

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202</p>	
<p>Plaintiffs:</p> <p>COLORADO CROSS-DISABILITY COALITION, a Colorado Corporation, and CARRIE ANN LUCAS,</p> <p>v.</p> <p>Defendants:</p> <p>JOAN HENNEBERRY, Executive Director of the Department of Health Care Policy and Financing, in her Official Capacity, and COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General JENNIFER L. WEAVER*, Assistant Attorney General JOAN E. SMITH*, Assistant Attorney General 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: 303-866-5136/5279 Fax: 303-866-5671 Registration Number: 28882/34605 *Counsel of Record Email: Jennifer.Weaver@state.co.us; Joan.Smith@state.co.us</p>	<p>Case No.: 2009 CV 11661 Courtroom: 6</p>
<p>MOTION TO DISMISS PLAINTIFFS' CLAIM BROUGHT UNDER 42 U.S.C. § 1983</p>	

The Defendants, by and through counsel, the Office of the Attorney General, pursuant to C.R.C.P. 12(b)(5), hereby submit the following Motion to Dismiss Plaintiffs' Claim Brought Under 42 U.S.C. § 1983.

A. Standard for dismissal.

A motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) must be decided solely on the face of the complaint, with all factual allegations being accepted as true and the court drawing all reasonable inferences from the complaint in favor of the plaintiff. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

B. Statutes enforceable under 42 U.S.C. § 1983.

42 U.S.C. § 1983 creates a right of action for injured parties against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” In order to state a claim under Section 1983 “a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*.” *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). In order to establish that a federal statute confers rights enforceable under Section 1983, three prerequisites must be met: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right so assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the States. *Id.* at 340-341.

In *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002), the Supreme Court further clarified that only unambiguously conferred rights, as distinguished from mere benefits or interests, are enforceable under Section 1983. A statute must contain rights-creating language that is individually focused, rather than speaking only in terms of institutional policy and practice. *Id.* at 287-288. “Where a statute does not include this sort of explicit ‘right- or duty-creating language,’ we rarely impute to Congress an intention to create a private right of action.” *Id.* at 284.

C. Plaintiffs’ complaint fails to cite a federal statute enforceable under Section 1983.

Plaintiffs fail to cite a particular statute within the medical assistance act to support their second claim for relief. Rather, Plaintiffs merely cite to the entire act, citing “42 U.S.C. § 1396 *et seq.*” However, certain provisions of the medical assistance act are enforceable and others are not. For example, the Tenth Circuit recently found that the disability trust statute at 42 U.S.C. § 1396p(d)(4)(A) and the methodology provisions at 42 U.S.C. §§ 1396a(a)(10)(C)(i) and (a)(17), are not enforceable under Section 1983. *Hobbs v. Zenderman*, 579 F.3d 1171 (10th Cir., 2009). *See also Bates v. Henneberry*, 211 P.3d 68 (Colo. App. 2009) (the irrevocable trust statute at 42 U.S.C. § 1396p(d)(3)(B) does not confer an enforceable right under Section 1983); *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir., 2005) (Section 1396a(a)(30)(A) is not enforceable under Section 1983).

On the contrary, courts have found that other sections of the medical assistance act are enforceable under Section 1983. *See Monez v. Reinertson*, 140 P.3d 242 (Colo. App.

2006)(Section § 1396a(a)(3) can be enforced by an injunction under Section 1983); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir., 2006)(Section 1396a(a)(10) is enforceable under Section 1983).

By failing to cite to a particular section of the medical assistance act that is enforceable under Section 1983, Plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs have failed to demonstrate that they are enforcing an unambiguous right conferred by Congress and are otherwise unable to substantiate their claim for relief under the standards imposed by *Blessing* and *Gonzaga*. As a result, Plaintiffs' second claim for relief must be dismissed.

D. Federal regulations are not enforceable under Section 1983.

Plaintiffs cite various federal regulations in support of their second claim for relief.¹ However, federal regulations do not confer individual rights that are enforceable under Section 1983. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 935 (9th Cir., 2003). Although an agency regulation may be relevant in determining the scope of a right conferred by Congress, plaintiffs suing under Section 1983 “must demonstrate that a *statute*-not a regulation-confers an individual right.” *Id.* at 943 (emphasis in original). *See also Blessing*, 520 U.S. at 341(the *statute* must unambiguously impose a binding obligation on the

¹ In paragraphs 89 through 95 of the Complaint, Plaintiff mistakenly cites the federal regulations as federal statutes. These citations to “U.S.C.” (United States Code) should be cited as “C.F.R” (Code of Federal Regulations).

States)(emphasis added); and *Gonzaga*, 536 U.S at 284 (“[f]or a *statute* to create such private rights, its text must be “phrased in terms of the persons benefited.” (emphasis added).

WHEREFORE, for the reasons and authorities cited above, the Defendants respectfully request that the foregoing Motion to Dismiss Plaintiffs’ second claim for relief be GRANTED.

Respectfully submitted this 18th day of February, 2010.

JOHN W. SUTHERS
Attorney General

S/ Jennifer L. Weaver
(original signature on file with the Office of the
Attorney General)

JENNIFER L. WEAVER, 28882*
Assistant Attorney General
Medicaid & Public Assistance Unit
State Services Section
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within MOTION TO DISMISS PLAINTIFFS’ CLAIM BROUGHT UNDER 42 U.S.C. § 1983 upon the following via Lexis-Nexis/Courtlink on this 18th day of February, 2010.

Kevin W. Williams
Colorado Cross-Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203

S/ Connie Risser
(original signature on file with the Office
of the Attorney General)
