DISTRICT COURT, DENVER COUNTY, COLORADO **Court Address:** **1437 BANNOCK STREET** **DENVER, CO 80202**	
Plaintiff(s): Mark Hotaling, v. **Defendant(s):** August William Ritter, Jr., et al.	**▲ COURT USE ONLY ▲**
	Case Number: 08CV9453 Courtroom: 6

ORDER

This matter comes before the Court on Defendants August William Ritter, Jr., sued in his official capacity as Governor of the State of Colorado, and James B. Martin, sued in his official capacity as Executive Director of the Colorado Department of Public Health and Environment (the "Department") (collectively with Governor Ritter, the "State Officials") Motion to Dismiss for Lack of Jurisdiction, filed February 2, 2009. This Court, having reviewed said Motion, the court file and being otherwise advised hereby finds and orders,

Plaintiff Mark Hotaling ("Hotaling") filed this lawsuit on October 29, 2008. His Complaint names the State Officials, Planned Parenthood of the Rocky Mountains Services Corporation ("PPRM") and Boulder Valley Women's Health Center, Inc. ("BVWHC," and collectively with PPRM, the "Grant Recipients") as defendants.

Hotaling challenges two grant programs administered by the state involving breast and cervical cancer screening and non-abortion family planning services. He specifically cites five contracts (the "Contracts") between the Department and the Grant Recipients as violating Article V, Section 50 of the Colorado Constitution (the "Abortion Funding Amendment"), which prevents the state from using "public funds" to directly or indirectly pay for abortions.

Hotaling asserts that he has standing to bring this lawsuit based on his status as a Colorado taxpayer interested in "ensuring that public funds are not expended in violation of the Colorado Constitution." The State Officials move this Court, pursuant to C.R.C.P. 12(b)(1), for an Order dismissing the Complaint for lack of subject matter jurisdiction on the ground that Hotaling lacks state taxpayer standing to pursue his claims because all funding provided under the Contracts consists of federal dollars.

Standard of Review

A court must dismiss a claim under C.R.C.P. Rule 12(b)(1) where there is a "lack of jurisdiction over the subject matter." C.R.C.P. 12(b)(1). When subject matter jurisdiction is challenged on a motion to dismiss, the plaintiff has the burden to prove jurisdiction. *Reynolds v. State Board for Community Colleges and Occupational Education*, 937 P.2d 774 (Colo. App. 1996).

To establish standing under Colorado law, a Plaintiff must show that she has suffered an injury in fact to a legally protected interest. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008) *quoting Wimberly v. Ettenberg*, 194 Colo. 163, 168, (1977); *Lobato v. State*, 216 P.3d 29 (Colo. App. 2008); *U.S. Fax Law Center, Inc. v. T2 Technologies, Inc*., 183 P.3d 642 (Colo. App. 2007). The injury in fact element assures that an actual controversy exists so that the matter is proper for judicial resolution. *Ainscough v. Owens*, 90 P.3d 851, 855-856 (Colo. 2004). For purposes of standing, "An interest is legally protected if the constitution, common law, or a statute, rule or regulation provides the plaintiff with a claim for relief." *Reeves v. City of Fort Collins*, 170 P.3d 850, 851 (Colo. App. 2007). Taxpayer standing in Colorado exists when a taxpayer challenges "an unlawful government expenditure which is contrary to our state government." *Barber*, 196 P.3d at 246-247.

All funding under the Contracts consists of federal dollars.

The Contracts consist of five agreements between the Grant Recipients and the Department. (Complt. at ¶¶ 12, 14.) Each of them specifically identifies the purpose for which it was entered. Four (05FLA00166, 08FLA00789, 05FLA00145, and 08FLA00769) provide the Grant Recipients with funds to perform breast and cervical cancer screening services for low income women.

The fifth contract (07FLA00050) provides BVWHC with funds to perform family planning services. (Exh. E., Contract No. 07FLA00050, at p. 1.) These services include "Routine Family Planning Services," "Sterilization Services," and "Chlamydia Testing Services." Contract No. 07FLA00050 specifically requires BVWHC to comply with the federal Title X requirements

(*Id.* at p. 1), which in turn preclude federal grant funding from being used to provide abortion services. *See* 42 U.S.C. § 300a-6.

The Department asserts that to the best of its knowledge, since at least 2000, there has not been a single state dollar paid to the Grant Recipients under the Contracts or their precursors. In support of its assertion, the State Officials submitted the Affidavit of Dr. Jillian Jacobellis, the current Director of the Prevention Services Division of the Colorado Department of Public Health and Environment. In her Affidavit, Dr. Jacobellis explained that the Grant Recipients have participated in breast and cervical cancer screening programs since approximately 1991 (PPRM) and 1995 (BVWHC). (Affidavit of Dr. Jillian Jacobellis). BVWHC also has participated in Title X non-abortion family planning programs since approximately 1984. (*Id.*) These programs currently are administered under the Contracts, and prior to their respective effective dates, they were governed by substantially similar agreements. (*Id.* at ¶ 4.)

Dr. Jacobellis stated that since at least 1997 with respect to the breast and cervical cancer screening services, and since at least 2000 with respect to the non-abortion family planning services, all funding provided to the Grant Recipients under the Contracts or their precursors has been derived from exclusively federal sources, and no state taxpayer dollars have been paid. (*Id.* at ¶¶ 5-7.) It is true that the breast and cervical cancer screening Contracts, which are form agreements used with a variety of different types of recipients, contemplate that state funds could be provided, but in practice, the Department has elected to use only federal funds with respect to these particular Grant Recipients. (*Id.* at ¶¶ 4, 7-10).

Dr. Jacobellis further asserted that the Department ensures that only federal dollars are provided to the Grant Recipients for the services set forth in the Contracts by putting all federal funds that it receives for distribution under the agreements into separate accounts, which are segregated from any accounts that might contain state dollars. (*Id.* at ¶¶ 8-10.) The Department takes this action with respect to both the breast and cervical cancer screening and non-abortion family planning services programs challenged in the Complaint. (*Id.*) The Department makes monthly distributions of funds to the Grant Recipients pursuant to the Contracts exclusively from these separate accounts containing federal-only money. (*Id.* at ¶ 9-10.)

Based on the foregoing, this Court finds that the State Officials have established that all funding under the contracts consist solely of federal money.

<u>The funding provided under the Contracts is custodial in nature.</u>

Custodial funds are funds "[w]hich are given to the state for particular purposes and of which the state is a custodian or trustee to carry out the purposes for which the sums have been provided...." *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 524 (Colo. 1985). However, when a

state is given broad flexibility on how to allocate federal funds, they become part of the state's general fund and are considered "non-custodial." *Interrogatories Submitted by the General Assembly on House Bill 04-1098*, 88 P.3d 1196, 1201-1202 (Colo. 2004).

Whether funds are custodial or non-custodial is determined on a case-by-case basis. The factors the Court should consider include "the source of the funds, the degree of flexibility afforded to the state as the process by which the funds should be allocated and the degree of flexibility afforded to the state as to the funds' ultimate purposes." 88 P.3d at 1202-1203.

First, as explained above, the funding provided under the Contracts is exclusively federal in nature. Second, there are a number of restrictions on the flexibility of the State Officials in administering the federal dollars pursuant to the Contracts. The four Contracts providing breast and cervical cancer screening money are part of what is now known as the state Women's Wellness Connection. This program in turn is administered by the U.S. Department of Health and Human Services ("DHHS") as part of its National Breast and Cervical Cancer Early Detection Program (the "NBCCEDP"), which has been codified at 42 U.S.C. § 300k *et seq.*

The NBCCEDP imposes a number of restrictions on the Department in administering this breast and cervical cancer screening program. Most importantly, Colorado's participation is subject to DHHS approval of a detailed application and competitive grant proposal. *See* 42 U.S.C. § 300k(a); 42 U.S.C. § 300n-1. The remedy for failure to comply with the terms of such a federal grant proposal is termination of the grant. *See, e.g., Pennhurst St. Sch. v. Halderman*, 451 U.S. 1 (1981). Furthermore, states receiving a NBCCEDP grant must implement certain preferences to determine which private organizations will ultimately receive the screening funding, as well as the patients who will be targeted for the screening procedures. *See* 42 U.S.C. § 300k(b)(2); 42 U.S.C. § 300n(a). These states also are strictly limited in the proportion of the funds that may be spent on various procedures, and they must agree to adhere to certain standards of efficiency, quality and pricing. *See* 42 U.S.C. § 300m(a)-(c); 42 U.S.C. § 300n(b). Finally, a state receiving a grant must agree to provide the screening services on a statewide basis. *See* 42 U.S.C. § 300n(c).

The federal program providing funding to BVWHCC for non-abortion family planning services contains similar restrictions that significantly limit the discretion of the State Officials. Federal Title X family planning restrictions apply to this funding. As was the case with the NBCCEDP program, the Title X program effectively requires states to submit detailed applications and budgets: "Any funds granted under this subpart shall be expended solely for the purpose for which the funds were granted in accordance with the approved application and budget." 42 CFR, Subpart A, Part 59, § 59.9. Additional requirements apply that govern the services that must be provided and the individuals targeted for participation. *See* 42 CFR, Subpart A, Part 59 § 59.5.

Based on the foregoing, it is clear that the Department has little discretion in how the federal funding provided under the NBCCEDP and Title X programs is to be used. Accordingly, this Court finds that the federal monies at issue in this case are custodial in nature.

The administration of custodial funds is not a state or local expenditure as required for taxpayer standing in Colorado.

Because this Court finds that the funding under the Contracts is exclusively federal, and the funds are custodial in nature, to establish taxpayer standing under *Barber*, Hotaling must show: (1) that the administration of custodial funds by the State Officials is a "government expenditure" and (2) if so, that the expenditure is "unlawful" and/or "contrary to [the] state government."

The funding provided under the Contracts is a "government expenditure." Federal dollars are being "expended" to provide for breast and cervical cancer and non-abortion family planning services. However, given the exclusively federal nature of the funds at issue in this case, Hotaling cannot show that the expenditure is "unlawful" and/or "contrary" to [the] state government."

Custodial funds in possession of a state official are intended for the use of a third party, *Colo. Gen. Assembly v. Lamm*, 738 P.2d 1156, 1170 (Colo. 1987), and the federal government will retain a property interest in them after distribution. *Id.*; *Palmiter v. Action, Inc.*, 733 F.2d 1244, 1249-50 (7th Cir. 1984). Colorado law is clear that custodial funds are funds "[w]hich are given to the state for particular purposes and of which the state is a custodian or trustee to carry out the purposes for which the sums have been provided...." *Lamm*, 700 P.2d at 524. They are not state moneys. *See McManus v. Love*, 499 P.2d 609, 610 (Colo. 1972); *Stong v. Indus. Comm'n*, 204 P. 892, 893 (1922).

Any "expenditure" made pursuant to the Contracts therefore comes from the federal government, and not the Department or the State Officials, who merely administer or distribute the "expended" money. "[T]he Colorado Constitution is not a grant of power, but an additional limitation upon all forms of state power…." *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1235 (Colo. 2003); *accord Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994). A federal expenditure cannot be unlawful or contrary to any state constitutional amendment because the Colorado Constitution has no inherent authority to limit federal spending. Accordingly, this Court finds that the expenditures made pursuant to the Contracts are not "unlawful" or "contrary to [the] state government" as required to vest taxpayer standing with Hotaling under *Barber*.

Conclusion

Based on the foregoing, it is hereby ORDERED that the State Officials' Motion is GRANTED and Hotaling's Complaint is DISMISSED pursuant to C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction.

SO ORDERED this 14th day of January, 2010.

BY THE COURT:

Larry J. Naves
Denver District Court Judge