

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INSTITUTE FOR CREATION	§	
RESEARCH GRADUATE SCHOOL,	§	
Plaintiff,	§	
	§	
v.	§	CAUSE NO. A:09 CA 382
	§	
TEXAS HIGHER EDUCATION	§	
COORDINATING BOARD, a state	§	
agency; <i>et al</i>	§	

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

TO THE HONORABLE SAM SPARKS, UNITED STATES DISTRICT COURT JUDGE:

Defendants, the Texas Higher Education Coordinating Board (“the Board”), Raymund Paredes, Commissioner of the Board, in his official and individual capacities, Board members Lyn Bracewell Philips, Joe B. Hinton, Elaine Mendoza, Laurie Bricker, A.W. “Whit” Riter, III, Robert Shepard, and Brenda Pejovich, in their official and individual capacities, file this response to the Plaintiff’s premature motion seeking judgment pursuant to Federal Rule of Civil Procedure 12(c).¹ For the following reasons, Defendants respectfully request the Court to deny the motion.

INTRODUCTION

Plaintiff, Institute for Creation Research Graduate School (“ICRGS”) alleges various violations of constitutional rights. Its claims purportedly arise from the Board’s denial of ICRGS’s application for a Certificate of Authority to offer a Master of Science

¹ A Rule 12(c) motion can only be filed after the pleadings are closed. FED. R. CIV. P. 12(c). As noted *infra*, Defendants have yet to file an answer. Similarly, to the extent Plaintiff seeks to have the motion serve as one for summary judgment, it is also premature.

degree in science education in Texas. *Plaintiff's Amended Complaint* at ¶ 9 (stating ICRGS's wishes to offer its program, which awards a Master of Science degree with a major in Science Education, "in and from" Texas).

Among other things, Plaintiff brings a claim pursuant to 42 U.S.C. § 1983, *id.* ¶ 14, and alleges infringement of its "1st and 14th Amendment-based liberties," *id.* ¶ 16, and its "freedom of association" rights. *Id.* ¶¶ 32, 50-51. Plaintiff also brings claims against the Defendants directly under the Texas Constitution. *Id.* ¶ 53. Further, Plaintiff asserts that Defendants have violated the Texas Religious Freedom Restoration Act, *id.* ¶ 33, and that the Board's actions unconstitutionally restrain legitimate competition in the higher education market, *id.* ¶ 42.

Plaintiff seeks declaratory and injunctive relief, and asks this Court to declare that "the Texas statutory scheme of accrediting accreditors" is unconstitutional on its face or as applied and amounts to an unlawful restraint on interstate commerce. *Plaintiff's Amended Complaint* ¶¶ 44, 60 and Part XVI.

Defendants have not yet answered Plaintiff's complaint and no discovery has been conducted. Instead, Defendant's filed a Rule 12 motion to dismiss, asking the Court to dismiss some of Plaintiff's claims because they have sued an improper party, failed to assert actionable claims against the Board members in their individual capacities, and for the Plaintiff's lack of standing. *Defendants' Motion to Dismiss* at 3-8. That motion is still pending. Neither party has commenced discovery, nor has a scheduling order been set.

STANDARD OF REVIEW

The Plaintiff asks the Court to determine whether Texas Education Code § 1.001 excludes it from the Board's oversight. *Plaintiff's Motion for Judgment* at 7. This is a legal question that depends on very limited facts. Judgment on the pleadings is appropriate only if material facts are not in dispute and questions of law are all that remain. *See Hebert Abstract Co. v. Touchstone Properties, Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990). However, if matters outside the pleadings are presented to the court for consideration, or issues of fact are in dispute, the matter is treated as a motion for summary judgment. *See* FED. R. CIV. P. 12(d). Interpretations of statutory provisions that are dispositive and which raise only questions of law, there being no challenge to the operative facts, are appropriate for summary judgment. *Dobbs v. Costle*, 559 F.2d 946, 947 (5th Cir. 1977).

The Plaintiff's motion, however, presents a mixed question of law and fact. First, the Court must determine whether the Board is cloaked with authority to regulate and oversee privately-funded postsecondary educational institutions. This is a question of law. *See Edwards v. Aguillard*, 42 U.S. 578, 595-96 (1987) (despite affidavits, decision can be made based on plain language of statute). If the Court finds that the Board lacks that authority, then it must determine whether Plaintiff is a privately-funded post secondary educational institution. This is a question of fact, which at this point, Defendants contend is in dispute.²

² Defendants object to Plaintiff's exhibit, the affidavit of Eileen Turner Spragins, on the grounds that it contains hearsay and is conclusory. Moreover, there has not been adequate time for discovery in this case. The Defendants have not yet answered, much less done any discovery in the case. It therefore has no way of refuting or admitting Plaintiff's contention that it is wholly unsupported by state taxes. Accordingly, should the Court determine that Plaintiff's legal argument has any merit---a contention the Defendants oppose---Defendants request the Court to either deny the motion outright or order a continuance to allow discovery to be undertaken on the issues relevant in this case. FED. R. CIV. P. 56(f).

ARGUMENT

According to Plaintiff, “[t]he Texas Higher Education Board..., to the extent that it claims any jurisdictional or regulatory authority over ICRGS’s academic liberties *under the Texas Education Code* (e.g. under its chapter 61 or otherwise), does so improperly, because ICRGS is statutorily exempt from the Texas Education Code’s application, as the fairly simple text of said § 1.001(a) clearly shows.” *Plaintiff’s Motion for Judgment* at 2 (emphasis in original). That section provides: “This code applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by this code.” TEX. EDUC. CODE § 1.001(a).

Plaintiff’s contention purposefully and improperly ignores the remainder of the Texas Education Code. *See* TEX. GOV’T CODE § 311.021, (2)-(5) (it is presumed that “(2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.”). Chapter 61 of the Texas Education Code—the Higher Education Coordinating Act of 1965—includes a subchapter which expressly authorizes the Higher Education Coordinating Board to regulate private postsecondary educational institutions.³ TEX. EDUC. CODE §§ 61.301 et seq.

The Act states that

the policy and purpose of the State of Texas [are] to prevent deception of the public resulting from the conferring and use of fraudulent or substandard college and university degrees [and] to regulate...the advertising, solicitation or representation by educational institutions or

³ The statute defines “private postsecondary educational institution” or “institution” as an “educational institution which: (A) is not an institution of higher education as defined by Section 61.003; (B) ...solicits business in this state; and (C) furnishes or offers to furnish courses of instruction...by electronic media...leading to a degree or providing credits alleged to be applicable to a degree.” TEX. EDUC. CODE § 61.302(2).

their agents.... [Therefore], regulation by law of the evidences of college and university educational attainment is in the public interest.

Id. § 61.301. To this end, section 61.304 (a) and (b) limits the terms an institution may use to describe designations of education attainment and prohibits an institution from awarding or offering to award any degree “unless the institution has been issued a certificate of authority to grant the degree by the board....”

Plaintiff contends that, even in spite of this express grant of authority to the Board, the Board lacks regulatory authority over it because § 1.001 states the Texas Education Code applies only to educational institutions supported by state funds. Docket Entry # 2 (Motion for Judgment at 2, ¶ 2). But by ignoring the remainder of the Code, Plaintiff invites the Court to ignore well-established statutory construction principles which require that the entire statute be given effect and that two arguably conflicting statutory provisions should be construed to give effect to both. TEX. GOV'T CODE §§ 311.021(2), .026(a); *see Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987) (courts “should act under the assumption that Congress intended its enactment to have meaningful effect and must, accordingly, construe [the enactment] so as to give it such effect.”); *Goswami v. American Collections Enterprise, Inc.*, 395 F.3d 225, 227 n.4 (5th Cir. 2004), cert. denied, 546 U.S. 811 (2005) (“One basic principle of statutory construction is that where two statutes appear to conflict, the statute addressing the relevant matter in more specific terms governs.”). Moreover, Plaintiff’s interpretation of the Code improperly favors its own interests over those of the public.

Although § 1.001 of the Education Code says that the Code applies to all educational institutions supported by state tax funds, it does not also say that it is inapplicable to any other educational institutions. In other words, the Code applies to

state tax-supported educational institutions and any other institutions the Texas Legislature elects to regulate by statute. The Texas Legislature chose to regulate private postsecondary educational institutions in addition to publicly-funded educational institutions and has delegated that regulatory authority to the Board. By considering the entirety of the Code and giving effect to both § 1.001 and Chapter 61, Subchapter G, it is clear that the Plaintiff is not exempt from the Board's authority under Chapter 61, Subchapter G. *See HEB Ministries, Inc. v. Tex. Higher Education Coordinating Bd.* 235 S.W.3d 627, 634 (Tex. 2007) (recognizing the Board's discretion in determining private postsecondary educational institutions' compliance with state standards). Such an interpretation favors the public's interest in the prevention of "diploma mills" in Texas over the interests of Plaintiff and other private postsecondary educational institutions. TEX. EDUC. CODE § 61.001; *HEB Ministries, Inc.*, 235 S.W.3d at 631.

CONCLUSION

Because the Higher Education Coordinating Board has the express authority to regulate ICRGS, and because ICRGS is not exempt from the scope of the Texas Education Code, Defendants respectfully request the Court to deny Plaintiff's motion for judgment. Alternatively, Defendants respectfully request the Court to delay its ruling on Plaintiff's motion until such time as the parties have had an opportunity to conduct discovery. Defendants further request any other such relief to which the Court may determine they are entitled.

Respectfully submitted,

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Certificate of Service

I certify that on the 29th day of June, 2009 I electronically filed with the Clerk of the Court using the CM/ECF system a copy of Defendants' Response to Plaintiff's Motion for Judgment which will send notification of such filing to the following:

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ORDER

On this day came on to be considered Plaintiff's Motion for Judgment and the court after considering arguments from both parties, is of the opinion it should be DENIED . Accordingly, it is hereby,

ORDERED that the Plaintiff's Motion for Judgment is DENIED in all respects.

SIGNED this the _____ day of _____, 2009.

SAM SPARKS
UNITED STATES DISTRICT JUDGE