DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 800202 COLORADO CROSS-DISABILITY COALITION, *et al*, Plaintiffs, v. COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, *et al.* Defendants.	▲ **COURT USE ONLY** ▲
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DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR AMENDMENT OF FINDINGS AND JUDGMENT PURSUANT TO C.R.C.P. 59	

The Court stated multiple times in it its order of August 10, 2011 that an award of $42,250 for fees in this case is reasonable. However, the order contains conflicting references to the methodology utilized by the Court in reaching that number. For example, in footnote number 2, page 8 of the order, the Court indicates it derives the $42,250 figure by awarding Plaintiffs fees from the beginning of the case through December 21, 2010, the date Plaintiffs filed their reply in support of their motion to enforce settlement. Although the Court's mathematical calculation contained in this footnote appears to be correct, Plaintiffs have alleged that the Court erred by understating the amount of fees sought by Plaintiffs through December 21, 2010.

The amount awarded by the Court in the August 10, 2011 is appropriate and within the Court's discretion. Nevertheless, even assuming that the Court misidentified the amount sought by Plaintiffs, Defendants have recalculated substantial reductions which are firm, clearly defined, supported by the law applicable to fees awards as articulated by this Court and which should be subtracted from the total amount of fees sought by Plaintiffs. Those reductions are set forth below.

I. Results Obtained (Class Certification)

The Court noted in its order of August 10, 2011, that Plaintiffs achieved some of the results they sought to achieve such as preventing the cuts to allocations without adequate notice to the recipients. Despite recognizing the success, the Court also noted that Plaintiffs' counsel spent a considerable amount of time getting ready for a class certification hearing that was never held, explaining that the case settled two full months before the scheduled certification hearing. Plaintiffs have billed the Defendants $9,120 for matters relating to class certification. *The full amount of $9,120 set forth in Plaintiffs' fee application attributable to time spent on matters relating to class certification should be eliminated from the fee award.*

II. Overhead/clerical

As recognized by Judge Hoffman, both Mr. Montoya and Ms. McCarten billed for professional services when their activities were more properly characterized as overhead. Specifically, prior to December 21, 2010, Ms. McCarten billed a full 30.9 hours for "transcribing" and greater than 21 additional hours for clerical tasks such as mailing, delivering, and copying. Ms. McCarten also billed nearly 11 hours for downloading documents from the computer and numbering documents; she billed an additional 14 hours for proofreading; and another 5.8 hours "researching" client contact information. Each of these items is properly considered overhead or clerical and would not be billable to a private client. *The full 82.5 hours set forth in Plaintiffs' fee application, ($8,250) billed by Ms. McCarten on such clerical tasks and other overhead should be eliminated from any fee award to Plaintiffs.*

III. Impermissible Billing Entries, Duplication

The Court also noted in its August 10, 2011 order that Plaintiffs' billing statement contained impermissible duplications and other impermissible billing entries. Defendants have quantified some of the improper entries for the Court's convenience.

A. Mediation attendance

There were two mediations prior to December 21, 2010 and they were both attended by multiple persons on behalf of Plaintiffs. Billing for the attendance of a second person is impermissible. At the June 23, 2010 mediation both Kevin Williams (KWW) and Briana McCarten (BM), Mr. Williams' paralegal, attended the mediation. Mr. Williams billed 9.0 hours for attending the mediation and Ms. McCarten billed another 8.5 hours for her attendance.

The second mediation, September 15, 2010 was also attended by both Mr. Williams and Ms. McCarten. Both Mr. Williams and Ms. McCarten billed 5.5 hours for their attendance.

The billing entries for Ms. McCarten represent impermissible duplications not billable to a private client and any fee award should be reduced by $1400. (8.5 + 5.5 X $100).

B. Montoya billing

As the Court noted in its order, both Ms. McCarten and Mr. Montoya billed for matters properly considered overhead. Prior to December 21, 2011, Mr. Montoya billed a total of 53.0 hours. Even if calculated at $100/hour his entries total more than $5000. Mr. Montoya's hours are comprised of matters considered overhead; are substantial duplications of hours billed by Mr. Williams or are for matters which were spent learning the subject matter and not furthering the purposes of the suit. For example, Mr. Montoya spent a number of hours researching issues relating to Section 1983 cases, reviewing the viability of the catalyst theory post *Buchanan*, reviewing the complaint filed by his employer, reviewing Federal and State Medicaid regulations regarding notice requirements, researching class certification issues, conducting general and undefined

"research", and he billed for several hours for drafting an amended complaint that contained no substantive changes, but instead added a few Plaintiffs to the case. Each of these items billed by Mr. Montoya reflect similar or identical items billed by Kevin Williams. These hours reflect improper duplications and *$4000 should be subtracted from any fee award to Plaintiffs.*

C. Kevin Williams

Kevin Williams is an experienced disabilities attorney who has handled other cases similar to this case. The Court has determined that an experienced attorney such as Kevin Williams may properly charge an hourly rate of $345. As the Court found, for such an experienced attorney it is inconsistent that he would be permitted to charge 20 hours to research Medicaid law relating to notice requirements and spend such an exorbitant amount of time researching class certification issues. Mr. Williams' billing entries also reflect greater than 50 hours of time that was impermissibly "Block billed". Although case law permits the striking of the entire block billing entries, defendants seek a reasonable reduction for the block billing entries. *Defendants request that any fee award to Plaintiffs be reduced by 15 hours ($5175) for impermissible entries relating to researching Medicaid notice requirements and an additional 30 hours reduction ($10,350) for impermissible block billing entries.*

D. Lack of Billing Judgment/Exercise of Billing Discretion

Plaintiffs have failed to exercise the required billing discretion to scrutinize their billing statement for improper entries. As a result, *Defendants seek a 5% across the board reduction from any fee award Plaintiffs may receive*. Plaintiffs seek $87,460 in fees through December 21, 2011. A 5% reduction would reduce that amount by $4,373. This reduction is justified because of additional improper billing entries unrelated to the furtherance of this suit such as the entry for researching a 1015C application, hours billed for time spent work on documents after the documents had already been finalized and filed, hours billed for talking to and recruiting potential outside counsel when no such counsel was ever engaged ($2,173), and for press releases improperly billed.

IV. Intentional Protraction of Litigation

As noted in the testimony of State Defendants' expert, and in the sworn affidavit of Joan Smith, attorney for the Department of Health Care Policy and Financing, counsel for Plaintiff has intentionally protracted this litigation. He sought relief that he knew or should have known was improper, such as demanding that his private corporation logo be placed on State letterhead when sending out future notices to CDASS recipients. He also demanded that notices be sent to CDASS recipients within 24 hours of any *proposed* allocation change, and made other similar unreasonable demands. By creating these straw issues, Mr. Williams unnecessarily and unreasonably protracted the litigation and increased the potential billable hours.

When Mr. Williams was asked to provide information about his "legal assistant" and disclose whether she was a paralegal, he refused to disclose any information that would be helpful to the undersigned in her efforts to properly assess CCDC's fee application. Testimony from Mr. Brougham at the reasonableness hearing articulated additional times when Mr. Williams intentionally caused the litigation to be protracted. Mr. Williams has asserted that the State Defendants conducted a "sham" mediation regarding fees. Mr. Brougham testified to the contrary, that in fact, it was Mr. Williams who sabotaged the fees mediation when he intentionally refused to provide the undersigned with the correct fee application[1]. By intentionally refusing to provide the fee application, the mediator and defense counsel spent more than two hours trying to determine why the entries on her fee application were different from the one being used by the undersigned. The result was as Mr. Williams intended: frustration caused a collapse of the mediation and the parties left without resolution. Counsel for the State Defendants requests that this Court take into account these incidents of intentional protraction and reduce CCDC's fee award accordingly.

V. Error To Award Costs

This Court properly denied costs to CCDC in this case based on statutory authority and the language of the September 15, 2010 Settlement Agreement signed by the parties. CCDC has again asked for reconsideration of this issue.

[1] Mr. Williams acknowledges in his pleadings that he intentionally failed to provide the fee application to counsel for Risk Management. (Plaintiffs; Brief in Support of Award of Attorney Fees at page 13)

It would be error for this court to award costs against the State, its officers or its agencies. Although generally costs may be awarded to the prevailing party in the court's discretion, costs against the State of Colorado, its officers or agencies may be imposed "only to the extent permitted by law." C.R.C.P. 54(d). Unless the General Assembly so directs, costs are not taxable against the State, its officers, or agenies." *McFarland v. Gunter*, 829 P.2d 510, 511 (Colo. App. 1992). Because C.R.S. §13-16-104 "contains only general provisions entitling a prevailing party to recover costs. . . it is not an express authorization allowing the assessment of costs against the State." *Id* at 511. *See also Rocky Mountain Animal Defense v. Colo. Div. of Wildlife,* 100 P.2d 508, 519-20. Not only does the Settlement Agreement require each side to pay their own costs, the imposition of costs against the State is prohibited. Thus, the State Defendants ask this court to eliminate of all costs sought by Plaintiff.

Conclusion

In a case such as this one where not a single deposition was taken, no hearings were conducted before the court other than the recent reasonableness hearing on CCDC's attorney fees, no trial preparation was needed or conducted, and the substantive issues were all resolved without court intervention, fees of nearly $90,000 through December 21, 2010 are excessive and unconscionable.

Based on the conduct of Plaintiffs counsel and his intentional protraction of this litigation, the objectionable billing practices outlined by Defendants, as well as the factors set forth in *Ramos v. Lamm*, 713 F.2d 446, Defendants request that this amount be reduced as follows:

Fees sought by Plaintiffs through December 21, 2010
(consistent with the Court's August 10, 2011 fees award)

$ 87,460

Less the following reductions:

9,120-hours on class certification
8,250-hours billed for overhead/clerical
1,400-duplicatation for KWW and BM to attend mediations
4,000-Montoya overhead/duplications

5,175-research Medicaid notice requirements
10,350-impermissible block billing entries
4,373-5% reduction –additional improper billing entries

Total after reductions: $ 44,792

Respectfully submitted this 16th day of September, 2011.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Defendants' Response in Opposition to Plaintiffs' Motion For Amendment Of Findings and Judgment Pursuant to C.R.C.P. 59 upon all parties herein by LexisNexis File and Serve or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 16th day of September, 2011.

s/ Patricia Herron
Patricia Herron