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 COODINATING BOARD, a state agency; *et al*	§ § § §	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO RULE 12(B) MOTION TO DISMISS

TO THE HONORABLE SAM SPARKS:

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 reply to Plaintiff's response to their Rule 12(b) motion to dismiss and motion for Rule 7(a) reply. For the reasons contained in their motion, as well as the Plaintiff's failure to rebut the arguments in that motion, Defendants respectfully request the Court to grant the motion.

A. PLAINTIFF'S CONTENTION REGARDING § 1.001 OF THE TEXAS EDUCATION CODE HAS NO RELEVANCE TO THE ISSUES PRESENTED IN DEFENDANTS' MOTION TO DISMISS.

According to Plaintiff, the Board lacks authority to regulate it pursuant to TEX. EDUC. CODE § 1.001(a). *Plaintiff's Motion for Judgment* at 11 (Doc. 11). Plaintiff contends that the Defendants' arguments in the motion to dismiss "presuppose THECB's right to regulate ICRGS…[and D]efendant's 12(b) Motion…should be weighed in light of that critical statute-applicability qualification." *Motion to Dismiss* at 1-2 (Doc. 12). Plaintiff, however, is putting the cart before the horse. Every argument in Defendant's motion attacks a pleading defect in Plaintiff's complaint. A determination that the plaintiff has failed to state a claim against a party in the proper capacity would preclude the court from entering judgment upon Plaintiff's § 1.001 claim against that party in that capacity. Accordingly, that contention is not of critical importance as Plaintiff suggests much less of any import to the questions before the Court in the Defendants' motion.

B. DEFENDANTS' REMOVAL OF THIS ACTION DID NOT WAIVE THE REQUIREMENT THAT PLAINTIFF HAVE STANDING TO BRING ITS CLAIMS.

Defendants asserted a single jurisdictional challenge in their motion to dismiss: whether the Plaintiff had standing to bring its First Amendment claims. *Motion to Dismiss* at 5 (Doc. 10). According to Plaintiff, the Board's "voluntary removal…negates any jurisdiction problems with this action." *Plaintiff's Resp.* at 3 (Doc. 12). However, standing to bring a claim sits at the heart of the case or controversy requirement and can *never* be waived. *In re Weaver*, 632 F.2d 461, 463 n.6 (5th Cir.1980) (noting that "[b]ecause standing is an element of the constitutional requirement of 'case or controversy,' lack of standing deprives the court of subject matter jurisdiction[,]" and, "objections to standing are never waived and must be raised by an appellate court sua sponte ") (citing *Fairley v. Patterson*, 493 F.2d 598 (5th Cir.1974)). Accordingly, that the Defendants removed this action is, like Plaintiff's § 1.001 contention, irrelevant to the Court's consideration of the Defendants' motion.

C. PLAINTIFF'S CLAIMS AGAINST THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES ARE WITHOUT BASIS IN FACT OR LAW.

Although Plaintiff states that it is dropping its individual capacity claims against the Board members, its statement is an empty concession. Plaintiff has *never* sought any relief against the Board members in their individual capacities *other than declaratory and prospective injunctive relief*. P*laintiff's Amended Complaint* ¶¶ 44, 60 and Part XVI. Not only has Plaintiff failed to allege any actions taken by the Defendants that were outside their capacities as state officials, but also it is well established that claims for declaratory and injunctive relief must be brought against state officials in their *official* capacity. *Hafer v. Melo*, 502 U.S. 21, 27-30 (1991); *Ex Parte Young*, 209 U.S. 123 (1908); *City of El Paso v. Heinrich*, No. 06-0778, 2009 Tex. LEXIS 253, 52 Tex. Sup. J. 689 (Tex. May 1, 2009). Accordingly, Plaintiff's claims against the Defendants in their individual capacities should be dismissed.

D. PLAINTIFF HAS FAILED TO DEMONSTRATE HOW THE BOARD'S DENIAL OF ITS APPLICATION FOR A CERTIFICATE OF AUTHORITY HAS A COERCIVE EFFECT ON ANY INDIVIDUALS' PRACTICE OF HIS RELIGION OR ASSOCIATION.

The United States Supreme Court has held that a free exercise claim "ordinarily requires individual participation" because "it is necessary in a free exercise case for one to show the coercive effect of the [action] as it operates against [a person] in the practice of his religion." *Harris v. McRae*, 448 U.S. 297, 321 (1980); *see Cornerstone Christian Schools v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009). Similarly, the Plaintiff has no inherent right to freedom of association, although its members might. *NAACP v. Alabama*, 357 U.S. 449, 459 (1958). Plaintiff has ignored these clear, well-established principles and relies only on conclusory statements that it has free exercise and association rights. Plaintiff could have demonstrated its standing by alleging that its "members" are actually coerced in practicing their religion or are somehow prohibited from exercising their right to association. Or at the least, Plaintiff could have demonstrated a close relationship between the organization and its members, and an allegation of injury to its members as a result of the action. *Id*; *Church of Scientology of California v. Cazares*, 638 F.3d 1272, 1278 (5th Cir. 1981)(citing *Warth v. Seldin*, 422 U.S. 490 (1975) and *NAACP v. Alabama*, 357 U.S. at 458-59). Plaintiff made no such assertion, instead stating

> ICRGS has a "free association" right to attract students who endorse ICR's creationist Tenets. Also, ICRGS has 1st Amendment-focused "Free Exercise"… rights to both advertize [sic] and to operate its non-evolutionist *Master of Science* program, and to institutionally confer its ultimate *opinion* in the form of an academic assessment…applied to selected ICRGS students, namely, those students who fully complete the objective requirements of ICRGS's non-evolutionist *Master of Science* program.

Doc. 12 (Resp. to Motion to Dismiss at 6). This argument is conclusory and demonstrates that ICRGS's students' participation is necessary to their claims. *Harris*, 448 U.S. at 321; *see Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir.2000) (a plaintiff must plead specific facts and may not rely on mere conclusory statements). Plaintiff itself lacks standing to bring First Amendment "free exercise" and "free association claims" and they should, therefore, be dismissed.

E. BASED ON THE PENALTIES PRESCRIBED BY CIVIL PRACTICE & REMEDIES CODE § 106.003, IT IS CLEAR THAT A CLAIM UNDER § 106.001 MUST BE BROUGHT AGAINST THE DEFENDANTS IN THEIR *OFFICIAL* CAPACITIES.

Plaintiff contends that the Defendants are acting in their individual capacities by acting discriminatorily and that the penalties described § 106.003 contemplate a suit against them "on the individual level." Doc. 12 at 7. However, the relief available under § 106.003 demonstrates that the claims must be against the Defendants in their official capacities. Plaintiff is entitled only to injunctive and declaratory relief under the statute. First, as stated previously, claims against state officials for declaratory and injunctive relief must be made against them in their official capacities. *Hafer*, 502 U.S. at 27-30; *Heinrich*, No. 06-0778, 2009 Tex. LEXIS 253; 52 Tex. Sup. J. 689 (Tex. May 1, 2009). Moreover, absent their positions on the Board, the Board members would be without authority *at all* to grant Plaintiff a license, permit, or certificate the denial of which serves as the basis for all of Plaintiff's claims. Finally, were the Court to enter an injunction against the Board members in their individual capacities, that injunction would follow those Defendants when they left the Board, and would not bind their successors. Accordingly, practically speaking, the claim must be one against the Board members in their official capacities only. Defendants respectfully request the Court to grant their motion and dismiss Plaintiff's § 106.002 claims against them in their *individual capacities.*

CONCLUSION

For the reasons set forth in Defendant's Partial Motion to Dismiss as well as those presented in this Reply, Defendants respectfully request the Court to grant their motion and dismiss Plaintiff's First Amendment Free Speech and Association claims for lack of standing and all of Plaintiff's claims against the Defendants in their individual capacities.

Respectfully submitted,

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Certificate of Service

I certify that on the July 6, 2009 I electronically filed with the Clerk of the Court using the CM/ECF system a copy of *Defendants' Reply to Plaintiff's Response to Motion to Dismiss* which will send notification of such filing to the following:

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