DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
ANN ROSSART, et al., Plaintiffs, v. DEVELOPMENTAL PATHWAYS, INC., et al., Defendants.	Case No. 06CV4479 COURTROOM 3
ORDER	

This case is before me on Plaintiffs' "Motion for Certification of a Class and Subclass," filed July 10, 2007. Based on my review of that motion, the supporting and opposing briefs and exhibits, and on the offers of proof and arguments made at the class certification hearing held on January 22, 2008, I find and conclude as follows.

I. INTRODUCTION

Plaintiffs claim they were denied certain specialized Medicaid services for the developmentally disabled without sufficient notice of, and an opportunity for, a state-level de novo hearing. The only remaining Defendants are the so-called "State Defendants," who consist of the Colorado Department of Human Resources and its executive director Karen L. Beye, and the

Colorado Department of Health Care Policy and Financing and its executive director Joan Henneberry.[1]

Plaintiffs asserted several different claims for relief in their Amended Complaint, but the First and Second Claims for Relief are the only two that survived summary judgment. Those claims allege that the State Defendants' procedures in failing to provide Plaintiffs with state-level de novo hearings violate the Medicaid Act, 42 U.S.C. §§ 1396 et seq. and the regulations thereunder (First Claim for Relief) and the due process clause of the Fourteenth Amendment to the United States Constitution (Second Claim for Relief). Both claims are asserted as class claims, and under both claims Plaintiffs seek only a declaration that they are entitled to notice of and an opportunity for state-level de novo hearings, coupled with injunctive relief ordering the State Defendants to provide such notice and opportunity.

Plaintiffs originally sought the certification of a class and subclass as to both of these claims, but at the class certification hearing they orally withdrew their request for the certification of any subclass. The class Plaintiffs seek to certify as to both of these claims is:

> All persons whose eligibility for Colorado's developmental disabilities Medicaid programs, including the Supported Living Services HCBS Medicaid waiver, the Comprehensive Services HCBS Medicaid waiver, and the Children's Extensive Support HCBS Medicaid waiver, has been denied or terminated, at any time on or after July 10, 2004, without being provided notice and an opportunity to appeal through a *de novo* state-level evidentiary hearing.

Motion for Certification ¶ 20 [emphasis in original]. Since the two claims this putative class would be asserting are claims only for declarative and injunctive relief, Plaintiffs seek certification under C.R.C.P. 23(b)(2), as discussed in more detail in Parts II and VIII below.

[1] Plaintiffs settled with Defendant Developmental Pathways, Inc., and those claims have been dismissed without prejudice. The indication in my Order dated January 16, 2008, that Plaintiffs also dismissed their claims against the individual State Defendants was incorrect. Those claims remain, but are being asserted against the individual State Defendants only in their official capacities as executive directors of the named state agencies, and not individually.

In an unusual procedural development, I not only dismissed several of Plaintiffs' other claims prior to the certification hearing, I also granted Plaintiffs' motion for partial summary judgment seeking a declaration that the applicable Medicaid regulations require the state-level de novo hearing Plaintiffs seek. I recognize that ruling on dispositive motions prior to the certification hearing is generally frowned upon. *See, e.g.,* C.R.C.P. 23 (c) (requiring that the class certification hearing be held "as soon as practicable"); *Goebel v. Colorado Dept. of Institutions*, 764 P.2d 785, 798 (Colo. 1988) ("the trial court prematurely and unnecessarily" addressed a merits issue). But the certification hearing in this case was delayed for an unusual length of time, in part because the parties were trying to settle and in part because I was actually in a criminal division in 2006 and 2007 and this case was mistakenly assigned to me. See Orders dated July 6, 2007 and August 17, 2007. It was my judgment that the class certification hearing would be much more efficient if I first ruled on the dispositive cross-motions.

In effect, then, I have already granted the named Plaintiffs the substantive relief they seek under both claims.[2] The only remaining issues are whether I will certify these claims as class claims and, if so, how to construct an injunction and remedial plan to provide all class members with the notice they are due.[3]

[2] As I explained in my Order dated January 16, 2008, although I agree with the State Defendants that they are not independently compelled by the due process clause to provide Plaintiffs with state-level de novo hearings, those hearings are required by applicable Medicaid regulations, and the State Defendants' failure to provide the required hearings becomes its own due process violation. Order dated January 16, 2008, p. 9, citing Department of Health v. Donahue, 690 P.2d 243, 249 (Colo. 1984) and Williams v. Colorado Dept. of Corr., 926 P.2d 110, 112 (Colo. App. 1996).

[3] A merits ruling can render class certification moot. See, e.g. State v. Buckley Powder Co., 945 P.2d 841 (Colo. 1997). But here, the State Defendants did not argue mootness at the class certification hearing. In any event, the limited relief Plaintiffs' seek, coupled with the rather unique make-up of a segment of this purported class—which

II. OVERVIEW OF RULE 23

In order to maintain a claim as a class claim, a proponent must prove all four of the requirements set forth in C.R.C.P. 23(a)(1) through (4): numerosity, commonality, typicality and fair and adequate representation. In addition, the class proponent must prove that the claim is maintainable as one of three recognized types of class actions under Rule 23(b): (1) risk of inconsistent or impairing adjudications; (2) injunctive or declaratory relief appropriate to class as a whole; (3) the catch-all, which requires that class issues predominate over individual issues, and that class-wide resolution is superior to other methods.

The class proponent has the burden of proving each of four 23(a) requirements and at least one of the 23(b) requirements. *Levine v. Empire Sav. & Loan Ass'n*, 197 Colo. 293, 297, 592 P.2d 410, 413 (1979); *LaBerenz v. American Family Mut. Ins. Co.*, ___ P.3d ___, 2007WL2493690 (Colo. App. 2007); *Berco Resources, Inc. v. Louisiana Land & Expl. Co.*, 805 P.2d 1132, 1133 (Colo. App. 1990).[4] Trial courts must carefully delineate each class or subclass with respect to each proposed class claim, and have an independent obligation to redefine classes, create subclasses and bifurcate issues, whenever necessary to accomplish the salutary purposes of Rule 23 while maintaining its procedural protections. C.R.C.P. 23(c)(4). *See generally Goebel v. Colorado Dept. of Institutions*, supra, at 793-95.

III. THE CLASS DEFINITION

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includes people, like Plaintiff Rice, who have been granted benefits, put on a waiting list, then denied benefits before they ever got any— makes certification appropriate in my mind notwithstanding the merits ruling.

[4] There still appears to be a controversy in the federal courts over whether a class proponent must also show "need," particularly for certification under 23(b)(2). See cases collected at 2 NEWBERG ON CLASS ACTIONS § 4.19 (4th ed.

The State Defendants object to the breadth of Plaintiffs' proposed class definition in two different dimensions. They argue that the class should be limited to people who, like the remaining named Plaintiffs: 1) had their benefits denied or terminated by former Defendant Developmental Pathways, Inc., and not by any of the other 19 community-centered boards ("CCBs"); and 2) were determined at the CCB level not to be developmentally disabled, and should not include people whose benefits were denied or terminated for any other reasons. I disagree. These arguments reflect the State Defendants' fundamental misunderstanding of the relationship between class definition, the requirements of Rule 23(a) and (b), and the underlying merits of class claims.

In general, what drives the breadth of the class definition is the breadth of the underlying claims for relief. Objections to breadth—such as the State Defendants' two objections here—are usually merits objections in disguise. See 3 NEWBERG ON CLASS ACTIONS § 7:22 (4th ed. 2002). That is especially true where, as here, certification is sought under 23(b)(2), which, as discussed in Part VIII below, by its very terms requires a plaintiff to demonstrate that the injunctive or declaratory relief is appropriate for the class as a whole. So, for example, if a claim is made, as it has been in this case, that a state procedure is illegal or unconstitutional, it is perfectly appropriate for a plaintiff to seek certification of a class consisting of all the people against whom that illegal or unconstitutional procedure was applied. *See, e.g., Brooks v. Flaherty*, 902 F.2d 250 (4th Cir. 1990) (class defined as all mentally ill people in North Carolina mental hospitals); *Hernandez v. Medows*, 209 F.R.D. 665 (S.D. Fla. 2002) (class defined as all current and future Florida Medicaid recipients denied prescription drug benefits).

If a class is so broad that its sheer breath makes it difficult for the named plaintiffs to represent all members typically, fairly or adequately, these problems should be addressed by the

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2002). But our Supreme Court has expressly rejected any implied "need" requirement. State v. Buckley Powder Co.,

23(a) inquiries, not by shrinking the class to exclude people who have actually been harmed by the illegal or unconstitutional procedure. Many problems with typicality and fair and adequate representation can be solved by requiring more or different representatives, and/or by creating appropriate subclasses.

This principle that the essential coverage of the class should ordinarily not be sacrificed to other concerns that can be managed by less drastic methods is particularly true in 23(b)(2) classes, where there are no requirements that common issues predominate over individual ones, or that class treatment be superior. If, as here, all the putative class is asking for is declaratory and injunctive relief to remedy past and stop future applications of an illegal procedure, there is no reason at all that the class should be restricted definitionally to any subset of all the people who were subjected to the illegal procedure. Admittedly, the broader the class the arguably more difficult it will be to identify these class members. But in my judgment that is a remedial issue, not an issue of class definition.

These conclusions are reinforced by the merits ruling I have already made. I have determined that applicable Medicaid regulations mandate the state-level de novo hearings Plaintiffs demand, and the language of that regulatory mandate applies whenever "the decision of a local evidentiary hearing is adverse to the applicant or recipient . . . ." 42 C.F.R. § 431.232 (2007). That mandate is not limited to any particular *reason* for the adverse decision, or of course to the geographic locations of the local hearing. Any CCB anywhere in the state violates the Medicaid regulation when it fails to notify applicants or recipients of their right to a state-level de novo hearing after denying or terminating those benefits for any reason.

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945 P.2d 841, 845-46 (Colo. 1997).

One other thing about the class definition in this case. As currently defined, the class has no temporal cutoff. It begins with people whose benefits were denied or terminated on or after July 10, 2004, and this date was selected by Plaintiffs based on the two-year residual statute of limitations for actions in Colorado under 42 U.S.C. § 1983. *See Civil Serv. Comm'n v. Carney*, 97 P.3d 961, 965 (Colo. 2004). But it has no cutoff date.

At the class certification hearing, Plaintiffs suggested that the cutoff date be the date a class-wide permanent injunction actually issues. Given that Plaintiffs are only seeking declaratory and injunctive relief, I believe that suggestion is appropriate. *See, e.g., Hernandez v. Medows*, *supra*. In theory, the declaratory relief will presumably take care of all future denials and terminations. That is, now that I have interpreted the Medicaid regulations as requiring the State Defendants to provide all applicants and recipients with notice of and an opportunity for a state-level de novo hearing, I trust all terminations and denials post-January 16, 2008 (the date of that declaration) will be done with the required notice. If that were true, the class cut-off could be January 16, 2008.

But I recognize the difference between a declaration and a positive injunction, as well as the fact that my declaration at the moment applies only to the two named Plaintiffs. I also recognize that the State Defendants might want to appeal that declaration, and that even if they do not it may well take them some time to construct a system in which they give appropriate notice to people terminated or denied, whether before or after January 16, 2008. Accordingly, I will use as the definitional cutoff date the date on which the permanent injunction issues.

IV. NUMEROSITY

There is no doubt, and I find, that Plaintiffs have met their burden of proving that the proposed class is so numerous as to make joinder of all members impractical within the meaning of Rule 23(a)(1). The exhibits attached to the summary judgment motion demonstrate that between July 2004 and May 2007, 156 applicants and 199 recipients had their benefits denied and terminated, respectively, without being given an opportunity for a state-level de novo hearing, for a total of 355. I recognize that the State Defendants have taken the position, as of April 2007, that they will provide such hearings to recipients who have had their benefits terminated, and that as a result the "recipient" portion of the proposed class should not be growing. But even if both the "recipient" and "applicant" portions were frozen, and no new class members were added after May 2007, that still leaves 355 existing class members. Even if the State Defendants gave state-level de novo hearings to all recipients retroactively (as they have agreed to do for Plaintiff Rice), and therefore we remove the 199 recipients from the total, that still leaves 156 applicants who were not given notice and an opportunity for such hearings.

Moreover, these numbers reflect only those applicants and recipients whose benefits were denied or terminated by Developmental Pathways. When the other 19 CCBs are included (as I determined in Part III they must), these numbers will be much larger and geographically diverse, further strengthening my conclusion as to numerosity.

V. COMMON ISSUES OF LAW AND FACT

There is likewise no doubt, and I find, that the class claims raise issues of law and fact common to the proposed class. Indeed, now that I have interpreted the applicable Medicaid regulations to apply to applicants and recipients alike, I have already applied the dispositive legal inquiry to all class members. Of course, that is often the nature of a 23(b)(2) class—the "common"

issues are the very issues on which the plaintiffs seek a declaration. It is for that reason that proposed 23(b)(2) classes, once they pass muster under 23(a), are almost always certified, even if the complaint also contains non-equitable relief, as of course this one does not. 2 NEWBERG, supra, at § 4:14.

What remains in this case—constructing an injunction and remedial order—likewise involves common issues of law and fact. How are class members to be identified? What exactly should the notice say? These remedial inquiries are perfectly appropriate for, and common to, the whole class.

VI. TYPICALITY

Although the putative class contains both applicants and recipients, and although, as I acknowledged in my January 16 Order, Plaintiff Rice has already been given notice that the State Defendants will give him an opportunity for a state-level de novo hearing, my substantive ruling on the motions for summary judgment has rendered all these differences meaningless. Because I have now ruled that both applicants denied benefits and recipients whose existing benefits are terminated have a right to a state-level de novo hearing, there is no doubt, and I find, that the claims of the remaining named Plaintiffs are typical of the class claims. Indeed, because of the injunctive and declaratory nature of all these claims, and my declaratory ruling, the named Plaintiffs' claims are not only typical of the putative class members' claims, they are identical to them.

VII. FAIR AND ADEQUATE REPRESENTATION

There are two separate, but related aspects of this inquiry: 1) will the named Plaintiffs themselves fairly and adequately represent the interests of the class? and 2) will the lawyers the named Plaintiffs chose fairly and adequately represent the interests of the class?

As to the second inquiry, the State Defendants conceded at the class certification hearing that Plaintiffs' counsel are highly qualified to represent the interests of the class. They are experienced both in disabilities litigation in general and in class action disabilities litigation in particular.

As for whether the two remaining named Plaintiffs themselves will fairly and adequately represent the class, this inquiry largely dissolves in a case like this, where the limited nature of the requested relief and the substantive rulings I have already made leave little room for individual and class interests to diverge. In any event, I find that Ms. Rossart and Mr. Rice will fairly and adequately represent the interests of the class.

VIII. PROPRIETY OF 23(b)(2) CERTIFICATION

The category of class Plaintiffs are seeking to certify is a class under Rule 23(b)(2), and they therefore have the burden of demonstrating that the State Defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole," and that they are in fact seeking such class-wide injunctive or declaratory relief. C.R.C.P. 23(b)(2).

Here again, the nature of the relief Plaintiffs seek and substantive rulings I have already made pretty much dispose of this inquiry. I have already found that the Medicaid regulations apply to the class as a whole. Plaintiffs seek injunctive and declaratory relief that corresponds with these class-wide rights under those regulations.

Accordingly, I find that this proposed class is properly certifiable under 23(b)(2).

IX. CONCLUSION

1. Plaintiffs' "Motion for Class Certification is GRANTED. The following class is HEREBY CERTIFIED as a 23(b)(2) class:

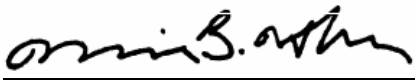
> All people who, between July 10, 2004 and the date of this Court's to-be-issued permanent injunction, had their application for developmental disability benefits denied, or their existing benefits terminated, under any Medicaid program for the developmentally disabled, including the Supported Living Services HCBS Medicaid waiver, the Comprehensive Services HCBS Medicaid waiver, and the Children's Extensive Support HCBS Medicaid waiver, without being provided notice of and an opportunity for state-level de novo review.

2. Plaintiffs and the State Defendants shall forthwith undertake efforts to agree to the language of a permanent injunction extending the relief I have already granted the named Plaintiffs to all class members. Plaintiffs and the State Defendants shall, by February 18, 2008, submit a stipulated permanent injunction, or if they cannot agree a joint proposed permanent injunction highlighting the areas of disagreement. If the submitted permanent injunction is not fully stipulated, I will either rule on the matter as submitted or direct the parties to set a hearing.

3. Plaintiffs and the State Defendants shall forthwith undertake efforts to agree to the language of a remedial plan to identify all class members and provide them the required notice and, if necessary, the required state-level de novo hearings. Plaintiffs and the State Defendants shall, by March 17, 2008, submit a stipulated remedial plan, or if they cannot agree a joint proposed remedial plan highlighting the areas of disagreement. If the submitted remedial plan is not fully stipulated, I will either rule on the matter as submitted or direct the parties to set a hearing.

DONE THIS 30th DAY OF JANUARY, 2008.

BY THE COURT:



Morris B. Hoffman
District Court Judge

cc: T. Fox
A. Klein (AG)
J. Loughman (AG)