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 Ari Krichiver, #37780 Fox & Robertson, PC 910 16th St. Ste. 610 Denver, CO 80202 303-595-9700 office 303-595-9705 fax tfox@foxrob.com akrichiver@foxrob.com	Case Number: 06CV4479 Division: 23
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT	

Pursuant to Rule 56(a) of the Colorado Rules of Civil Procedure, Plaintiffs, on their own or through their next friend or parent, for themselves and all others similarly situated, move for Partial Summary Judgment as to Defendants Karen L. Beye ("Beye"), and Joan Henneberry ("Henneberry") (collectively "State Defendants").[1] Specifically, Plaintiffs seek an order granting them judgment as a matter of law on the first two claims for relief asserted in their amended complaint, determining that Defendants Beye and Henneberry have violated 42 U.S.C. § 1983 by depriving Plaintiffs and class members of the following rights secured by the Medicaid Act and the Due Process Clause: (1) the right to request a *de novo* state-level evidentiary hearing appealing adverse Medicaid determinations, and (2) the right to notice of the opportunity to request such a hearing.

INTRODUCTION

Plaintiffs have brought suit on behalf of a Class, generally consisting of individuals whose Medicaid eligibility has been denied or terminated without proper notice or opportunity for a *de novo* state-level evidentiary hearing ("Applicants"), and a Subclass, generally consisting of individuals who were initially found to be eligible for Medicaid benefits but whose eligibility was subsequently terminated without proper notice or opportunity for a *de novo* state-level evidentiary hearing ("Recipients"). Simultaneous with the filing of this Motion, Plaintiffs have

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[1] Pursuant to Rule 25(d)(1), Karen L. Beye and Joan Henneberry are substituted as parties for Marva Livingston Hammons and Stephen P. Tool, as the new executive directors of Defendants Colorado Department of Human Services and Colorado Department of Health Care Policy and Financing, respectively. In addition, Plaintiffs have reached a Proposed Settlement Agreement with Defendants Developmental Pathways, Inc. and John Meeker and will be seeking approval of this agreement with the Court.

filed a motion seeking certification of the Class and Subclass. (See Pls.' Mot. for Certification of a Class and Subclass.)

By this Motion, Plaintiffs seek partial summary judgment establishing that the State Defendants have violated 42 U.S.C. § 1983 by denying members of the Class and Subclass rights afforded them by the Medicaid Act and its implementing regulations, and by the Due Process Clause of the United States Constitution. If the Court grants this Motion, Plaintiffs respectfully ask the Court to direct the parties to submit proposed remediation plans to address the violations.

FACTS

1. Colorado provides a variety of public benefit programs for individuals with developmental disabilities. Among them, Colorado has chosen to participate in the federal Medicaid program, which is jointly funded by state and federal funds. Colo. Rev. Stat. § 25.5-4-102 ("It is the purpose of the 'Colorado Medical Assistance Act' to . . . [provide], in cooperation with the federal government, medical and remedial care and services for individuals . . . as contemplated by the provisions of Title XIX of the social security act.") Specifically, Colorado established "[a] program to provide home- and community-based services to persons with developmental disabilities . . . pursuant to the federal 'Social Security Act' . . .." Colo. Rev. Stat. § 25.5-6-409(1).

2. Colorado uses community centered boards ("CCBs") to administer home- and community-based services for persons with developmental disabilities. CCBs are private corporations whose responsibilities include, among others, "determin[ing] eligibility of such persons [with developmental disabilities] within a specified geographical area . . .." Colo. Rev. Stat. § 27-10.5-102(3).

3. Defendant Beye, as Executive Director of the Colorado Department of Human Services, is charged with promulgating rules "as are necessary to fulfill the obligations of the state department as the single state agency to administer medical assistance programs in accordance with Title XIX of the federal 'Social Security Act'. . .." Colo. Rev. Stat. § 25.5-6-404(4). Defendant Beye is responsible for promulgating rules and regulations governing the appeal rights of Applicants and Recipients whose eligibility for Medicaid benefits was denied or terminated. See Colo. Rev. Stat. §§ 27-10.5-103(2)(d) -107(3). She is also required to review each CCB program to ensure that it complies with appeal rights and other regulations. See Colo. Rev. Stat. § 27-10.5-105(3).

4. Defendant Henneberry, as Executive Director of the Colorado Department of Health Care Policy and Financing, is charged with promulgating rules and regulations governing "medicaid eligibility, and appeal rights associated with" home- and community-based services for persons with developmental disabilities. Colo. Rev. Stat. § 25.5-6-404(4).

5. Applicants whose applications for Medicaid developmental disabilities services are denied can appeal that denial, and the appeal is governed by 2 Colo. Code Regs. 503-1 § 16.322 ("Section 16.322"). (See Mem. Directive ("Directive") of April 4, 2007 (attached as ex. 1) (Memorandum from the Medicaid Program Director instructing CCBs that the "only" method for Applicants to appeal eligibility denials is through Section 16.322).)

6. Under Section 16.322, the initial proceedings on administrative appeal are conducted by CCBs through a "dispute resolution process." See Section 16.322(A) - (H). Although Applicants may make a written appeal of the CCB's decision to Defendant Karen L. Beye, Applicants are not entitled to a *de novo* evidentiary hearing. See Section 16.322(I).

7. Because Applicants did not have the right to a *de novo* state-level evidentiary hearing, they were not notified that they had such a right.

8. Developmental Pathways ("DP"), a CCB, demonstrates how CCBs have applied Section 16.322.

9. According to Georgia Edson, Director of Quality Assurance at DP since November 1, 2005, DP denied Medicaid eligibility to 156 Applicants during the period from July 10, 2004, through May 31, 2007. (See Aff. of Georgia Edson at ¶ 5 (hereinafter "Edson Aff.") (attached as ex. 2).)

10. The notice of dispute resolution procedures provided to these Applicants, consistent with Section 16.322, did not notify them of their right to a *de novo* evidentiary hearing. (See Edson Aff. at ¶ 6, exs. B-F.)

11. One of these Applicants was Plaintiff Ann Rossart. Her application for Medicaid developmental disability benefits was denied by DP. Ms. Rossart was not provided with, or informed of her right to request, a *de novo* state-level evidentiary hearing. (See Various Letters to A. Rossart (attached as ex. 3).)

12. Similarly, after DP denied Christopher Strange's application for Medicaid developmental disability benefits, he requested a *de novo* state-level evidentiary hearing through the Office of Administrative Courts. The appeal was set to be heard through a *de novo* state-level evidentiary hearing before an Administrative Law Judge on March 30, 2007. (See Notice of the Dep't of Human Serv. to Dismiss and Vacate Hr'g (hereinafter "ALJ Mot.") (attached as ex. 4).)

13. On March 26, 2007, Defendant DHS filed a Motion to Dismiss and Vacate Hearing, arguing that the proper appeals process "provides for negotiation and hearing at the CCB level, followed by, on request, a record review and final agency decision. . .." (Id. at ¶ 4 (emphasis added).) The process does not allow for any state-level evidentiary hearing.

14. Many Recipients -- individuals who were previously approved for Medicaid developmental disability benefits, but whose eligibility was terminated -- have not been provided with a *de novo* state-level evidentiary hearing, and have not been notified of their right to such a hearing.

15. For example, between July 10, 2004 and May 31, 2007, DP notified 199 Recipients that their eligibility for Medicaid developmental disability benefits was being terminated, but the dispute resolution procedures provided to these Recipients did not mention the right to appeal through a *de novo* state-level evidentiary hearing. (See Edson Aff. ¶¶ 9-10, exs. G-H.)

16. In addition, Plaintiff Matthew Rice ("Rice") was approved for Medicaid benefits, and was placed on a wait list to receive benefits. As the result of a subsequent redetermination of eligibility, Plaintiff Rice was deemed to be ineligible for Medicaid benefits, and was removed from the wait list. (See Letter from DP to Matthew Rice of April 15, 2004 (hereinafter "Rice Notice") (attached as ex. 5).) The Rice Notice included a document titled "Developmental Pathways Dispute Resolution Procedure." (Id. at 2.) To challenge the decision from the local-level review, this document informed Plaintiff Rice to "ask the Executive Director to review the problem." (Id. (emphasis added).) The document did not notify Plaintiff Rice of his right to a *de novo* state-level evidentiary hearing. (Id.)

17. Likewise, Plaintiff Robert Swift ("Swift") was notified that the Medicaid benefits he had been receiving would be terminated. Plaintiff Swift's notice contained no information regarding the opportunity for a *de novo* state-level evidentiary hearing, or the procedure for obtaining a hearing. (See Letter from DP to Robert Swift of March 14, 2006 (hereinafter "Swift Notice") (Attached as ex. 6).) The Swift Notice included a document also titled "Developmental Pathways Dispute Resolution Process," but a different version from the one included in the Rice Notice. (Id. at 3-4.) This document stated that Plaintiff Swift could "ask, in writing, for a review of your dispute . . . Your resource coordinator can help make the arrangement." (Id. at 4.) Again, there is no mention of the availability of a state-level *de novo* evidentiary hearing. (Id.)

ARGUMENT

As set forth below, Defendants have violated 42 U.S.C. § 1983 by depriving members of the proposed Class and Subclass of their rights under the Medicaid Act and Due Process Clause to request a *de novo* state-level evidentiary hearing appealing adverse Medicaid determinations, and by failing to notify Class and Subclass members of their right to request such a hearing. Thus Plaintiffs are entitled to partial summary judgment.

I. Summary Judgment Standard

Summary judgment may be granted where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). "The burden is on the moving party to establish that no genuine issue of fact exists and any doubts in this regard must be resolved against the moving party." Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251, 1256 (Colo. 1995). In addition, "an

adverse party may not rest upon mere allegations or denials of the opposing party's pleadings." C.R.C.P. 56(e). Rather, the non-moving party must "adequately demonstrate by relevant and specific facts that a real controversy exists." Ginter v. Palmer and Co., 585 P.2d 583, 585 (Colo. 1978).

II. Plaintiffs Are Entitled to Partial Summary Judgment.

By choosing to participate in the federal Medicaid program, Defendants must strictly adhere to the provisions of the Social Security Act and accompanying federal regulations. Ohlson v. Weil, 953 P.2d 939, 943 (Colo. App. 1997).[2]

Medicaid regulations governing the rights to notice and a hearing apply to both Applicants and Recipients whose benefits have been denied or terminated. See 42 C.F.R. § 431.200 (providing right to a hearing for anyone whose request for benefits is denied, or whose eligibility is terminated). The state may provide a local level evidentiary hearing as the initial review of a denial or termination of Medicaid benefits.[3] Under both the Due Process Clause[4] and Medicaid regulations, if the decision of a local evidentiary hearing is adverse to the applicant or

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[2] See also Lankford v.Sherman, 451 F.3d 496, 504 (8th Cir. 2006) ("Participation is voluntary, but if a state decides to participate, it must comply with all federal statutory and regulatory requirements"); Granato v. Bane, 74 F.3d 406, 408 (2nd Cir. 1996) ("States are not required to participate in all aspects of the Medicaid program, but if they do participate in a given program they must comply with the federal Medicaid statute and regulations in administering that program"); Mass. Assoc. of Older Ams. v. Sharp, 700 F.2d 749, 750 (1st Cir. 1983) (same); Eder v. Beal, 609 F.2d 695, 700 (3rd Cir. 1979) (same).

[3] 42 C.F.R. § 431.205(b).

[4] The Due Process Clause requires "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).

recipient, the agency must inform the applicant or recipient of his right to request that his appeal be a de novo hearing before the state agency. Id. §§ 431.232(b) - (c) (emphasis added). If the applicant requests a *de novo* hearing, "the applicant . . . must be given the opportunity to – (a) Examine [the evidence]; (b) Bring witnesses; (c) Establish [evidence] . . . [and] (e) Question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses." Id. § 431.242 (emphasis added).

An individual who is not provided with the notice or opportunity for a hearing that is required by the Due Process Clause and/or the Medicaid Act may bring an action seeking injunctive relief under 42 U.S.C. § 1983 to enforce those requirements. See Monez v. Reinertson, 140 P.3d 242, 247-48 (Colo. App. 2006) (holding that the hearing required by the Medicaid Act and the Due Process Clause is enforceable in a private action under section 1983).

Section 16.322 of the Colorado Code of Regulations, which sets forth the appellate rights of Applicants who have been denied Medicaid benefits, on its face violates the Due Process Clause and Medicaid regulations. Assuming *arguendo* that the administrative appeals process before CCBs satisfies the requirements for a local evidentiary hearing under the federal regulations, the process for appealing CCB determinations under Section 16.322 clearly violates Medicaid regulations. Contrary to these regulations, Section 16.322 does not provide for notice to Applicants of their right to request and receive a *de novo* state-level evidentiary hearing after an adverse determination by a CCB. See 2 Colo. Code Regs. 503-1 § 16.322(I). Indeed, in its motion in the Strange case, the State reiterated that the appeals process beyond the local level is "a record review and final agency decision . . .." (ALJ Mot. ¶ 4 (emphasis added).)

Likewise, as demonstrated by Ms. Edson's affidavit and the experiences of Plaintiffs Rice and Swift, many Recipients who have had their Medicaid benefits terminated have not been provided with an opportunity for a *de novo* state-level evidentiary hearing, and have not been notified of their right to such a hearing.

Numerous courts have held that plaintiffs are entitled to judgment as a matter of law where, as here, defendants have failed to comply with the Due Process Clause and/or Medicaid regulations governing appeals of denials or terminations of benefits.

For example, in Weaver v. Colorado Department of Social Services, 791 P.2d 1230, 1231 (Colo. App. 1990), the defendant terminated the plaintiff's Medicaid benefits. Although the defendant notified the plaintiff of the termination, the notice did not contain all of the information required by Medicaid regulations. Id. at 1232. The court found that Medicaid benefits may be terminated only through a process that comports with the Due Process Clause, and that "[t]o implement this precept," Medicaid regulations governing notice and hearings were promulgated. Id. The court held that "the notices here did not comply with the constitutional or regulatory standards for such notices." Id. at 1233. The court remanded the case with instructions to provide relief to the plaintiff in the form of a reinstatement of his Medicaid benefits. Id. at 1235.

Similarly, in Parry v. Crawford, 990 F. Supp. 1250, 1252 (D. Nev. 1998), the plaintiff's application for Medicaid benefits was denied. After the initial denial, the plaintiff was sent notice of his right to a hearing. Id. The plaintiff subsequently reapplied for alternative services, and was again denied. Id. at 1253. Following the second denial, however, the plaintiff was not provided any notice of his rights. Id. The court found that "once a state provides any services

for which it receives matching funds, including optional services, that service becomes part of the Medicaid plan, subject to the requirements of federal law." Id. The defendants argued that no notice is required for subsequent applications where there is no change in circumstances. Id. at 1258. The court, however, rejected this argument as contrary to "[t]he plain language of the statute and the implementing regulations." Id. at 1258-59. Therefore, the court granted the plaintiff's motion for partial summary judgment, holding that the notice violated Medicaid regulations. Id. at 1259.

The court reached a similar result in Stenson v. Blum, 476 F. Supp. 1331 (S.D.N.Y. 1979). In this class action, the plaintiff received no notice or opportunity for a hearing following termination of her Medicaid benefits. Id. The court found that "granting an opportunity for a state hearing is essential,"[5] and is consistent with the Due Process Clause. Id. at 1342. Holding that the state must provide notice and opportunity for a hearing whenever it terminates Medicaid benefits,[6] the court granted the plaintiff's motion for summary judgment. Id. at 1343.

Other courts have similarly concluded that the plaintiff is entitled to relief where the state has failed to comply with the notice and hearing required by the Due Process Clause and Medicaid regulations.[7]

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[5] Id. at 1339 (emphasis added).

[6] Id. at 1338-39.

[7] See Ladd v. Thomas, 962 F. Supp. 284, 289, 295 (D. Conn. 1997) (court granted summary judgment to plaintiff, holding that Due Process Clause and Medicaid regulations require notice and an opportunity for a fair hearing whenever benefits are denied, terminated or reduced); Febus v. Gallant, 866 F. Supp. 45, 46-47 (D. Mass. 1994) (court granted issuance of preliminary injunction where notice did not comport with Due Process Clause or Medicaid requirements); Catanzano v. Dowling, 847 F. Supp. 1070, 1086 (W.D.N.Y. 1994) (court granted preliminary injunction to class where state procedure for notice and hearing did not comply with

In this case, the State Defendants have failed to notify class members of, or provide them with, an opportunity for a *de novo* state-level evidentiary hearing, in violation of the Due Process Clause and Medicaid regulations. Plaintiffs are thus entitled to partial summary judgment.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their Motion for Partial Summary Judgment be granted, and that the parties be directed to submit proposed remediation plans to address these violations.

Certification of Compliance with C.R.C.P. 121 § 1-15(8).

The undersigned certifies that Plaintiffs' counsel has conferred with Defendants' counsel regarding this motion, who has indicated that the State Defendants are opposed to the Court's grant of this motion.

Dated: July 10, 2007.

Due Process Clause or Medicaid requirements); Haymons v. Williams, 795 F. Supp. 1511, 1525 (M.D. Fla. 1992) (court granted summary judgment for plaintiffs where defendant failed to provide notice or hearing prior to termination of Medicaid benefits); Moffitt v. Austin, 600 F. Supp. 295, 297-99 (W.D. Ky. 1984) (court granted partial summary judgment for the class where hearing provided by defendant did not satisfy due process or Medicaid requirements); Becker v. Blum, 464 F. Supp. 152, 153 (S.D.N.Y. 1978) (court granted summary judgment for plaintiff where notice did not comport with federal statutory and regulatory requirements).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Partial Summary Judgment 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 2007, to the following:

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