attributable to the budget cuts imposed by Executive Orders but also by a contract change that reduced each CDASS participant's allocation by an additional 1%, and also by some unexplained amount. Complaint ¶ 60. The Department concedes the 1% reduction is based on the change in contract with the new FIS. Motion at 10.

The Department does not address how the removal of an additional 1% of each client's allocation amount equates to a change in state law. The Department does not try to explain away this reduction by asserting the Department gave notice under 42 C.F.R. § 447.205(d). It simply assumes it can reduce CDASS clients allocations (by any amount apparently) to pay for contracts it negotiates with providers in the program. As noted in the Complaint, this reduction in benefits is even more egregious because the Department, in a meeting of the CDASS Advisory

Committee,[7] informed CDASS clients that no change in allocation would be made to pay for the new FIS. Complaint ¶ 60.

V. Unexplained Reductions in Allocation Amounts Required Notice

Finally, Defendants do not dispute nor address the allegations in the Complaint alleging Plaintiffs' CDASS allocation amounts were reduced by as much as 4.06% from in December when the reduction should have included 1% for the state budget cut only, after having already been reduced by 1.5% in September. *See* Complaint ¶¶ 57 & 64. Even if it was permissible under some theory for the Department to reduce CDASS allocations another 1% for the new FIS, this still leaves an unexplained reduction of over 2% from each allocation for which Plaintiffs all should have received advanced notice and an opportunity for a hearing. Defendants essentially ignore this reduction.[8] Defendants are utilizing this additional 2% for some purpose unknown to CDASS participants or taxpayers and should be required to account for it.

CONCLUSION

CDASS participants are held to rigorous standards regarding keeping within an allocation

---

[7] A small group of CDASS recipients, Department officials and an FIS representative, that meets periodically to discuss the program.

[8] Footnote 3 of the Motion indicates the Department was aware that "calculation errors" were made when Plaintiffs' available dollars for attendant care were reduced. In rather nonchalant treatment of these errors, the Department explains it provided worksheets to case managers, and that inappropriate amounts were removed from clients' allocations. The Department does not deny or provide any documentation refuting Plaintiffs' allegations that clients had over 6% of their allocations removed without notice, *see* complaint ¶¶ 57 & 64, and states that someday the Department will correct the errors. Even then, the Department indicates that after the "corrections," client allocations will be reduced by "3.55%." Again, this is more than the 2.5% in state budget cuts. There is no explanation of how or when the Department intends to do this or why CDASS clients have not been informed of the errors or intended corrections.

allotment and budget when paying their attendants, yet the Department, apparently, believes it can reduce that allocation amount as it chooses without advance notice to the Medicaid recipient or an opportunity for a hearing. Medicaid recipients are entitled in this case to simple due process -- before their available attendant care funds are taken away, they should have advance notice and an opportunity for a hearing. Even after the state made budget cuts, CDASS recipients were entitled to advance notice under 42 C.F.R. § 431.211 because a reduction in benefits was about to happen and they were entitled to an opportunity for a hearing under § 431.220 because the amount of the reduction in benefit clearly demonstrates that the budget cuts alone were not the reason for the reduction. For the foregoing reasons, Defendants' motion to dismiss must be denied.

Dated: March 22, 2010

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION
LEGAL PROGRAM

/s Kevin W. Williams
Legal Program Director

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2010, I electronically filed the foregoing using the Lexis Nexis Court Link and served by electronic mail on the following:

Jennifer L. Weaver, Esq.
Jennifer.Weaver@state.co.us

Joan E. Smith, Esq.
Joan.Smith@state.co.us

/s/ Briana McCarten

Duly Authorized Signature on file at the Colorado Cross-Disability Coalition.