DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): COLORADO CROSS-DISABILITY COALITION, a Colorado Corporation, *et al.* v. Defendant(s): COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, *et al.*	Δ COURT USE ONLY Δ Case Number: 09cv11761 Div.: Ctrm.: 3
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PLAINTIFFS' BRIEF IN SUPPORT OF CLASS CERTIFICATION

BACKGROUND

The named Plaintiffs in this case are all individuals with disabilities who receive Medicaid-funded home health care and need attendant care services in their homes. Amended Complaint ¶ 2. Through its participation in Medicaid, the Department is required to provide home health services to "categorically needy" recipients. 42 C.F.R. § 441.15(b)(1); *see also* 42 C.F.R. § 440.70 (definition of home health services). All Individual Plaintiffs 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 of Health Care Policy and Financing ("Department"). *Id*. Plaintiff Colorado Cross-Disability Coalition ("CCDC") is a non-profit statewide disability rights advocacy organization whose members are individuals with disabilities and their friends and family members. Amended Complaint ¶ 3. The Individual Plaintiffs are CCDC members. *Id*. CCDC has been actively involved with the development of the CDASS program, described below. Amended Complaint ¶¶ 65, 67-69.

The CDASS program is a long term care home health care service delivery option for qualified individuals. Answer ¶ 96 (Answer to Am. Cpt. ¶ 302). Traditionally in Colorado, Medicaid-funded, in-home attendant care is provided to eligible individuals by home health care agencies. In the CDASS program, clients manage their own attendant care services in their homes, including interviewing, training, hiring and supervising attendants.[1] According to the Department's website:

> In CDASS, Medicaid funds are set aside for you to control, instead of paying a home health agency or personal care agency to provide your attendant care. Your case manager determines your "individual monthly allocation." After you and/or your authorized representative complete training and enroll in the services, you and/or your authorized representative will be responsible for managing these funds to meet your needs.

Like all clients receiving home health care services, each CDASS client has a case manager who oversees the delivery of home health care services. *See generally* 10 Colo. Code

[1] *See* http://www.colorado.gov/cs/Satellite/HCPF/HCPF/1210324172195, the Department's website description of the CDASS program.

Reg. § 2505-10:8.510.12 (Case Management Functions in the CDASS program).[2] Each CDASS client is provided with a monthly Individual Allocation amount with which to pay attendants, determined by the Case Manager through either (1) prior utilization of home health care services before entering the CDASS program; or (2) a calculation of hours needed for certain home care services defined by the Department. CDASS Rule § 8.510.12.C. Case managers are required to provide notification of each client's Allocation Amount in advance. CDASS Rule 8.510.12.D. If a CDASS client believes he or she requires a change in the Allocation Amount, the client is required to request his or her case manager conduct a reassessment. CDASS Rule 8.510.12.E.

The Department contracts with a Financial Management Service ("FMS"), which is the employer of record for each CDASS client's attendants, and which provides personnel management services, fiscal management and skills training to a client receiving CDASS and/or Authorized Representative. CDASS Rule 8.510.1 (Definition of FMS) and is responsible for worker's compensation insurance, unemployment compensation insurance, withholding of all federal and state taxes, compliance with federal and state laws regarding overtime pay and minimum wage requirements and compliance with any other relevant federal, state, or local laws. CDASS Rule 8.510.13.D. A percentage of each client's Individual Allocation is paid by the Department to the FMS. CDASS clients have no control over this amount.

CDASS clients are required to manage their assigned Individual Allocation. Consequences to spending over the Individual Allocation amount, assuming the allocation

[2] Hereinafter all references to 10 Colo. Code Regs. 2505-10:8.510 will be cited as "CDASS Rule."

amount is appropriate under the rules, can be severe. *See, e.g.*, CDASS Rule 8.510.10.7 ("Involuntary Termination"). Plaintiffs allege that for many CDASS clients, other home health care service delivery options do not work and, for some Medicaid clients who require long term care services and wish to continue those services in their homes, CDASS is the best or only available option.

Plaintiffs allege that all eligible CDASS participants during the time period of August of 2009 through July of 2010,[3] had the amount of funding they have available to pay for attendant care ("Individual Allocation") reduced without any advance notice or an opportunity for a hearing. Defendants deny that CDASS participants' Individual Allocations were reduced without advanced notice and deny generally that any reductions were improper.

Three of the Individual Allocation cuts resulted from statewide budget reductions implemented by the Department, pursuant to Governor Ritter's Executive Orders, D 017 09, and D 026 09, and D 2010-03. Plaintiffs allege that the Department's methods of applying these budget cuts to the CDASS program were done arbitrarily and capriciously in that the final amounts that were cut did not correspond to the amounts required to be cut by the Executive Orders or the amounts the Department later claimed were being reduced. The Department admits that reductions to all CDASS clients' Individual Allocations were done improperly. *See* Motion to Dismiss at 10, n.3.

Additionally, Plaintiffs allege that the Department entered into a contract with a new

[3] Answer ¶¶ 46, 51, 54, 58, 64, 69, 74, 83, 90, 93 (Answer to Am. Cpt. ¶¶ 125, 139, 153, 167, 178, 192, 206, 221, 254, 283, 294). Plaintiff Marion Hamby has since deceased and no further claims are brought on her behalf.

FMS for the CDASS program, which resulted in an additional reduction in the amount CDASS clients have available to pay their attendants. Plaintiffs allege this reduction was also made without advance notice or an opportunity for a hearing.

According to the Department, implementation of the statewide budget cuts by the Department was supposed to result in the following reductions in Individual Allocation amounts: (a) A 1.5% reduction effective September 1, 2009; (b) a 1% reduction effective December 1, 2009; (c) 1% reduction based on the changed FMS contract; and (d) a 1% reduction effective July 1, 2010. Instead, Plaintiffs allege the Department's reductions have been inconsistently applied and do not add up to the amounts allegedly reduced. For example, Plaintiff Julie Reiskin's available Individual Allocation amount from September 1, 2009 to December 1, 2009, was reduced 4.06%.

There are over one thousand CDASS clients. Answer ¶ 34 (Answer to Am. Cpt. ¶ 83). Each CDASS client was affected by the improper reductions in their Individual Allocations and by the lack of advanced notice. The Department has taken the position that the reductions to Individual Allocation amounts did not require advance notice to individual CDASS clients or an opportunity for a hearing. In fact, the Department's position is that if reductions are to be made to CDASS clients' Individual Allocations based on state budget reductions, publishing the anticipated reductions in Medicaid "provider bulletins" is sufficient to provide notice to CDASS clients. *See* Department's Motion to Dismiss at 13: " The Governor's Executive Orders mandated that the Department reduce provider rates, and the notice of the rate reductions was properly given under 42 C.F.R. § 447.205. No other notice was required under state or federal

law." (Emphasis added.)

Plaintiffs alleged that all CDASS clients whose Individual Allocation Amounts were reduced without advanced notice or an opportunity for a hearing were denied due process of law and that the Department violated federal Medicaid Act requirements in reducing Individual Allocation Amounts without advanced notice. *See* Amended Complaint, Claims for Relief. Advance notice of a reduction in covered services is required under 42 C.F.R. §§ 431.201 & 431.211. Plaintiffs, CCDC and each individual named plaintiff in this case ("Class Representatives") seek on behalf of themselves and all other CDASS clients a court order compelling the Department to restore all CDASS participants' Individual Allocation amounts to what they were prior to these reductions and to provide a system for making such reductions with advanced notice and an opportunity for a hearing if the amount of the method for calculating the reductions or the amount of the reductions is disputed. Plaintiffs also seek a court order requiring the Department to provide advance notice to all CDASS clients when reductions are made to Individual Allocations and an opportunity for a hearing if CDASS clients believe those reductions were calculated erroneously.

ARGUMENT

Rule 23 of the Colorado Rules of Civil Procedure governs class actions and consists of four prerequisites. C.R.C.P. 23(a). Rule 23 further requires that the action be one of three specific types. C.R.C.P. 23(b). Since C.R.C.P. 23 "is virtually identical to Fed. R. Civ. P. 23, and [Colorado state courts] often look to a similar federal rule for guidance in interpreting [its] own." *State v. Buckley Powder Co.*, 945 P.2d 841, 844 (Colo. 1997). "[T]he language of the

two rules is virtually identical." *Farmers Ins. Exchange v. Benzing*, 206 P.3d 812, 818 (Colo. 2009)

"The decision of whether to certify a class action lies within the discretion of the trial court and will not be disturbed unless the decision is clearly erroneous and an abuse of discretion." *Buckley Powder*, 945 P.2d at 844 (citing *Friends of Chamber Music v. City and County of Denver*, 696 P.2d 309, 317 (Colo. 1985)). While the decision of whether to certify a class action lies within this Court's sound discretion, "a court must generally accept as true the allegations in support of certification." *Benzing*, 206 P.3d at 818. Further, while this Court "may analyze the substantive claims and defenses that will be raised to determine whether class certification is appropriate, it cannot prejudge the merits of the case." *Id.*

"The basic purpose of a class action is to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit[,]" *Mountain States Tel. & Tel. Co. v. District Court*, 778 P.2d 667, 671 (Colo. 1989), and such actions are favored to advance these policies. *Benzing*, 206 P.3d at 818. "While the burden is on the plaintiff to demonstrate that the requirements for a class action have been met, C.R.C.P. 23 should be liberally construed in light of its policy of favoring the maintenance of class actions." *Id*.

This case satisfies all of the requirements of C.R.C.P. 23 and should be certified as a class action.

I. Rule 23(a): Prerequisites

The four prerequisites to a Class Action under Rule 23(a) are:

(1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Colo. R. Civ. P. 23(a); *Benzing* at 81.

A. Numerosity

Here, Plaintiffs seek to maintain this action as a class, with the class defined as:

> All clients of the CDASS program whose Individual Allocation Amounts were or will be reduced improperly by the Department and who have been or will be denied due process by the Department's failure to provide advance notice of the cuts and an opportunity for a fair hearing. Amended Complaint ¶ 34.

"A party seeking class certification is required to establish by competent evidence that the class is sufficiently large to render joinder impracticable." *LaBerenz v. American Family Mut. Ins. Co.*, 181 P.3d 328, 334 (Colo. App. 2007). "The actual size of the defined class is a significant factor in such determination . . . ." *Id.* (quoting *Kniffin v. Colo. W. Dev. Co.*, 622 P.2d 586, 592 (Colo. App. 1980)). In this case, the class as defined consists of over one thousand members.

"[A] class . . . need not be so ascertainable that every potential member can be identified at the outset of the litigation." *Patterson v. BP America Production Co.*, No. 09CA1943, 2010 WL 547644, at * 6 (Colo. App. 2010) (citing *LaBerenz*, 181 P.3d at 334)). "Rather, if the general outlines of the class are determinable, a class may be found to exist." *Id*. (citing *Cook v. Rockwell Intern. Corp.*, 151 F.R.D. 378, 382 (D. Colo. 1993)). In this case, the Defendants can

readily identify who is and who is not a class member based on those who have been eligible since the time the reductions began in September of 2009 and each person who has become a CDASS client since the implementation of those reductions who is subject to Defendant's policy regarding Individual Allocation reductions and notice.

In addition, due to the class size and the relief requested, joinder of all affected parties is impracticable. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (recognizing that the core mechanism of class action claims is to redress injuries that would otherwise provide too small a recovery to induce injured parties to sue on their own behalf). Moreover, this case involves the intricacies and interplay of federal Medicaid laws and regulations, state Medicaid laws and regulations, and procedural due process under the United States and Colorado Constitutions. It is unlikely individual class members would pursue such claims.

Plaintiffs have met the numerosity requirement of C.R.C.P. 23(a)(1).

B. Commonality

The second prerequisite to a Class Action is that "there are questions of law or fact common to the class[.]" C.R.C.P. 23(a)(2). "Commonality requires only a single issue common to the class . . . [and] is met if plaintiffs' grievances share a common question of law or of fact." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) (internal citations omitted); *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010). In this case, each class member had his or her Individual Allocation amount reduced as a result of the Department's implementation of state budget cuts and increased payment to the FMS, and no class member received individual advance notice of the reduction.

Although Plaintiffs allege that their Individual Allocations were reduced by differing amounts, that does not defeat a finding of commonality. "It is to be recognized that there may be varying fact situations among individual members of the class and this is all right as long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory." *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986)). Moreover, it is not necessary for Plaintiffs to show the amount of damages each class member suffered at the class certification stage, though it is necessary to show that the class members were harmed by Defendants' action. *See LaBerenz*, 181 P.3d at 337.

In addition, the legal questions raised in this case are identical to those that would be raised in individual adjudications, in that the common legal questions all involve the application of the Due Process Clauses of the Fourteenth Amendment to the United States Constitution, Article II, Section 25 of the Colorado Constitution, and pre-deprivation process requirements pursuant to *Goldberg v. Kelly*, 397 U.S. 254 (1970), as codified in 42 C.F.R. § 431.205. Plaintiffs' claims and the claims of each potential class member arise out of the same legal theories.

Here, commonality exists, both factually and legally. Therefore, Plaintiffs have met the commonality requirement of Rule 23(a)(2), Colorado Rules of Civil Procedure.

C. Typicality

The third prerequisite to a Class Action is the typicality requirement, which demands that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." C.R.C.P. 23(a)(3).

"Typicality requires that the class representative claims be typical of the class and that the class claims are encompassed by the named plaintiffs' claims. This requirement is usually met 'when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims.'" *Ammons v. American Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo. App. 1995) (quoting 1 H. Newberg, *Newberg on Class Actions* § 3-13 at 3-77 (3d ed. 1992)). Again, it is not necessary for Plaintiffs to show the amount and degree of harm each member suffered at the class certification stage, which amount may vary from CDASS client to CDASS client, though it is necessary to show that the class members were harmed by Defendants' action. *See LaBerenz*, 181 P.3d at 337.

In this case, the named Plaintiffs and members of the class are all Medicaid recipients and all clients of the CDASS program. All named Plaintiffs' and class members' allocations were cut, and none of the named Plaintiffs or the class members received any pre-deprivation notice. The named Plaintiffs' claims are not only typical of the claims of the class members, but are identical. Plaintiffs have, therefore, met the typicality requirement of C.R.C.P. 23(a)(3).

D. Adequacy of Representation

The fourth and final prerequisite to a Class Action requires that "the representative parties will fairly and adequately protect the interests of the class." C.R.C.P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. *Amchem Products*, 521 U.S. at 625-26 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58, n.13 (1982)). "A class

representative must be part of the class and 'possess the same interests and suffer the same injury' as the class members." *Id.* The question is "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id* at n.20 (*quoting General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58, n.13 (1982)). "To satisfy the adequacy requirement of C.R.C.P. 23(a)(4), plaintiffs must show by a preponderance of the evidence that they will fairly and adequately protect the interests of the class. To this end, named plaintiffs must have no conflicting interests with the class they seek to represent, and the plaintiffs must be represented by competent counsel." *Reyher v. State Farm Mut. Auto. Ins. Co.*, Nos. 08CA2021, 09 CA0080, 2009 WL 4981898, at *10 (citations omitted).

In this case, the named Plaintiffs do not have any interests inimical to those of the class members. In fact, the named Plaintiffs' interests are the same as the members of the class, and the named Plaintiffs' injury is the same as the members of the class. The named Plaintiffs and all class members have an interest in ensuring that if and when the Department attempts to reduce their Individual Allocation amounts, it does so consistent with federal and state law and due process requirements. If the relief sought herein is granted, there will be no conflict of interest among the claims of each class member.

Moreover, Plaintiffs are represented by the Colorado Cross-Disability Coalition ("CCDC") Legal Program, a public interest law organization experienced in class action litigation.

Plaintiffs have met the adequacy requirement of C.R.C.P. 23(a)(4).

II. Rule 23(b): Types of Claims

In addition to meeting the four prerequisites of Rule 23(a), Colorado Rules of Civil Procedure, "[t]he plaintiff must also demonstrate that it meets one of the three subsections of 23(b) necessary to maintain a class action." C.R.C.P. 23(b); *Benzing*, 206 P.3d at 818. While Plaintiffs submit that the class proposed in this case is easily typified as any one of the Rule 23(b) types of actions maintainable as a class action, "[t]he determination of the appropriate subsection under which a class should be certified depends largely upon the type of relief sought by the putative class." *Buckley Powder*, 945 P.2d at 844 (citing 5 James Wm. Moore, *Moore's Federal Practice* § 23.40[1], at 23-154 (3d ed. 1997). C.R.C.P. 23(b) allows for an action may be maintained as a class action if one of the following is established:

A. Rule 23(b)(1):

A class may be certified if the prosecution of separate actions by or against individual members of the class would create a risk of: (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) Adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests. C.R.C.P. 23(b)(1).

In this case, each of the class members could bring a separate claim, which would likely result in inconsistent determinations. A class action is the best method for proceeding in this case because the factual circumstances and application of law for each class member are the

same, and efficiency will be achieved by trying all these claims in one court. If this Court determines advance notice of reductions and an opportunity for a hearing was required, this ruling would impact all CDASS clients.

B. Rule 23(b)(2):

A class may be certified if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief with respect to the class as a whole." C.R.C.P. 23(b)(2).

In this case, Plaintiffs seek injunctive and declaratory relief. See Amended Complaint, Prayer for Relief. "C.R.C.P. 23(b)(2) certification is appropriate for classes seeking predominately injunctive or declaratory relief." *Buckley Powder*, 945 P.2d at 845 (citing 1 H. Newberg & Alba Conte, *Newberg on Class Actions* § 4.11, at 4-39 (3d ed. 1995 Supp.). In this case, Defendants made reductions to all CDASS clients without providing them with advance notice. Defendants have taken the position that they are not required to provide CDASS clients with individual advance notice. The injunction and declaratory relief sought by Plaintiffs will apply to all CDASS clients.

C. Rule 23(b)(3):

A class may be certified if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other adjudication of the controversy." C.R.C.P. 23(b)(3). "For purposes of C.R.C.P. 23(b)(3), common issues predominate where a plaintiff has a method of proving a defendant's liability by class-wide proof." *State Farm Mut. Auto. Ins. Co.*

230 P.3d at 1257 (citing *Benzing*, 206 P.3d at 820).

The factors to be considered when seeking to maintain an action under Rule 23(b)(3) are the following:

> (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) The difficulties likely to be encountered in the management of class action.

Plaintiffs allege that Defendants' inaccurate calculations and failure to provide notice applied to each class member. Each individual CDASS member would have difficulty proceeding with a separate action. No other actions regarding the issues in this case have been filed by individual class members. Because the Department is the defendant, the most appropriate forum for this case is the Denver district court. There are no difficulties anticipated in maintaining this action as a class action.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court find the requirements of C.R.C.P. 23 have been met and request this Court certify the class as proposed in paragraph 34 of the Amended Class Action Complaint.

Dated: August 16, 2010.

Respectfully submitted,

COLORADO CROSS-DISABILITY
LEGAL PROGRAM

s/ Kevin W. Williams
Kevin W. Williams
Legal Program Director

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2010, I electronically filed the foregoing using the Lexis Nexis Court Link which will serve notice via electronic mail on the following:

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/s/ Briana McCarten

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