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 23
ORDER	

This case is before me on cross motions for summary judgment, namely Plaintiffs' "Motion for Partial Summary Judgment," filed July 10, 2007, and the State Defendants' "Cross-Motion for Summary Judgment," filed November 15, 2007.[1]

I. INTRODUCTION

This putative class action revolves around Plaintiffs' central complaint that the State Defendants denied them certain specialized Medicaid services for the developmentally disabled, or terminated those benefits, without sufficient notice and hearing. The facts are largely undisputed.

In 1965, Congress adopted the Medicaid Act, 42 U.S.C. §§ 1396 et seq., which established a broad program of federal assistance to indigent people unable to pay for necessary medical

[1] The term "State Defendants" now refers collectively to the Colorado Department of Human Resources and the Colorado Department of Health Care Policy and Financing. Although the individual directors of those agencies, as well as the private company Developmental Pathways, Inc., and its executive director, were all originally named as Defendants, the two State agency Defendants are the only Defendants who remain in this case. See Part III below.

services. Congress appropriated federal funds to states electing to participate by adopting their own medical assistance programs. Colorado opted in by adopting the Colorado Medical Assistance Act (now, at §§ 25.5-4-101 et seq.).

The Medicaid Act also provided for so-called "state waivers," granted to participating states and relieving those states from certain categories of federal requirements. 42 U.S.C. § 1396n (2007). As pertinent to the home and community-based services at issue in this case, those waiveable federal requirements are limited to three kinds of regulations: 1) so-called "statewideness" (requiring uniform programs throughout a state); 2) comparability (requiring comparable treatment of all recipients) and 3) income and resource requirements. 42 U.S.C. § 1396n(c)(3) (2007).

Before 1994, Colorado's Medicaid program was administered by Defendant Colorado Department of Human Services ("DHS"). When Defendant Colorado Department of Health Care Policy and Financing ("HCPF") was created in 1994, it took over responsibility for all Medicaid administration, but delegated back to DHS, and in particular to a division in DHS called the Division of Developmental Disability ("DDD"), the administration of three specialized home and community-based service programs for the developmentally disabled. See §§ 25.5-6-401 et seq. ("The Home- and Community-based Services for Persons with Developmental Disabilities Act").

DDD in turn has contracted with twenty private providers, called community-centered boards ("CCBs"), who not only provide services to people who have been determined to be developmentally disabled and Medicaid eligible, but also make the initial determinations of whether a person is developmentally disabled. If a CCB determines that a person is developmentally disabled, then it writes an individualized services plan for that person, and if the services plan recommends any of the three specialized Medicaid programs for the developmentally

disabled, then the person is referred to a county social services office for a determination of Medicaid eligibility. If the person is found to be Medicaid eligible, then the CCB begins to provide the specialized benefits, though sometimes there is a waiting list for the benefits.

Former Defendant Developmental Pathways ("DP") is, and at all times pertinent to this case was, a CCB, and all three named Plaintiffs applied to DP for specialized benefits for the developmentally disabled, with differing results.

DP found that Plaintiff Ann Rossart was not developmentally disabled. She appealed that determination to DDD, which, after a records review (that is, not a de novo hearing), affirmed that finding. Rossart was therefore not referred for a Medicaid eligibility determination, and she has never received any of the benefits to which she claims she is entitled. Rossart not only joins in the other Plaintiffs' claims and requests for injunctive and declaratory relief, she seeks judicial review of DDD's final agency action determining that she is not developmentally disabled.

DP initially found that Plaintiff Matthew Rice was developmentally disabled and referred him to his local social services office, which found him Medicaid eligible and placed him on the waiting list to receive benefits. Before any benefits were provided, however, DP reversed its finding and found that Rice was no longer developmentally disabled.[2] Like Rossart, Rice never received any benefits, but unlike Rossart, on September 26, 2007 (after this lawsuit was filed), DDD gave Rice notice that it would give him a state-level de novo hearing on the question of whether he is or is not developmentally disabled. Exhibit D to the State Defendants' Cross-Motion. As far as I can tell from this record, that state-level de novo hearing has not yet been held.

[2] It is not clear from this record whether Rice appealed that re-determination.

Like Rice, Plaintiff Robert Swift was found developmentally disabled and Medicaid eligible, but unlike Rice he actually began to receive benefits before the re-determination that he was not developmentally disabled. He appealed to DDD, and, because he was already receiving benefits, DDD continued to authorize his benefits during the pendency of the appeal. Without giving him a de novo review, DDD nevertheless reversed DP's finding that he was not developmentally disabled and ordered his benefits to continue. Thus, at all times since he first began receiving benefits, Swift has continued to receive those benefits without interruption.

II. PLAINTIFFS' CLAIMS

In their Amended Complaint, Plaintiffs assert the following eight claims for relief, all but one of which (the claim for judicial review by Rossart) seek only injunctive and declaratory relief requiring the State Defendants to hold state-level de novo hearings before denying or terminating benefits:

Claim No.	Plaintiff	Basis	Relief
1	All + Class	Medicaid Act	Inj./Decl.
2	Rice & Swift + Subclass	14th Amendment	Inj./Decl.
3	All	§§ 27-10.5-112 & -134	Inj./Decl.
4	Rice & Swift	§§ 27-10.5-112 & -134	Inj./Decl.
5	All	§ 504 of Rehab Act	Inj.Decl.
6	All	ADA	Inj./Decl.
7	Rossart	§ 24-4-106 & Rule 106	Judicial review
8	Rossart	§ 27-10.5-112 & -134	Inj./Decl.[3]

The proposed Class is defined as all people whose eligibility for the subject benefits was denied or terminated without being given notice of and an opportunity for a state-level de novo hearing. Amended Complaint ¶ 24. The proposed "Subclass" is defined as people in the Class

[3] It is not clear to me from my review of the Amended Complaint whether Plaintiffs' Eighth Claim for Relief is duplicative, overlapping or distinct from their Third Claim for Relief. Both seem to be based on §§ 27-10.5-112 and -134. In any event, both are being dismissed with prejudice for failure to state a claim. See Part IV.D below.

who had once been found eligible for the subject benefits but whose eligibility was terminated without being given notice of and an opportunity for a state-level de novo hearing. Id. at ¶ 25.

III. PROCEDURAL HISTORY

Defendant Developmental Pathways ("DP") and its executive director John Meeker were named as Defendants, both in the original Complaint filed April 14, 2006, and in the Amended Complaint filed July 10, 2006, as were the individual executive directors of the two named agencies. Plaintiffs moved to dismiss all three individually-named Defendants, and I granted that motion on July 6, 2007.

Plaintiffs reached a settlement with DP, and Plaintiffs and DP filed a joint motion to approve that settlement on July 3, 2007. By my Order dated October 5, 2007, and after a hearing, I granted the Joint Motion and dismissed all of Plaintiffs' claims against DP without prejudice.

The case is set for a class/subclass certification hearing on January 22, 2008.

IV. STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Because I agree with some of the arguments advanced in their cross motion, and because as a result I am dismissing several of the claims, and all of the claims of one of the named Plaintiffs, let me first address the State Defendants' cross motion.

A. Justiciability

Among many other arguments, the State Defendants contend that the claims of the individually named Plaintiffs must be dismissed because those Plaintiffs either have suffered no injury or their claims are now moot. I agree as to Swift, but disagree as to Rossart and Rice.

I reject the State Defendants' arguments that all of Rossart's Medicaid-based claims must be dismissed because she was never determined to be Medicaid eligible. The crux of all of her

Medicaid-based claims is not that she was wrongfully denied a de novo hearing in a Medicaid eligibility proceeding that never happened, but rather that she was entitled, under the Medicaid Act and its regulations, to have DP's initial determination that she was not developmentally disabled reviewed de novo by a state agency. Whether the Medicaid Act and regulations in fact give her that right is of course another matter, and is discussed in Part V below. But surely Rossart's standing to make that argument cannot be defeated by her failure to be considered for Medicaid, when, as discussed above, that step is taken only after an applicant is determined to be developmentally disabled.

As for Rice, Plaintiffs concede that his claims, all of which seek only injunctive and declaratory relief ordering a state-level de novo hearing, are presumptively moot since the State Defendants have recently granted Rice a state-level de novo hearing. That decision was an apparent implementation of a new policy, adopted by DDD in April 2007 (again, after this lawsuit was filed) providing state-level de novo review for all "recipients" whose initial favorable determination was later reversed, but not for any initial denial of benefits to fist-time applicants. Directive Memorandum from J. Kauffman dated April 4, 2007 (attached as Exhibit 1 to Plaintiff's Motion) ["the Kauffman Directive"].

Nonetheless, Plaintiffs argue that I should overlook this defect under three exceptions to the mootness doctrine: 1) the controversy involves an issue of "great public importance"; 2) the controversy involves an "allegedly recurring constitutional violation" and 3) the "relation-back" doctrine for class actions. Although I do not believe Plaintiffs have correctly stated the second of these exceptions, I am satisfied that, as correctly stated, it applies to this case.

The applicable mootness exception is for claims that are "capable of repetition, yet evades review." *See, e.g., Simpson v. Bijou Irrig. Co.*, 69 P.3d 50, 71 (Colo. 2003). *See also Colorado*

Dept. of Corrections v. Madison, 85 P.3d 542, 544, n.2 (Colo. 2004) (Supreme Court addresses defendant's claim that parole revocation was not timely held, despite fact that the revocation had been dismissed); *Gresh v. Balink*, 148 P.3d 419 (Colo. App. 2006) (court of appeals addresses issue of tainted ballot issue notices despite fact that election had already occurred).

Here, it is clear to me, and indeed the State Defendants concede, that this issue of whether applicants and/or recipients are entitled to state-level de novo review of denials or terminations of their benefits is an issue that has arisen many times in the past, and presumably will continue to arise in the future every time an applicant or recipient is denied or terminated. In fact, materials submitted by the State Defendants themselves indicate that between July 2004 and May 2007, more than 100 people, besides Rice, were first found to be developmentally disabled, then Medicaid eligible, but then found not to be developmentally disabled while awaiting their benefits. Affidavit of Georgia Edson ¶ 10 (attached as Exhibit F to State Defendant's Cross Motion).

It is equally clear to me that this issue is not only capable of repetition but may also evade review. The Kauffman Directive guarantees, whether this was the State Defendants' intention or not, that no one in Rice's position can complain about a *right* to state-level de novo review because the State Defendants have volunteered to provide such review, at least since April 2007. But the Kauffman Directive could be rescinded at any time, and indeed by its own terms applies only "[u]ntil [DDD] rescinds this directive . . . ."

Under these circumstances, it is clear to me that Rice's claim will be repeated by others in his position, that those claims are likely to evade review, and therefore that Rice has standing to bring these claims notwithstanding the Kauffman Directive. Because of my resolution of this issue, I do not reach Plaintiffs' "great public importance" or "relation-back" arguments as to Rice.

Finally, as for Swift's claims, the problem is not mootness but rather standing. As set out above, it is undisputed that Swift has received and continues to receive all benefits to which he claims he is entitled, and indeed the final agency action with regard to Swift was to *reverse* DP's determination and find that Swift *was* developmentally disabled. I therefore find and conclude as a matter of law that Swift has suffered no cognizable injury from the State Defendant's failure to provide him with a de novo hearing, and that all of his claims must therefore be dismissed for lack of standing. *See Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) (standing doctrine requires claimant to have suffered an injury in fact to a protectible interest).

B. The General Argument that the State Defendants are Not Responsible for DP's Procedural Decisions

The State Defendants argue as to all of the claims for injunctive/declaratory relief, regardless of the underlying theory, that even if DP violated some regulatory, statutory or constitutional requirement for a state-level de novo review, that violation is attributable to DP, not to the State Defendants. I disagree.

The very nature of Plaintiffs' claims—that they are entitled to a *state*-level de novo hearing—disposes of this attempt by the State Defendants to shuffle the claimed responsibility to provide such a hearing onto DP. It is the State Defendants, not DP, who have decided not to provide state-level de novo review (at least to "applicants" within the meaning of the Kauffman Directive), and only the State Defendants, not DP, could provide such review.

This conclusion is not affected by refocusing from the State Defendants' failure to provide a state-wide de novo hearing to DP's failure to give Plaintiffs notice of such hearing. The latter is the ineluctable result of the former. DP and other CCBs could not be expected to notify applicants or recipients of their right to a hearing the State Defendants will not give them.

C. Second Claim for Relief (Due Process)

I also reject the State Defendants' argument that they are entitled to summary judgment on Plaintiffs' Second Claim for Relief, the one based on general due process principles. I agree with the State Defendants that the current procedure satisfies the minimum requirements of due process set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970)[4] and its progeny. But these due process claims get resuscitated by Plaintiffs' Medicaid arguments, since it is well-settled that once a state is obligated by some non-constitutional source, or otherwise agrees, to take on more process than is constitutionally due, its failure to notify aggrieved parties of that additional process, and to then provide that additional process, itself becomes a due process violation. *See Department of Health v. Donahue*, 690 P.2d 243, 249 (Colo. 1984); *Williams v. Colorado Dept. of Corr.*, 926 P.2d 110, 112 (Colo. App. 1996).

D. Plaintiffs' Third, Fourth Fifth, Sixth and Eighth Claims for Relief

I agree with the State Defendants that Plaintiffs' Third, Fourth, Fifth, Sixth and Eighth Claims for Relief fail as a matter of law. Those claims are grounded, respectively, on § 27-10.5-112(1) of the Care and Treatment of the Developmentally Disabled Act, on § 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. § 794), and on the federal Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.) But each of these statutes requires, among other things, that a plaintiff plead and then prove the element of discrimination, that is, that a subject process or policy discriminates between those with disabilities and those without. § 27-10-112(1) ("No otherwise

[4] There is no doubt that the finding that an applicant is not developmentally disabled is a finding concerning a "direct benefit," which therefore requires notice and a pre-deprivation hearing under *Goldberg.* Cf. O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 785 (1980) (indirect interests, such as being able to choose a particular provider, do not trigger due process concerns), discussed in Perry v. Chen 985 F. Supp. 1197, 1204 (D. Ariz. 1996). But it is equally clear that due process does not require any particular kind of pre-deprivation hearing, and that the pre-deprivation

qualified person, by reason of having a developmental disability, shall be . . . subjected to discrimination"); 29 U.S.C. § 794(a) (same) and (d) (incorporating ADA discrimination provisions); and 42 U.S.C. § 12112(a) (prohibiting "discriminat[ion] against a qualified individual with a disability because of the disability").

Plaintiffs here do not plead, and cannot prove, any actionable discrimination in this case. Plaintiffs' core claim is that all applicants and recipients of services for the developmentally disabled are entitled to more process than they are being currently given. But the alleged lack of sufficient process has nothing to do with any discrimination based on disabilities. There is nothing at all discriminatory about the State Defendants' current process, except that the Kauffman Directive discriminates between initial applicants and recipients, a distinction that is not discrimination based on disability.

E. Plaintiffs' Seventh Claim for Relief (Rossart's Claim for Judicial Review)

This claim is dismissed, but not for the merits reasons argued by the State Defendants. It is dismissed because, as discussed below, I am granting Plaintiffs' motion for partial summary judgment on the legal issue of whether the Medicaid regulations require state-level de novo review. As a result, since Rossart and the other Plaintiffs will be getting state-level de novo hearings, it is unnecessary for me to decide whether DDD's affirmance of DP's decision as to Rossart was an abuse of discretion.

This dismissal, of course, is without prejudice to Rossart's right to seek judicial review of the state-level de novo hearing should the state also find that she is not developmentally disabled.

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notice and CCB-level hearings here meet minimum due process requirements. See Heller v. Doe, 509 U.S. 312, 332 (1993).

Moreover, Plaintiffs' recently-filed "Motion for Stay of Judicial Review Claim," filed January 4, 2008, is DENIED AS MOOT in light of these conclusions.

V. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs' motion is limited to the single argument that they are entitled as a matter of law, under applicable Medicaid regulations, to notice of and an opportunity for a state-level de novo hearing after being denied benefits, or having benefits terminated, by DP. I agree.

The Medicaid regulation at issue provides as follows:

> If the decision of a local evidentiary hearing is adverse to the applicant or recipient, the agency must—
>
> (a) Inform the applicant or recipient of the decision;
>
> (b) Inform the applicant or recipient that he has the right to appeal the decision to the State agency, in writing, within 15 days of the mailing of the notice of the adverse decision;
>
> (c) Inform the applicant or recipient of his right to request that his appeal be a *de novo* hearing; and
>
> (d) Discontinue services after the adverse decision.

42 C.F.R. § 431.232 (2007) ("the Medicaid Regulation") (emphasis in original).

This language, by its plain and unambiguous terms, provides that both recipients and applicants have a right to demand a state-level de novo hearing, and thus conflicts on its face with the position taken by the Kauffman Directive. Equally important, the regulatory waivers that apply to participating states, discussed in Part I above, do not encompass a waiver of the procedural protections contained in this regulation. That is, the right to a de novo state-level hearing was deemed so important by Congress that it made sure it was not part of the Medicaid waiver provisions participating states could avoid. Likewise, the protections of this regulation were

deemed so important by the Secretary that the regulation expressly cites *Goldberg v. Kelly*. Id. at § 431.205(d).

If the Medicaid Regulation itself were not unambiguous in treating recipients and applicants alike, other language in the regulation makes this result abundantly clear. The subpart in which the Medicaid Regulation is embedded is titled "Fair Hearings for Applicants and Recipients," and thus starts out with the clear message, repeated in the body of the regulation, that it encompasses people initially denied benefits as well as people terminated or reduced from existing benefits. The definitions section goes on to define "adverse determination" as a determination "that the individual does not require the level of services provided by a nursing facility *or that the individual does or does not require specialized services.*" Id. § 341.201 (emphasis added). The "specialized services" are precisely the services for the developmentally disabled at issue in this case.

The State Defendants respond by making all the justiciability arguments addressed and resolved in Part IV.A above. As for the merits, they do not challenge the plain meaning of the Medicaid Regulation or argue that it was waived, but instead contend, in a fashion similar to their standing argument, that the Medicaid Regulation applies only to persons already deemed eligible for Medicaid. I disagree with that contention.

The regulation contains a scope section, which expressly states that the regulation applies "to any person whose claim for assistance is denied or not acted upon promptly." Id. at § 431.200(a). And although the term "claim for assistance" is not defined, nor, to my knowledge, has it been the subject of interpretation by the Secretary, its plain meaning must surely include people applying for developmental disability benefits potentially payable by Medicaid. Had the Secretary intended this regulation to apply only to people who had already applied for Medicaid, she could

have said so. Indeed, other parts of the regulation specifically talk about Medicaid applicants and Medicaid recipients. In my judgment, the Secretary's use of the much broader term "claim for assistance" expressly and unambiguously anticipates that states like Colorado may well design their systems to make the services inquiry before the Medicaid inquiry, but that regardless of such design choices applicants and recipients of such services are entitled to state-level de novo review of adverse decisions.

When first-time applicants for these services apply to DP for a determination of their status as developmentally disabled, this is just the first step in what can be characterized as the whole Medicaid application for specialized services for the developmentally disabled. And when they are denied benefits based on a finding that they are not developmentally disabled, they have in effect been denied Medicaid benefits for these services, even though the general Medicaid eligibility step happens later. I therefore reject the State Defendants' artificial and arbitrary characterizations that people like Rossart have not been denied Medicaid, and that the Medicaid regulations thus do not apply to them.

Moreover, to give this regulation the interpretation advanced by the State Defendants would be to limit its applicability to situations in which a CCB's initial determination of developmental disability was later reversed. That seems an irrational and unnecessary constriction of such an important procedural guaranty, even if the regulation were sufficiently ambiguous to allow it. *See Stamm v. City & County of Denver*, 856 P.2d 54, 56 (Colo. App. 1993).

Accordingly, I conclude that 42 C.F.R. § 431.232 requires the State Defendants to provide state-level de novo hearings to both remaining named Plaintiffs (Rossart and Rice) and, if the classes and subclasses are certified, to all class and subclass members as well.

VI. CONCLUSION

A. All of Plaintiff Robert Swift's claims are HEREBY DISMISSED WITHOUT PREJUDICE for lack of standing.

B. The remaining Plaintiffs' Third, Fourth, Fifth, Sixth and Eight Claims for Relief are HEREBY DISMISSED WITH PREJUDICE.

C. Plaintiff Ann Rossart's Seventh Claim for Relief is HEREBY DISMISSED WITHOUT PREJUDICE.

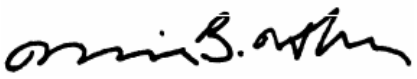
D. Plaintiffs' "Motion for Stay of Judicial Review Claim," filed January 4, 2008, is DENIED AS MOOT.

E. Partial summary judgment is HEREBY GRANTED to the remaining Plaintiffs on their First and Second Claims for Relief as follows. IT IS HEREBY DECLARED that the State Defendants have a legal obligation, under 42 C.F.R. § 431.232, to provide the remaining Plaintiffs with state-level de novo hearings on the question of whether they are developmentally disabled.

Class and any subclass certification will be determined at the hearing set for January 22, 2008, and any class-wide remedial or injunctive relief will be determined later, if necessary.

DONE THIS 16TH DAY OF JANUARY, 2008.

BY THE COURT:



Morris B. Hoffman
District Court Judge

cc: A. Faley
T. Fox
A. Klein (AG)
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