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

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CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY

INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL,
Plaintiff,

-vs-

Case No. A-09-CA-382-SS

TEXAS HIGHER EDUCATION COORDINATING BOARD, COMMISSIONER RAYMUND PAREDES, LYN BRACEWELL PHILLIPS, JOE B. HINTON, ELAINE MENDOZA, LAURIE BRICKER, A.W. "WHIT" RITER, III, BRENDA PEJOBICH, and ROBERT SHEPARD,
Defendants.

ORDER

BE IT REMEMBERED on this day the Court held a hearing in the above-styled cause, and the parties appeared through counsel. Before the Court were Defendants the Texas Higher Education Coordinating Board (the "Board"), Commissioner Raymund Paredes, Lyn Bracewell Phillips, Joe Hinton, Elaine Mendoza, Laurie Bricker, A.W. Riter, III, Brenda Pejobich, and Robert Shepard (collectively, "Defendants")' Motion to Dismiss [#10], Plaintiff the Institute for Creation Research Graduate School ("Plaintiff" or the "Institute")'s response thereto [#12], and Defendants' reply thereto [#18]; Defendants' Motion for a Rule 7(A) Reply [contained in #10]; Plaintiff's Motion for Judgment on the Pleadings [#11], Defendants' response thereto [#15], and Plaintiff's reply thereto [#16]. Having considered the aforementioned documents, the arguments of counsel at the hearing, the case file as a whole, and the relevant law, the Court enters the following orders.

In Plaintiff's response to Defendants' motion to dismiss, Plaintiff stipulated it is not asserting any "claim under 42 U.S.C. § 1983 against [the Board] itself," only against the Board members. At the hearing, Plaintiff's counsel further stipulated it is not seeking recovery against any of the Board Members in their individual capacities in this lawsuit, thereby mooting several portions of the Motion to Dismiss. Thus, the only contested portion of the motion to dismiss which remained and was argued at the hearing was the portion on standing—specifically, whether Plaintiff has standing to assert its "free exercise of religion claims." Defendants claim Plaintiff does not have standing to bring any claims "arising of an alleged abrogation of a right to the 'free exercise' of religion" because it lacks associational standing to assert those claims on behalf of its members, students, or employees. *See* Defs.' Mot. Dismiss at unnumbered page 5. Defendants' counsel claimed at the hearing the Fifth Circuit and Supreme Court have been "relatively clear" the First Amendment right to free exercise is a "personal right."

The Court does not agree with Defendants' counsel that a free exercise claim is inherently a "personal" right. In fact, the Court finds there are two possible theories under which an institution or corporation might bring a free exercise claim: (1) to protect the rights of its members; or (2) to protect its own rights as a corporate institution. *Compare Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983) (where religious institutions raised their own Free Exercise claims); with *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163 (1958) (where organization was granted standing to raise the rights of its members who could not practically protect their own interests).

Of course, Defendants are correct Plaintiff does not appear to have standing under the first theory—the theory of organizational standing—based on their present complaint. Plaintiff does not state anywhere in the Amended Petition that it is bringing this lawsuit as a "representative" action

on behalf of its members or students, for violations of their rights to exercise their religion; for example, Plaintiff does not purport to sue on behalf of any student or prospective student who wishes to obtain a Masters of Science degree from the Institute and cannot.[1] But Defendants are mistaken in focusing entirely on whether there is associational standing in this case. Defendants must also consider whether Plaintiff may proceed under the second theory, and invoke its ***own*** institutional right to freely exercise religion, as it purports to do in the Amended Petition.

The Court finds Plaintiff does indeed have standing to invoke its own institutional right to the free exercise of religion. Although the Fifth Circuit explicitly left open whether there is an "institutional" right of free exercise of religion, *see, e.g., Church of Scientology v. Cazares*, 638 F.2d 1272, 1280, n.7 (5th Cir. 1981), the Supreme Court just a few years later seemed to assume (without explicitly considering the issue) that a Christian university and a Christian school both had standing to pursue free exercise claims on behalf of the institutions themselves. *See Bob Jones University v. United States*, 461 U.S. 574 (1983). Other circuits have also allowed various religious organizations to sue in federal court for abridgements of the institutions' rights under the free exercise clause of the First Amendment. *See New Creation Fellowship of Buffalo v. Town of Cheektowaga, N.Y.*, 2004 WL 1498190 at *10 (W.D.N.Y. 2004) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *The Rectors, Wardens and Members of the Vestry of St. Bartholomew's Church v. New York City*, 914 F.2d 348, 352-55 (2nd Cir. 1990); *St. German of*

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[1]Although the Fifth Circuit has held that "the requisite for representational standing in this circuit is not necessarily an explicit statement of representation but a close nexus between the organization and its members," *Church of Scientology v. Cazares*, 638 F.2d 1272, 1278 (5th Cir. 1981), the Court would be hard-pressed to examine whether Plaintiff may sue on behalf of its members when the Amended Petition alleges nothing whatsoever about any individual member, student, or prospective student of the Institute. The Amended Petition references only ***the Institute's*** rights under the Constitution.

Alaska Eastern Orthodox Church v. United States, 840 F.2d 1087, 1091-92 (2nd Cir. 1988), among others). Accordingly, the motion to dismiss is DENIED on this ground, as the Court finds the Institute is within the scope of protection of the First Amendment's free exercise clause, and therefore has standing to assert the claim on its own behalf.[2]

Conclusion

In accordance with the foregoing, and in commemoration of the oral orders given at the hearing,

> IT IS ORDERED that Defendant's Motion to Dismiss or, Alternatively, for a Rule 7(A) Reply [#10] is OVERRULED, based on the Court's foregoing opinion and on the stipulation of Plaintiff's counsel in open court that no individual liability is sought against the Board Members in this lawsuit, and its stipulation in its response that no claims are asserted against the Board under § 1983.

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[2]Of course, in addition to a showing that it is within the scope of protection granted by a specific constitutional right, an organizational plaintiff must also (like an individual plaintiff) show it has standing to enforce those rights, as required by Article III of the Constitution. Thus Plaintiff must demonstrate that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 180-81 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). But these elements do not appear to be in dispute with regard to Plaintiff. Plaintiff has presented an "injury in fact" in that its capacity to offer Master's degrees in Texas has undisputedly been abolished by the Board's decision. Courts have held violations of constitutional or federal statutory rights that directly impair an organization's capacity to function as an organization, such as a diversion of organizational resources, establish an injury in fact sufficient to confer constitutional standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998). Furthermore, this injury is not, as far as the Court can tell, conjectural or incapable of redress—it has already happened, and is ongoing. Thus, based on record before the Court at this time it appears Plaintiff fulfills the constitutional standing requirements.

IT IS FURTHER ORDERED that Plaintiff's Motion for Judgment on the Pleadings [#11] is DENIED without prejudice to refile at a later date, as it is premature at this time.

IT IS FINALLY ORDERED that Plaintiff shall file a second amended complaint within TWENTY (20) DAYS of the date of this order, which shall not exceed TWENTY (20) PAGES. Plaintiff's complaint must comply with Rule 8 and Rule 10(b) of the Federal Rules of Civil Procedure and specifically state the grounds for the complaint and actions taken by Defendants that give rise to the complaint.

SIGNED this the 20 day of July 2009.

SAM SPARKS
UNITED STATES DISTRICT JUDGE