IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTEHRN DISTRICT OF OHIO
EASTERN DIVISION

PARENTS' LEAGUE FOR EFFECTIVE AUTISM SERVICES, *et al.,*	:	CASE NO. 2:08-cv-421
Plaintiffs,	:	JUDGE GRAHAM
v.	:	MAGISTRATE JUDE KING
HELEN E. JONES-KELLEY, *et al.,*	:	
Defendants.	:	

DEFENDANTS' JOINT MOTION TO DISMISS

Helen Jones-Kelley, Director of the Ohio Department of Job and Family Services, and Sandra Stephenson, Director of the Ohio Department of Mental Health, move to dismiss Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 12(b)(6), and/or 12(b)(7). A Memorandum in Support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiffs, Parents' League for Effective Autism Services ("PLEAS") and three individuals receiving services at Step-by-Step Academy, Inc. ("SBSA"), seek to prevent two new administrative rules from becoming effective on July 1, 2008. All claims raised by PLEAS must be dismissed for lack of standing. Even if PLEAS had standing (and it does not), PLEAS should still be dismissed because Plaintiffs' counsel is prohibited from representing PLEAS.

Unless the remaining Plaintiffs consent to joining the Centers for Medicare and Medicaid Services ("CMS"), their claims must also be dismissed pursuant to Fed.R.Civ.P. 19. If those Plaintiffs do consent to joining CMS, their claims should be dismissed because they have not identified any federal statute(s) enforceable through 42 U.S.C. §1983 that grant Plaintiffs a right to the relief they request. Also, to the extent that they seek an order requiring Defendants to furnish health care services, that claim for relief should be dismissed.

II. FACTS

Earlier this year, Defendants adopted two new administrative rules that are set to become effective on July 1, 2008. *See* Ex. 1. The first rule – Ohio Admin. Code 5101:3-27-02 (eff. 7/1/08) – describes when the Ohio Medicaid program will cover community mental health services. The old rule stated that Ohio Medicaid would cover those services "when rendered by eligible medicaid providers." Ohio Admin. Code 5101:3-27-02(A). The new rule requires that the services be "rehabilitative" and defines the term "rehabilitative." *Id*. It defines "rehabilitative services" as services that "provide for the maximum reduction of mental illness and are intended to restore an individual to the best possible functional level." *Id*. This language parallels federal regulations which states that "rehabilitative services" include "any medical or

remedial services recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law, for maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level." 42 C.F.R. §440.130(d).

The second rule – Ohio Admin. Code 5122-29-17 (eff. 7/1/08) – describes what services will be considered to be community psychiatric supportive treatment ("Community Psych") services. Ohio Admin. Code 5122-29-17 (eff. 7/1/08). The new rules clarifies a number of provisions in the old rule regarding the provision of Community Psych services. In particular, it requires that those services be rehabilitative and intended to restore an individual's functioning to the highest possible level. *See* Ohio Admin. Code 5122-29-17(A) (eff. 7/1/08).

Neither of these rules prohibit health care providers from furnishing services addressed in other rules or prohibit Medicaid from covering services addressed in other rules. Other rules allow for the provision and funding of a vast number of services to autistic children after the new rules become effective. For example, autistic children can receive (and Medicaid will pay for) psychology services, hospital services, physician services, pharmaceutical services, durable medical equipment, medical transportation, and outpatient therapy services (e.g., occupational therapy, speech therapy, and physical therapy). *See* Ohio Admin. Code 5101:3-8-05; 5101:3-2 et seq.; 5101:3-4 et seq.; 5101:3-9 et seq.; 5101:3-10 et seq.; 5101:3-15 et seq. Many autistic children may also be eligible for "autism scholarships" that pay up to $20,000 per school year to provide special education and/or related services that implement the child's individualized education program. *See* R.C. 3310.41; Ohio Admin. Code 3301-51-01 through -30.

Plaintiffs allege that when the new rules go into effect, SBSA will be deprived of the "authority, capacity, and funds" necessary to provide "medically necessary services," "applied

behavioral analysis," "community mental health services," "intensive behavioral health services," and/or "community psychiatric supportive treatment." *See* Compl. at p.1 (Introduction) and ¶¶6, 8, 13, 21, and 28, 54-57; Plaintiffs' Motion for Temporary Restraining Order at 11.[1] They further allege that Plaintiff children will be injured if they cannot obtain these services. Compl. at ¶7. Therefore, Plaintiffs seek to enjoin enforcement of the new rules. Plaintiffs' Complaint should be dismissed for the reasons discussed below.

III. LAW AND ARGUMENT

A. Plaintiff PLEAS Should Be Dismissed Because It Lacks Association Standing.

Plaintiffs have the burden of showing they have standing to sue in federal court. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *Children's and Parents Rights Ass'n of Ohio, Inc. v. Sullivan*, 1991 U.S. Dist. LEXIS 8371 at *6 (N.D. Ohio 1991) (attached as Ex. 2). If a plaintiff's allegations of jurisdictional facts are challenged in any appropriate manner, a plaintiff must support them by competent proof. *Children's and Parents Rights Assn of Ohio, Inc.*, 1991 U.S. Dist. LEXIS at *6, *citing McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

Plaintiff PLEAS lacks standing in its own right, because it is not a natural person and is not entitled to Medicaid services or reimbursement. *See* Compl. at ¶¶5-8. PLEAS could have standing if it could demonstrate that it has standing to assert its members' rights, a concept often referred to as "association standing." In order to show that it has association standing, PLEAS must show that: 1) its members would otherwise have standing to sue in their own right; 2) the interests it seeks to protect are germane to its purpose; and 3) neither the claims asserted nor the

[1] Because Plaintiffs have not indicated the specific types of services that make up these variously named service bundles, Defendants cannot determine precisely what types of services are at issue in this case (physician services, pharmaceuticals, durable medical equipment, nursing services, etc.).

relief requested require the participation of individual members in the lawsuit. *See Natl. Rifle Assoc. v. Magaw*, 132 F.3d 272, 294 (6th Cir. 1997), *citing, Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977).

PLEAS cannot satisfy the third part of the association-standing test because the claims in the Complaint involve fact-specific inquiries regarding the children and/or their legal guardians. For example, the Complaint alleges that without services from SBSA, PLEAS children are at risk of a regression in skills and an increase in unwanted behaviors and/or an increase in aggressive and dangerous behaviors. Compl. at ¶¶7, 16, 24, and 32. This allegation cannot be proven (or tested by Defendants) without the participation of the Plaintiff children and/or their guardians. It may be that some Plaintiff children could receive adequate services from other providers or programs after the new rules become effective. That will depend, in part, on the individual medical conditions of the individual Plaintiff children. Also, the Complaint alleges that Plaintiffs are currently seeking "medically necessary" services that they risk losing when the new rules become effective. But whether a service is "medically necessary" involves complex fact-specific inquiries into an individual's medical condition and the specific services being sought. *See* Ohio Admin. Code 5101:3-1-01(A) regarding "general" definition of medical necessity.[2] This inquiry requires the participation of the individual Plaintiff children.

Because the Plaintiff children must participate in the lawsuit, PLEAS lacks association standing and should be dismissed.

[2] There are a number of standards for determining whether an item or service is "medically necessary." Some items and services are subject to medical necessity standards that are specific to those items and services. For example, hospital services, nursing facility therapy services, physical medicine and rehabilitation services, psychology services, chiropractic services, and numerous other Medicaid-covered services must meet specific criteria to be "medically necessary." *See e.g.*, Ohio Admin. Code 5101:3-2-02(B)(4) (hospital services); 5101:3-3-47.1(A)(8) (nursing facility therapy services); 5101:3-4-26(F) (physical medicine and rehabilitation services); 5101:3-8-05(G)(9) (psychology services).

B. Ohio Legal Rights Service Cannot Represent Plaintiff PLEAS.

Plaintiff PLEAS is represented by Ohio Legal Rights Service ("OLRS"). OLRS has been designated as Ohio's "protection and advocacy system" ("P&A system") established by the Developmental Disabilities Assistance and Bill of Rights Act (the "DDA") and the Protection and Advocacy for Mentally Ill Individuals Act (the "PAIMI").[3] The DDA is codified at 42 U.S.C. §15001 through 15044 and the PAIMI is codified at 42 U.S.C. §10801 through 10807.

The DDA and the PAIMI do not permit OLRS to represent organizations. They only permit it to represent individuals with mental illness or developmental disabilities. *See* 42 U.S.C. §10805(a)(1); 10802(4)(B)(ii); 15043(a)(2)(A)(i); 15002(8)(A). Ohio law implementing the DDA and PAIMI limit OLRS to protecting and advocating the rights of: 1) mentally ill persons: 2) mentally retarded persons; 3) developmentally disabled persons; and 4) other disabled persons, provided OLRS is operating under a grant issued pursuant to R.C. 5123.60(F)(4). R.C. 5123.60(A)(1). **OLRS' own rules expressly prohibit it from pursuing legal actions on behalf of individuals who are not disabled and/or mentally ill**. *See* Ohio Admin. Code 5124-1-02(E) ("In carrying out the purposes identified in [the DDA and PAIMI], [O]LRS shall represent only a person who has or has been alleged to have mental retardation or another developmental disability, or who is labeled as mentally ill.") (attached as Ex. 12).[4] OLRS is therefore prohibited from representing PLEAS.

[3] *See* Ohio Admin. Code 5124-1-02(D).

[4] This rule is current and accurate to the best of Defendants' knowledge. It is not available in paper form or any electronic database known to Defendants. It was provided by OLRS at Defendants' request.

C. The Complaint Should Be Dismissed Unless Plaintiffs Consent To Join CMS Pursuant To Fed.R.Civ.P. 19.

1. Standard For Joinder Pursuant To Fed.R.Civ.P. 19.

The question of whether a complaint must be dismissed for failure to join an a party involves a three-step process. *Ford v. Kreachbaum,* 1992 WL 752897 (S.D. Ohio 1992) at *7 (ordering joinder of U.S. Secretary of Agriculture in §1983 action against Ohio Department of Human Services) (attached as Ex. 3); *Dorsey v. Tompkins,* 917 F. Supp. 1195, 1200 (S.D. Ohio 1996) (Graham, J.), *citing, Keweenaw Bay Indian Community v. Michigan,* 11 F.3d 1341, 1345 (6th Cir. 1993). Under Fed.R.Civ.P. 19(a), a person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction shall be joined if: 1) in the person's absence complete relief cannot be accorded among the existing parties, or 2) the person claims an interest in the subject matter of the action and disposition of the action in his absence may impair or impede his ability to protect that interest or create a substantial risk of double, multiple or inconsistent obligations. *Ford*, 1992 WL 752897 at *7. If the person falls within either of these categories, the court must then consider the second issue of whether personal jurisdiction is present. *Id.* If personal jurisdiction is present, the party must be joined. *Id.* If personal jurisdiction is not present, the court must take the third step of analyzing the factors in Fed.R.Civ.P. 19(b) to determine whether the action may proceed without that party or whether the action must be dismissed. *Id.* Defendants do not believe that it is necessary to analyze whether the case should be dismissed pursuant to Fed.R.Civ.P. 19(b) because the Court can exercise personal jurisdiction over CMS. Courts have exercised jurisdiction over a variety of federal administrative agencies pursuant to Fed.R.Civ.P. 19. *See, e.g., Chicago Teachers Union v. Johnson,* 639 F.2d 353, 358 (7th Cir. 1980) (ordering federal Secretary of Labor joined pursuant to Fed.R.Civ.P. 19(a)); *Ford v. Kreachbaum*, 1992 WL 752897 at *9 (ordering federal

Department of Agriculture joined pursuant to Fed.R.Civ.P. 19(a); *Lopez v. Arraras*, 606 F.2d 347, 353 (1st Cir. 1979) (ordering federal Department of Housing and Urban Development joined pursuant to Fed.R.Civ.P. 19(a)). Only if Plaintiffs refuse to consent to joining CMS should the Complaint must be dismissed pursuant to Fed.R.Civ.P. 12(b)(7).

2. CMS Must Be Joined As A Defendant.

CMS must be joined because: 1) complete relief cannot be afforded without CMS' presence; and 2) CMS has a financial and policy stake in the outcome of this case and disposition of the case without CMS creates a risk of inconsistent obligations.

CMS must be joined to provide complete relief because Defendants cannot pay for Medicaid services to the Plaintiff children without CMS. Medicaid services are paid by a combination of federal and state funds. *See Alexander v. Choate*, 469 U.S. 287, 290 n.1 (1985). CMS is responsible for paying the federal portion of Medicaid services. CMS' share of the payment varies depending on the particular service, but generally ranges from 50% to 83% of amount of the service. *See Arizona Health Care Cost Containment System v. McClellan*, 508 F.3d 1243, 1246 (9th Cir. 2007); 42 U.S.C. §1396d(b). If the Court enjoins the new rules and determines that Plaintiffs are entitled to the services they seek, then Defendants will be required to pay for those services. But CMS will not be required to do so unless it is joined as a party. In those circumstances, Defendants would be on the hook for millions of dollars, but CMS will not be required to provide any federal funding. Joinder is appropriate in such a situation. *See Lopez*, 606 F.2d at 352 (Court required joinder of Secretary of U.S. Dept. of Housing and Urban Development when Secretary had the "final say as to the availability of requested funds." Without the Secretary, any relief would be "hollow" and incomplete.).

Defendants face a very real risk of being Court-ordered payment and denied federal funding. ODJFS has already requested federal funding for services furnished to Plaintiff children by SBSA and CMS has "deferred" payment (i.e., not paid) for such services on the grounds that they are "habilitative" and therefore not covered by Medicaid. *See* March 21, 2008 letter from CMS to Defendant Helen Jones-Kelley, attached as Ex. 4; October 28, 2005 letter from CMS to former ODJFS Director Barbara Riley (explaining habilitative services not covered by Medicaid and denying ODJFS' request of program providing habilitative services) (attached as Ex. 5).[5] The Court can consider these materials without converting this Motion into a summary judgment motion. *See, e.g., Colon v. Gonzalez*, 2008 U.S. Dist. LEXIS 23182 at *4 (Dist. P.R. 2008) (a party moving pursuant to Fed.R.Civ.P. 19 may present, and the court may consider, evidence outside the pleadings) (attached as Ex. 6).

The fact that the deferral decision is not a final action to withhold federal funding does not preclude joinder. Fed.R.Civ.P. 19 was designed to address practical considerations – not legal formalities. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 117 n.12 (1968) (noting that the Committee revising Fed.R.Civ.P. 19 stressed that motions be reviewed on "practical consideration" and "particular consequences of the proceeding."). The practical reality in this case is that CMS' concerns about the propriety of SBSA's services are significant enough that it has taken the first step in withholding $496,121 of federal funds. And that amount reflects federal funding for services furnished by SBSA for just one quarter of one year. *See* Ex. 4. It is likely that CMS will examine other quarters and withhold millions of dollars of federal funding. If that happens, Defendants could be faced with the conflicting obligations of complying with a Court order requiring payment for services furnished to Plaintiff children and

[5] Habilitative services are covered when provided through Medicaid waivers and in institutional settings. However, Plaintiffs are not seeking any services through waivers or in institutional settings.

complying with a CMS decision denying payment for those same services (and possibly even an obligation to recover payments for past services furnished to Plaintiff children by SBSA). There is therefore a "substantial risk" that proceeding without CMS will result in inconsistent obligations. This provides an alternate basis for requiring joinder. *See* Fed.R.Civ.P. 19(a)(2).

D. The Complaint Should Be Dismissed Because Plaintiffs Have Not Alleged A Right Enforceable Through 42 U.S.C. §1983.

In order to state a valid §1983 claim, a plaintiff must assert a violation of a federal right, not merely a violation of federal law. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). The plaintiff has the burden of establishing that the statute at issue confers a "right" within the meaning of §1983. To carry this burden, a plaintiff must show that: 1) the statutory provision in question is intended to benefit him; 2) the provision embodies a binding obligation on the governmental unit and not merely a congressional preference for a certain kind of conduct; and 3) the interest asserted is not so vague or amorphous that it is beyond the competency of the judiciary to enforce. *Blessing*, 520 U.S. at 340-341; *Clark v. Portage County*, 281 F.3d 602, 603 (6th Cir. 2002). In order to show that statutory a provision is intended to benefit him, a plaintiff must show an "individual entitlement" that is "unambiguously conferred" through the use of rights-creating language. *See Gonzaga Univ. v. Doe*, 536 U.S. at 283-284, 287 (2002). A statute with an "aggregate focus," unconcerned with whether the needs of the particular plaintiff have been satisfied, is insufficient. *See Gonzaga*, 536 U.S. at 288. The statute must be phrased in terms of the persons benefited and use individual-focused terminology. *Gonzaga*, 536 U.S. at 287.

Read liberally, the Complaint alleges that Plaintiffs are seeking to enforce rights found in 42 U.S.C. §§1396a, 1396a(a)(43), 1396d(a), 1396d(a)(4)(B), 1396d(a)(6), 1396d(a)(13), 1396d(r)(5), and/or "the Medicaid Act," without reference to any particular provision of that Act.

Complaint at ¶¶ 46, 50, 73, and 85-87. But these sections do not give Plaintiffs a "right" to the services they seek – at least not one that is enforceable through 42 U.S.C. §1983.

1. 42 U.S.C. §1396d Does Not Create Rights Enforceable Through 42 U.S.C. §1983.

None of the sections of 42 U.S.C. §1396d cited by Plaintiffs create rights that are enforceable through 42 U.S.C. §1983. Those sections contain definitions only. *See* 42 U.S.C. §§1396d (entitled "definitions"), 1396d(a) ("the term 'medical assistance' means . . . "), 1396d(r) ("the term 'early periodic screening, diagnostic, and treatment services means the following items and services . . . "). As such, they cannot create enforceable rights. *See A.M.H. v. Hayes*, 2004 U.S. Dist. LEXIS 27387 at *21 (S.D. Ohio 2004) (holding that 42 U.S.C. §1396d(a)(19) and §1396(d)(r)(5) do not create "private rights, or private causes of action" because they are "simply definitional") (attached as Ex. 7); *Health Care For All, Inc. v. Romney*, 2004 U.S. Dist. LEXIS 26470 at *15 (Dist. Mass 2004) (holding that 42 U.S.C. §1396d(a)(4)(B) and §1396d(r) cannot be enforced through 42 U.S.C. §1983 because those "definitions do not articulate an obligation to be met" by the State) (attached as Ex. 8). *See also, 31 Foster Children v. Bush*, 329 F.3d 1255, 1271 (11th Cir. 2003) (holding definitions in federal adoption act do not create rights enforceable through 42 U.S.C. §1983 and citing other cases). Cases holding otherwise have not applied *Gonzaga's* standards to these definitions and explained how definitions create show an "individual entitlement" that is "unambiguously conferred" through the use of rights-creating language. *See, e.g., Pediatric Specialty Care Network v. Arkansas*, 443 F.3d 1005, 1016 (8th Cir. 2006) (concluding, in dicta,[6] that 42 U.S.C. §1396d(a)(13) creates rights).

[6] The Eighth Circuit explained that decision was made based on the law-of-the-case doctrine because *Gonzaga* was not an intervening decision of a superior tribunal. *Pediatric Specialty Care Network*, 443 F.3d at 1014. Therefore, the Eighth Circuit's statements regarding *Gonzaga* and rights pursuant to 42 U.S.C. §1396d are dicta.

2. An Allegation That 42 U.S.C. §1396a Or "the Medicaid Act," Without Citation To A Subsection, Is Insufficient.

Plaintiffs cannot claim "rights" through 42 U.S.C. §1396a, in the abstract. *Blessing*, *supra*, requires plaintiffs to set forth the specific federal right, privilege or immunity that is allegedly being violated. *Blessing*, 520 U.S. 239, 242. 42 U.S.C. §1396a is a large statute, comprised of many subparts. Some of these subparts create rights enforceable through 42 U.S.C. §1983 and some do not. Without identifying which part of 42 U.S.C. §1396a is at issue, Defendants cannot meaningfully respond to the alleged violation and the Court cannot determine whether the section in questions creates enforceable rights pursuant to *Blessing* and *Gonzaga*. Therefore, Plaintiffs' claims alleging violations of 42 U.S.C. §1396a and "the Medicaid Act" must be dismissed. *See National Child Support v. Hayes*, 2005 U.S. Dist. LEXIS 9355 at *13-14 (S.D. Ohio, 2005) (dismissing 42 U.S.C. §1983 claim because plaintiff failed to identify specific statute it alleged defendant violated) (attached as Ex. 9).

3. 42 U.S.C. §1396a(a)(43) Does Not Confer Rights That Plaintiffs Seek To Enforce.

42 U.S.C. §1396a(a)(43) does not grant Plaintiffs a right to the relief they seek in this case. That statute states that State Medicaid assistance plans must do four things: 1) inform appropriate individuals of the availability of early periodic screening, diagnosis, and screening ("EPSDT") services and the need for age-appropriate immunizations; 2) provide or arrange for the provision of screening services in all cases where they are requested; 3) arrange for "corrective treatment" the need for which is disclosed by such child health screening services; and 4) report certain information to the Secretary of the Department of Health and Human Services. 42 U.S.C. §1396a(a)(43)(A) – (D). That statute does not obligate Defendants to provide or pay for the

services defined in 1396d(a) (defining "medical assistance"), 1396d(a)(4)(B) (same), 1396d(a)(6)(same), 1396d(a)(13)(same), or 1396d(r)(5) (defining "EPSDT services").

The Sixth Circuit has held that 42 U.S.C. §1396a(a)(43) creates rights enforceable through 42 U.S.C. §1983. *See Westside Mothers v. Olszewski*, 454 F.3d 532, 540 (6th Cir. 2006). But the "right" found under 42 U.S.C. §1396a(a)(43) in that case was the right to be effectively informed of the availability of EPSDT services. *See Westside Mothers*, 454 F.3d at 544. In this case, Plaintiffs seek services and/or payment for services alleged to be "medical assistance" and/or "EPSDT services." 42 U.S.C. §1396a(a)(43) does not confer rights to those services. If Plaintiffs wish to allege that other statutes give them the right to such services, Plaintiffs must amend the Complaint and identify such sections so that their claims are clearly stated for the record and Defendants have an opportunity to test the adequacy of those allegations before this Court and on appeal, if necessary.

E. The Complaint Should Be Dismissed To The Extent It Seeks To Compel Defendants To Furnish Actual Health Care Services.

The Complaint should be dismissed to the extent that it seeks an order requiring Defendants to furnish health care services. *See* Compl. at Request for Relief (A). Medicaid laws do not require States to furnish actual health care or other services. *Westside Mothers v. Olszewski*, 454 F.3d 532, 540 (6th Cir. 2006); *Bruggeman v. Blagovitch*, 324 F.3d 906, 910 (7th Cir. 2003); *Mandy R. v. Owens*, 464 F.3d 1139, 1146 (10th Dist. 2006).

F. Plaintiffs Cannot Sue For Alleged Violations Of Regulations Through 42 U.S.C. §1983.

Plaintiffs claim that Defendants violated 42 C.F.R. § 440.130(d). Compl. at ¶91. That claim must be dismissed, along with any other claims based on alleged violations of regulations. Until recently, it was questionable whether regulations could create rights enforceable through

42 U.S.C. §1983. Federal circuit courts were split on this issue. The U.S. Courts of Appeals for the Third, Fourth, Ninth, and Eleventh Circuits held that federal regulations could not create rights enforceable through 42 U.S.C. §1983. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 936 (9th Cir. 2003). The U.S. Courts of Appeals for the Sixth Circuit and the D.C. Circuit held that federal regulations could create rights enforceable through 42 U.S.C. §1983. *See Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994) *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985). However, both *Loschiavo* and *Samuels* were decided before the U.S. Supreme Court cases *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Read together, *Sandoval* and *Gonzaga* clearly hold that federal regulations cannot create rights enforceable through 42 U.S.C. §1983.

In *Sandoval*, the U.S. Supreme Court considered allegations that the Alabama Department of Public Safety violated Title VI and its implementing regulations by administering its driver's license examination in English only. *Sandoval*, 532 U.S. at 278-279. The *Sandoval* plaintiffs claimed that the implementing regulations created an implied right of action that permitted them to sue to enforce the implementing regulations. *Id.* The *Sandoval* Court rejected this claim, stating:

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative.

Sandoval, 532 U.S. at 286-287 (emphasis added)

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.

Sandoval, 532 U.S. at 291 (emphasis added).

> It is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice, but not the sorcerer himself.

Sandoval, 532 U.S. at 291.

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.

Sandoval, 532 U.S. at 286.

These statements clearly show that federal regulations cannot create implied rights of action. Such rights must be created by Congress, through language in federal statutes.

The U.S. Supreme Court explicitly adopted this logic and applied it to §1983 cases in *Gonzaga*. The *Gonzaga* Court stated:

> We now reject the notion that our implied right of action cases are separate and distinct from our §1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under §1983.

Gonzaga, 536 U.S. at 283 (emphasis added).

> We have recognized that whether a statutory violation may be enforced through 1983 "is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." But the inquiries overlap in one meaningful respect – in either case we must first determine whether Congress intended to create a federal right.

Gonzaga, 536 U.S. at 283 (citation omitted and emphasis added).

Since *Sandoval* and *Gonzaga*, at least one U.S. Supreme Court case has explicitly stated that federal statutes – and not federal regulations – can create rights that are individually enforceable through 42 U.S.C. §1983. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) ("Accordingly, to sustain a §1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs.").

Other circuit courts have followed suit. The First and Fifth Circuits have recognized that *Sandoval* and *Gonzaga* stand for the proposition that federal regulations cannot create rights that are enforceable through 42 U.S.C. §1983. *S.D. v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004). *See also*

Bonano v. East Caribbean Airline Corp., 365 F.3d 81, 84 (1st Cir. 2004).[7] *See also, Save Our Valley,* 335 F.3d at 943 ("Plaintiffs suing under §1983 must demonstrate that a statute – not a regulation – confers an individual right.").

The Sixth Circuit has retreated from its position in *Loschiavo* by stating that *Sandoval* and *Gonzaga* "have cabined *Loschiavo's* holding" and implied that it would have overruled *Loschiavo,* but that a procedural rule prevented it from doing so. *See Caswell v. City of Detroit Housing Comm.*, 418 F.3d 615, 618 (6th Cir. 2005). In a footnote following its statement that *Sandoval* and *Gonzaga* "cabined" the *Loschiavo* holding, the Sixth Circuit stated that it could not overrule the decision of another panel [*i.e.*, the *Loschiavo* panel], but that it could modify prior holdings when an intervening opinion of the U.S. Supreme Court requires it to do so. *Caswell*, 418 F.3d at 618, n. 1. Furthermore, district court cases from within the Sixth Circuit indicate that the *Sandoval* and *Gonzaga* cases have overruled the Sixth Circuit's former holdings that federal regulations can create rights that are enforceable through 42 U.S.C. §1983. *See, e.g., Great Lakes Consortium v. Michigan*, 480 F. Supp.2d 977, 984 (W.D. Mich. 2007) ("As the courts recently have made clear, however, an enforceable right may not be inferred from regulations alone."); *Almendares v. Palmer*, 284 F. Supp.2d 799, 809 (N.D. Ohio 2003)"[r]egulations cannot be used as a basis for creating a private cause of action unless there is a statute that establishes such a right."); *Johnson v. City of Detroit*, 319 F. Supp.2d 756, 761 n.4 (E.D. Mich. 2004 ("As discussed in more detail below, the Sixth Circuit's rule which holds that regulations alone can create enforceable federal rights under §1983 may no longer be viable in light of recent Supreme Court decisions" (citing *Gonzaga* and *Sandoval*)).

[7] This non-1983 case held that federal regulations cannot create a private right of action. However, because *Gonzaga* explicitly stated that private-right-of-action cases should guide the determination of whether a statute confers rights enforceable through §1983, this case is relevant to the discussion.

In short, it is clear that after *Gonzaga* and *Sandoval*, federal regulations cannot create rights that are enforceable through §1983. And, of course, no state laws can enforced through §1983.[8] Therefore, all §1983 claims alleging violations of state laws or federal regulations must be dismissed.

IV. CONCLUSION

The Court should dismiss the Complaint because Plaintiffs have not identified a federal statute creating "rights" that Plaintiffs seek to enforce through 42 U.S.C. §1983. If the Court does not dismiss the Complaint, it should dismiss PLEAS as a party, dismiss Plaintiffs' claims based alleged violations of state or federal regulations, and dismiss the Complaint to the extent it seeks to compel Defendant to furnish actual health care or other services.

Respectfully submitted,

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[8] The Eleventh Amendment prevents federal courts from awarding monetary or injunctive relief for alleged violations of state law asserted against states, their instrumentalities, or state officials in their official capacities. *Pennhurst v. Halderman*, 465 U.S. 89, 103-106 (1984). *See also*, *Johns v. Supreme Court of Ohio*, 753 F.2d 524, 526 (6th Cir. 1985 ("Case law is legion that the Eleventh Amendment to the United States Constitution directly prohibits federal courts from ordering state officials to conform their conduct to state law."); *Dvorak v. Wright State Univ.*, 1997 U.S. Dist. LEXIS 23804 at *35 (S.D. Ohio 1997) ("The law is well-established that the Eleventh Amendment bars federal courts from awarding either monetary or injunctive relief in regard to supplemental state-law claims asserted against states, their instrumentalities, and state officials sued in their official capacities.") (attached as Ex. 10). In this case, Defendants are sued in their official capacities only. Therefore, they are considered instrumentalities of the State. *See McCrary v. Ohio Dept. of Hum. Servs.*, 2000 U.S. App. LEXIS 19212 at *6 (6th Cir. 2000) (attached as Ex. 11.

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CERTIFICATE OF SERVICE

I hereby certify that on May 19th, 2008, a copy of the foregoing Motion to Dismiss was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Ara Mekhjian
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