

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

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|---|---|----------------------------------|
| INSTITUTE FOR CREATION RESEARCH | § | |
| GRADUATE SCHOOL | § | |
| An unincorporated educational ministry | § | |
| Unit for the Institute for Creation | § | |
| Research, Inc., a California not-for-profit | § | |
| Corporation | § | |
| <i>Plaintiff,</i> | § | |
| | § | |
| V. | § | CIVIL ACTION NO. 3:09-CV-00693-B |
| | § | |
| RAYMUND PAREDES, | § | |
| in his official and individual capacities; | § | |
| LYN BRACEWELL PHILLIPS, | § | |
| in her official and individual capacities; | § | |
| JOE B. HINTON, in his official and individual | § | |
| capacities; | § | |
| ELAINE MENDOZA, in her official and | § | |
| individual capacities; | § | |
| LAURIE BRICKER, in her official and | § | |
| individual capacities; | § | |
| A.W. "WHIT" RITER, III, in his official and | § | |
| individual capacities; | § | |
| BRENDA PEJOVICH, in her official and | § | |
| Individual capacities; and | § | |
| ROBERT SHEPARD, in his official and | § | |
| individual capacities, | § | |
| <i>Defendants</i> | § | |

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JANE J. BOYLE, UNITED STATES DISTRICT COURT JUDGE:

Defendants, Raymund Paredes, Commissioner of the Higher Education Coordinating 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 for summary judgment. 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 arise from the Board's denial of ICRGS's application for a Certificate of Authority to offer a Master of Science degree in Science Education in Texas. *Plaintiff's Complaint* at ¶ 37 (stating ICRGS's wishes to offer its program, which awards a Master of Science degree with a major in Science Education, in Texas).

Among other things, Plaintiff brings a claim pursuant to 42 U.S.C. § 1983, *id.* ¶ 14, and alleges infringement of its purported free speech and its "freedom of association" rights, *id.* ¶¶ 67-89, 114, and its due process rights, *id.* ¶¶ 61-66. Plaintiff also brings claims against the Defendants directly under the Texas Constitution. *Id.* ¶ 116. Further, Plaintiff asserts that Defendants have violated the Texas Religious Freedom Restoration Act, *id.* ¶ 228, and § 106.001 of the Texas Civil Practice and Remedies Code, *id.* ¶ 119. Finally, Plaintiff maintains that the Board's actions unconstitutionally restrain legitimate competition in the higher education market, *id.* ¶¶ 90-108.

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 Complaint* Part V, ¶ C.

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 Plaintiff's claims for improper venue, or alternatively, to transfer the case to the Western District, Austin Division,

where Plaintiff has an almost-identical case pending. *Defendants' Motion to Dismiss* at 3-4. That motion is still pending. Neither of the parties has commenced discovery and a scheduling order not been entered.

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 First Motion for Summary Judgment* at ¶ 2. This is a legal question that depends on very limited facts. 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.¹

¹ 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. Accordingly, they have 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 First Motion for Summary Judgment* ¶ 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.² 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 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

² 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)

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....” *Id.* § 61.304.

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 with state funds.² *Plaintiff’s First Motion for Summary Judgment* ¶ 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" as well as the granting of substandard degrees 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 July 9, 2009 I electronically filed with the Clerk of the Court using the CM/ECF system a copy of *Defendants' Response to Plaintiff's First Motion for Summary Judgment* which will send notification of such filing to the following:

James J.S. Johnson
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and by U.S. Certified Mail, Return Receipt Requested to:

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SHELLEY NIETO DAHLBERG
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Defendants §

ORDER

On this day came on to be considered Plaintiff’s Motion for Summary Judgment. After considering the motion, the response, and argument of counsel, the Court is of the opinion that the motion should be DENIED. Accordingly, Plaintiff’s Motion for Summary Judgment is DENIED.

SIGNED this the ____ day of _____, 2009.

UNITED STATES DISTRICT JUDGE