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 ▲

Case Number: 2009 CV 11761

Ctrm.: 280

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PLAINTIFFS' CLOSING ARGUMENT REGARDING HEARING ON REASONABLENESS OF PETITION FOR FEES AND COSTS

Pursuant to the request of counsel for the Defendants ("Department") and this Court's bench order at the July 21, 2011 hearing regarding attorneys' fees, Plaintiffs, by and through undersigned counsel, hereby submit this written Closing Argument.

INTRODUCTION

This Court should award Plaintiffs' reasonable attorneys' fees and their costs in this case as set forth below:

1. Plaintiffs should be awarded their requested lodestar attorneys' fees for all time devoted to this case because paragraph 6 of the parties' September 15, 2010 Settlement Agreement requires payment for all fees in connection with the "representation" in this case and that representation continues.

2. Plaintiffs should be awarded their requested lodestar attorneys' fees for all time devoted to this case after September 15, 2011 pursuant to C.R.S. 13-17-102, *et seq*., because Department counsel acted in violation of that statute.

3. Plaintiffs should be awarded their requested lodestar costs in this case pursuant to C.R.S. § 13-16-104 because this Court made the parties' September 15, 2010 Settlement Agreement an order of this Court pursuant to the Dispute Resolution Act, C.R.S. § 13-22-301 *et seq.,* and costs shall be awarded under these circumstances.

4. Plaintiffs' lodestar attorneys' fees and costs may be adjusted upwards in this case because the Court should find defense counsel's conduct violated C.R.S. 13-17-102, *et seq*.

ARGUMENT

I. Why Plaintiffs' Lodestar Attorneys' Fees Should Be Awarded

A. Background[1]

Plaintiffs in this lawsuit are Medicaid recipients who need home health care services in order to live independently in their homes. By definition and under state and federal rules, they meet the criteria for low-income individuals in need of Medicaid services. The Consumer Directed Attendant Support Services ("CDASS") program, at issue in this case, is a relatively new development as a Medicaid service. The program was developed with the assistance of CCDC members to enable, as the name implies, disabled Medicaid recipients ("consumers") to manage and control their home health care services and provide a benefit

[1] The facts set forth in this section are all set forth in Plaintiffs' Amended Class Action Complaint ("Complaint"), filed with Plaintiffs' Motion for Leave to File Amended Class Action Complaint on June 21, 2010. This Court granted Plaintiffs' motion on July 2, 2010, recognizing that Plaintiffs had a right as a matter of course to amend their complaint. The Department answered the Complaint on July 2, 2011 denying Plaintiffs' claims and denying Plaintiffs were entitled to any of the relief sought.

to the state by removing the necessity for provider agencies to deliver home health care services. In many ways, the program has been a resounding success. However, because of the novelty of the program and its relative infancy in the large body of services delivered under Medicaid, there is no developed case law regarding the program. Because this litigation involved complicated legal issues, and the settlement achieved benefitted all CDASS Medicaid consumers, Plaintiffs should recover their lodestar fees for all work prior to the September 15, 2010 mediation because the Department agreed in the Settlement Agreement to pay those fees.

B. The nature and complexity of the case[2]

One of the underlying questions in this case, is whether individualized advance notice required of reductions to CDASS allocations. The parties' legal positions are exactly opposite. As set forth in the Department's Motion to Dismiss, filed February 18, 2010, "The Plaintiffs in this case are Medicaid recipients who allege that the Department failed to give proper notice and an opportunity for a hearing when it implemented provider reimbursement rate reductions in September and December 2009, pursuant to Executive Orders issued by the Governor in response to Colorado's significant budget shortfall." Motion to Dismiss at 2. The Department attempted to implement these state budget cuts to "provider reimbursement rates" across the board for all home health care services. *See* Motion to Dismiss at 2 ("[T]he Department merely implemented system-wide provider rate reductions pursuant to the Governor's Executive Orders.") The problem with trying to apply provider rate reductions to the CDASS program is that CDASS clients are Medicaid consumers who must rely upon a certain amount of money each month to pay for home health care services, and they must stay within that monthly budget when scheduling and seeking payment for attendant care services. In all other home health care delivery systems, an agency, or Medicaid "provider" is paid by the Department to provide the services. Providers of Medicaid services operate under very specific rules and contractual arrangements with the Department that are completely different from what is expected of Medicaid recipients or consumers of services. *Compare* 42 C.F.R., pt. 434 (setting forth requirements for contracts for furnishing Medicaid services or processing or paying Medicaid

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[2] The background of this case is also set forth in significant detail in Plaintiffs' Brief In Support of Award of Attorneys' Fees ("Fees Brief"), filed February 7, 2011, *see* Fees Brief at 3-17, and in Plaintiffs' Motion to Enforce Settlement Agreement and Request for Issuance of Order ("Motion to Enforce"), filed October 18, 2010, *see* Motion to Enforce at 1-8. Both of these pleadings, including their factual assertions and legal arguments, are expressly incorporated herein.

claims) *with* the CDASS Medicaid beneficiary rules. *See* n. 4 *infra*.

CDASS recipients' "allocation" amount, referenced the briefing in this case, represents the total dollar amount the Department authorizes for each individual CDASS client to use to pay for their attendant care services and includes a percentage used to pay a fiscal intermediary service ("FIS") to manage payroll and billing.[3] Therefore, any dollar reduction made to the allocation total equates to one less dollar the CDASS client has available to pay for needed services. Not providing advanced notice of the reduction means CDASS clients have no way of knowing how much money they have to spend on attendant care despite the rigorous methods each client goes through to apply for and be accepted into the CDASS program and to determine that amount in the first place. *See* CDASS rules §§ 8.510.2 & 8.510.14.[4] Changing rules mid-stream and without notice of any sort, in how much services a Medicaid recipient will receive or can pay for is a violation of due process and is, at its basest level, fundamentally unfair. *See generally Weaver Dep't of Social Services*, 791 P.2d 1230(Colo. App. 1990); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

With an understanding of how CDASS and allocations work,[5] the due process implications of the Department's action are clear. The allocation amount is a sum of money

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[3] The actual funds go from the Department to the FIS and then to the attendants. The money does <u>not</u> go directly to the CDASS Medicaid recipient.

[4] The CDASS program regulations can be found at 10 Colo. Code Regs. 2505-10:8.510, *et seq*. ("CDASS rules").

[5] The Department, in conjunction with its contracted local single entry point services and the with the input of each CDASS client, arrives at the total allocation amount based on a formula and a number of factors concerning the home health care needs of each client using elaborate "norms" established by the Department for how many minutes each home health care task is expected to take for the average disabled person. The allocation amount (minutes multiplied by rates set by the Department) translates to a dollar figure that is supposed to enable the CDASS client to pay for services such as health maintenance, personal care and homemaking services, all service categories defined in the Department's regulations. Each of these categories are defined in Department regulations and involve a very complex set of home health care services required for each client. The CDASS client must set attendant rates, schedule attendant hours, determine the types of services needed and more, staying ever vigilant of the total dollar amount available in the budget. *See* n.4, *supra*. The Department also makes its "CDASS Training Manual" available online at http://www.colorado.gov/cs/Satellite/HCPF/HCPF/1243344800584 ("Manual").

available each month with which the consumer can pay attendants for home health care services. If CDASS consumers exceed their monthly allocation amounts, then they are subject to very harsh penalties, including restitution and expulsion from the CDASS program.[6] When the Department reduced all CDASS consumers' allocation amounts without prior notice -- in some instances without notice at all -- and when the Department either provided incorrect adjusted allocation amounts or did not provide adjusted allocation amounts at all, a CDASS consumer who used the same amount of home health care services in the months following the reductions would be overspending without even knowing it. Moreover, every penny by which each CDASS consumer's allocation amount was reduced was one less cent that consumer had to pay for attendants. In short, every reduction in CDASS allocation amounts constituted a reduction in the home health care services the CDASS consumers could utilize.

C. Necessity of the lawsuit

In 2009, attempting to apply the state budget cuts to the CDASS program, the Department directed its contacting agencies for coordinating home health care services, known as single entry point agencies ("SEP's") to cut CDASS recipients' allocations 1.5% first in September of that year. In December of 2009, the Department directed SEP's to cut allocation amounts again by another 1% and directed the SEP'S to take another 1% out of each allocation to pay an increased fee to a new FIS the Department hired. Neither the Department nor the SEP's ever provided any advance notice to any CDASS recipient of any of these reductions. This is so because, for the reasons set forth in the Motion to Dismiss, the Department believed no individualized advance notice was required.

Not only were CDASS' consumers allocation amounts reduced without any prior notice, there were wide variations in the percentage reductions of CDASS recipients' allocations with each successive reduction. Some consumers received notifications of these reductions after they occurred; many received no notification at all. CCDC members who were CDASS consumers, including Julie Reiskin, CCDC's Executive Director, became aware that they had less money to spend for their attendants, and thus less home health care services to utilize. Those members, particularly those who were already needing to use

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[6] *See* Manual at p. 7-6 § 7.3.4 (regarding "Over Spending") and 10 C.C.R. 2505-10:8.065 ("Recovery of Medical Assistance Overpayments").

nearly the entirety of their allocation amount every month were terrified.[7] They contacted Ms. Reiskin and the Legal Program and asked for help. Once CCDC's Legal Program started investigating, we became aware that the reductions that actually occurred were greater than what the Department claimed it was cutting Medicaid providers' rates -- more like 4% and 5%. Reductions were inconsistent at best, occurred without explanation, and were made with no advanced notice to the CDASS clients. The Department not only does not deny its reductions in allocations were wildly inconsistent, it concedes the point. *See* Motion to Dismiss at 10, n. 3 ("In order to implement these rate cuts in individual allocations, the Department sent worksheets to the case managers for each of the CDASS recipients. When the worksheets were returned to the Department, they contained calculation errors. The Department has collected data from the case managers and is currently in the process of making corrections to allocations so that clients for whom no change in their services occurred during the time period should receive a reduction in client allocation portion no greater than 3.55% for the period."); *see also* State Defendants' Response to Plaintiffs' Attorney Fee Application, Plaintiffs' Renewed Request for Costs and Request for Fees for Briefing Motion to Enforce, filed March 9, 2011, at 6, n. 2 (According to the Department, "There are approximately 100 case managers in various locations across the state of Colorado. These individuals are case managers in the truest sense, responsible for the needs and welfare of their charges. Generally speaking, they are not mathematicians."). Apparently, according the Department, the "calculation errors" were the fault of the SEP caseworkers, not the Department, despite the fact that, according to the Department, it has a "Rates Department" who mandated the spreadsheet the SEP's used to "calculate" the reductions. *See, id*. at 7. In any event, no "corrections" had been made at the time the Motion to Dismiss was filed, and, only now, with an enforceable Settlement Agreement in place, is the Department required to provide a notice in advance of cutting CDASS

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[7] Ms. Reiskin has been actively involved with the CDASS program since its inception and serves on the CDASS Advisory Committee, an ongoing committee comprised of Department staff, and FIS representative and CDASS recipients who work to provide advice regarding continuing implementation of the program. During these meetings, Ms. Reiskin became aware of the cuts and the fact that no notice was going to be provided because the Department believed no notice was required. Department counsel's and its expert witness' views expressed at the July 21 hearing that if Ms. Reiskin simply told the Department of her concerns, no lawsuit was needed are without merit. As set forth in the Amended Class Action Complaint, Ms. Reiskin and the other CDASS consumers who actually heard from the Department, did not know until after the reduction was made that it had occurred. Ms. Reiskin informed the Department it needed to forewarn CDASS clients of the reductions. She was ignored.

allocation amounts, which states the amount of the pre-reduction allocation and the amount after. The Agreement also requires that advance notice be provided as well as an explanation for appealing which is consistent with the law and due process requirements. Although the Department may, under federal requirements, be permitted to apply "across the board state budget cuts," it cannot fail to notify CDASS consumers of the service reductions and must provide a factual (mathematical) and legal reason for doing so. The Agreement requires this.

The CCDC Legal Program sprang into action,[8] gathering evidence, confirming the accuracy of its clients' complaints, and preparing to address the legal issues involved. CCDC also knew more cuts were coming and had confirmed the Department would not provide CDASS clients notice. To suggest, as the Department's counsel and expert did at the hearing, that this case did not need to be filed is, frankly, ludicrous. Plaintiffs faced the overwhelmingly real needed to know immediately how much money they had to pay their attendants to stay within their budgets, and undersigned counsel's experience with Department counsel in this[9] and other cases[10] demonstrates delay is Department counsel's office's *modus operandi*. Settlement negotiations are a means by which Department counsel stave off action or payment.[11] This is apparent from the amount of time has passed between

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[8] This case would have been brought as a temporary restraining order/preliminary injunction motion ("TRO/PI"), but the Legal Program, which at the time consisted of one attorney, one part-time law clerk and one paralegal, did not have the time for an expedited Rule 65 hearing.

[9] *See e.g.*, Plaintiffs' Motion to Enforce Settlement Agreement; Defendants' Motion to Dismiss.

[10] The CCDC Legal Program was already embroiled in a Rule 65 TRO/PI action in another case, *Lucas, et al. v. Colorado Department of Health Care Policy and Financing et al.*, 2009CV11661, filed December 18, 2009, in the Denver District Court. CCDC's Legal Program was also involved in extensive attempted settlement negotiations with the Department in two other cases, later filed in Denver District Court. *See Taylor v. Colorado Department of Health Care Policy and Financing et al.*, 2011CV58, and *Taylor v. Colorado Department of Health Care Policy and Financing et al.*, 2011cv59, which, despite CCDC's best efforts did not settle.

[11] Just recently, despite being informed that CCDC's Executive Director would be out of town and difficult to reach, on July 28, 2011, Department counsel Patricia Herron sent a new settlement agreement draft, apparently in another attempt to postpone the date of the

September 15, 2010 -- the date signing of the Settlement Agreement requiring the payment of reasonable attorneys' fees -- and today, when fees still have not been paid.

D. Necessity of time spent on the lawsuit

Every moment of time spent investigating Plaintiffs' claims, communicating with caseworkers, and researching, drafting and filing pleadings in this case was necessary and required. Communications with outside counsel were necessary, in part, because Medicaid and due process actions are not part of undersigned counsel's daily practice, which involves mostly ADA, Fair Housing Act, and Section 504 Rehabilitation Act claims. The undersigned conferred with experienced attorneys from other offices, including Timothy P. Fox, Plaintiffs' fees expert, various Colorado Legal Services attorneys, and attorneys for the National Health Law Project. These communications were necessary, and ultimately time-saving, since Plaintiffs' counsel did not have to re-invent the wheel.

The Department's claim that it was "notifying" CDASS clients and "immediately" recalculating CDASS allocation amounts is simply false. *Compare* the Department's argument that it was working diligently to notify CDASS recipients of the reduction in their rates[12] *with* the Department's Motion to Dismiss, arguing, "Plaintiffs were not entitled to

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submission of these closing arguments. The Department has had since January 17, 2011, when this Court granted Plaintiffs' Motion to Enforce and ordered briefing on the reasonable amount of fees to offer to settle. Every time Department counsel has a brief due in this case, e.g., the response to class certification and the written closing arguments, Department counsel suddenly decides to offer settlement.

[12] According to the Department,

> This case was filed December 22, 2009 shortly after the Governor announced a second "across the board" budget cut that would impact CDASS participants. When the Governor announced the cuts, the Department of Health Care Policy and Financing notified the CDASS case managers throughout the state that they must contact their CDASS clients to notify them of the reduction in rates and the effect on their individual allocations. Prior to the announcement of a second (subsequent) rate cut on December 1, 2010, the Department learned from CDASS recipients that the case managers were not able to perform the complex task of recalculating clients' allocation amounts. The Department's Rates Division immediately began assembling the

notice under 42 C.F.R. § 431.210," because notice provided to Medicaid service "providers" in provider bulletins under 42 C.F.R. § 431.205 was legally sufficient. Motion to Dismiss at 12-13.) The Department was very clear in February of 2010 about its views regarding providing notice to CDASS recipients. "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." *Id*. "Special treatment," apparently, means individualized notice. Plaintiffs' Response to the Department's Motion to Dismiss, filed March 22, 2010, sets forth the reasons why the Departments' argument that CDASS Medicaid beneficiaries are not "providers," cannot be treated as such, and must be provided with individualized advance notice. The arguments set forth in Plaintiffs' Response and Surreply are incorporated herein.

E. The timing of the Settlement Agreement indicates that Plaintiffs' counsel's work was necessary.

Plaintiffs request this Court take notice of the following facts:

- This lawsuit was filed in December of 2009.
- The Department's Motion to Dismiss denying individualized advance notice was required was filed in February of 2010.
- The Department never wavered from its position or withdrew the Motion to Dismiss.
- This Court ruled against the Department's Motion to Dismiss on June 15, 2010 and ordered Defendants to answer the Complaint and the parties to brief the issue of class certification.
- On July 19, 2010, Defendants answered the Complaint denying Plaintiffs' claims and right to notice.

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data necessary to properly calculate each of the approximately 1400 individual CDASS recipient's allocation amounts. The Rates Division had already begun the process of assembling information, programming spreadsheet functions and recalculating all CDASS recipients' rates when this lawsuit was filed. Response to Fees Brief at 6-7.

- On September 15, 2010, on the eve of the Department's deadline for submitting its response to Plaintiffs' motion for class certification -- September 17, 2010, after already having one extension -- Department counsel signed the "Settlement Agreement."

- On September 16, 2010, counsel for the Department requested undersigned counsel agree to a stay of proceedings to "give [the parties] time to go the mediation route on the attorney fees, if necessary, and then ask the court to set a hearing if mediation fails," to which undersigned counsel agreed.[13]

- On September 17, 2010, instead of a motion to stay, Department counsel filed an "Advisement of Settlement."

- On September 22, 2010, this Court issued an Order vacating the trial and ordering the Parties to file a stipulate motion to dismiss on or before October 12, 2011, "failing which this case will be dismissed without prejudice."

On September 17, the date of the Department's "Advisement of Settlement," the question of the amount of fees to be determined pursuant to Paragraph 6 of the Parties' signed Settlement Agreement had not been decided. Department counsel did not send the "Advisement" to or confer with undersigned counsel before filing it. The "Advisement" did not mention the undecided fees issue.

Because every single CDASS client was and still is affected by the Department's failure to provide advanced and accurate individualized notice, this case needed to be brought as a class action. *See* Plaintiffs' Motion for Class Certification, filed August 16, 2010. The motion was filed pursuant to this Court's order denying Defendants' Motion to Dismiss. Just because the Department did not "have to" respond to that motion does not mean it was not necessary for this litigation. It seems far more likely the Motion for Class Certification was a driving force behind why the Department settled when it did. It is routine in undersigned counsel's practice that defense counsel settle on the eve of a response deadline to a motion for class certification. Far from deriving a benefit of its non-response, Department counsel should be sanctioned for their antics related to "settling" the case on

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[13] *See* Order Granting Unopposed Motion for Extension of Time to File Response to Plaintiffs' Motion to Certify Class, entered September 7 (response to fees brief was set for September 17, 2011) and Motion to Enforce at 4-5 and exhibits submitted therewith (showing Department counsel simply lied about the Motion to Stay.)

the eve of this deadline and subsequently reneging on the agreement.

F. Adequacy of the billing records

After undersigned counsel reviewed again Department counsel's response to the Fees Brief and their defense expert David Brougham's affidavit, hearing both experts' testimony at the July 21 hearing, having further time post-hearing to consult with Plaintiff's expert Tim Fox and with guidance provided by the Court's questions at the hearing, Plaintiffs have gone over the billing statement one last time and provide the following to the Court and the Department: A revised billing statement with additional items removed and time added for the preparation and filing of this Closing Argument.[14] *See* Exhibit A (attached billing statement). For example, undersigned counsel removed entries related to the media. Also attached as Exhibit B is a breakdown by category of the time devoted to this case.

If it would be helpful to the Court, undersigned counsel would be happy to e-mail the editable Microsoft Excel file to chambers.

One of the very unfortunate consequences of doing the work of private attorneys general and enforcing the rights of those who Mr. Brougham referred to as "non-paying clients," is that the staff of undersigned counsel's office has to take time to bill time. As explained during the hearing and as set forth in the briefing and affidavits in this case, the CCDC Legal Program consists of Kevin Williams, a full-time salaried attorney, Andrew Montoya, a contract attorney, and Briana McCarten, a full-time legal assistant who is also a paralegal.[15]

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[14] As the Court may recall, it was Department counsel, not Plaintiffs' counsel, who requested that written arguments be provided.

[15] Department counsel Patricia Herron in briefing and in the recent hearing has accused undersigned counsel of "refusing" to provide her with information regarding the credentials of Briana McCarten, CCDC's Legal Assistant and paralegal. If the Court cares, when it came time for the Department to file a response to the Motion to Enforce, true to Department counsel form, Ms. Herron sent a last minute e-mail message demanding all sorts of information from undersigned counsel on a very busy day. Ms. Herron had never entered an appearance in this case, and to undersigned counsel's knowledge, Joan Smith and Jennifer Weaver remained counsel of record. The docket entries showing Ms. Herron's several requests for extensions to file a response to the Motion to Enforce, the fact that the Notice of Withdrawal filed by attorneys Smith and Weaver was not filed until February 22,

G. Reasonableness of number of hours spent and rates charged

As set forth in Plaintiffs' Brief in Support of Award of Attorneys' Fees the number of hours expended in this case and the rates charged by the timekeepers in this case was reasonable. Plaintiffs provided evidence in their briefing necessary to demonstrate compliance with the factors set forth in Colorado appellate court decisions applicable in this case and Colo. R. Prof. C. 1.5. Fees Brief at 3, n. 1. Plaintiffs' counsel's supplemental billing statement submitted to the Court on July 19, 2011 sets forth the total number of hours, tasks performed, and rates assigned for each timekeeper in this case.

During the hearing, Tim Fox of the law firm of Fox & Robertson P.C. provided expert witness opinion testimony regarding the reasonableness of Plaintiffs' attorneys' time devoted to this case and the rates charged by each timekeeper. Defendants also put on expert witness testimony from David Brougham of Hall & Evans LLC. Mr. Fox is an attorney with over eighteen years of practice almost exclusively devoted to plaintiffs disability class actions and civil rights cases. Although Mr. Fox's practice involves some paying clients, the vast majority of his practice is devoted to representing disabled plaintiffs who cannot afford to pay for attorneys. Mr. Fox opined that the number of hours Plaintiffs' counsel and staff devoted to this case were reasonable, analyzing all of the pleadings, the time devoted to settlement, the impact of the settlement agreement itself and the knowledge and experience of counsel for the plaintiffs. Mr. Fox's opinion was also based on years of working with CCDC's legal program and personal familiarity with the skill, abilities, background and competence of CCDC's legal program counsel and staff. Mr. Fox also provided his opinion that the rates charged by Plaintiffs' counsel in this case were reasonable based on the factors set forth in Colorado Appellate decisions and Colorado Rules of Professional Conduct 1.5, as well as applicable prevailing market rate for attorneys with fifteen years of practice who work in risk-based disability rights class action cases.

Defendant's expert opined this case is not a contingent fee case, but that is not correct. In this lawsuit, Plaintiff CCDC sought monetary damages but chose not to request those in settlement. In addition, this case is just like the typical damages contingency fee case in that Plaintiffs' counsel represents individuals who cannot afford to pay contingent

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2011, and even Ms. Herron's inability to get Ms. McCarten's name spelled correctly in the Department's Response to the Motion to Enforce or pronounced correctly during the hearing (referring to Briana McCarten as "Brianna McCarty" and "Ms. McCarty") demonstrate not a lack of cooperation by undersigned counsel, but rather a lack of preparation by Department counsel.

upon receiving payment of fees (or fees and a percentage of damages) if successful in the litigation.[16]

The question of how high the hourly rate should be set is a function of the risk of representing clients for free and the risk of recovering nothing, rather than whether the fee is contingent upon the recovery of a large damages award. As with most of undersigned counsel's cases and those of Mr. Fox's firm, this case involved mostly injunctive relief, not the pursuit of large monetary damages.

Mr. Brougham, who testified he has vast experience in providing expert witness testimony regarding the reasonableness of attorneys' fees in litigated cases, opined that the number of hours devoted to tasks performed in this was too much. Mr. Brougham also opined that the rates charged by the timekeepers in this case was too much. In large part, Mr. Brougham's opinions were self-contradictory[17] and, at times, based on factually inaccurate premises.[18] Mr. Brougham, like Department counsel, demonstrated a lack of preparation.

The only cases cited by Mr. Brougham in his Affidavit and in his testimony were *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), a case in which Mr. Brougham testified he was the state's attorneys' fees expert. Mr. Brougham did not bother to reference or cite to any decisions of the Colorado appellate courts, even though several have been decided in the past few years. Those cases are cited throughout Plaintiffs' Fees Brief. It appears Mr. Brougham has been providing the same

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[16] Defendants' expert seems to feel Plaintiffs' counsel should lose the benefit of recovering fees because Plaintiffs chose not to seek damages against the Department.

[17] Without explanation, the amount Mr. Brougham claimed Plaintiffs' counsel should recover and the reasons set forth in his affidavit suddenly changed at hearing. *Compare* Brougham Affidavit *with* hearing Exhibit A.

[18] For example, Mr. Brougham repeatedly testified that absent the language of the Settlement Agreement and this Court's order, Plaintiffs would be entitled to no fees whatsoever. Yet, Mr. Brougham also testified that Plaintiffs' counsels' fees were not "contingent." Similarly, Mr. Brougham testified multiple times Plaintiffs' counsel engaged in inappropriate billing practices, including seeking fees for three individuals -- undersigned counsel, Mr. Montoya and Ms. McCarten -- to attend the mediations and previous hearings. Mr. Montoya neither attended nor billed for any mediations or hearings prior to the July 21, 2011 hearing.

testimony on behalf of the state of Colorado for many years. *See, e.g.,* Exhibit 1 attached hereto (Affidavit of David R. Brougham, submitted in *Colorado Right to Life Committee v. Coffman*, Civil Action No. 2003-CV-1454-WDM-PAC (D. Colo., filed Oct. 29, 2007). The paragraphs are nearly identical to those in the affidavit submitted in this case with a few factual details changed out of necessity to fit the case.

A significant reason for Mr. Brougham's opinion that the hours devoted to this case were excessive was premised upon his conclusion that this lawsuit and all subsequent proceedings were unnecessary because the Department had offered to resolve them. When cross-examined Mr. Brougham admitted he was not familiar with and had not reviewed the Department's Motion to Dismiss. As explained above, in that motion the Department took the legal position that Plaintiffs were never entitled to notice of any kind related to a reduction of their CDASS allocation amounts. Mr. Brougham also testified he based this opinion on a discussion with and the affidavit of Department counsel Joan Smith. He specifically referenced paragraph 2 of Ms. Smith's affidavit. Ms. Smith, counsel for the Department from the time the lawsuit was file in December of 2009 until February of 2011, testified in her Affidavit that the Department made certain promises on "the first day of mediation" that CDASS clients would not be harmed. That testimony and Department counsel's on-going assertion that the litigation was unnecessary is flatly and plainly contradicted by Department counsel's legal position maintained throughout this case and decided by this Court against the Department and in favor of Plaintiffs. The Department did not believe advance notice was necessary. Furthermore, lawyers' promises made at mediation sessions are not facts to be considered as evidence.

Undersigned counsel is the only attorney working full-time for the CCDC legal program. Mr. Montoya is a contract attorney with CCDC who had worked with the organization as a legal assistant prior to entering law school and became an attorney with the program upon graduation and admission to the Colorado Bar. The other timekeeper in this case, Ms. McCarten, is a paralegal. Undersigned counsel has had only two clients, in fifteen years who were in the financial position to be able to afford costs, not fees. The reason for this is that none of CCDC's clients have ever been in a financial position to afford a lawyer to assist them with enforcing their civil and constitutional rights. As set forth in the affidavit of Julie Reiskin submitted in connection with the Fees Brief, the Legal Program was started precisely because CCDC members with disabilities could not find private counsel to enforce their rights under the Americans with Disabilities Act and other civil rights statutes. CCDC's Legal Program is not a private law firm and derives no funding whatsoever from any source except the recovery of reasonable attorneys' fees and costs in cases brought pursuant to statutes that provide for fee-shifting. The vast majority of CCDC's cases do settle and the vast majority of those settlement agreements provide for the recovery of attorneys' fees.

Such was the case in the settlement agreement reached in this case. This is a niche practice. It is unique and unusual and there are few attorneys who practice in this area in Colorado. Civil rights statutes like 42 U.S.C. § 1983 and the ADA specifically acknowledge the need for private attorneys general to enforce the rights of those who otherwise would not have access to the legal system and vindicating policies that Congress considered of the highest priority. *Newman v. Piggie Park Enterprises, Inc*., 390 U.S. 400, 402 (1968); *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598 (2001) (persons who bring civil rights claims serve as private attorney generals). This is what the legal program does. Lawsuits are expensive and time consuming. This case has been no exception.

C. Plaintiffs' lodestar fees for <u>all</u> work performed in this case should be awarded pursuant to the Settlement Agreement.

Nothing in the Settlement Agreement cuts off Plaintiffs' fees as of the date of the September 15, 2010 mediation. It simply states Plaintiffs "will provide itemized billing records reflecting time spent in the representation." Clearly, due to the Department's reneging on paying fees after signing the Settlement Agreement, the "representation" has not ended. This is why Plaintiffs' counsel provided an updated billing statement to the mediator prior to the October 2010 mediation and why Plaintiffs' counsel updates the billing statement each time there is a hearing or pleading due.[19] Nevertheless, as set forth below,

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[19] Again, Department counsel once again claims impropriety by undersigned counsel claiming that undersigned "refused" to provide Department counsel with the same updated statement provided to the mediator in October of 2010. This accusation is highly disingenuous. After undersigned counsel provided Department counsel with billing records at the September 15, 2010 as the parties agreed in paragraph 6 of the Settlement Agreement, the following occurred: (1) Department counsel waited until September 27, 2010 to inform undersigned counsel they would not respond to the billing statement as required by the Agreement; (2) Department counsel then asked to re-set the mediation to October 12, the day the Court ordered the parties to submit a stipulated motion to dismiss, and informed undersigned counsel a different department never before disclosed needed to review the agreement; (3) as is customary, the Department then waited until days before October 12 to send undersigned counsel the letter from Ms. Herron stating it was the Department's position no fees should be awarded. Ms. Herron had never been counsel in the case before. Given this complete about face in position from Paragraph 6 of the Agreement, what would have been the point of providing updated records and to whom should they have been provided? Undersigned counsel was unaware until the October 12

Plaintiffs' fees must be awarded for defense counsel's conduct post-September 15, 2010 pursuant to C.R.S. 13-17-102, *et seq*., and this Court's Order regarding the Motion to Enforce at 3 (inviting Plaintiffs' counsel to request fees beyond September 15, 2010 based on "whether Defendants' position on the motion to enforce was itself groundless and frivolous such that Plaintiffs should also recover the fees they incurred" after that time and to submit billing records).

II. Why Fees Must Be Awarded Pursuant to C.R.S. 13-17-102, *et seq*., for All Fees and Costs Incurred After the September 15, 2010 Mediation.

A. Department counsel's conduct: Scam or Coincidence?

As described above, the Department's response to the class certification motion was due September 3, 2010. On September 2, 2010, the Department filed an Unopposed Motion for Extension of Time to File Response to Plaintiffs' Motion to Certify Class, seeking two additional weeks to respond, making its response due on September 17, 2010. On September 15, 2010, the parties had a mediation session with Judge Barr at which the parties agreed to and signed the "Settlement Agreement," in which the Department agreed to pay fees. On September 16, 2010, the day after the mediation, undersigned counsel received an email 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. *See* Plaintiffs' Motion to Enforce Settlement Agreement and Request for Issuance of Order ("Motion to Enforce") at 4-5 and Williams Aff. ¶ 12 & Exhibit 6, submitted with that motion. 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. *Id*. On September 17, 2010, the day the class certification motion response was due, Department counsel instead filed an "Advisement of Settlement." In two short paragraphs, Department counsel set in motion a chain of events that this Court must either believe was an amazing set of coincidences or part of a carefully calculated hoodwinking by, in the words of Department counsel, "unscrupulous henchman] lying in wait for the opportunity to perpetrate a scam on Mr. Williams and CCDC." *See* State Defendants' Response to Fees Brief Application, Plaintiffs' Renewed Request for Costs and Request for Fees for Briefing Motion to Enforce, filed March 9, 2011, at 18-19.

The paragraphs in the Advisement state in full:

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hearing which attorney would be representing the Department that day.

1. The parties attended a second mediation session at JAG on September 15, 2010. The parties reached an agreement and have executed a settlement agreement. As required by the terms of the settlement agreement, the parties will be filing a joint motion to dismiss this case.

2. As such, the motion for class certification is moot and Defendants will not be filing response.

Plaintiffs ask this Court to look at the chain of events, conduct of the lawyers involved and the result and find, determine and hold Department counsel's conduct violated C.R.S. § 13-17-102 *et seq*. This Court should take notice of the fact that this "Advisement" does not represent whether counsel conferred regarding the "Advisement," and the "Advisement" 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. Undersigned counsel, being unsuspecting, did not file an "advisement" notifying the Court that the "Advisement" was inaccurate and incomplete.

On September 27, 2010, the day the Department was required to respond to the billing statement provided by Plaintiffs pursuant to paragraph 6 of the Agreement, 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. Motion to Enforce at 5 & Williams Aff. ¶ 13 and Exhibit 7at p. 6 (Sept. 27, 2010 10:47 a.m. e-mail from Jennifer Weaver to Kevin Williams). 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 despite the clear language of the Agreement requiring a response on September 27, no one had reviewed Plaintiffs' statement of billing, and the Department was unprepared for the October 5, 2010 mediation. *See* Motion to Enforce, Exhibit 7 at pp. 1-6. This Court should also take notice of the fact that nowhere in the Settlement Agreement, signed by Department counsel, does it mention further approval by the Risk Management Division. 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 order in response to the Advisement.

Despite the Department's agreement to resolution of the fees issue in the Agreement reached and signed by Department counsel at the September 15 mediation, on October 6, 2010, undersigned counsel received the letter from Patricia Herron, Senior Assistant

Attorney General, Litigation Division, informing undersigned counsel of her view that Plaintiffs were not entitled to recovery of 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). Ms. Herron had never before participated in this case, never entered an appearance, and never participated in settlement discussions. Undersigned counsel never heard of Ms. Herron before.

For reasons explained in Plaintiffs' Motion to Enforce, *Buckhannon* has no application to a case like this, which was settled pursuant to a contract between the parties and enforceable as such. Oddly, now that the Settlement Agreement contract, including paragraph 6 requiring the Department to pay fees, has been made an order of this Court, the *Buckhannon* decision allows for awarding Plaintiffs' fees and costs. *See* Motion to Enforce at 12-13.

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. Defendants knew the Court would dismiss the case on or before October 12, and the Department rescheduled the mediation on fees for that day.

Recognizing this problem and holding out some hope for a legitimate fees mediation, on October 7, 2010, Plaintiffs filed a motion requesting until October 18, 2010 to file a stipulated motion to dismiss and planned to attend the October 12, 2010 mediation. In that motion, undersigned counsel informed the Court the parties had not resolved the fees issue and that the mediation had been rescheduled. The Court granted that motion on October 8, 2010.

The parties returned to mediation on October 12, 2010. The mediator separated the parties into different rooms. Ultimately, the mediator did not make a determination regarding fees. Undersigned counsel requested that defense counsel agree per the Settlement Agreement to have the mediator make a final determination regarding fees. Motion to Enforce at 5-6 & Williams Aff. ¶ 14 and Exhibit 8. Defense counsel refused to do so. *Id*.

It is clear from Assistant Attorney General Herron's e-mail, even if the mediator arrived at a final fees determination, the Department rejected the mediator's authority to make a determination. *Id*. Apparently, the Department had no intention of resolving the issue in mediation, and, given the Department's position that Plaintiffs were entitled to no fees, it is now clear that the Department had no intention at that mediation to offer any

amount. The Department's Legal Director, Robert Douglas emailed an individual who is a CCDC member but not a named Plaintiff in the case stating that the Department withdrew any offer to pay fees at mediation. Motion to Enforce at 16 & Reiskin Aff. ¶ 3 & Exhibit 1. Plaintiffs disagree with the characterization of events of the mediation as described in Mr. Douglas' e-mail message; however, what is clear from the e-mail message is that the Department takes the position that it withdrew any offer to pay fees and resolved that Plaintiffs must now litigate the fees issue "through the Colorado Court of Appeals." *Id*. That is exactly what undersigned counsel seems to be doing in what is now rather remarkably protracted litigation.

Undersigned counsel never expected or intended to have to file the Motion to Enforce and had to spend a considerable amount of time researching this state law mechanism foreign to the Legal Program's usual practice. Despite Assistant Attorney General Smith's September 16, 2010 e-mail suggesting the parties "ask the court to set a hearing if mediation fails," counsel for the Department opposed Plaintiffs' Motion to Enforce.

However clever defense counsel's actions may have been -- and, from the vantage point of an attorney who has settled many cases, admittedly were -- they were unbecoming of representatives of the State and officers of this Court. In addition, like Mr. Brougham who testified his firm, Hall & Evans, needs to recover attorneys' fees to "pay the light bill," so too does CCDC's Legal Program. These cases are expensive and time consuming, and the Legal Program is trying to meet the legal needs of as many of Coloradans with disabilities whose civil rights are violated as it can. Plaintiffs were very successful. Because of the settlement reached in this case, each and every CDASS consumer is guaranteed advance notice of any future reductions to their allocation amounts, which is a major change given the Department's pre-settlement position that CDASS consumers were, in reality, Medicaid "providers," only entitled to a notice published in provider bulletins most CDASS consumers probably never heard of. Unfortunately, such advanced notice to CCDC's indigent clients does not pay the light bill alone.

Unlike the opulent Hall & Evans, the non-profit Legal Program does not have any paying clients to off-set its litigation risk or a committee in the "firm" who can set regular meetings to deliberate over fees trends, or submit canned expert affidavits ready to go each time the state needs a fees expert. The Legal Program is just the three people this Court had present in its courtroom on July 21, 2011.[20]

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[20] CCDC did have one other attorney, Carrie Lucas, who resigned from CCDC during the pendency of this case and started her own practice based out of Northeastern

B. Requirements of C.R.S. 13-17-102, *et seq*., regarding frivolous, groundless or vexatious actions

Under C.R.S. 13-17-102, *et seq.,* regarding frivolous, groundless or vexatious actions, this Court "may award . . . reasonable attorneys' fees." C.R.S. § 13-17-102(1). Such an award is subject to the provisions set forth in the statute. Those provisions include the following, "[T]he court *shall award*, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has . . . defended a civil action, either in whole or in part, that the court determines 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* . . . ." C.R.S. §§ 13-17-102(2)&(4) (emphasis added). "As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious." C.R.S. § 13-17-102(4).

Department counsel agreed in the September 15, 2010 mediation to payment of fees and a method for doing so. Department counsel then failed to comply with that process and, for the first time, introduced new counsel it claims was a necessary player in settlement. Department counsel then discussed seeking a stay pending resolution of the fee issue with undersigned counsel, and then filed a factually inaccurate advisement of settlement. Department counsel made clear their position that Plaintiffs were not entitled to fees under the agreement, then attended a mediation which may have met the letter, but not the unambiguous intent, of the settlement agreement. Such conduct is, at the very least, substantially vexatious. Furthermore, counsel's reliance on the *Buckhannon* decision after counsel had already signed a contract agreeing to pay fees was a substantially frivolous and groundless argument. This Court does not have to go as far as to find Ms. Herron was the "unscrupulous henchman lying in wait" to find and hold Department counsel's conduct violated the statute. It need only find Department counsel agreed to a Settlement Agreement term -- payment of fees -- and later reneged and unilaterally filed an inaccurate Advisement of Settlement. If Risk Management was needed to settle the case, a representative should have been at the mediation table on or before September 15, 2010 and the Agreement should have been explicit.[21]

Colorado. Ms. Lucas was a volunteer attorney and did not work on this case at all.

[21] In the most recent settlement agreement draft provided to undersigned counsel in the evening of July 28, 2011, Department counsel Patricia Herron informed undersigned counsel that an essential contract term in any contract with the state requires the following

The actions of Department counsel beginning with the September 15, 2010 mediation and continuing through today have been substantially frivolous, groundless and vexatious. In addition, Department counsel's conduct needlessly protracted this litigation and was interposed for delay, alternative grounds, which, if found, require awarding fees.

On the record before the Court, this Court can easily make any of the following findings and, if any one of the findings is made, this Court "shall award" fees and costs:

1. On September 15, 2010, Department counsel Joan Smith, Jennifer Weaver and Robert Douglas[22] agreed to pay fees in the Settlement Agreement and, therefore the subsequent position taken by the Department that it had withdrawn any offer to pay fees by agreement lacks substantial justification and/or is frivolous.

2. On September 15, 2010, Department counsel Joan Smith, Jennifer Weaver and Robert Douglas agreed to pay fees in the Settlement Agreement and, therefore, the subsequent position taken by Department counsel Patricia Herron that the *Buckhannon* decision, which does not apply in a contract action, applies lacks substantial justification and/or is frivolous.

3. The actions of Department counsel Joan Smith and Jennifer Weaver regarding requesting undersigned counsel agree to a motion to stay proceedings and then filing an Advisement of Settlement was vexatious conduct.

4. The actions of Department counsel Joan Smith, Jennifer Weaver and Patricia Herron including, but not limited to the following, were interposed for the purpose of delay and/or unnecessarily expanded the proceedings in this case, constituting other improper conduct by Department counsel:

    a. Violating paragraph 6 of the Settlement Agreement, which states, "The

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language, "This Release and Settlement Agreement shall not be deemed valid until it shall have been approved by the State Controller or his designee, as provided by Section 24-30-202(1), C.R.S. (2007)." That language was never a part of the discussions leading to, nor was it incorporated into the Settlement Agreement signed by the Department and its counsel resulting from the September 15, 2010 mediation.

[22] Mr. Douglas is the Legal Director for the Department and, therefore, technically, is a party.

Department will respond by September 27,2010," by refusing to provide a response.

b. Scheduling a mediation on October 5, 2010, canceling it and rescheduling it for the day the Court ordered a motion to dismiss to be filed with the intent of not reaching an agreement and having the Court dismiss the case.

c. Waiting until September 27, 2010, the due date of the Department's response to the statement of fees to inform Plaintiffs' counsel that 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.

d. Not bringing parties or Department counsel with full settlement authority to the September 15, 2010 mediation.

Plaintiffs filed the Motion to Enforce to obtain the full benefit of the bargain reached in paragraph 6 of the Settlement Agreement. Every pleading, response and reply that followed and all costs associated therewith are directly attributable to Department counsel's improper conduct that delayed resolution and unnecessarily expanded these proceedings.

There is one other point that has not been raised in Plaintiffs' briefing to date that relates to Defendants' counsel's improper conduct. Counsel has continued to represent to this Court that this lawsuit and continued proceedings were unnecessary. *See* Smith Affidavit. This contention is belied by the legal position taken in the Department's motion to dismiss, which was never withdrawn. Obviously, this case is not over until the last petition for rehearing or *certiorari* is denied. It is, frankly, nonsense to say this case was not necessary and the settlement provides no benefit to the class members. The Department could very well have continued to assert its legal theory that CDASS class members are not entitled to any notice whatsoever no matter how much the Department cut their allocation amounts. The Department maintained that position until this Court denied the Motion to Dismiss. The Department may still appeal this Court's denial of the Department's motion or any of this Court's orders granting Plaintiffs' motions.

The specific factors this Court must consider in determining whether to award fees and cost and Plaintiffs' arguments in support of such an award pursuant to each factor are set forth in the Motion to Enforce at 14-15, "Factors for Determining Whether Reasonable Fees Should Be Awarded," and are expressly incorporated herein. In addition, as set forth in that Motion:

2. Counsel for the Department violated Colo. Rev. Stat. § 13-17-102, *et seq*.

Clearly defense counsel's conduct required Plaintiffs and their counsel to spend time and resources preparing for the process of mediation of the fees question when the Department had no intention of paying those fees. In addition, defense counsel led Plaintiffs' counsel to believe the parties would request a stay of proceedings and address the fees issue with the Court if mediation failed and, instead, tried to get the case dismissed before the fees issue was resolved.

"Bad faith may include conduct that is arbitrary, vexatious, abusive, or stubbornly litigious, and it may also include conduct that is aimed at unwarranted delay or is disrespectful of truth and accuracy." *In re Estate of Becker*, 68 P.3d 567, 569 (Colo. App. 2003) (*citing Zivian v. Brooke-Hitching*, 28 P.3d 970 (Colo. App. 2001)); *Stegall v. Stegall*, 756 P.2d 384, 386 (Colo. App. 1987) ("bad faith" includes conduct resulting in undue delay or that is disrespectful of the truth); *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984) (same).

Robert Douglas is Legal Director for the Department. Joan Smith and Jennifer Weaver are Assistant Attorneys General for the Medicaid and Public Assistance Unit. Patricia Herron is Senior Assistant Attorney General for the Litigation Division. These four attorneys work for the State of Colorado and represent and defend the legal interests of the people of the State of Colorado and its sovereignty.

Although all attorneys, including the undersigned, recognize we have a duty to zealously represent our clients, that duty is tempered by our obligations of candor to the tribunal and other parties, Colo. Rules of Prof. Conduct 3.4 & 3.5, and by our duty not to engage in conduct that is disrespectful of truth and accuracy. See also Williams Aff. ¶ 18 and Exhibit 11 (American Bar Association Ethical Guidelines for Settlement Negotiations (2002) at pp. 47-48 § 4.3.1 Bad Faith in the Settlement Process). According to the ABA guidelines, "An attorney may not employ the settlement process in bad faith: "[I]t may be impermissibly deceptive, and thus an act of bad faith, for a lawyer to obtain participation in settlement discussions or mediation or other alternative dispute resolution processes by representing that the client is genuinely interested in pursuing a settlement, when the client actually has no

> interest in settling the case and is interested in employing settlement discussions or alternative dispute resolution processes solely as a means of delaying proceeding Id. at p. 48.
>
> The conduct of these four attorneys with respect to the issue of payment of fees and costs, especially in opposing Plaintiffs who are all, by definition, disabled and low-income, has been unbecoming for attorneys representing the State of Colorado.

Motion to Enforce at 15.

Plaintiffs respectfully request this Court make specific findings that counsel representing the Department violated C.R.S. § 13-17-102 *et seq*.

III. Reasonable Costs Are Recoverable In This Case.

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);[23] *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 set forth in the attached billing statement. The types of costs are broken down on the statement are those for which Colorado law allows recovery and shall be awarded, essentially automatically, despite the failure to mention them in the Settlement Agreement.[24] *See Parker*, 216 P.3d at 14; Colo. Rev. Stat. § 13-16-104.

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[23] Undersigned counsel apologizes to this Court for providing this Court with an incorrect response to the Court's question regarding costs during the hearing. Costs are not specifically authorized under the Dispute Resolution Act, C.R.S. § 13-22-301 *et seq.*, but are instead mandatory pursuant to C.R.S. § 13-16-104. It was correct in the briefing, but undersigned counsel mis-spoke during argument.

[24] Undersigned counsel affirms CCDC's Legal Program knows what not to do in any future settlement agreements with astute counsel from the Attorney General's office.

For the foregoing reasons, Plaintiffs respectfully request this Court find all costs incurred by Plaintiffs' counsel in this case were reasonable and award all requested costs.

CONCLUSION

For these reasons, Plaintiffs' counsel seeks an order from this Court containing the following findings and orders:

1. The lodestar rate Plaintiffs seek in the attached submission is reasonable as to both hours billed and rates charged based on factors in Colo. R. Prof. Cond. 1.5 and applicable appellate decisions binding on this Court.

2. The parties' settlement agreement requires payment of reasonable attorneys' fees for all time spent in the representation of Plaintiffs in this case, which includes all time spent subsequent to the September 15, 2010 mediation.

3. That this Court make a specific finding and order that the Department's counsel violated Colo. Rev. Stat. § 13-17-102, *et seq*.

4. That this Court make specific findings and issue an order as to whether the fees and costs awarded should be adjusted upward because of Department counsel's conduct.[25]

5. That this Court make specific findings and issue an order as to whether counsel and Mr. Douglas as a party representative or as counsel in this case should be held jointly and severally liable for payment of fees per 13-17-102(3).

6. That this Court make a specific finding and issue an order awarding all costs to Plaintiffs' counsel for costs incurred in these proceedings, or, at least, after September 15, 2010.

The total amounts now sought by Plaintiffs' counsel in the attached billing statement are the following:

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[25] Throughout these proceedings, Plaintiffs' counsel has sought and continues to seek only its lodestar fees and costs in this case; however, to establish a clear record, Plaintiff requests the Court address each of the standards set forth in Colo. Rev. Stat. § 13-17-102. Counsel will submit a revised proposed order if the Court so requests.

TOTAL FEES AND COSTS	$122,287.02
TOTAL FEES ONLY	$116,849.50
TOTAL COSTS ONLY	$5,437,52

Dated: August 1, 2011

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION
LEGAL PROGRAM

/s/ Kevin W. Williams
Kevin W. Williams
Andrew C. Montoya

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I electronically filed the foregoing using the Lexis Nexis Court Link and served by electronic mail on the following:

Patricia Herron, Esq.
Patricia.Herron@state.co.us

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

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