DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): COLORADO CROSS-DISABILITY COALITION *et al*. v. Defendant(s): COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING *et al.*	▲ COURT USE ONLY ▲
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PLAINTIFFS' BRIEF IN SUPPORT OF AWARD OF ATTORNEYS' FEES

Pursuant to this Court's Order, dated January 11, 2011, Plaintiffs' counsel hereby submits this Brief In Support of Award of Attorneys' Fees.

INTRODUCTION

Plaintiffs filed their Motion to Enforce Settlement Agreement and Request for Issuance of Order ("Motion to Enforce") on October 18, 2010. That motion was filed

pursuant to the Colorado Dispute Resolution Act ("CDRA"), Colo. Rev. Stat. § 13-22-301 *et seq*. This Court granted that motion in its entirety on January 18, 2011.

Under the CDRA,

> If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

Colo. Rev. Stat. § 13-22-308(1) (emphasis added). Therefore, as a result of the January 18 order, the settlement agreement reached in this case is now a Court Order. *See* Affidavit of Kevin W. Williams ("Williams Aff.") ¶ 5 & Exhibit 1, a copy of the Settlement Agreement.

This Court also ordered Plaintiffs to submit a brief with accompanying billing statements, detailing the reasonableness of Plaintiffs' requested attorneys' fees. Attached are all of Plaintiffs' attorneys' billing records in this case up to and including today's date. Williams Aff. ¶ 6 & Exhibit 2. Plaintiffs' explanation regarding the reasonableness of the requested fees is set forth in this brief.

This brief provides the following:

- A description of the "lodestar" amount of fees devoted to this case;
- an explanation of the factual basis for the reasonableness of Plaintiffs' fees;
- an explanation of the factors to be applied to determine whether an adjustment to the lodestar amount should be made pursuant to Colorado

law;

- an explanation of why Plaintiffs should recover fees related to preparing and replying to the Motion to Enforce as well as this brief;
- an explanation of why Plaintiffs should be permitted to recover their costs in this case as well.

Plaintiffs request this Court award Plaintiffs $94,861.00 in attorneys' fees for the reasonable time spent working on this case as well as $964.74 in costs, for a total of $95,825.74.

BACKGROUND

The background of this litigation and ultimate settlement were explained in Plaintiffs' Motion to Enforce; however, the facts and circumstances surrounding the litigation and the details of the settlement negotiations and settlement reached are relevant to a determination of the reasonableness of the attorneys' fees under Colorado appellate decisions[1] and Colo. Rev. Stat. § 13-17-102, *et seq*., "Frivolous, Groundless, or Vexatious Actions." Therefore, the background of this case and details of the settlement are reiterated here.

I. The Litigation

In late 2009, undersigned counsel represented four Colorado Consumer Directed

[1] *Stuart v. North Shore Water & Sanitation Dist*., 211 P.3d 59, 63 (Colo. App. 2009); *Dubray v. Intertribal Bison Co-op*, 192 P.3d 604, 608 (Colo. App. 2008); *Balkind v. Telluride Mountain Title Co*., 8 P.3d 581, 587-88 (Colo. Ct. App. 2000); *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1115-16 (Colo. 1996).

Attendant Support ("CDASS") clients in bringing suit against the Department based on alleged violations of 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. The original complaint was captioned "Class Action Complaint" because, as is clear from the allegations in the complaint, the Department's actions impacted every Medicaid client in the CDASS program. The underlying facts of this case are set forth in Plaintiffs' Amended Class Action Complaint, filed June 21, 2010, and are summarized here.

Plaintiffs are all disabled Medicaid recipients who require in-home attendant care services to assist with activities of daily living to keep them from being institutionalized. As Medicaid recipients, Plaintiffs are all on limited incomes and unable to pay for legal services. In the CDASS program, a Medicaid waiver program, Plaintiffs apply to self-direct their attendant care and avoid the rigidity and lack of autonomy associated with receiving home health services from agencies ("agency model"). CDASS participants must apply, take a test demonstrating their ability to self-direct and get approval for the program. Once approved, CDASS participants, along with their case managers, make a determination about what their monthly attendant care needs will be based on a number of factors, including a detailed analysis of what their daily home health attendant assistance needs are. The Department then assigns a dollar amount to those services based on a number of factors, including what it would have paid an agency to provide the services, and that dollar amount is what each CDASS program

participant has available to pay for attendant care. Payments are made by program participants and their attendants submitting time sheets to a fiscal intermediary service hired by the Department. Unlike traditional agency-model home health care, CDASS participants hire, fire, train and manage attendants themselves. CDASS program participants prefer the flexibility and autonomy the program allows versus agency-model care, but managing one's own attendant care comes with responsibilities. For example, the program rules require program participants to stay within a monthly budget, and there are consequences for spending over the designated monthly allocation amount, such as being removed from the program, or being subjected to a recovery action for overpayment. Therefore, it is critical that CDASS program participants know what the monthly allocation amount is so they can budget accordingly.

Plaintiffs filed their original complaint on December 22, 2009. In 2009 (and later in 2010), the Department made reductions to the CDASS participants' allocation amounts without providing advance notice or an opportunity for a hearing. By "reduction," what is meant is that each program participant suddenly had less money to spend each month to pay for needed in-home attendant services. Three of these reductions were alleged to be related to mandatory state budget cuts. The other occurred because the Department contracted with a new fiscal intermediary service to manage time sheet submissions and attendant payroll and decided to pay the new service more. The increased payment for this service resulted in another reduction to each CDASS participant's monthly allocation amount, again without prior notice. Eleven

percent, instead of ten percent, of CDASS participants' allocations was used to pay the new service, again, with no prior notice, and, in fact, CDASS clients were informed that the change to a different fiscal intermediary service would have no affect on allocations. Plaintiffs also alleged the cuts to allocation amounts were disparately applied to CDASS program participants, a fact conceded by the Department in its Motion to Dismiss as "calculation errors." Part of the time devoted to this case involved Plaintiffs' counsel and staff sorting through Plaintiffs' records to determine when the Department through its contractors notified Plaintiffs of past changes to their allocation amounts, corrected changes to their allocation amounts, and, in some cases, re-corrected changes in their allocation amounts. This necessitated releases to Plaintiffs' case managers, reviewing more client documents and turning over supplemental disclosure documents to Defendants, creating and reviewing spreadsheets for each client and entering data from case managers' letters to determine the inaccuracies of the applied reductions.

The Department has denied that it violated Plaintiffs' due process rights. On February 18, 2010, the Department moved to dismiss this lawsuit, arguing that (1) implementing state budget cuts relieved it of any duty to give advance notice to Medicaid recipients in the CDASS program; (2) Plaintiffs did not experience a "reduction" in services entitling them to an administrative hearing; and (3) Plaintiffs are not Medicaid recipients but are actually Medicaid "providers" and notice in "provider

bulletins"[2] about upcoming rate reductions was sufficient. Plaintiffs responded to the Motion to Dismiss on March 22, 2010. Defendant filed a reply on April 5, 2010. Because Defendant raised entirely new arguments in its reply not raised in the motion to dismiss, Plaintiffs sought leave and filed a surreply on April 13, 2010. On June 17, 2010, the Court denied Defendants' motion to Dismiss and set a schedule for filing an answer and class certification motion.

Plaintiffs' counsel continued to investigate additional CDASS program participants' claims and on June 21, 2010, filed a motion for leave to amend the class action complaint, adding nine additional plaintiffs and their claims.

Beginning in March of 2010, the parties engaged in discovery. This may have been in error since the Department filed a motion to dismiss and did not file an actual answer until July 19, 2010. Nevertheless, the discovery process, whether formal or not, was informative and necessary both for proceeding through the litigation process and in settlement discussions. Both parties engaged in the process of producing documents needed to move forward with the case.

The parties exchanged initial disclosures, supplemental disclosures, discovery requests and responses. The Department turned over several hundred pages of documents in response to discovery, including spreadsheets and corrected

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[2] Provider bulletins, as the name suggests, are documents that those who provide services to Medicaid recipients, e.g., doctors, clinics, home health agencies, are expected to review based on their contracts with the Department. In contrast, CDASS program participants are recipients of Medicaid services and have never been advised or instructed to receive, obtain or review provider bulletins.

spreadsheets requiring time to discern their application. Plaintiffs' counsel interviewed numerous CDASS participants and case management agencies and obtained, reviewed and produced approximately five hundred pages of records related to Plaintiffs' claims. Plaintiffs' counsel also conducted research into Defendant's compliance with federal rules regarding the Medicaid waiver under which the CDASS program operates and conducted interviews with representatives of the federal management agency overseeing the waiver and prepared a Freedom of Information Act request and reviewed responsive documents.[3]

Pursuant to this Court's order denying Defendant's Motion to Dismiss, on August 16, 2010, Plaintiffs moved for class certification on behalf of all CDASS clients in Colorado. The time devoted to this motion was necessary to this litigation and contemplated at the time the case was filed. It also may have influenced the timing and substance of settlement.

During the course of this litigation, the Department has been represented by two Assistant Attorneys General, Jennifer Weaver and Joan Smith. Throughout this process, the Department's Legal Director, attorney Robert Douglas, has been an active participant. Mr. Douglas has negotiated terms of agreements, participated in calls between the Assistant Attorneys General and undersigned counsel, and attended all three mediation sessions as the client for the Department.

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[3] This time and research were necessary to the claim regarding the Department taking the increased amount for the new fiscal intermediary service from CDASS program participants' available allocation amounts.

It was during the second mediation session that the parties arrived at the Settlement Agreement. Ms. Smith, Ms. Weaver and Mr. Douglas sat at the table with Plaintiffs, Plaintiffs' counsel and Judge Robbie Barr at the September 15 mediation at the Judicial Arbiter Group offices and agreed to pay fees as set forth in the agreement. All signed the agreement. After the Agreement was signed, Senior Assistant Attorney General, Litigation Division, Patricia Herron, who had never been involved before, sent Plaintiffs' counsel a letter stating it was her position Plaintiffs were not entitled to recover any fees. That letter and the subsequent third sham mediation session to determine the amount of fees are the reasons why Plaintiffs had to request this Court enforce the Agreement and award fees.

This is, essentially, an injunctive relief case. Plaintiffs sought an order compelling the Department to correct errors and reductions in CDASS client allocations based, in part, on inappropriate or non-existent notices and an order compelling the Department to provide advance notice of allocation reductions to all CDASS clients in the future. *See* Amended Complaint, Prayer for Relief.

As described more fully below, in settlement, Plaintiffs achieved what they were seeking.

II. Settlement Negotiations

Discussion of the settlement negotiations is necessary and serves, in part, as the basis for this motion.

The parties attended the first mediation session with Judge Robbie Barr of the

Judicial Arbiter Group on June 23, 2010. This mediation session required preparation of a mediation statement in advance, preparation with each of the Plaintiffs and review of worksheet spreadsheets applied to each of the Plaintiffs' allocation amounts showing what the amounts should have been with each successive cut and what they actually were. The parties spent an entire day in mediation. The mediation resulted in a preliminary settlement agreement prepared by undersigned counsel at that mediation.

All totaled, the parties exchanged seven drafts of settlement agreements and associated e-mail messages and telephone calls discussing possible resolution, each version of the agreement requiring Plaintiffs counsel to communicate with clients.

The parties returned to mediation on September 15, 2010. During that mediation session, the Settlement Agreement was reached and drafted by the parties during mediation. At the end of the day at the September 15, 2010 mediation, the parties did not reach agreement regarding the amount of reasonable attorneys' fees and costs to be paid; however, as this Court determined in the January 18 order, all counsel sitting at the table with Judge Barr and Plaintiffs – the undersigned, Ms. Smith, Ms. Weaver and Mr. Douglas – agreed that attorneys' fees would be paid. According to the Agreement, Plaintiffs provided a "statement of their reasonable attorneys' fees and costs" to date at the September 15 mediation. Plaintiffs provided defense counsel with those fees and costs; however, at the last minute of the mediation, unknown to undersigned counsel or the mediator, the Department claimed it did not have settlement authority to resolve the amount of the fees. As set forth in the Agreement, the parties

agreed to a schedule by which the Department would make a counter-offer on fees, and, if the parties could not reach agreement, they would return for a third mediation for the purpose of resolving the amount of the fees.

On September 16, 2010, the day after the mediation, undersigned counsel received an e-mail message from Department counsel, Joan Smith, requesting the parties agree to a stay of proceedings to allow time to resolve the fees issue and for the Department to avoid having to respond to the motion for class certification due September 17, 2010.[4] Ms. Smith proposed the following: "That'll give us time to go the mediation route on the attorney fees, if necessary, and then ask the court to set a hearing if mediation fails." Undersigned counsel agreed.

On September 17, 2010, instead of filing a motion to stay, the Department filed an "Advisement of Settlement." Department counsel had called the undersigned late in the day on September 16 to say the Department wanted to submit an advisement of settlement to the Court to avoid the class certification motion response deadline. The advisement, which was not provided to undersigned counsel in advance, neglected to inform this Court that the issue of determination of fees and costs was outstanding and needed to be resolved. As a result of the Department's September 17 Advisement, this Court entered an Order on September 22, 2010, vacating the trial date and requiring the parties to submit a stipulated motion to dismiss on or before October 12, 2010.

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[4] *See* Affidavit of Kevin W. Williams ¶ 12 & Exhibit 6, filed with the Motion to Enforce.

Under the Agreement, the Department was to respond to Plaintiffs' statement of fees and costs by September 27, 2010. *See* Agreement ¶ 6. On September 20, 2010, in case the parties did not reach agreement on September 27, the parties scheduled mediation to resolve the issue of fees and costs. The mediation was scheduled for October 5, 2010.

On September 27, 2010, Department counsel Jennifer Weaver e-mailed undersigned counsel and stated the Department would not provide a response to the statement of billing on that day, and that the State's tort litigation and risk management unit needed to make that determination.[5] In this e-mail exchange, undersigned counsel found out for the first time that a different Assistant Attorney General would be handling resolution of the fees issue, that no one had reviewed Plaintiffs' statement of billing, and the Department was unprepared for the October 5, 2010 mediation to address fees.[6] The Department requested and rescheduled the mediation for October 12, 2010. October 12 was also the deadline for the parties to submit their stipulated motion to dismiss per this Court's September 22 order.

Despite the Department's agreement to payment of reasonable attorneys' fees, on October 6, 2010, undersigned counsel received a letter from Patricia Herron informing undersigned counsel of her view that Plaintiffs are not entitled to recovery of

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[5] *See* Affidavit of Kevin W. Williams ¶ 13 and Exhibit 7 at p. 6 (Sept. 27, 2010 10:47 a.m. e-mail from Jennifer Weaver to Kevin Williams) filed with the Motion to Enforce.

[6] *See* Exhibit 7 at pp. 1-6, filed with the Motion to Enforce.

fees under the theory articulated in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). As discussed in Plaintiffs' Motion to Enforce, at the time of the third mediation in October of 2010, *Buckhannon* had no application to this case.[7] The case at bar had been resolved by a settlement agreement in which the Department agreed to pay fees, to negotiate the amount of reasonable fees and to have a third party resolve the issue of reasonableness if the parties could not reach agreement. The Attorney General office's shift in position seemed disingenuous at best.

Prior to the October 12 mediation to resolve the amount of fees, Plaintiffs' counsel prepared yet another mediation statement for Judge Barr, explaining the mis-application of *Buckhannon* and providing a fee petition, including the additional time spent researching and addressing the Department's new claims regarding attorneys' fees. Admittedly, undersigned counsel never provided the new statement of billing to the Attorney General's office prior to the mediation, as they had informed Plaintiffs' counsel six days before they believed Plaintiffs were entitled to no fees whatsoever. At the October 12 mediation. Ms. Herron and Mr. Douglas attended. The Department had made an offer that was approximately 1/8 of Plaintiffs' actual billed hours at that time, but then withdrew any offer to pay fees at all. This is made clear from Mr. Douglas'

[7] *But see* discussion of "Costs" *infra*.

October 13, 2010 e-mail unrelated to the mediation.[8]

The Department continues to argue that Plaintiffs are not entitled to fees because of *Buckhannon* decision. *See* Response to Motion to Enforce, filed December 16, 2010. This Court disagreed in its January 18 order, *see* Order at 3, rejecting Defendant's application of *Buckhannon* to this contract claim:

> The clear and unambiguous meaning of ¶ 6 of the Settlement Agreement is that the parties have reached an agreement that Defendants would pay Plaintiffs' attorney fees, but were in disagreement about the reasonable amount of those fees. It twice uses the phrase "an award of attorney fees," and refers to the second[9] mediation session with Judge Barr as a process by which the parties would attempt to "determine fees." The plain and unforced meaning of this language is that the parties had not yet agreed to the amount of the fees to be awarded, but had agreed that Plaintiffs would be entitled to their reasonable fees as part of the overall settlement. It is equally clear to me that this paragraph means that if the parties are unable to reach a mediated agreement on the amount of fees, that inability will have no impact on the balance of the settlement, and it will devolve to me to resolve the amount of those reasonable fees. This was the bargained agreement, and Plaintiffs are entitled to the benefit of that bargain.

The Court invited Plaintiffs to include a discussion of whether Defendants' position on the motion to enforce was itself groundless and frivolous such that Plaintiffs should also recover the fees they incurred in briefing that motion. Because Plaintiffs' counsel has had to spend a significant amount of time addressing Defendant's bad faith approach to fees, Plaintiffs accept that invitation as more fully discussed below.

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[8] *See* Affidavit of Julie Reiskin¶ 5 & Exhibit 1, filed with Plaintiffs' Motion to Enforce.

[9] The October mediation was actually the <u>third</u> session with Judge Barr.

Defendant's conduct with respect to fees was a clear case of deception and bad faith based on the following: (1) After the Agreement was signed and after the only question that remained regarding fees was the amount, Defendants' counsel claimed Plaintiffs were not entitled to fees and costs precisely because they settled with Defendants; and (2) the Court would dismiss the case on or before October 12, the newly scheduled date for mediation, ensuring that, if the mediation regarding the fees amount failed, Plaintiffs would have no additional recourse to recover fees. It was a clever plan.

In an effort to avoid the potentially harsh consequences of defendant's actions, on October 7, 2010 Plaintiffs filed a motion requesting until October 18, 2010 to file a stipulated motion to dismiss. In that motion, undersigned counsel informed the Court the parties had not resolved the fees issue and that the mediation had been rescheduled. This Court granted that motion on October 8, 2010. In that motion, undersigned counsel informed the Court the issue of fees and costs was unresolved. Plaintiffs hoped the Department would proceed in good faith at the October 12 mediation to resolve the fees question. However, the Department refused to pay fees, and the mediator did not make a determination regarding fees. As a result, undersigned counsel devoted more time and resources to preparing the Motion to Enforce to request this Court enforce the mediation agreement and order the Defendant to pay attorneys' fees as agreed.

Plaintiffs seek their reasonable attorneys' fees as was contemplated in the

Settlement Agreement. In addition, for these reasons set forth herein, Plaintiffs respectfully request this Court order the Department and/or its counsel, Robert Douglas, Joan Smith, Jennifer Weaver and Patricia Herron, to pay reasonable attorneys fees and costs devoted to all time and expenses incurred after the September 15 mediation.

III. Counsel

Kevin W. Williams of the Colorado Cross-Disability Coalition ("CCDC") has represented Plaintiffs' throughout this litigation. CCDC is a non-profit corporation. Reiskin Aff. ¶ 9. CCDC represents plaintiffs in disability rights cases. Two legal Assistants also worked on this case, Andrew Montoya and Briana McCarten. Andrew Montoya worked as a legal assistant until he took and passed the Colorado bar exam and became licensed to practice law in Colorado. Mr. Montoya has worked as a contract attorney with CCDC since then. Each individual's time is represented on the attached billing statements by their respective initials.

Kevin Williams, who is the Legal Program Director of the Colorado Cross Disability

Coalition, graduated third in his class from the University of Denver College of Law in 1996, has been published on the topic of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.,* and was the Co-Chair of the Colorado Bar Association Disability Law Forum Committee. Williams Aff. ¶¶ 13-14. Mr. Williams has extensive experience litigating under the Americans with Disabilities Act and other civil rights legislation. In recent years, Mr. Williams' practice has included several cases involving the Due

Process rights of Medicaid clients. Williams Aff. ¶ 15. Mr. Williams's 2010 hourly rate is $345.00 and his legal assistants' hourly rate is $100.00. *Id.* ¶¶ 7-8. Mr. Montoya's rate since becoming an attorney is $200.00/hour. *Id.* ¶ 9.

This litigation placed a heavy burden on CCDC, a small 501(c)(3) non-profit organization. *See* Affidavit of Julie Reiskin ("Reiskin Aff.") ¶ 9 CCDC already devoted an enormous amount of time addressing issues and problems in the CDASS program unrelated to this lawsuit. *Id*. ¶ 4. All costs associated with this case were fronted by CCDC. Williams Aff. ¶ 10. CDASS clients who are on Medicaid are, by definition, low income. CCDC needed to expend a great deal of time addressing its members' concerns about the CDASS program. It should be noted that CCDC itself did not seek damages for itself as an organization and could have as an organizational plaintiff. CCDC is not a private law firm. Its attorneys and assistants work on a salaried or contract basis and do not gain benefit by the amount of fees recovered. Reiskin Aff. ¶ 5. Fees recovered fund the work of the Legal Program in representing people with disabilities who have no resources to pay for legal services. *Id*. ¶ 6. CCDC derives no federal or state funding for this purpose and, to date, has only been able to obtain minimal grants and loans to fund its legal program operations. *Id*. ¶ 7. Recovery of fees and costs allow the program to continue doing its work. *Id*. ¶ 8.

ARGUMENT

The Court has now ordered the Department to pay reasonable fees in this case. Plaintiffs have sought their costs and continue to do so, but this Court has indicated the

absence of a specific reference to costs in the agreement may preclude recovery of those costs. This issue is discussed *infra*.

I. Basis For Fees Calculation

A. Lodestar Calculation

The initial estimate of reasonable attorney fees is reached by calculating the "lodestar" amount, which represents the number of hours reasonably expended multiplied by a reasonable hourly rate. *Stuart*, 211 P.3d at 63; *Dubray*, 192 P.3d at 608; *Balkind*, 8 P.3d at 587-88. The lodestar amount "carries with it a strong presumption of reasonableness." *Balkind* at 588. That amount may then be adjusted based on several factors, including the amount in controversy, the length of time required to represent the client effectively, the complexity of the case, the value of the legal services to the client, awards in similar cases, and the degree of success achieved. *Stuart*, 211 P.3d at 63; *Dubray*, 192 P.3d at 608; *see also City of Wheat Ridge*, 913 P.2d at 1115-16. As demonstrated below, undersigned counsel's fee request should be granted under the Colorado Court of Appeals' lodestar approach.

1. Reasonable Number of Hours.

In connection with the fee petition submitted to Judge Barr at the September 15 mediation, the undersigned submitted the Affidavit of Tim Fox ("Fox Aff."), an expert retained to opine on the reasonableness of the fees and costs requested. *See* Williams Aff. ¶ 16 and Exhibit 6. Mr. Fox did not review Plaintiffs' counsel's time submissions beyond September 15; however the opinions presented apply with equal force to all

fees and costs incurred after September 15 as well.[10]

Mr. Fox reviewed fee records. Fox Aff. ¶ 5. He found the fee records to be "detailed, and [to] provide a clear basis for understanding the tasks performed and the time expended for those tasks . . . easily meet[ing] the standards typically required in this judicial district for compensability of time spent." *Id*.

As noted above, during the course of litigation, undersigned counsel and staff have: interviewed the thirteen clients and others, collected and tracked voluminous pieces of correspondence received by clients, the Department and others crucial to this case, responded to a motion to dismiss, moved for class certification, briefed the issue of class certification, and have made numerous attempts to negotiate settlement.

Mr. Fox has reviewed counsel's records and, in his expert opinion, the number of hours billed by Counsel in this case up to September 15 was reasonable. Fox Aff. ¶ 16. The number of hours after that date undersigned counsel submits were reasonable because of Defendant's conduct.

2. Reasonable Hourly Rates.

Hourly rates must reflect the prevailing market rates in the relevant community. Because of the significant resources and skill required, as well the risks entailed, to litigate large-scale actions on behalf of a class, very few attorneys handle such cases.

[10] If the Court believes additional expert witness testimony is needed regarding fees incurred after September 15, 2010, and a hearing is scheduled, undersigned counsel will enlist the assistance of Mr. Fox or another similarly qualified attorney for the hearing.

Thus the relevant community for purposes of determining a reasonable billing rate for class action lawyers likely consists of attorneys who litigate complex class actions. *See, e.g., Casey v. City of Cabool*, 12 F.3d 799, 805 (8th Cir. 1994) ("'A national market or a market for a particular legal specialization may provide the appropriate market.'" (Quotation omitted.)). This rate would be significantly higher than the rate prevailing in Denver. Undersigned counsel has chosen to take an exceptionally conservative approach and have applied rates applicable in the Denver legal community. In class action contingency like this, Colorado courts recognize the rate can be higher to reflect the risks of not prevailing and receiving nothing. *Brody v. Hellman*, 167 P.3d 192, 202 (Colo. App. 2007).

Counsel seeks a rate of $345.00 per hour for work performed in connection with this case. This rate is consistent with the prevailing rate for attorneys in the Denver community, as demonstrated by:

- The expert opinion of Mr. Fox (Fox Aff. ¶¶ 18-19);
- The hourly rates approved by Colorado federal and state courts in successful employment and civil rights actions over recent years. *See, e.g., Milham v. Perez*, No. 03CV00702MSKMJW, 2005 WL 1925770, at *6 (D. Colo. Aug. 11, 2005) (Krieger, J., noting that $300 per hour was within the prevailing rate charged by partner-level lawyers in civil rights actions in the Denver legal community) (Williams Aff. ¶ 17 & Exhibit 3); *see also Lucas v. Kmart Corp.,* Civil Action No. 99-cv-01923-JLK-CBS, 2006 WL

2729260 at * 5 (D. Colo., July 27, 2006) (Williams Aff. ¶ 18 & Exhibit 4); *Rossart v. Developmental Pathways, Inc.,* Case No. 06CV4479 (Denv. Dist. Ct., July 21, 2008) (Hoffman J., this Court found attorneys' rates of $360, $350, $300, and $200 (Krichiver) are fair and reasonable, and that the hourly paralegal and intern rates of $110 are fair and reasonable) (Williams Aff. ¶ 19 and Exhibit 5).

- A survey conducted by the Colorado Bar Association in 2008 (the "CBA Survey"), reflected that the top 5% of plaintiff's employment lawyers (a reasonable comparison to the type of work performed in this case) charged $350 per hour. Fox Aff. ¶ 21 and Exhibit 1 attached to Fox Aff. In light of the fact that years have passed since the CBA survey, the rate requested here -- $330 per hour -- is very conservative. Fox Aff. ¶¶ 20-21.

3. Hourly rates of other timekeepers.

Counsel has applied rate of $100.00 per hour for work done by legal assistants in this case, a rate that Mr. Fox opines is reasonable for the Denver community. Fox Aff. ¶ 18. This rate is also supported by the 2000 CBA Survey, which found that over ten years ago, experienced assistants paralegals charge between $75 and $120 per hour. A rate of $110.00 per hour for legal assistant time was held by this Court to be fair and reasonable in the *Rossart* case.

Based on the total hours billed at the rates set forth above, the total lodestar in this case is $94,861.00. Williams Aff. ¶ 20.

B. Frivolous, Groundless, or Vexatious Defenses

In addition, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees. Colo. Rev. Stat. § 13-17-102(1). Furthermore, "[T]he court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification," Colo. Rev. Stat. § 13-17-102(2) (emphasis added), or if the court "finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct . . . that lacked substantial justification." Colo. Rev. Stat. § 13-17-102(4). The statute defines "lacked substantial justification" as substantially frivolous, substantially groundless, or substantially vexatious. *Id*.[11]

The amount of fees attributable to work after the September 15 settlement was $24,244.50. Williams Aff. ¶ 20.

II. Recovery Of Fees Under Colorado Law.

In determining whether the lodestar amount of fees should be reduced or

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[11] When a court determines that reasonable attorney fees should be assessed, it shall allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such amount, or portion thereof, to any offending attorney or party. Colo. Rev. Stat. § 13-72-102(3).

increased, the Court should consider the following:

A. Relief Obtained

"Of course, one of the factors to be considered in determining the reasonableness of the fees requested is the degree of success achieved." *Stuart*, 211 P.3d at 63. In this case, as a result of the settlement:

- All CDASS clients either have or will be provided with an opportunity to receive corrected information about their CDASS allocation amounts;[12]
- All CDASS clients either have or will receive specific notice of any reductions to their allocation amounts that complies with the dictates of due process;
- the Department will follow the requirements of the federal Centers for Medicaid and Medicare Services ("CMS") with respect to using CDASS allocation money to pay the fiscal intermediary service;[13]
- the Department will not try to recover any CDASS funds that might have caused CDASS clients to go over their monthly allocation amounts for the amounts that were related to the reductions made inaccurately during the

[12] The Department resisted this because it claimed the Department had made all necessary corrections. The evidence demonstrated otherwise. Plaintiffs have not actively sought to enforce the terms of the agreement while the Motion to Enforce was pending, but may do so now that the Court has granted Plaintiffs' motion and ordered Defendant to comply with the settlement agreement.

[13] Defendants vehemently opposed Plaintiffs' efforts to sort out how the Department could utilize CDASS allocations to pay more to a state contractor without notifying CDASS clients.

budget cutting period.

These changes in Department policy and conduct apply to all CDASS clients, not just the named plaintiffs. This number exceeds 1,000.

With the exception of an organizational damages claim for CCDC, this is, essentially, all of the relief Plaintiffs sought and all that the Court would have ordered if this case had been tried. This is not a "damages" case in the traditional sense because Plaintiffs here challenged improper notice and improper calculation. This case really involves injunctive relief. Plaintiffs, in settlement, have obtained that injunctive relief.

Furthermore, that settlement has now been made an order of this court as a result of the January 18 order. Even under Defendant's *Buckhannon* argument, the order of this Court enforcing the mediation agreement has now created the "judicial imprimatur" and "judicially sanctioned change in the legal relationship of the parties" Defendant claims is necessary to find Plaintiffs to be a "prevailing party" entitled to an award of reasonable attorneys' fees and costs. *See* Defendant's Response to Motion to Enforce (*citing Buckhannon v. Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* 532 U.S. 598, 605 (2001). Plaintiffs also could seek to enforce the injunctive relief portions of the agreement through contempt proceedings if necessary. These are not small victories.

B. Other Reasonableness Factors

The other factors used by Colorado courts to determine whether the lodestar rate should be adjusted up or down are the following: (1) the time and labor involved; (2) the

novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Brody*, 167 P.3d at 200-01 (*citing Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)); *see also* Colo. Rules of Prof. Cond., Rule 1.5.

A. Time Involved

Applying these factors, the attached billing statements set forth the tasks and time involved. Undersigned counsel needed to review each clients' paperwork, to compare those to the documents provided by clients' case managers, to determine the impact of the cuts, to determine the impropriety of the Department's calculations and which clients received which notices and when. Undersigned counsel needed to communicate with each of the clients regarding each step of the litigation and settlement process. Discovery progressed and undersigned counsel reviewed numerous documents. Defendants' reluctance to resolve this case led to counsel responding to a motion to dismiss and preparing a motion for class certification. A large amount of time was devoted to three mediations and settlement as well as to responding to Defendant's bad faith change in position with respect to attorneys' fees.

B. Complexity of Issues

The issues in this case are novel and complex. They involve the interplay between the Department's need to implement budget reductions while ensuring proper notice and due process are afforded to this group of Medicaid recipients who were impacted differently from other Medicaid recipients. Only under the CDASS program are Medicaid long term care clients provided an amount of money to spend on services. CDASS clients had the amount of money available to pay for needed services taken away without notice or an opportunity to appeal the amount of the reduction. Defendants' unsuccessful motion to dismiss highlighted the nuances of this Due Process case, e.g., applying state budget cuts to CDASS clients results in a reduction of Medicaid services, but the Department, if successful, would not be required to provide any individual notice to CDASS clients when it cuts available funds. Plaintiffs achieved an important victory.

C. Requisite Skill

Skills needed to bring this case required undersigned counsel to understand and apply Medicaid law, federal requirements for receipt of Medicaid, constitutional principles and state fiscal requirements in an arena where due process rights are implicated. In addition, undersigned counsel needed to understand and apply the body of federal law pertaining to attorneys fees recoveries, contract principles under Colorado law and the impact of the CDRA, not generally needed in resolution of disability discrimination cases.

D. Preclusion of Other Work

The cuts to allocation amounts in this case happened suddenly and without notice beginning in September and December of 2009. Because there are so many CDASS clients who are CCDC members, undersigned counsel literally had to drop everything to address this case and address the appeal rights issues of existing CDASS clients. The Legal Program at the time consisted of two attorneys and two assistants. This precluded working on other cases like ADA accessibility cases that typically and regularly permit the recovery of fees. Although the CCDC Legal Program is not a traditional law firm, we represent clients who cannot afford to pay fees and, therefore, clients are not charged. The non-profit Legal Program cannot fund itself without the recovery of reasonable attorneys' fees and costs. The fee-shifting "prevailing party" statutes like 42 U.S.C. § 1988, the ADA and the Fair Housing Act are designed with the idea in mind that organizations like CCDC can act as private attorneys general and enforce the law when rights are violated, but because most cases are about obtaining injunctive relief, the replenishment of fees and costs after a case concludes is essential to the continued enforcement of these laws.

E. The Customary Fee

With respect to the amount of hours devoted, as set forth in the statement and in the Affidavit of Timothy P. Fox, Esq., Plaintiffs' fees are customary for this type of work. The rates charged are also reasonable.

F. Any Prearranged Fee

Plaintiffs' counsel represented Plaintiffs at no charge contingent upon recovery of

reasonable attorneys' fees and costs.

G. Time Limitations Imposed by the Client or the Circumstances

If this case had not resolved in favor of all CDASS clients, Plaintiffs could all have overspent their allocation amounts and been subjected to severe consequences.

H. All Other Factors

Each of the remaining factors under *Brody* have been discussed already. Additionally, Plaintiffs are also entitled to recover their reasonable attorneys' fees and costs for time spent defending any challenge to their award. *Stuart* at 64. Here, Defendants simply would not make an offer, necessitating additional time spent to research the case law and prepare the petition for mediation and all subsequent pleadings necessary in this matter.

III. Reasonable Costs

In its January 18 Order, the Court indicated that its decision was based on contract principles and, because the settlement agreement does not specifically reference "costs," payment of costs was not part of the agreement; however, Plaintiffs should be entitled to recover their reasonable costs for the reasons explained.

Under Colorado law, reasonable costs may be awarded to successful plaintiffs in cases like this one. *Parker v. USAA*, 216 P.3d 7, 14 (Colo. App. 2007) ("A prevailing plaintiff is entitled to recover costs against the defendant"); *see also* Colo. Rev. Stat. § 13-16-104 (the award of costs to a prevailing party pursuant to 13-16-104 is mandatory); *Nat'l Canada Corp. v. Dikeou*, 868 P.2d 1131, 1139 (Colo. App. 1993). As

explained above, because the Court granted Plaintiffs' Motion to Enforce, the terms of the mediation agreement have now been approved by the Court and "shall be enforceable as an order of the court." Colo. Rev. Stat. § 13-22-308(1). The costs for which Plaintiffs seek recovery in this case are $964.74. Williams Aff. ¶¶21. The types of costs are broken down on the statement are those for which Colorado law allows recovery. *See Parker*, 216 P.3d at 14; Colo. Rev. Stat. § 13-16-122.

CONCLUSION

For the reasons set forth above, Counsel respectfully requests that this Court award Plaintiffs their reasonable attorneys' fees in the amount of $94,861.00 and their reasonable costs in the amount of $964.74. Plaintiffs do not believe a hearing is necessary to resolve the issue of the reasonableness of Plaintiffs' submission of attorneys' fees and costs but are prepared to present additional evidence if the Court believes doing so will be helpful.

Dated: February 7, 2011

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION
LEGAL PROGRAM

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

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2011, I electronically filed the foregoing using the Lexis Nexis Court Link and served by electronic mail on the following:

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