District Court City and County of Denver State of Colorado 1437 Bannock St. Denver, CO 80202	⇧ **COURT USE ONLY** ⇧
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, v. Defendants: DEVELOPMENTAL PATHWAYS, INC.; JOHN MEEKER, in his official capacity as Executive Director, Developmental Pathways, Inc.; COLORADO DEPARTMENT OF HUMAN SERVICES; KAREN L. BEYE in her official capacity as Executive Director, Colorado Department of Human Services; COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING; and JOAN HENNEBERRY, in her official capacity as Executive Director, Colorado Department of Health Care Policy and Financing. _____ Attorneys for Plaintiffs: Andrea E. Faley, #32025 Elizabeth Cooper Fuselier, #23974 The Legal Center for People with Disabilities and Older People 455 Sherman St., Ste. 130 Denver, CO 80203-4403 303-722-0300 office 303-722-0720 fax afaley@thelegalcenter.org fuselier@thelegalcenter.org Timothy P. Fox, #25889 Fox & Robertson, PC 910 16th St. Ste. 610 Denver, CO 80202 303-595-9700 office 303-595-9705 fax tfox@foxrob.com	Case Number: 06CV4479 Division: 23

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR CERTIFICATION OF A CLASS AND SUBCLASS

Pursuant to Rule 23 of the Colorado Rules of Civil Procedure, Plaintiffs hereby submit their Reply Brief in Support of Their Motion for Certification of a Class and Subclass.

Plaintiffs demonstrated in their Motion for Certification of a Class and Subclass that the proposed Class and Subclass meet the requirements of C.R.C.P. 23, and that these classes are identical in all material respects to classes that have been certified by courts across the country. In their response, Defendants do not challenge the facts on which Plaintiffs Motion is grounded, and do not cite a single case in which a court has refused to certify a class similar to the classes proposed here.

Defendants' arguments should be rejected for the following reasons:

- The fact that each Named Plaintiff was determined not to meet the common state and federal standard for developmental disability made them ineligible for Medicaid, entitling them to notice and an opportunity for a hearing; that question is, in any event, common to the class;
- Neither the stage at which Medicaid services were denied nor the reason for their denial affects the common question of entitlement to notice and a hearing;
- The fact that Developmental Pathways reversed its two previous decisions and determined Named Plaintiff Robert Swift to be eligible less than one month after he filed this lawsuit does not render Mr. Swift's claim atypical, as the motion for class certification relates back to the date of filing.

I. Defendants' Argument That A Class Should Not Be Certified Because Plaintiffs Were Not Denied Medicaid-Waiver Services Should Be Rejected.

Each of the Named Plaintiffs were determined to be ineligible for developmental disability services on the ground that they do not have developmental disabilities. Defendants

argue that this determination was made solely for purposes of state-funded services, and not Medicaid services, and thus did not trigger the right under Medicaid regulations and the Due Process Clause to notice of, and opportunity for, a *de novo* state-level evidentiary hearing. Defendants are incorrect.

There are two categories of services for persons with developmental disabilities in Colorado: (1) Services funded solely by the state, which are subject to the statutory requirements set forth in Colo. Rev. Stat. § 27-10.5-101 to -707 (2007); and (2) Services funded through Medicaid, in this case from Medicaid waivers ("Medicaid-waiver services") obtained through the Home and Community Services for the Developmentally Disabled program, which are subject to the statutory requirements set forth in Colo. Rev. Stat. § 25.5-6-401 to -411 (2007) (as well as federal Medicaid statutes and regulations).

Defendants argue that Developmental Pathways's determination that the Named Plaintiffs are not developmentally disabled was solely for the purpose of determining their eligibility for state-funded services, and not Medicaid-waiver services, and thus did not trigger a right to a hearing under Medicaid regulations. This argument should be rejected for two reasons: (1) The legal issue of what constitutes a denial of Medicaid-waiver services is a merits question common to the class that supports class certification; and (2) On its merits, Defendants' argument is contrary to Colorado statutes as well as the affidavits submitted by Defendants in support of their Response.

A. The Legal Issue Of What Constitutes A Denial Of Medicaid-Waiver Services Is A Merits Question Common To The Class Supporting Class Certification.

It is black-letter law that a court should not pass on the merits of the claims at the class certification stage. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178 (1974); see also Shook v. El Paso County, 386 F.3d 963, 971 (10th Cir. 2004) ("'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.'" (Citation omitted.)).

The issue raised by Defendants -- whether a denial of Medicaid-waiver services occurs when a CCB determines that a person is not developmentally disabled -- goes to the merits of the class claims in this case and thus should not be considered for purposes of class certification. This issue, moreover, supports class certification because it is common to class members.

B. A CCBs' Determination That A Person Is Not Developmentally Disabled Constitutes A Denial Of Medicaid-Waiver Services.

Defendants assert, correctly, that to be eligible for state-funded developmental disability services, a person must meet the statutory definition of "[p]erson with a developmental disability." State Defendants' Response to Plaintiffs' Motion for Certification of a Class and Subclass ("Response") at 11; see also Colo. Rev. Stat. § 27-10.5-102(13). Section 27-10.5-102(11)(b) provides that a "'[p]erson with a developmental disability' means a person determined by a community centered board to have a developmental disability . . .." Thus Developmental Pathways's determination that the Named Plaintiffs were not developmentally disabled made them ineligible for state-funded services.

Contrary to Defendants' argument, this determination also made the Named Plaintiffs ineligible for Medicaid-funded services. Like state-funded services, a person must have a developmental disability to be eligible for Medicaid-waiver services. Colo. Rev. Stat. § 25.5-6-403(2)(a) ("'Eligible person' means a person with developmental disabilities . . ."). The statute governing Medicaid-waiver services expressly incorporates the definition of "person with a developmental disability" set forth in section 27-10.5-102. Colo. Rev. Stat. § 25.5-6-403(1) ("'Developmentally disabled person' means a person with a developmental disability as defined in section 27-10.5-102, C.R.S."). Thus Developmental Pathways's determination that the Named Plaintiffs were not developmentally disabled made them ineligible for both state-funded and Medicaid-waiver services, and, as a result, they were entitled to notice and an opportunity for a *de novo* state-level evidentiary hearing.

The affidavit of Kimberly Eisen, which Defendants submitted in support of their Response, makes this point. Ms. Eisen states that applications to a CCB "are not made for specific services," but rather "for determination of whether the applicant is considered to have a developmental disability." (Aff. of K. Eisen at ¶ 2, attached as ex. 1 to Response.) It is only after a "successful determination that an applicant has a disability" that the application is sent to the county department of social or human services to determine whether an applicant meets the other eligibility requirements for Medicaid-waiver services. (Id. at ¶ 2-3.) Thus an applicant who is found not to have a developmental disability is disqualified and goes no further in the application process for Medicaid-waiver services.

Defendants appear to argue that because applicants found by a CCB to be developmentally disabled still must satisfy the other eligibility criteria for Medicaid-waiver

services, a Medicaid denial does not occur until the county determines that they do not meet these other criteria. This argument ignores people like the named plaintiffs, who at the first step of the process were deemed ineligible for Medicaid-waiver services because they were not developmentally disabled. This determination constituted a denial of Medicaid-waiver services entitling plaintiffs to notice and an opportunity for a *de novo* state-level evidentiary hearing.

II. The Proposed Classes Satisfy The Commonality Requirement.

Defendants argue that the commonality requirement is not met here because: (1) The recipients class includes putative class members whose Medicaid eligibility was terminated while they were on the waiting list for services, though other class members' eligibility was terminated after they actually started receiving benefits; and (2) There were different reasons why Class and Subclass members were found to be ineligible for Medicaid-waiver services. (Response at 14-18.) These alleged differences are irrelevant here because they have no impact on the common question of Class and Subclass members' right to notice and an opportunity for a hearing when Medicaid-waiver services are denied or terminated.

Medicaid regulations require provision of notice and an opportunity for a hearing any time an applicant is denied Medicaid services,[1] or a recipient's Medicaid services are terminated.[2] The notice and hearing requirements apply whether a person's Medicaid eligibility is terminated while they are on the waiting list or after they have already begun receiving services, and thus the fact that some class members are on the waiting list for services, while others are receiving services, is irrelevant here.

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[1] 42 C.F.R. § 431.220(a)(1).

[2] Id. at §§ 431.201, 431.220(a)(2).

The same is true with respect to differences in the reasons why Medicaid services were denied or terminated. Defendants insist that this case will require an analysis of why each class member was denied, or was terminated from, Medicaid services. With one exception discussed below, Defendants fail to explain why such an analysis would be relevant or necessary. An applicant or recipient who is determined to be ineligible for Medicaid services -- regardless of whether the reason for that determination was because he or she is not developmentally disabled, is not financially eligible, or some other reason -- must receive notice and an opportunity for a hearing, the lack of which, here, is common to the Class and Subclass.

There is one rare exception to the hearing requirement -- an agency need not provide a hearing "if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients." 42 C.F.R. § 431.220(b). Defendants cite this exception, but do not provide any evidence -- in either their class certification or summary judgment papers -- that it has ever applied during the period relevant to this case. Even assuming that this statutory exception applies, the interpretation and application of the exception involves issues common to the class.

III. The Claims Of The Named Plaintiffs Satisfy The Typicality Requirement.

Defendants argue that Ms. Rossart's and Mr. Swift's claims are not typical of the claims of the class. (Response at 18-21.[3])

With respect to Ms. Rossart, Defendants restate their argument discussed above, asserting that Developmental Pathways's determination that Ms. Rossart was not

[3] Defendants do not challenge the adequacy of Matthew Rice as a representative of both the Class and Subclass. Thus even assuming *arguendo* that Ms. Rossart and Mr. Swift do not meet the adequate representative requirement, that requirement is met by Mr. Rice.

developmentally disabled was solely for purposes of state-funded services and was not a denial of Medicaid-waiver services. Id. at 18-20. As set forth above, this argument is wrong because the Colorado statutory provisions governing Medicaid-waiver services expressly incorporate the statutory definition of "person with a developmental" disability from the provisions governing state-funded services. See supra at pp. 4-6. As a result, Developmental Pathways's determination that Ms. Rossart was not developmentally disabled made her ineligible for both state-funded and Medicaid-waiver services. She claims that she was entitled to notice and an opportunity for a hearing, and this claim is typical of those of members of the class.

Defendants argue that Mr. Swift's claims are not typical on the grounds that as a result of an August 4, 2006 letter reinstating his eligibility for Medicaid-waiver services, his claims are now moot. The timing here is significant. Mr. Swift was first informed that he was "no longer eligible" for Medicaid-waiver services by letter dated March 14, 2006. After Mr. Swift appealed that decision, utilizing Developmental Pathways's dispute resolution process, Developmental Pathways reaffirmed its determination that Mr. Swift was not developmentally disabled. (See Letter dated May 10, 2006 from M. Welch to M. and D. Swift (attached as ex. 1 hereto).) On July 10, 2006, Mr. Swift was added to this lawsuit, and it was only after Mr. Swift brought suit that the decision denying his eligibility was reversed. See Ex. 3 to Defendants' Response.

Even assuming, *arguendo*, that Mr. Swift currently does not need judicial relief, he is a proper class representative. In the class action context, numerous courts have applied the "relate back" doctrine to mootness challenges. See, e.g., Crisci v. Shalala, 169 F.R.D. 563, 567 (S.D.N.Y. 1996); Jackson v. Foley, 156 F.R.D. 538, 543-44 (E.D.N.Y. 1994); Williams v. Schweiker, 541 F. Supp. 1360, 1366 (E.D. Mo. 1982). Under this doctrine, "where a named

plaintiff's claim has become moot, class certification may be deemed to relate back to the filing of the complaint in order to avoid mooting the entire controversy." Crisci, 169 F.R.D. at 567. Thus if the named plaintiff's claim was not moot when the complaint was filed, he or she may serve as a class representative. See Jackson, 156 F.R.D. at 544; Williams, 541 F. Supp. at 1366.

Courts rely on two primary factors in deciding whether to apply the relate back doctrine: (1) "The fact that a live controversy still exists as to unnamed members of the class;" and (2) "[T]he potential ability of defendants to 'purposefully moot the named plaintiffs' claims after the class action complaint has been filed but before the class has been properly certified.'" Crisci, 169 F.R.D. at 568 (citation omitted); see also Jackson, 156 F.R.D. at 543-44.

Both of these factors are present in this case. Defendants do not assert that they intend to change their policies concerning the provision of notice and an opportunity for a hearing, and thus there is an ongoing controversy with respect to unnamed members of the class. Second, Defendants' mootness argument is based on the fact that Mr. Swift's eligibility determination was reversed less than a month after he filed suit, despite the fact that he had been found to be ineligible on two separate occasions prior to filing suit. This suggests that Defendants purposefully mooted Mr. Swift's claim. For these reasons, even if Mr. Swift does not currently need judicial relief, he is a proper class representative under the relate back doctrine.

IV. Defendants' Arguments Concerning The Scope Of The Class Go To The Merits Of Plaintiffs' Claims And Are Not Relevant To Class Certification.

Plaintiffs seek a state-wide class, and in support of their motion for certification of this class, Plaintiffs submitted the affidavit of Georgia Edson, the Director of Quality Assurance at Developmental Pathways. Ms. Edson's affidavit demonstrated that a significant number of putative class members served by Developmental Pathways have been denied eligibility for

Medicaid-waiver services, or had their eligibility for such services terminated, without notice or an opportunity for a hearing.

Defendants argue that a class should be limited to Developmental Pathways on the ground that Plaintiffs have not met their "burden of proving the elements necessary to establish" a state-wide class. Defendants confuse the burden of proof applicable to a class certification motion.

A motion for class certification should be brought and decided "[a]s soon as practicable after the commencement of an action brought as a class action . . .." C.R.C.P. 23(c)(1) (2007). Further, "[i]t is generally accepted that Rule 23 should be liberally construed." 3 Alba Conte and Herbert B. Newberg, Newberg on Class Actions (hereinafter "Newberg"), § 7:20 (4th ed. 2002). Given these factors, "allegations of class facts, viewed in the light of attending facts and circumstances, are usually sufficient for a prima facie showing of entitlement to maintain a class action." Id. In other words, "the initial burden on the party invoking the class action to show class facts is light. A well-pleaded complaint usually constitutes a prima facie showing of these facts sufficient to shift immediately the burden of disproving them to the party opposing the class." Id.

Thus for purposes of class certification, Plaintiffs could have met their burden of seeking a state-wide class simply through allegations in a "well-pleaded complaint." The fact that Plaintiffs have submitted an affidavit supporting their allegations does not, of course, increase their burden of proof.

Defendants' argument that in order to obtain a state-wide class, Plaintiffs must show that Defendants' allegedly illegal practices extended beyond Developmental Pathways goes to the

merits of Plaintiffs' claims. As set forth above, the merits of a plaintiff's claim should not be considered on a motion for class certification. The leading class action treatise makes this point:

> In the usual case, the defendants will contest liability both in fact and in law. Disputes of fact as to the geographical scope of the defendant's alleged wrongdoing are really disputes over the merits of the action and generally depend for resolution on completion of discovery on the merits. Accordingly, for purposes of determining impracticability of joinder (and common issues) and reaching an early class ruling, the geographical scope of the injured class, sufficiently alleged in the complaint, may reasonably be assumed or presumed to exist. This fact is especially so where the operations or marketing areas of the defendant encompass such a geographical area, even in the face of express denials in responsive pleadings or in opposing affidavits, until the contrary is shown by actual testimony.

3 Newberg § 7:22.

CONCLUSION

Plaintiffs respectfully request this Court GRANT their Motion for Certification of a Class and Subclass.

Dated: September 12, 2007

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' Reply Brief in Support of Their Motion for Certification of a Class and Subclass was filed via Lexis Nexis File & Serve, who will serve the pleading either electronically or via U.S. Mail, first class postage prepaid, this 12th of September, 2007, to the following:

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