

<p>District Court  City and County of Denver  State of Colorado  1437 Bannock St.  Denver, CO 80202</p>	<p style="text-align: center;">↑ <b>COURT USE ONLY</b> ↑</p> <p style="color: red;">FILED Document  CO Denver County District Court 2nd JD  Filing Date: Jul 10 2006 11:50PM MDT  Filing ID: 11752120  Review Clerk: Jon M. Lloyd</p>
<p>Plaintiffs: ANN ROSSART, MATTHEW RICE, through his mother and next friend Kathy Rice, and ROBERT SWIFT, through his parent and guardian, Mark Swift, for themselves and all others similarly situated,</p> <p>v.</p> <p>Defendants: DEVELOPMENTAL PATHWAYS, INC.; JOHN MEEKER, individually and in his official capacity as Executive Director, Developmental Pathways, Inc.; COLORADO DEPARTMENT OF HUMAN SERVICES; MARVA LIVINGSTON HAMMONS individually and in her official capacity as Executive Director, Colorado Department of Human Services; COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING; and STEPHEN C. TOOL, individually and in his official capacity as Executive Director, Colorado Department of Health Care Policy and Financing.</p> <hr/> <p>Attorneys for Plaintiffs:  Andrea E. Faley, #32025  Elizabeth Cooper Fuselier, #23974  Mark Ivandick, #27041  The Legal Center for People with Disabilities and Older People  455 Sherman St., Ste. 130  Denver, CO 80203-4403  303-722-0300 office  303-790-0720 fax  afaley@thelegalcenter.org  fuselier@thelegalcenter.org  ivandick@thelegalcenter.org</p> <p>Timothy P. Fox, #25889  Fox &amp; Robertson, PC  910 16<sup>th</sup> St. Ste. 610  Denver, CO 80202  303-595-9700 office  303-595-9705 fax  tfox@foxrob.com</p>	<p>Case Number: 06CV4479</p> <p>Division: 23</p>
<p><b>AMENDED CLASS ACTION COMPLAINT</b></p>	

In this Amended Class Action Complaint, Plaintiff Ann Rossart amends her Complaint pursuant to Rule 15(a) of the Colorado Rules of Civil Procedure. Plaintiffs Matthew Rice and Robert Swift join suit with her through their next friends and/or parents. Plaintiffs bring individual and class action claims for themselves and all others similarly situated, as follows:

## INTRODUCTION

1. This action asserts claims on behalf of named Plaintiffs and similarly situated individuals whose eligibility for Colorado’s state-funded and/or Medicaid programs for people with developmental disabilities has been unlawfully denied.

2. Colorado has a variety of public benefit programs designed to meet the needs of people with developmental disabilities. Programs funded solely by state funds are described at Title 27, Article 10.5, Part 1, of the Colorado Revised Statutes. These include the state-funded Supported Living Services (“SLS”) program, which provides services that enable adults to live in their own homes or in family members’ homes, the state-funded Comprehensive services program, which provides services that include, among other things, residential placements for adults, and the Family Support Services Program (“FSSP”), which provides services that enable children to live with their families.

3. State-licensed community centered boards (“CCBs”), each of which covers a different local catchment area, and Defendants Colorado Department of Human Services (“DHS”) and Hammons are responsible for determining eligibility, administering, and/or overseeing the programs described in the preceding paragraph. To be eligible for these programs, an individual must meet the definition of developmental disability described at Section 27-10.5-102(11)(a) of the Colorado Revised Statutes. The right to appeal a denial or termination of eligibility for one of these programs requires that the individual whose eligibility is denied or terminated be given notice and the right to a local-level informal dispute resolution meeting with employees of the CCB that denied or terminated the individual’s eligibility. If unsuccessful, the individual is afforded a local-level formal dispute resolution meeting before the executive director, or designee, of the CCB. If the matter is not successfully resolved at the local level, the individual is provided with the opportunity to make a written appeal to Defendant Hammons, or her designee with Defendant DHS, who makes a *de novo* decision on eligibility.

4. Plaintiff Rossart was unlawfully denied eligibility for state-funded developmental disabilities programs and asserts claims for judicial review and other individual claims associated with the failure of Defendant Developmental Pathways, Inc. (“DP”) and DHS to find her eligible for such programs.

5. Colorado also has Medicaid programs for people with developmental disabilities that are jointly funded by state and federal funds, which are described at Title 25.5, Article 6, Part 4, of the Colorado Revised Statutes. These programs include the Supported Living Services (“SLS”) Home and Community Based Services (“HCBS”) Medicaid waiver, the Comprehensive Services HCBS Medicaid waiver, and the Children’s Extensive Support (“CES”) HCBS

Medicaid waiver. Like the state programs of similar names, the SLS HCBS Medicaid waiver provides services that enable individuals to live in their own homes or in family members' homes and the Comprehensive Services HCBS Medicaid waiver provides services that include residential placements. The CES HCBS Medicaid waiver provides services to children to enable them to remain living at home with their families. Like the state-funded programs described above, all of these HCBS Medicaid waiver programs require that an individual meet the definition of developmental disability described at Section 27-10.5-102(11)(a) of the Colorado Revised Statutes. Each of these HCBS Medicaid programs provides more intensive services than the aforementioned state-funded programs.

6. CCBs, including Defendant DP, and the other Defendants named in this action, are responsible for determining eligibility, administering, and/or overseeing the developmental disabilities Medicaid programs described in the preceding paragraph. In operating such Medicaid programs, Defendants must comply with federal Medicaid laws and provide due process of law to individuals whose eligibility for such programs is denied or terminated. Federal Medicaid laws and the Due Process Clauses of the Colorado and United States Constitutions mandate that individuals whose eligibility for one of Colorado's HCBS Medicaid programs is denied or terminated be provided more due process than is afforded to individuals who are denied or terminated from the state-funded developmental disabilities programs described above. Under these sources of federal and state law, an individual whose eligibility for an HCBS Medicaid program is denied or terminated must be afforded notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing.

7. On information and belief, individuals whose eligibility for any of Colorado's Medicaid programs is denied or terminated are afforded notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing before an administrative law judge, *except* those individuals whose eligibility for Colorado's developmental disabilities HCBS Medicaid waiver programs is denied or terminated. This latter group of individuals are only provided with notice and the right to local-level dispute resolution with a written *de novo* appeal to Defendant Hammons. In failing to afford individuals whose eligibility for Colorado's developmental disabilities HCBS Medicaid waiver programs has been denied or terminated with proper notice and the right to a *de novo* state-level evidentiary hearing, Defendants have violated federal and state laws.

8. Defendants deprived named Plaintiffs and others similarly situated of federal and state rights associated with obtaining services through Colorado's developmental disabilities Medicaid programs, discriminated against Plaintiffs by reason of disability, and unlawfully denied Plaintiffs eligibility for such programs. Plaintiffs, individually and/or on behalf others similarly situated, assert claims against Defendants for violation of the Medicaid Act, Section 504 of the Rehabilitation Act, Title II and III of the ADA, the United States and Colorado Constitutions, and other sources of state and federal law.

## **PARTIES**

9. Plaintiff Ann Rossart is and was at all pertinent times a resident of the city of Aurora, Colorado.

10. Plaintiff Matthew Rice is and was at times pertinent to this litigation residing in the city and county of Denver, Colorado, as a patient of the Colorado Mental Health Institute at Fort Logan (“CMHIFL”). Plaintiff Rice resided within the city of Centennial, Colorado, prior to his hospitalization and intends to reside in Centennial, Colorado, where his mother and next friend, Kathy Rice, also resides, upon his release from CMHIFL.

11. Plaintiff Robert Swift and his parent and legal guardian, Mark Swift, are and were at all pertinent times residents of Larkspur, Colorado.

12. Defendant DP is and was at all pertinent times a not-for-profit corporation and a state-licensed CCB doing business under authority of the state of Colorado in the city of Aurora, Adams County, and in Arapahoe and Douglas Counties, Colorado.

13. Defendant John Meeker, who is sued individually and in his official capacity, is and was at all pertinent times employed by Defendant DP and acting within the scope of his official duties and/or employment.

14. Defendant DHS, is and was at all pertinent times a Colorado state governmental agency, resident in the city and county of Denver, Colorado.

15. Defendant Marva Livingston Hammons, who is sued individually and in her official capacity, is and was at all pertinent times employed by Defendant DHS and acting within the scope of her official duties and/or employment.

16. Defendant Colorado Department of Health Care Policy and Financing (“HCPF”), is and was at all pertinent times a Colorado state governmental agency, resident in the city and county of Denver, Colorado.

17. Defendant Stephen C. Tool, who is sued individually and in his official capacity, is and was at all pertinent times employed by Defendant HCPF and acting within the scope of his official duties and employment.

18. All Defendants were at all times pertinent hereto acting under color of state law.

## **JURISDICTION AND VENUE**

19. This action arises under: U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25; 29 U.S.C. § 794; 42 U.S.C. § 1396a(a)(3); 42 U.S.C. § 1983; 42 U.S.C. § 1988; 42 U.S.C. §§ 12131 et seq.; 42 U.S.C. §§ 12181 et seq.; Colo. Rev. Stat. § 24-4-106; Colo. Rev. Stat. Title 25.5, Art.

6, Part 4; Colo. Rev. Stat. Title 27, Article 10.5, Part 1; Colo. R. Civ. P. 65(a), 106(a)(2), and 106(a)(4); and 42 C.F.R. Part 431, Subpart E.

20. Jurisdiction is appropriate in Denver District Court as a court of general jurisdiction under Article VI, Section 9, of the Colorado Constitution.

21. All administrative prerequisites to the filing of this action have been satisfied.

22. Venue is proper in Denver District Court pursuant to Colo. Rev. Stat. § 24-4-106(4).

### **CLASS ACTION ALLEGATIONS**

23. Plaintiffs seek to maintain this action as a class action on behalf of a class and subclass under Rule 23(b)(2) of the Colorado Rules of Civil Procedure.

24. The class (“Class”) consists of all persons whose eligibility for Colorado’s developmental disabilities Medicaid programs, including the SLS HCBS Medicaid waiver, the Comprehensive Services HCBS Medicaid waiver, and the CES HCBS Medicaid waiver, has been denied or terminated without being provided notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing. The Class seek declaratory and injunctive relief for violations of 42 U.S.C. § 1983 for deprivations of rights secured by the Medicaid Act. All Named Plaintiffs are representative members of the Class.

25. The subclass (“Subclass”) consists of all persons in the Class who have already been found eligible for Colorado’s developmental disabilities Medicaid programs, but whose eligibility for such programs has been terminated without being provided notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing. Named Plaintiffs Rice and Swift are representative members of the Subclass.

26. The Class and Subclass are believed to consist of hundreds of members, and joinder of all such members in this lawsuit is impracticable.

27. There are numerous questions of law and fact common to the Class and Subclass, including but not limited to, the following:

a. Whether the Medicaid Act required Defendants to provide the Class with a *de novo* state-level evidentiary hearing when Class members’ eligibility for Colorado’s developmental disabilities Medicaid programs was denied or terminated.

b. Whether the Due Process Clause of the United States Constitution required Defendants to provide members of the Subclass with notice and the opportunity for a *de novo* state-level evidentiary hearing when Subclass members’ eligibility for Colorado’s developmental disabilities Medicaid programs was terminated.

c. Whether Defendants DP, DHS, and HCPF have statutes, ordinances, regulations, customs, policies, practices, or usages that failed to afford the Class with the right to notice and the opportunity for a *de novo* state-level evidentiary hearing when Class members' eligibility for Colorado's developmental disabilities Medicaid programs was denied or terminated;

d. Whether Defendants Meeker, Hammons and Tool supported, adopted, approved and ratified statutes, ordinances, regulations, customs, policies, practices, or usages of their respective organizations which failed to afford the Class with the right to notice and the opportunity for a *de novo* state-level evidentiary hearing when Class members' eligibility for Colorado's developmental disabilities Medicaid programs was denied or terminated.

e. What measures are legally required to bring Defendants into compliance with the Medicaid Act and/or the Due Process Clause of the United States Constitution.

28. Named Plaintiffs' claims are typical of the claims of the members of the Class and Subclass. They—like other members of the Class and Subclass—are persons whose eligibility for developmental disabilities Medicaid programs have been denied or terminated without being provided with notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing.

29. Named Plaintiffs, on their own and/or through their next friend or parent, will fairly and adequately protect the interests of the Class and Subclass.

30. In addition, Named Plaintiffs have secured counsel with extensive litigation experience. Plaintiffs' counsel Timothy Fox and Andrea Faley have successfully represented classes of people with disabilities in prior litigation. Plaintiffs' counsel are also thoroughly familiar with the Medicaid Act and the requirements of the Due Process Clause of the United States Constitution.

31. This action may be maintained as a class action pursuant to Colorado Rule of Civil Procedure 23(b)(2) because Defendants' violations of the Medicaid Act and/or Due Process Clause of the United States Constitution in failing to provide Plaintiffs with notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing are applicable to all members of the Class and Subclass. Declaratory and injunctive relief is the only relief sought on behalf of the Class and Subclass.

## FACTS

### **Plaintiff Ann Rossart**

32. Plaintiff Ann Rossart is 50 years old.

33. As early as age 5, a physician who examined Plaintiff Rossart found “evidence of possible cerebral damage.” That same year, psychologists who evaluated Plaintiff Rossart found “suggestions of brain damage, or lack of cerebral development” and a “question of organic involvement.”

34. In 1967, a physician documented that Plaintiff Rossart had a history “highly suggestive of [an] organically brain damaged child” and concluded that “Ann’s problems are of an organic basis and have affected her mental abilities.” Another doctor determined that Plaintiff Rossart showed “mild neurologic deficits suggesting an organic basis for her academic problems.” That same year, still another psychologist concluded that Plaintiff Rossart was “a girl with mental retardation on a neurological basis” and recommended that she be placed in “a special education class for children with neurological disorders and functional mental retardation.”

35. In her youth, Plaintiff Rossart’s intelligence was tested four times, resulting in full scale IQ scores of 75, 74, 71 and 80.

36. As a child, Plaintiff Rossart also was given numerous neuropsychological assessments designed to test visual perception, visual memory, visual-motor functioning, the results of which revealed “fairly severe perceptual and visual motor dysfunction.”

37. Plaintiff Rossart’s adaptive functioning was tested in her youth as well, using the Vineland Social Maturity Scale, which was designed to measure an individual’s performance in eight skill areas. The overall results of this test revealed that Plaintiff Rossart had a Social Age of 9 years, 8 months, though her actual age at the time of testing was 11 years, 6 months. In addition, the psychologist concluded that Plaintiff Rossart showed “some retardation of performance in areas of self-directiveness, occupation, and communication.”

38. Plaintiff Rossart was enrolled in special education classes throughout her youth.

39. Plaintiff Rossart has never been able to drive. In her youth, Plaintiff Rossart had to rely on family or buses. However, as she has grown older, Plaintiff Rossart is less able to cross streets on foot quickly enough to make it through an intersection on a green light. Consequently, she must rely on paratransit services for all but the simplest of trips.

40. Plaintiff Rossart also has never been able to manage her own finances. Until the passing of her parents in 1992, her family helped her with her finances. Since then, Plaintiff

Rossart has relied upon a court-appointed financial conservator for the payment of all bills and budgeting.

41. Plaintiff Rossart continued to live with her parents, on whom she relied for support in daily living activities, until they passed away in 1992. After that, Plaintiff Rossart lived intermittently with her siblings for several years, who also provided her with support in daily living activities. For the past couple of years, she has lived on her own in an apartment with subsidized rent, though she continues to require support in daily living activities.

42. In 1992, Plaintiff Rossart's intelligence was again tested, resulting in a full scale IQ score of 73. Additional neuropsychological testing completed at the same time again revealed that Plaintiff Rossart suffers from significant deficits in visual perception, visual memory, and visual-motor functioning. At this time, Plaintiff Rossart was diagnosed with Developmental Arithmetic Disorder and Developmental Perceptual-Motor Disorder.

43. In 2004, Plaintiff Rossart was tested again as part of applying for disability benefits from the Social Security Administration. Her full scale IQ was measured at 72. Neurological testing in areas of visual-perceptual abilities put her in the "impaired range." Physicians and psychologists diagnosed with Major Depressive Disorder, Generalized Anxiety Disorder, Cognitive Disorder NOS—of neurodevelopmental origin, Mathematics Disorder, Borderline Intellectual Functioning, severe osteoarthritis, and obesity.

44. A physician who tested Plaintiff Rossart in 2004 determined that "[s]he also needs some supervision of her personal hygiene, in the form of rules (i.e., daily showering/bathing, hair washed daily, use of a brassiere, hair should be cut only in the presence of another person, hair should be combed daily)."

45. As Plaintiff Rossart has aged and developed physical problems, she is unable to do the unskilled labor that she performed as a youth. Consequently, she has been unable to keep any job at all for the past couple of years.

46. In addition to her financial conservator, Plaintiff Rossart has sought the assistance of a vocational counselor, a mental health professional, a social worker, an advocate, and a paratransit service for the past couple of years. Even with all of these supports, Plaintiff Rossart still cannot maintain a job, remains isolated from community activities, and continues to require help to complete daily living activities.

47. Plaintiff Rossart requires assistance in performing daily living activities, a specialized program of services to live on her own in the community, and otherwise meets the requirements necessary to receive services through state-funded developmental disabilities programs and the SLS and Comprehensive Services HCBS Medicaid waivers.

48. Plaintiff Rossart is also financially eligible for each of the programs described in the preceding paragraph.

49. On or about August of 2004, Plaintiff Rossart applied for developmental disabilities services through Defendant DP.

50. Though the application did not provide a place to indicate precisely which services Plaintiff Rossart was seeking, Plaintiff Rossart sought to receive services through the state-funded SLS and Comprehensive Services program as well as through the SLS and Comprehensive Services HCBS Medicaid waivers.

51. Defendant DP denied Plaintiff Rossart's application for all of the developmental disabilities programs described in the preceding paragraph on or about December 2004. Plaintiff Rossart disputed the denial and Defendant DP sought to obtain additional information during the dispute resolution process. After several informal dispute resolution meetings and a formal one, Defendants DP and Meeker, through his designee, issued a decision on January 4, 2006 denying Plaintiff Rossart's application for developmental disabilities services on grounds that Plaintiff Rossart does not have a developmental disability as defined under Colo. Rev. Stat. § 27-10.5-102(11)(a).

52. On January 30, 2006, Plaintiff Rossart appealed Defendant DP's denial of developmental disabilities services to Defendant DHS through Defendant Hammons.

53. In March of 2006, the Social Security Administration awarded Plaintiff Rossart disability benefits.

54. In a decision effective March 16, 2006, Defendant DHS, through a designee of Defendant Hammons, issued a Final Agency Decision denying Plaintiff Rossart developmental disabilities services on grounds that she does not have a developmental disability as defined under Colo. Rev. Stat. § 27-10.5-102(11)(a).

55. In denying Plaintiff Rossart developmental disabilities services, Defendants DHS and Hammons denied Plaintiff Rossart eligibility for state-funded developmental disabilities programs and the SLS and Comprehensive Services HCBS Medicaid waiver programs.

56. When denying Plaintiff Rossart eligibility for the developmental disabilities programs described in the preceding paragraph, Defendants DP, Meeker, DHS, and Hammons gave Plaintiff Rossart notice and the opportunity to appeal under the dispute resolution process that is applicable to state-funded developmental disabilities services only.

57. Neither at the time Plaintiff Rossart applied for state-funded developmental disabilities services and the SLS and Comprehensive Services HCBS Medicaid waiver programs, nor at any time when she was denied eligibility for these programs, did any of Defendants give Plaintiff Rossart notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing.

### **Plaintiff Matthew Rice**

58. Plaintiff Matthew Rice is 26 years old.

59. Plaintiff Rice has been diagnosed with a variety of conditions, among them Tourette's Syndrome, Asperger's Syndrome, Obsessive Compulsive Disorder, Attention Deficit Hyperactivity Disorder, and mild to moderate brain injury, primarily in the frontal lobes of the brain.

60. Adaptive skills testing reveals that Plaintiff Rice has significant adaptive limitations similar to a person with mental retardation. Results from the Scale of Independent Behavior-Revised, administered to Plaintiff Rice in May of 2000 indicate the following scores: Motor Skills SS 68, Socialization/Communication SS 56, Personal Living Skills SS 53, Community Living Skills SS 61, Overall Adaptive Behavior SS 60. A Behavioral Assessment System for Children administered to Plaintiff Rice in November of 1997 revealed adaptive skills in the at-risk range or below. In December of 1998, Plaintiff Rice received a Global Assessment of Functioning score of only 50. That score declined further to a 30 by November of 1999. Results of the Allen Cognitive Level Screen and Sensory Motor assessments in August and November of 2001 measured Plaintiff Rice at levels of 4.8 and 5.4, indicating that he had significant deficits in the areas of attention/learning, living skills, social skills, work/school, and safety issues.

61. Plaintiff Rice also has substantial cognitive deficits. On or about 1998, he was administered a Weschler Individual Achievement Test, from which results the evaluator concluded that Plaintiff Rice "evidences both the cognitive processing (in the area of psychomotor speed) and the ability-achievement discrepancies (in the area of written language) indicative of a learning disability." At about the same time, results of the Adolescent Test of Problem Solving indicated that Plaintiff Rice had scored less than 55. Plaintiff Rice's results on the Detroit Test of Learning Aptitude revealed the following scores: Work Opposites SS 11 (63 %tile), Sentence Imitation SS 9 (37 %tile), Oral Directions SS 8 (25th %tile), Story Construction SS 3 (1 %tile). In June of 2002, Plaintiff Rice received a complete neuropsychological evaluation. Plaintiff Rice scored in the impaired range on several tests that were administered to him as part of this evaluation, including tests of naming pictures and verbal fluency, and on the Wisconsin Sort Test, a test that requires learning, problem solving, and shifting cognitive set.

62. Plaintiff Rice requires assistance in performing daily living activities, a specialized program of services to live in the community, and otherwise meets the requirements necessary to receive services through the Comprehensive Services HCBS Medicaid waiver.

63. Plaintiff Rice is also financially eligible for the programs described in the preceding paragraph.

64. On or about September of 2000, Plaintiff Rice applied for developmental disabilities services. Defendant DP determined that Plaintiff Rice met the eligibility criteria for state and Medicaid programs for people with developmental disabilities. He received SLS developmental disabilities services, mainly day habilitation services, for a short time while living with his parents. Defendant DP also put Plaintiff Rice on wait lists for the state-funded Comprehensive Services program and the Comprehensive Services HCBS Medicaid waiver program.

65. Since August of 2001, Plaintiff Rice has been an in-patient of the Colorado Mental Health Institute at Fort Logan (“CMHIFL”). Plaintiff Rice has been certified as having mental illness and a long-term legal disability pursuant to Colo. Rev. Stat. 27-10-109.

66. On April 15, 2004, while Plaintiff Rice was still wait-listed for the Comprehensive Services HCBS Medicaid program, Defendant DP notified Plaintiff Rice that it had reviewed his eligibility “due to new information from the Division for Developmental Disabilities’ [sic] regarding a ruling about people with Asperger’s Syndrome” and had determined that he no longer met “the criteria of a person with developmental disabilities . . . mean[ing] that Developmental Pathways cannot serve you in any of its funded services.” Plaintiff Rice was only given notice of the right to the appeals process that applies to individuals who are denied or terminated from state-funded developmental disabilities services.

67. Plaintiff Rice appealed the decision to terminate his eligibility for developmental disabilities services through a local-level informal dispute resolution meeting with employees of Defendant DP. However, on June 30, 2004, Developmental Pathways upheld its determination that Plaintiff Rice was not eligible for developmental disabilities services of any kind.

68. Plaintiff Rice appealed this decision in a local-level formal dispute resolution meeting held before a designee of Defendant Meeker on August 8, 2004. On October 5, 2004, Defendant DP, through a designee of Defendant DP, again upheld its determination that Plaintiff Rice was not eligible for developmental disabilities services of any kind.

69. On October 28, 2004, Plaintiff Rice made a written appeal of Defendant DP’s decision to Defendant DHS, through Defendant Hammons. Defendant DHS, through the designee of Defendant Hammons, issued a *de novo* Final Agency Decision terminating Plaintiff Rice’s eligibility for developmental disabilities services effective December 19, 2004.

70. When terminating Plaintiff Rice’s eligibility for developmental disabilities programs, including the Comprehensive Services HCBS Medicaid waiver, Defendants DP, Meeker, DHS, and Hammons gave Plaintiff Rice notice and the opportunity to appeal under the dispute resolution process that is applicable to state-funded developmental disabilities services only.

71. At no time when Defendants DP, Meeker, DHS, and Hammons issued decisions terminating Plaintiff Rice’s eligibility for the Comprehensive Services HCBS Medicaid waiver program did any of Defendants give Plaintiff Rice notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing.

### **Plaintiff Robert Swift**

72. Plaintiff Robert Swift is six years old and has autism. A psychologist determined that Plaintiff Swift “has all the cardinal characteristics of Autism Disorder; for example, he has failed to develop peer relationships appropriate to his developmental level, lacks social/emotional reciprocity, has a marked impairment in the use of multiple nonverbal behaviors, is significantly delayed in the developmental of spoken language, has a stereotyped use of language, has a marked impairment to initiate and sustain a conversation with others, displays an inflexible adherence to nonfunctional routines, and has a persistent preoccupation with parts of objects.”

73. As a result of having autism, Plaintiff Swift also has an impairment in general intellectual functioning. In March of 2006, Plaintiff Swift was administered the Weschler Abbreviated Scale of Intelligence test, which gave him a verbal IQ of 70 and the Quick Test, which measured his overall IQ at 66. A Differential Ability Scale administered in the fall of 2005 measured Plaintiff Swift’s Verbal IQ at 71, his non-verbal reasoning IQ at 131, his spatial reasoning score at 120, and which together give him a global composite IQ score of 108. The psychologist who completed this testing explained these results as follows:

The fact that an approximate average of Bobby’s three DAS Cluster IQ scores is 108, and in the middle of the average range of performance, does not mean that Bobby functions as an average six year old student at school or home. Due to the fact that there is a 60 point difference between Bobby’s Verbal and Nonverbal Reasoning Cluster score, and a 49 point difference [sic] between Bobby’s Verbal and Spatial IQ ability means that interpretation of the GCA or average overall level of functioning (108) is invalid. An average six year old can tell the difference between a map and a stick of dynamite. Bobby can’t and could not on his testing. A six year old can tell what a beard or a prize are. Bobby could not. In short, Bobby is functioning as in [sic] individual who is in the mild range of mental retardation.

74. An adaptive behavioral assessment from April of 2006 demonstrates that Plaintiff Swift also has adaptive behavior limitations similar to a person with mental retardation. Results of the Adaptive Behavior Assessment System indicate significant concerns (scaled scores below 4) in every adaptive skill area except Functional Academics. Results of the Vineland Adaptive Behavior Scales scored Plaintiff Swift more than two standard deviations below the norm in the domains of Communication, Daily Living Skills, and Socialization, giving him an overall Adaptive Behavior Composite Standard Score of 64, placing him in the first percentile when compared with other children his age.

75. Plaintiff Swift requires assistance in performing daily living activities, a specialized program of services to live in the community with his parents, and otherwise meets the requirements necessary to receive services through state-funded developmental disabilities programs and the CES HCBS Medicaid waiver.

76. Plaintiff Swift is also financially eligible for the programs described in the preceding paragraph.

77. On or about January of 2005, Plaintiff Swift, through his parents, applied for developmental disabilities services. Defendant DP determined that Plaintiff Swift met the eligibility criteria for such services because he has a developmental disability as defined under Colo. Rev. Stat. § 27-10.5-102(11)(a). Plaintiff Swift began receiving state-funded developmental disabilities services through FSSP on January 24, 2005 and was wait-listed for the CES HCBS Medicaid waiver. In November of 2005, Plaintiff Swift was removed from the aforementioned wait list, terminated from FSSP, and was enrolled in the CES HCBS Medicaid waiver.

78. After reviewing psychological testing for Plaintiff Swift, Defendant DP issued a letter on March 14, 2006 indicating that it had re-evaluated Plaintiff Swift's eligibility for the CES HCBS Medicaid waiver and other developmental disabilities services programs. Defendant DP determined that Plaintiff Swift no longer met the eligibility criteria for any such services because psychological testing indicated that Plaintiff Swift had an "overall IQ of 108." Defendant DP informed Plaintiff Swift's parents that their son would be "terminated from CES and Developmental Pathways casemanagement [sic] services effective April 1, 2006."

79. Plaintiff Swift, through his parents, appealed the termination of his eligibility for the CES HCBS Medicaid waiver through a local-level dispute resolution meeting with employees of Defendant DP. On May 10, 2006, Defendant DP upheld its determination that Plaintiff Swift was to be terminated from the CES HCBS Medicaid waiver and was no longer eligible for any developmental disabilities services that Defendant DP provides. Defendant DP wrote, "results of the Adaptive Behavior Summary . . . show substantial adaptive deficits. However, there is no evidence that the deficits are linked to significant cognitive impairment. The lower verbal IQ scores are significant but again do not reflect overall cognitive impairment and are characteristic of the diagnosis of autism."

80. On May 23, 2006, Plaintiff Swift, through his parents, sent a letter to Defendant Meeker appealing Defendant DP's May 10, 2006 decision and requesting a local-level formal dispute resolution meeting before Defendant Meeker. This meeting is to be scheduled for August 14, 2006. Plaintiff Swift continues to receive previously approved CES HCBS Medicaid waiver services during the pendency of his appeal. However, Defendant DP has refused to provide Plaintiff Swift with any additional services available to him under the CES HCBS Medicaid waiver unless he prevails upon appeal.

81. When terminating Plaintiff Swift's eligibility for developmental disabilities programs, including the CES HCBS Medicaid waiver, Defendants DP and Meeker gave Plaintiff Swift notice and the opportunity to appeal under the dispute resolution process that is applicable to state-funded developmental disabilities services only.

82. At no time when Defendant DP issued a decision terminating Plaintiff Swift's eligibility for the CES HCBS Medicaid waiver program did any of Defendants give Plaintiff Swift notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing.

## **CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF**

#### **Violation of 42 U.S.C. § 1983**

#### **Failure to Provide Notice and State-Level Hearing Per Medicaid Act Against Developmental Pathways, Inc., John Meeker, Individually and in His Official Capacity, Marva Livingston Hammons, Individually and in Her Official Capacity, and Stephen C. Tool, in His Individual and Official Capacity On Behalf of Named Plaintiffs and the Class**

83. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

84. Pursuant to 42 U.S.C. § 1983, it is prohibited for a person acting pursuant to a statute, ordinance, regulation, custom, policy, practice, or usage under color of state law to deprive an individual of any clearly established rights, privileges, or immunities guaranteed to that individual under federal law.

85. The Medicaid Act and its implementing regulations at 42 U.S.C. § 1396a(a)(3), 42 C.F.R. §§ 431.210 and 431.211, and 42 C.F.R. § 431.220(a)(1) require state-agencies and their designees to provide individuals upon application for a Medicaid program with notice of the right to appeal via a *de novo* state-level evidentiary hearing when a state agency and/or its designee denies or terminates an individual's eligibility for a Medicaid program available in the state. Such notice must also be provided whenever an individual's eligibility for a Medicaid program is denied or terminated. After the state agency or its designee provides such notice, an individual whose eligibility for a Medicaid program has been denied or terminated must be afforded the opportunity to appeal via a *de novo* state-level evidentiary hearing.

86. Defendants are responsible for determining eligibility, administering, and/or overseeing Colorado's developmental disabilities Medicaid programs, including the SLS, Comprehensive Services, and CES HCBS Medicaid waiver programs. Defendants DP and Meeker are responsible for determining eligibility for these Medicaid programs for individuals residing in the city of Aurora and in Arapahoe and Douglas counties. The remaining Defendants are jointly responsible for determining eligibility, administering, and/or overseeing these Medicaid programs for individuals living throughout Colorado.

87. Defendant HCPF has enacted rules that allow individuals receiving services through Colorado's SLS, Comprehensive Services, and CES HCBS Medicaid waiver programs, but not applicants to such programs, to have a *de novo* state-level evidentiary hearing before an

administrative law judge to appeal an adverse action. *See* §§ 8.057, 8.500.6, 8.500.100, 8.503.190 of the Department of Health Care Policy and Financing rules located at 10 Colo. Code. Regs. 2505-10.

88. Despite the rules cited in the preceding paragraph, Defendants DP, DHS, and HCPF each have a statute, ordinance, regulation, custom, policy, practice or usage that provided named Plaintiffs and the Class only with notice and the opportunity to appeal under the appeals process that applies to Colorado's *non-Medicaid* developmental disabilities programs, as detailed at § 16.322 of the Department of Human Services Rules located at 2 Colo. Code Regs. 503-1.

89. The statute, ordinance, regulation, custom, policy, practice or usage described in the preceding paragraph provides applicants and recipients of Colorado's developmental disabilities Medicaid programs whose eligibility is denied or terminated with notice and the opportunity to appeal through a local-level dispute resolution meeting before the executive director of the CCB with a *de novo* written review by Defendant Hammons, rather than a *de novo* state-level evidentiary hearing before an administrative law judge, such as is afforded to persons whose eligibility for other Medicaid programs is denied or terminated.

90. Defendants DP, Meeker, Hammons, and Tool knew or should have known that the statute, ordinance, regulation, custom, policy, practice or usage of their respective organizations violated clearly established federal law under the Medicaid Act; yet, Defendants DP, Meeker, Hammons, and Tool supported, adopted, approved and ratified such statute, ordinance, regulation, custom, policy, practice or usage.

91. With deliberate indifference, Defendants DP, Meeker, Hammons, and Tool violated the clearly established federal rights of Named Plaintiffs and the Class as provided for under the Medicaid Act by failing to provide them with notice of their right to a *de novo* state-level evidentiary hearing upon their application for Colorado's developmental disabilities Medicaid programs and by failing to provide them with notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing when denying or terminating their eligibility for such programs.

92. Defendants DP, Meeker, Hammons, and Tool were acting under color of state law at all pertinent times.

93. Defendants Meeker, Hammons, and Tool were acting within the scope of their official duties and/or employment at all pertinent times.

94. The acts or omissions of Defendants DP, Meeker, Hammons, and Tool were the legal and proximate cause of significant damages, injuries, and losses to Named Plaintiffs and the Class.

95. If found eligible for Colorado's developmental disabilities Medicaid programs after being afforded the right to notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing, Named Plaintiffs intend to participate in such programs.

**SECOND CLAIM FOR RELIEF**  
**Violation of 42 U.S.C. § 1983**  
**Failure to Provide Notice and State-Level Hearing Per Due Process Clause**  
**Against Marva Livingston Hammons, Individually and in Her Official Capacity**  
**On Behalf of Plaintiffs Rice and Swift and the Subclass**

96. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

97. Pursuant to 42 U.S.C. § 1983, it is prohibited for a person acting pursuant to a statute, ordinance, regulation, custom, policy, practice, or usage under color of state law to deprive another individual of any clearly established rights, privileges, or immunities guaranteed to that individual under federal law.

98. The Due Process Clause of the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. *See* U.S. Const. Amend. XIV, § 1.

99. The Due Process Clause of the United States Constitution requires that persons who have a property interest in public benefits programs such as Colorado's developmental disabilities Medicaid programs be provided notice of the right to a *de novo* state-level evidentiary hearing prior to having their eligibility for such programs terminated and be afforded a *de novo* state-level evidentiary hearing upon an appeal of such a termination.

100. Plaintiffs Rice and Swift and the Subclass have already been found eligible for Colorado's developmental disabilities Medicaid programs. Having been found eligible for such programs, Plaintiffs Rice and Swift and the Subclass have a property interest in continued eligibility that cannot be taken away from them without due process of law.

101. Defendant HCPF has enacted rules that allow individuals receiving services through Colorado's SLS, Comprehensive Services, and CES HCBS Medicaid waiver programs, such as Plaintiffs Rice and Swift and the Subclass, to have a *de novo* state-level evidentiary hearing before an administrative law judge to appeal an adverse action. *See* §§ 8.057, 8.500.6, 8.500.100, 8.503.190 of the Department of Health Care Policy and Financing rules located at 10 Colo. Code. Regs. 2505-10.

102. Despite the rules cited in the preceding paragraph, Defendants DP, DHS, and HCPF each have a statute, ordinance, regulation, custom, policy, practice or usage that provided Plaintiffs Rice and Swift and members of the Subclass only with notice and the opportunity to appeal under the appeals process that applies to Colorado's *non-Medicaid* developmental disabilities programs, as detailed at § 16.322 of the Department of Human Services Rules located at 2 Colo. Code Regs. 503-1.

103. The statute, ordinance, regulation, custom, policy, practice or usage described in the preceding paragraph provides individuals whose eligibility for Colorado's developmental disabilities Medicaid programs is terminated with notice and the opportunity to appeal through a local-level dispute resolution meeting before the executive director of the CCB with a *de novo* written review by Defendant Hammons, rather than a *de novo* state-level evidentiary hearing before an administrative law judge, such as is afforded to persons whose eligibility for other Medicaid programs is terminated.

104. Defendants DP, Meeker, Hammons, and Tool knew or should have known that the statute, ordinance, regulation, custom, policy, practice or usage of their respective organizations violated clearly established federal law under the Due Process Clause of the United States Constitution; yet, Defendants DP, Meeker, Hammons, and Tool supported, adopted, approved and ratified such statute, ordinance, regulation, custom, policy, practice or usage.

105. With deliberate indifference, Defendants DP, Meeker, Hammons, and Tool violated the clearly established federal rights of Plaintiffs Rice and Swift and similarly situated individuals as provided for under the Due Process Clause by failing to provide them with notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing when terminating their eligibility for Colorado's developmental disabilities Medicaid programs.

106. Defendants DP, Meeker, Hammons, and Tool were acting under color of state law at all pertinent times.

107. Defendants Meeker, Hammons, and Tool were acting within the scope of their official duties and/or employment at all pertinent times.

108. The acts or omissions of Defendants DP, Meeker, Hammons, and Tool were the legal and proximate cause of significant damages, injuries, and losses to Plaintiffs Rice and Swift and the Subclass.

109. If found still eligible for Colorado's developmental disabilities Medicaid programs after being afforded the right to notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing, Plaintiffs Rice and Swift intend to participate in such programs.

**THIRD CLAIM FOR RELIEF**  
**Violation of Colo. Rev. Stat. §§ 27-10.5-112 and 27-10.5-134**  
**Failure to Provide Notice and State-Level Hearing Per Medicaid Act**  
**Against Developmental Pathways, Inc.,**  
**Colorado Department of Human Services, and**  
**Colorado Department of Health Care Policy and Financing**  
**On Behalf of Named Plaintiffs**

110. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

111. Under Colo. Rev. Stat. § 27-10.5-134, Plaintiffs have the right to a “civil cause of action” for a violation of any provision of Title 27, Article 10.5 of the Colorado Revised Statutes.

112. “[A] person with a developmental disability shall have the same legal rights and responsibilities guaranteed to all other individuals under federal and state constitutions and federal and state laws.” Colo. Rev. Stat. § 27-10.5-112(1).

113. Plaintiffs are persons with developmental disabilities as defined under Colo. Rev. Stat. 27-10.5-102(11)(a).

114. The Medicaid Act and its implementing regulations at 42 U.S.C. § 1396a(a)(3), 42 C.F.R. §§ 431.210 and 431.211, and 42 C.F.R. § 431.220(a)(1) require state-agencies and their designees to provide individuals upon application for a Medicaid program with notice of the right to appeal via a *de novo* state-level evidentiary hearing when a state agency and/or its designee denies or terminates an individual’s eligibility for a Medicaid program available in the state. Such notice must also be provided whenever an individual’s eligibility for a Medicaid program is denied or terminated. After the state agency or its designee provides such notice, an individual whose eligibility for a Medicaid program has been denied or terminated must be afforded the opportunity to appeal via a *de novo* state-level evidentiary hearing.

115. Defendants are responsible for determining eligibility, administering, and/or overseeing Colorado’s developmental disabilities Medicaid programs, including the SLS, Comprehensive Services, and CES HCBS Medicaid waiver programs. Defendant DP is responsible for determining eligibility for these Medicaid programs for individuals residing in the city of Aurora and in Arapahoe and Douglas counties. Defendants DHS and HCPF are jointly responsible for determining eligibility, administering, and/or overseeing these Medicaid programs for individuals living throughout Colorado.

116. Defendant HCPF has enacted rules that allow individuals receiving services through Colorado’s SLS, Comprehensive Services, and CES HCBS Medicaid waiver programs, but not applicants to such programs, to have a *de novo* state-level evidentiary hearing before an administrative law judge to appeal an adverse action. *See* §§ 8.057, 8.500.6, 8.500.100, 8.503.190 of the Department of Health Care Policy and Financing rules located at 10 Colo. Code. Regs. 2505-10.

117. Despite the rules cited in the preceding paragraph, Defendants DP, DHS, and HCPF each have a statute, ordinance, regulation, custom, policy, practice or usage that provided Plaintiffs only with notice and the opportunity to appeal under the appeals process that applies to Colorado’s *non-Medicaid* developmental disabilities programs, as detailed at § 16.322 of the Department of Human Services Rules located at 2 Colo. Code Regs. 503-1.

118. The statute, ordinance, regulation, custom, policy, practice or usage described in the preceding paragraph provides individuals whose eligibility for Colorado’s developmental disabilities Medicaid programs is terminated with notice and the opportunity to appeal through a local-level dispute resolution meeting before the executive director of the CCB with a *de novo* written review by Defendant Hammons, rather than a *de novo* state-level evidentiary hearing before an administrative law judge, such as is afforded to persons whose eligibility for other Medicaid programs is terminated.

119. In failing to give Plaintiffs notice of their appeal rights at the time of application for Colorado’s developmental disabilities Medicaid programs and notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing when their eligibility for such programs was denied or terminated, Defendants DP, DHS, and HCPF have deprived Plaintiffs of the same rights as guaranteed to others under federal Medicaid laws.

120. Defendants’ conduct is the proximate cause of Plaintiffs’ significant damages, injuries, and losses.

121. If found eligible for Colorado’s developmental disabilities Medicaid programs after being afforded the right to notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing, Plaintiffs intend to participate in such programs.

**FOURTH CLAIM FOR RELIEF**  
**Violation of Colo. Rev. Stat. §§ 27-10.5-112 and 27-10.5-134**  
**Failure to Provide Notice and State-Level Hearing Per Due Process Clauses**  
**Against Developmental Pathways, Inc.,**  
**Colorado Department of Human Services, and**  
**Colorado Department of Health Care Policy and Financing**  
**On Behalf of Plaintiffs Rice and Swift**

122. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

123. Under Colo. Rev. Stat. § 27-10.5-134, Plaintiffs Rice and Swift have the right to a “civil cause of action” for a violation of any provision of Title 27, Article 10.5 of the Colorado Revised Statutes.

124. “[A] person with a developmental disability shall have the same legal rights and responsibilities guaranteed to all other individuals under federal and state constitutions and federal and state laws.” Colo. Rev. Stat. § 27-10.5-112(1).

125. Plaintiffs Rice and Swift are persons with developmental disabilities as defined under Colo. Rev. Stat. 27-10.5-102(11)(a).

126. The Due Process Clauses of the Colorado and United States Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. XIV, § 1; Colo. Const. art. II, § 25.

127. The Due Process clauses of the Colorado and United States Constitutions require that persons who have a property interest in public benefits programs such as Colorado's developmental disabilities Medicaid programs be provided notice of the right to a *de novo* state-level evidentiary hearing prior to having their eligibility for such programs terminated and be afforded a *de novo* state-level evidentiary hearing upon an appeal of such a termination.

128. Plaintiffs Rice and Swift have already been found eligible for Colorado's developmental disabilities Medicaid programs. Having been found eligible for such programs, Plaintiffs Rice and Swift have a property interest in continued eligibility for such programs that cannot be taken away from them without due process of law.

129. Defendants are responsible for determining eligibility, administering, and/or overseeing Colorado's developmental disabilities Medicaid programs, including the SLS, Comprehensive Services, and CES HCBS Medicaid waiver programs. Defendant DP is responsible for determining eligibility for these Medicaid programs for individuals residing in the city of Aurora and in Arapahoe and Douglas counties. Defendants DHS and HCPF are jointly responsible for determining eligibility, administering, and/or overseeing these Medicaid programs for individuals living throughout Colorado.

130. Defendant HCPF has enacted rules that allow individuals receiving services through Colorado's SLS, Comprehensive Services, and CES HCBS Medicaid waiver programs, such as Defendants Rice and Swift, to have a *de novo* state-level evidentiary hearing before an administrative law judge to appeal an adverse action. *See* §§ 8.057, 8.500.6, 8.500.100, 8.503.190 of the Department of Health Care Policy and Financing rules located at 10 Colo. Code Regs. 2505-10.

131. Despite the rules cited in the preceding paragraph, Defendants DP, DHS, and HCPF each have a statute, ordinance, regulation, custom, policy, practice or usage that provided Plaintiffs Rice and Swift only with notice and the opportunity to appeal under the appeals process that applies to Colorado's *non-Medicaid* developmental disabilities programs, as detailed at § 16.322 of the Department of Human Services Rules located at 2 Colo. Code Regs. 503-1.

132. The statute, ordinance, regulation, custom, policy, practice or usage described in the preceding paragraph provides individuals whose eligibility for Colorado's developmental disabilities Medicaid programs is terminated with notice and the opportunity to appeal through a local-level dispute resolution meeting before the executive director of the CCB with a *de novo* written review by Defendant Hammons, rather than a *de novo* state-level evidentiary hearing before an administrative law judge, such as is afforded to persons whose eligibility for other Medicaid programs is terminated.

133. In failing to give Plaintiffs Rice and Swift notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing prior to terminating them from Colorado's developmental disabilities Medicaid programs, Defendants have deprived Plaintiffs Rice and Swift of the same rights as guaranteed to others under state and federal laws, namely the Due Process Clauses of the United States and Colorado Constitutions.

134. Defendants' conduct is the proximate cause of significant damages, injuries, and losses to Plaintiffs Swift and Rice.

135. If found still eligible for Colorado's developmental disabilities Medicaid programs after being afforded the right to notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing, Plaintiffs Rice and Swift intend to participate in such programs.

**FIFTH CLAIM FOR RELIEF**  
**Violation of Section 504 of the Rehabilitation Act of 1973**  
**Against Developmental Pathways, Inc.,**  
**Colorado Department of Human Services, and**  
**Colorado Department of Health Care Policy and Financing**  
**On Behalf of Named Plaintiffs**

136. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

137. Section 504 (29 U.S.C § 794) of the Rehabilitation Act of 1973 (29 U.S.C. §§ 701 et seq., as amended) provides that “[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 29 U.S.C. § 794.

138. At all pertinent times, Defendants DP, DHS, and HCPF were the recipients of federal funds in the form of Medicare and Medicaid payments specifically granted for the benefit of individuals such as Plaintiffs.

139. As relevant to Plaintiffs, the Act defines “individual with handicaps” as any person who “has a physical or mental impairment which substantially limits one or more of such person's major life activities.” 29 U.S.C. § 706(8)(B)(i).

140. Plaintiff Rossart has a developmental disability, mental illness, osteoarthritis, degenerative joint disease, asthma, and obesity that separately and in combination result in physical and mental impairments that affect one or more of her major life activities.

141. Plaintiff Rice has been diagnosed with a variety of conditions, including Asperger's Syndrome, Tourette's Syndrome, Obsessive Compulsive Disorder, Attention Deficit Hyperactivity Disorder, learning disabilities, a mood disorder, anxiety, and mild to moderate impairment of the frontal lobes of the brain. As a result, Plaintiff Rice has developmental disability and mental illness that separately and in combination results in mental impairments that affect one or more of his major life activities.

142. Plaintiff Swift has autism and a developmental disability that separately and in combination results in mental impairments that affect one or more of his major life activities.

143. Plaintiffs Rossart, Rice, and Swift, were at all pertinent times substantially limited in the major life activities of learning, working, and caring for themselves as appropriate to their respective ages, as they are unable to complete these activities without substantial assistance and a specialized program of services such as that which can be provided by Defendants through Colorado's developmental disabilities Medicaid programs, including the SLS, Comprehensive Services, and/or CES HCBS Medicaid waivers.

144. Notwithstanding that Plaintiffs Rossart, Rice, and Swift were "otherwise qualified" for Colorado's developmental disabilities Medicaid programs, Defendants DP, DHS, and HCPF have discriminated against them by denying them meaningful access to Colorado's developmental disabilities Medicaid programs, specifically by failing to provide them with notice and the opportunity to appeal their denial or termination from eligibility for such programs via a *de novo* state-level evidentiary hearing.

145. On information and belief, all individuals who apply for Medicaid programs *other than* Colorado's developmental disabilities Medicaid programs are given notice of their right to a *de novo* state-level evidentiary hearing at their time of application for such programs and are afforded notice and the opportunity to appeal via a *de novo* state-level evidentiary hearing whenever their eligibility for such programs is denied or terminated.

146. The failure of Defendants DP, DHS, and HCPF to provide Plaintiffs Rossart, Rice, and Swift with meaningful access to Colorado's developmental disabilities Medicaid programs such as is afforded to individuals who do not have developmental disabilities whose eligibility for other Medicaid programs is denied or terminated served to subject Plaintiffs Rossart, Rice, and Swift to discriminatory conduct by reason of disability.

147. The acts or omissions of Defendants DP, DHS, and HCPF were the legal and proximate cause of significant damages, injuries, and losses to Plaintiffs Rossart, Rice, and Swift.

**SIXTH CLAIM FOR RELIEF**  
**Violation of the Americans with Disabilities Act of 1990**  
**Against Developmental Pathways, Inc.,**  
**Colorado Department of Human Services, and**  
**Colorado Department of Health Care Policy and Financing**  
**On Behalf of Named Plaintiffs**

148. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

149. Plaintiffs Rossart, Rice, and Swift are each a “qualified individual with a disability” under the ADA as they meet the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by Defendants DP, DHS, and HCPF.

150. Title II (42 U.S.C. §§ 12131 et seq.) of the ADA provides that “[s]ubject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

151. Title III of the ADA prohibits public accommodations from discriminating on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182(a).

152. Defendant DP is either a public accommodation (42 U.S.C. § 12181(7)(F)) or a public entity (42 U.S.C. § 12151(1)) covered by the ADA.

153. Defendants DHS and HCPF are public entities covered by the ADA.

154. Defendants DP, DHS, and HCPF have discriminated against Plaintiffs Rossart, Rice, and Swift by denying them meaningful access to Colorado’s developmental disabilities Medicaid programs, specifically by failing to provide them with notice and the opportunity to appeal Defendants’ denial or termination of their eligibility for such services via a *de novo* state-level evidentiary hearing.

155. The failure of Defendants DP, DHS, and HCPF to provide Plaintiffs Rossart, Rice, and Swift with meaningful access to Colorado’s developmental disabilities Medicaid programs such as is afforded to individuals who do not have developmental disabilities whose eligibility for other Medicaid programs is denied or terminated served to subject Plaintiffs Rossart, Rice, and Swift to discriminatory conduct by reason of disability.

156. The acts or omissions of Defendants DP, DHS, and HCPF were the legal and proximate cause of significant damages, injuries, and losses to Plaintiffs Rossart, Rice and Swift.

**SEVENTH CLAIM FOR RELIEF**  
**Judicial Review of Agency Decision**  
**Under Colo. Rev. Stat. § 24-4-106 and Colo. R. Civ. P. 106(a)(4)**  
**Against Colorado Department of Human Services**  
**On Behalf of Plaintiff Ann Rossart**

157. Plaintiff incorporates all other paragraphs of this Complaint for purposes of this claim.

158. Plaintiff Rossart has the right to judicial review of the Final Agency Decision of the Department of Human Services pursuant to Colo. Rev. Stat. § 24-4-106 and Colo. R. Civ. P. 106(a)(4).

159. In its Final Agency Decision, Defendant DHS interpreted the term, “substantial disability,” as used in the definition of developmental disability at Colo. Rev. Stat. § 27-10.5-102(11)(a), in a manner inconsistent with historical precedent, which requires that “substantial disability” be defined as “one of such severity that, alone or in connection with social, legal, or economic constraints, prohibits the individual from living independently without assistance when appropriate to their age level and requires the provision of a specialized program of services,” as detailed in the Division for Developmental Disabilities’ Uniform Eligibility Criteria of May 1984.

160. Even if the aforementioned definition did not apply, the plain meaning of the term “substantial disability” dictates that a person like Plaintiff Rossart, who needs assistance in daily living activities and a specialized program of services to live on her own in the community, has a “substantial disability.”

161. In addition, DHS abused its discretion in finding that Plaintiff Rossart did not have an “impairment of general intellectual functioning,” as contained in the definition of developmental disability at Colo. Rev. Stat. § 27-10.5-102(11)(a).

162. When taking into account the standard measure of error for each IQ test that Plaintiff Rossart was administered, Plaintiff Rossart’s IQ was within the range of a person with an impairment of general intellectual functioning on every test she took, clearly demonstrating an impairment in general intellectual functioning.

163. DHS also abused its discretion in finding that Plaintiff Rossart did not have “adaptive behavior similar to a person with mental retardation” as that term is used in the definition of developmental disability at Colo. Rev. Stat. § 27-10.5-102(11)(a).

164. Plaintiff Rossart had “some retardation of performance in areas of self-directiveness, occupation, and communication,” clearly demonstrating adaptive behavior similar to a person with mental retardation.

165. Had Defendant DHS properly interpreted the term, “substantial disability,” and applied such term to the facts evidencing such disability and also properly considered the evidence of Plaintiff Rossart’s impairment of general intellectual functioning and adaptive behavior, DHS could only have concluded that Plaintiff Rossart has a developmental disability.

166. DHS’ Final Agency Decision was erroneous as a matter of law, and an abuse of discretion, and must be reversed.

**EIGHTH CLAIM FOR RELIEF**  
**Exclusion from Program of Colo. Rev. Stat. Title 27, Art. 10.5, Part 1**  
**Against Developmental Pathways, Inc. and**  
**Colorado Department of Human Services**  
**On Behalf of Plaintiff Ann Rossart**

167. Plaintiff incorporates all other paragraphs of this Complaint for purposes of this claim.

168. Under Colo. Rev. Stat. § 27-10.5-134, Plaintiff has the right to a “civil cause of action” for a violation of any provision of Title 27, Article 10.5 of the Colorado Revised Statutes.

169. Under Colo. Rev. Stat. § 27-10.5-112(1), “[n]o person with a developmental disability, shall be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity which receives public funds.”

170. Plaintiff Rossart has a disability as defined under Colo. Rev. Stat. § 27-10.5-102(11)(a).

171. As a person with a developmental disability as defined under Colo. Rev. Stat. § 27-10.5-102(11)(a), Plaintiff Rossart is eligible for participation in the publicly funded programs and activities provided for under Colo. Rev. Stat. Title 27, Art. 10.5, Part 1, including the state-funded SLS program for which she sought eligibility.

172. Defendants DP and DHS violated §§ 27-10.5-102(11)(a), 27-10.5-104, 27-10.5-106, 27-10.5-112(1) and other provisions of Colo. Rev. Stat. Title 27, Art. 10.5, Part 1 in excluding Plaintiff Rossart from participation in the publicly funded programs and activities provided for under these sources of law.

173. The acts or omissions of Defendants DP and DHS were the legal and proximate cause of significant damages, injuries, and losses to Plaintiff Rossart.

## PRAYER FOR RELIEF AND JURY DEMAND

WHEREFORE, Plaintiff respectfully requests that this Court:

- a. Certify the Class and Subclass described in this Complaint pursuant to Rule 23(b)(2) of the Colorado Rules of Civil Procedure and certify Named Plaintiffs as representatives of the Class and Subclass;
- b. Issue an Order declaring Defendants DP, Meeker, Hammons, and Tool to be in violation of 42 U.S.C. § 1983;
- c. Issue an Order declaring Defendants DP, DHS, and HCPF to be in violation of Colo. Rev. Stat. §§ 27-10.5-112 and 27-10.5-134, the Rehabilitation Act, and the ADA;
- d. Issue a Preliminary Injunction (or Writ of Mandamus) and a Final Injunction ordering Defendants to provide all persons whose eligibility for Colorado's developmental disabilities Medicaid programs is denied or terminated with notice and access to an appeals process that complies with the Medicaid Act and Due Process Clauses of the United States and Colorado Constitutions;
- e. Reverse the Final Agency Decision of Defendant DHS;
- f. Issue an Order awarding Plaintiff Rossart developmental disabilities services provided for under Title 27, Article 10.5, Part 1, of the Colorado Revised Statutes;
- g. Award Plaintiffs their reasonable attorney fees and costs; and
- h. Award such additional or alternative relief as is just, proper, and equitable.

Plaintiff hereby requests a jury trial on all issues so triable.

RESPECTFULLY SUBMITTED this 10th day of July 2006.

**Original Signatures on File at the Offices of The  
Legal Center for People with Disabilities and  
Older People**

/s/ Andrea E. Faley

Andrea E. Faley, #32025

Elizabeth Cooper Fuselier, #23974

Mark Ivandick, #27041

The Legal Center for People with  
Disabilities and Older People

455 Sherman St., Ste. 130

Denver, CO 80203-4403

/s/ Timothy P. Fox

Timothy P. Fox, #25889

Fox & Robertson, PC

910 16<sup>th</sup> St. Ste. 610

Denver, CO 80202

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Amended Class Action Complaint was filed via Lexis Nexis File & Serve, who will serve the pleading either electronically or via U.S. Mail, first class postage prepaid, this 10th day of July 2006, to the following:

John W. Suthers, Attorney General  
William Allen, Assistant Attorney General  
1525 Sherman St., 5<sup>th</sup> Floor  
Denver, CO 80203

Eileen R. Lerman  
Lerman & Associates PC  
50 S. Steele St. Ste. 820  
Denver, CO 80209-2809

Kenneth R. Stettner  
Susan M. Schaecher  
Stettner, Miller and Cohn, P.C.  
1050 17<sup>th</sup> St., Ste. 700  
Denver, CO 80265-2008

**Original Signatures on File at the Offices of The  
Legal Center for People with Disabilities and  
Older People**

/s/ Andrea E. Faley  
Andrea E. Faley, #32025  
Elizabeth Cooper Fuselier, #23974  
Mark Ivandick, #27041  
The Legal Center for People with  
Disabilities and Older People  
455 Sherman St., Ste. 130  
Denver, CO 80203-4403