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 Courtroom: 23

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Colorado Rules of Civil Procedure, Plaintiffs Ann Rossart, Matthew Rice, and Robert Swift, on their own or through their next friend or parent, for themselves and all others similarly situated, and via their undersigned counsel, hereby submit their Reply Brief in Support of Their Motion for Partial Summary Judgment.

INTRODUCTION

Plaintiffs seek partial summary judgment on their first two claims for relief on grounds that Defendants Karen L. Beye and Joan Henneberry (together "State Defendants") failed to provide them with notice and the right to participate in a *de novo* state-level evidentiary hearing to dispute the determinations that they were ineligible for Medicaid-funded developmental disabilities services. State Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment does not dispute that the Plaintiffs and members of the proposed Class and Subclass were not provided with notice or an opportunity for a *de novo* state-level evidentiary hearing. Nor does the Response dispute Plaintiffs' legal argument that individuals whose eligibility for Medicaid-funded developmental disabilities services is denied or terminated are entitled to *de* novo state-level evidentiary hearings to appeal their denials or terminations. Rather, State Defendants' Response rests upon three narrow arguments, all of which the Court should reject.

Regarding Plaintiffs' first claim for relief, State Defendants oppose summary judgment as to Plaintiff Rossart on grounds that Ms. Rossart was not entitled to a *de novo* state-level evidentiary hearing because she was only seeking a determination that she has a developmental disability and did not really apply for Medicaid-funded developmental disabilities services. This

assertion should be rejected because neither the law nor facts applicable to this case support it. Indeed, this contention is belied by State Defendants' own arguments and evidence.

State Defendants also oppose summary judgment on Plaintiffs' first claim for relief as to Plaintiffs Matthew Rice and Robert Swift. As to these Named Plaintiffs, State Defendants aver that summary judgment should be denied because neither the Colorado Department of Human Services ("DHS") nor the Colorado Department of Human Services ("DHS") is responsible for any act or omission that deprived Mr. Rice and Mr. Swift of the right to a *de novo* state-level evidentiary hearing. This argument should be rejected because State Defendants had a statutory duty to see that Plaintiffs Rice and Swift were provided with *de novo* state level evidentiary hearings to dispute their terminations of eligibility for Medicaid-funded developmental disabilities services, a duty which they failed to fulfill.

Regarding Plaintiffs' second claim for relief, State Defendants oppose summary judgment as to Plaintiffs Matthew Rice and Robert Swift on grounds that the Due Process Clause of the United States Constitution did not require them to afford these Named Plaintiffs the due process required by the Medicaid Act. However, pursuant to long-established case law, the Due Process Clause is violated when an agency fails to provide the specific method of procedural due process that is mandated under laws applicable to that agency program. Consequently, this argument also should be rejected.[1]

[1] State Defendants' response brief addresses the claims of individual Named Plaintiffs only. Consequently, all facts and arguments that Plaintiffs have presented alleging that similarly situated individuals also were denied the right to *de novo* state-level evidentiary hearings to dispute their denials and termination of Medicaid-funded developmental disabilities services are admitted and unopposed for the purposes of summary judgment.

I. State Defendants' Determination that Ms. Rossart Did Not Have a Developmental Disability Constituted a Denial of Eligibility for Medicaid-Funded Developmental Disabilities Services Such That She Should Have Been Offered a *De Novo* State-Level Evidentiary Hearing.

State Defendants contend Plaintiff Rossart was not entitled to a *de novo* state-level evidentiary hearing because she had not applied for developmental disabilities services and instead sought only a determination that she has a developmental disability. However, even State Defendants' own evidence belies such a contention. Ms. Rossart applied for and was denied *all* developmental disabilities services offered by the state, both those funded solely by the state under Title 27, Article 10.5, and those jointly funded by Medicaid under Title 25.5, Article 6, Part 4 of the Colorado Revised Statutes. Hence, she should have been offered notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing.

A. Ms. Rossart Applied for and Was Denied Developmental Disabilities Services.

State Defendants attempt to characterize Ms. Rossart's application for developmental disabilities services as merely a request for an evaluation as to whether she has a developmental disability. In State Defendants' view, because Ms. Rossart merely sought a determination as to whether she has a developmental disability, she was not denied Medicaid-funded developmental disabilities services and did not have the right to a *de novo* state-level evidentiary hearing. However, State Defendants' own evidence, as well as that submitted by Plaintiffs, belies such a contention. Indeed, the evidence in this regard is so dispositive that even when viewing it in the light most favorable to State Defendants, any reasonable trier of fact would have to conclude that Ms. Rossart applied for and was denied Medicaid-funded developmental disabilities services.

The form that Ms. Rossart completed to apply for developmental disabilities services is entitled "Application for Services in the Colorado Developmental Disabilities System." [Ex. B

to St. Defs' Response to Pls' M. for Partial Summ. Jgmt., at 1.] The signature line of this form specifically states, "I am applying for services through the Developmental Disabilities system. I am requesting eligibility determination." [*Id.* at 5.] On its face then, the form is an application for developmental disabilities services and a request that the agency make a determination as to whether the applicant is eligible for such services. The form is clearly *not* just a request for a determination of developmental disability. Rather, it is a generic application for developmental disabilities services offered by the state. By completing and submitting it, Ann Rossart was applying for all developmental disabilities services offered in Colorado, including those funded through Medicaid.

Further, when the community centered board, ("CCB"), here Developmental Pathways, Inc. and DHS, determined that Ms. Rossart did not have a developmental disability, they determined that she was ineligible for developmental disabilities services offered in Colorado. The denial letters that Ms. Rossart received make this clear. The first denial letter, dated December 9, 2004, states, "[a]fter reviewing your request for an eligibility determination, application and supporting documentation," it was determined that "Ann Rossart does not meet the eligibility requirements for developmental disability services . . . ." [Ex. 1 to Pls' M. for Partial Summ. Jgmt., at 3.] The second denial letter affirms the first, stating that after review by the CCB's Eligibility Review Committee, "the 'not eligible' decision stands." [*Id.* at 2.] The third letter, dated August 10, 2005, states that even after receiving further information, the Eligibility Review Committee again "deemed [Ms. Rossart] not eligible for services through the developmental disabilities system for lack of a cognitive disability." [*Id.* at 1.] The final letter of denial from the CCB affirms the previous determinations, stating, "[b]ased upon the review of

the information in our files, I find Ann to not be eligible for services from Developmental Pathways, Inc." [Ex. 1 of Pls' SJ Reply Brf., at 1.] Last, the Final Agency decision of DHS—which was issued upon a written review of the decision of the CCB rather than after a *de novo* state-level evidentiary hearing—affirmed the decision of the CCB, "ORDER[ING] that Ms. Rossart's appeal of Developmental Pathways decision finding him [sic] ineligible for DD services is DENIED." [Ex. 2 to Pls' SJ Reply Brf., at 4.] Hence, Ms. Rossart did not merely seek a determination as to whether she has a developmental disability. Ms. Rossart applied for and was denied developmental disabilities services.

B. Ms. Rossart Was Denied Eligibility for *All* Developmental Disabilities Services, Including Those Funded Through Medicaid.

Defendants further contend that even if Ms. Rossart did apply for developmental disabilities services, she applied for and was denied only state-funded developmental disabilities services and so had no right to a *de novo* state-level evidentiary hearing. However, applicable laws and State Defendants' own evidence clearly do not support such a contention. Rather, the laws and evidence applicable to this case dispositively demonstrate that when Ms. Rossart was determined not to have a developmental disability, she was denied eligibility for *all* developmental disabilities services offered by the state, including those funded through Medicaid. Hence, Ms. Rossart should have been provided with notice and the opportunity to appeal that denial through a *de novo* state-level evidentiary hearing.

As State Defendants point out, the statutes that apply to Medicaid-funded developmental disabilities services are separate from those that apply to developmental disabilities services funded solely by the state. The former are contained in Title 25.5, Article 6, Part 4 of the Colorado Revised Statutes. The latter are located at Title 27, Article 10.5, of the Colorado

Revised Statutes. Persons eligible for state-funded services are those who have a developmental disability as defined under C.R.S. § 27-10.5-102. Medicaid-funded services have additional requirements beyond those stated at C.R.S. § 27-10.5-102; however, the first criteria for eligibility for Medicaid-funded developmental disabilities services is that the person have "a developmental disability as defined in section 27-10.5-102, C.R.S." Thus, *both* state-only funded and Medicaid-funded developmental disabilities services require that an individual have a developmental disability to be eligible for services. Indeed, *all* developmental disabilities services offered through the state, regardless of funding source, have criteria mandating that the individual have a developmental disability (or a developmental delay if younger than age 5). [*See generally*, Ex. 3 to Pls' SJ Reply Brf.]

Given that all developmental disabilities services programs require that an individual have a developmental disability, an application for any developmental disabilities services begins with a determination as to whether the individual has a developmental disability. This is confirmed by State Defendants' own witness, Ms. Kimberly Eisen, whose affidavit states, "Applications to a CCB for a DD determination are not made for specific services." [Ex. 1 to St. Defs' Response to Pls' M. for Cert. of Class & Subclass, at ¶ 2.] Though Ms. Eisen attempts to characterize such an application as one solely for a determination of developmental disability, she admits that only "upon *successful* determination that an individual has a developmental disability" is a 'ULTC 100.2' completed and the individual referred to the county department of social services for completion of a financial application for assistance so as to determine whether the individual is otherwise eligible for Medicaid-funded developmental disabilities services. [*Id.* at ¶ 2 (emphasis added).]

An *unsuccessful* determination as to developmental disability will then, as a matter of course, preclude the individual from receiving *any* developmental disabilities services, including those funded through Medicaid. In such a situation, it makes sense that no one from the CCB or the county department of social services goes on to complete any of the other paperwork required to establish whether the individual meets the additional criteria for Medicaid-funded services. To do so would be superfluous. Nevertheless, an individual who has been, *ipso facto*, denied eligibility for Medicaid-funded developmental disabilities services by virtue of having been determined not to have a developmental disability should be provided with notice and the opportunity to appeal that denial of eligibility through a *de novo* state-level evidentiary hearing as is required under federal Medicaid law. *See* 42 C.F.R. § 431.200 *et seq.* Here, Defendants admit that neither Ms. Rossart nor any other applicant for developmental disabilities services received such due process. Consequently, it is appropriate to grant summary judgment to Plaintiff Rossart, and others similarly situated to her, on Plaintiffs' first claim for relief.

II. State Defendants Had a Duty to Comply with and Enforce Federal and State Laws So As to Provide Plaintiffs Rice and Swift with a *De Novo* State-Level Evidentiary Hearing.

State Defendants next argue that it is inappropriate for the Court to grant summary judgment on Plaintiffs' first claim relief as to Plaintiffs Swift and Rice because State Defendants were not responsible for any act or omission that served to deprive these Plaintiffs of their right to notice and the opportunity for a *de novo* state-level evidentiary hearing. This argument should be rejected because State Defendants' own admissions establish that they had a duty to ensure that Plaintiffs were given such notice and hearings.

State Defendants admit that Plaintiffs Rice and Swift, and other individuals who were already receiving or wait-listed for Medicaid-funded developmental disabilities services, were not provided with notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing, as required under federal regulations and state rules. However, State Defendants argue that they were not responsible for the failure to provide such notice and hearing processes. Instead, they intimate that CCBs such as Developmental Pathways, Inc., rather than State Defendants, are responsible for the failure to follow laws mandating that Plaintiffs be given notice and the right to a *de novo* state-level evidentiary hearing to appeal their terminations from Medicaid-funded developmental disabilities services. However, State Defendants remain liable for the failure of entities such as CCBs to provide notice and fair hearings because State Defendants were ultimately responsible for ensuring that Plaintiffs were provided with this notice and process.

Within the context of federal programs that provide financial or other assistance which are administered through the states, courts have consistently held the state liable for the acts of the local entity charged with the responsibility of making eligibility determinations for the program. For example, in *Catanzano v. Dowling*, 60 F.3d 113, 115 (2d Cir. 1995), the plaintiffs challenged the state procedure for providing notice and opportunity for a fair hearing when their Medicaid benefits were terminated. The defendant argued that it was not liable for violations of the Medicaid Act because eligibility determinations were made by private entities, which were not state actors. *See id.* at 118. The court disagreed, holding that "[t]he state may not circumvent th[e] requirement [of providing a fair hearing] by delegating prior approval to [private entities]." *Id.* at 119-20.

Similarly, in *Hillburn v. Maher*, 795 F.2d 252 (2d Cir. 1986), the plaintiffs brought a class action against the state department of income and maintenance based on the alleged failure of their skilled nursing facility ("SNF") to comply with the requirements of the federal Medicaid Act. *See id.* at 253. Under the Medicaid Act, the state agency did not directly administer health care services. *See id.* at 254. Rather, the state entered into provider agreements with SNFs, which were certified to participate in the Medicaid program. *See id.* The state agency argued that it was not responsible for the failure of the SNFs to comply with the Medicaid Act and accompanying regulations because it "is not the agency responsible for certification of facilities as Medicaid." *Id.* at 261. However, the court was not persuaded, reasoning that "the reason for the requirement that a state designate a 'single State agency' to administer its Medicaid program . . . was to avoid a lack of accountability for the appropriate operation of the program." *Id.* (internal citations omitted).

Even when a state agency delegates a duty to a local entity, it still remains vicariously liable for the failure of the local entity to fulfill that duty because the state retains supervisory and enforcement responsibilities. For instance, in *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 403 (S.D.N.Y. 2006), the plaintiffs brought suit under 42 U.S.C. § 1983 against the commissioner of the state department of health for local-level failure to provide adequate notice of Medicaid eligibility determinations. As an initial matter, the court noted that "[s]tates may directly administer [federal assistance] programs or may delegate the administration to agencies of local government, *subject to state supervision.*" *Id.* at 404 (internal citations omitted) (emphasis added). The state chose to delegate administration of the Medicaid program in New York City to the local-level Human Resources Administration ("HRA"), which in turn operated a number of

"Job Centers," which processed applications for Medicaid benefits. *See id.* at 406. The plaintiffs provided evidence that mistaken eligibility determinations were the result of "the flawed design of the City's computer system ("POS"), the pervasive errors in the City's training materials and policy directives, and the widespread worker ignorance resulting from the inadequate training of the City employees." *Id.* at 434. The court concluded that "the plaintiffs have made a clear and substantial showing that the City itself was the '*moving force*' behind the violations of plaintiffs' federal and state rights, and is therefore liable under § 1983 . . .." *Id*. (emphasis added). In addition, the court determined that "the plaintiffs have clearly established a likelihood that the State Defendants will be held vicariously liable for the City Defendant's violations of plaintiffs' federal rights." *Id*. at 436.

Other courts have held the state responsible for local-level violations of the federal statutory and regulatory requirements without relying upon non-delegable duty or vicarious liability theories. *See Robertson v. Jackson*, 972 F.2d 529, 534 (4th Cir. 1992) ("[a] state that chooses to operate its program through local, semi-autonomous social service agencies cannot thereby diminish the obligation to which the state, as a state, has committed itself . . .."); *U.S. v. New York*, 225 F. Supp. 2d 73, 79 (E.D.N.Y. 2003) ("It would be plainly unreasonable to permit a mandatorily designated State agency to shed its [federal] responsibilities because it has chosen to delegate the rendering of its services to local municipal agencies."); *J.K. v. Dillenberg*, 836 F. Supp. 694, 699 (D. Ariz. 1993) ("It is patently unreasonable to presume that Congress would permit a state to disclaim federal responsibilities by contracting away its obligations to a private entity."); *Robidoux v. Kitchel*, 876 F. Supp. 575, 580 (D. Vt. 1995) (commissioner of state

department of social welfare liable for failure of agencies' employees to process food stamp applications in a timely manner).

Here, State Defendants do not dispute that "[f]ederal law requires that one state agency be charged with oversight of the Medicaid program." [St. Defs' Response to Pls' M. for Cert. of Class & Subclass, at 5.] They further acknowledge that HCPF "is the single state agency designated to administer the Medicaid program in Colorado" pursuant to C.R.S. §§ 25.5-4-104 and 25.5-1-201. [*Id.*] State Defendants also admit that "HCPF has express authority to administer the Colorado Medicaid program so that it complies with requirements to receive federal matching funds" under C.R.S. § 25.5-4-105. [*Id.*] State Defendants also assert that under C.R.S. § 25.5-4-205, "jurisdiction is exclusively given to HCPF, acting through the county departments of social services, to determine eligibility for the Medicaid program." [*Id.*] In addition, HCPF's own rules give it and DHS responsibility for quality assurance and oversight in the administration and delivery of Medicaid-funded developmental disabilities services, including "on-site surveys" that "include a review of applicable rules and standards developed for programs serving individuals with developmental disabilities." §§ 8.500.7, 8.500.101, and 8.500.200, 10 Colo. Code Regs. 2505-10.

Given the facts as asserted by State Defendants and the above sources of law, State Defendants are responsible for determining who remains eligible for Medicaid-funded developmental disabilities services. Consequently, State Defendants have a clear duty to ensure that individuals whose eligibility for Medicaid-funded developmental disabilities service programs is terminated are provided with notice and the opportunity to appeal through a *de novo* state-level evidentiary hearing. State Defendants may attempt to delegate these duties and assert

that CCBs, rather than they themselves, are responsible for the failure to provide such notice and hearings. However, under the law, it does not matter that State Defendants did not directly commit any act or omission that served to deprive Plaintiffs of their right to notice and the opportunity for a *de novo* state-level evidentiary hearing. State Defendants nevertheless retain responsibility for the administration of Medicaid-funded developmental disabilities programs, including the duty to provide proper notice and hearings. For this reason, the Court should reject State Defendants' argument and grant summary judgment to Plaintiffs Rice and Swift, and others similarly situated to them, on their first claim for relief.

III. The Due Process Clause Required State Defendants to Provide Plaintiffs Rice and Swift with Notice and the Opportunity to Appeal Through a *De Novo* State-Level Evidentiary Hearing.

Defendants also argue that Plaintiffs are not entitled to summary judgment as to their second claim for relief because the Due Process Clause did not require State Defendants to provide Plaintiffs Rice and Swift with the specific method of procedural due process that is mandated by federal Medicaid law under 42 C.F.R. § 431.200 *et seq.*, i.e., the right to notice and the opportunity to appeal their terminations from Medicaid-funded developmental disabilities services through a *de novo* state-level evidentiary hearing. State Defendants contend that providing Plaintiffs Rice and Swift with notice and the opportunity to appeal through a local-level dispute resolution process with a written review by a state agency, as provided under § 16.322, 2 Colo. Code Regs. 503-1, was sufficient to comply with the requirements of the Due Process Clause.

However, this contention should be rejected because well-established case law dictates that the Due Process Clause is violated when an agency fails to provide the specific method of

procedural due process that is mandated under laws applicable to that agency program. In *Weaver v. Department of Social Services*, 791 P.2d 1230, 1232 (Colo. App. 1990), the petitioner appealed his termination of eligibility for a Medicaid-funded program on grounds that the notice that was issued to him did not comply with the tenets of due process of law as required under the Fourteenth Amendment of the Constitution. *Weaver* determined that federal and state regulations applicable to that Medicaid-funded program mandated that the notice that was issued to the petitioner contain specific information that was absent from the notice. *See id.* at 1233. The court held that "in the absence of a waiver of any defect in the form of the notice, a notice of adverse action that does not substantially comply with the federal and state requirements cannot provide the basis for a deprivation of benefits." *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)). *See also Department of Health v. Donahue*, 690 P.2d 243, 249 (Colo.1984) ("When the state . . . promulgates a regulation that imposes on governmental departments more stringent standards than are constitutionally required, due process of law requires . . . adhere[nce] to those standards."). *Cf. Monez v. Reinertson*, 140 P. 3d 242, 248 (Colo. App.) (holding that plaintiffs could sustain a separate claim for violation of the Due Process Clause under 42 U.S.C. § 1983 without regard to federal Medicaid hearing requirements "based on broader principles of constitutional due process.")

Given this case law, State Defendants' failure to ensure that Plaintiffs Rice and Swift, and others similarly situated to them, were provided with notice and the opportunity for a *de novo* state-level evidentiary hearing as mandated by federal Medicaid regulations at 42 C.F.R. § 431.200 *et seq.* and state rules at §§ 8.500.6, 8.500.100, 8.503.190, and 8.057, *et seq.*, 10 Colo. Code Regs. 2505-10, is a violation of the Due Process Clause. Consequently, State Defendants

argument should be rejected and the Court should grant summary judgment to Plaintiffs as to their second claim for relief also.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court GRANT their Motion for Partial Summary Judgment.

SUBMITTED this 12th day of September 2007.

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

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR 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 12th day of September 2007, to the following:

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