IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of Miriam Flores, a minor child, et al., Plaintiffs, vs. STATE OF ARIZONA, et al.,	No. CV 92-596-TUC-RCC **ORDER ON MOTION FOR STAY NOS. 1 and 2**

Pending before the Court is Defendant Thomas C. Horne's Motion for Stay No. 1 and No. 2 (Docket Nos. 338 and 339) filed January 17, 2006. On February 3, 2006, Plaintiffs filed responses to both motions (Docket Nos. 360 and 361). As set forth below, the Defendant's Motions to Stay (Docket Nos. 338 and 339) are DENIED. The Court will not address the issue of whether Defendant Thomas Horne has standing.

DISCUSSION

On December 16, 2005, the Court entered its Order Granting Plaintiff's Motion for Sanctions and enjoining the State of Arizona from requiring English Language Learner ("ELL") students to pass the AIMS test as a requirement for graduating from high school. Additionally, the Order required Defendant State of Arizona to take specific actions in order to lift the injunction. Defendant Thomas Horne moves the Court to stay the injunction pending completion of an appeal to the Ninth Circuit Court of Appeals.

I. Standard For a Stay Pending Appeal

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. Fed.R.Civ.P. 62(c). *See Democratic Nat'l Committee v. Watada*, 198 F.Supp.2d 1193, 1196 (D.Hawaii, 2002). The Court has previously explained the standards for an injunction:

> The district court has the discretion to suspend or modify an injunction pursuant to Fed.R.Civ.P. 62(c). The standard that guides trial courts on stay motions was set forth by the Supreme Court as follows: 1) whether the applicant has made a strong showing of likelihood of success on the merits; 2) whether the applicant will be irreparably injured unless a stay is granted; 3) whether the grant of a stay will substantially injure other interested parties; and 4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987). Although the above criteria must be applied individually to the facts of each case, the court's decision must be made in light of all criteria.

Overstreet v.Thomas Davis Medical Centers, P.C. 978 F.Supp. 1313, 1314 (D.Ariz.,1997).

see also Evans v. Buchanan, 435 F.Supp. 832, 842 (D.Del.1977).

II. Likelihood of Success on Appeal

A literal reading of the first criterion, that defendant show it is likely to succeed on the merits of its appeal, has not been adopted by courts that have applied it. *Mamula v. Satralloy, Inc.*, 578 F.Supp. 563, 580 (D.C.Ohio,1983). However, courts have interpreted the first criterion to be satisfied by a showing that "the appeal raises serious and difficult

questions of law in an area where the law is somewhat unclear." *Overstreet*, 978 F.Supp. at 1314, quoting *Mamula*, 578 F.Supp. at 580.

Defendant states that the December 2005 Court Order is not based on any factual predicates. The Court disagrees. In the Findings of Fact and Conclusions of Law of the January 2000 Court Order, the Honorable Alfredo C. Marquez found in pertinent part that:

1. The State's minimum $150 appropriation per limited English proficient ("LEP") student, in combination with its property based financing scheme, is inadequate and has resulted in the following LAU program deficiencies: 1) too many students in a class room, 2) not enough class rooms, 3) not enough qualified teachers, including teachers to teach ESL and bilingual teachers to teach content area studies, 4) not enough teacher aids, 5) an inadequate tutoring program, and 6) insufficient teaching materials for both ESL classes and content area courses.

2. The State does not provide any other forms of in-kind assistance to offset the base level deficiency. The State has not designed any programs, nor implemented any practices, nor committed any resources which would supplement or supplant district level services.

3. The State's minimum base level for funding LAU programs is arbitrary and capricious and bears no relation to the actual funding needed to ensure LEP students in NUSD are achieving mastery of its specified essential skills.

4. Defendants are violating the EEOA because the State's arbitrary and capricious LAU appropriation is not reasonably calculated to effectively implement the LAU educational theory which it approved and NUSD adopted.

5. Defendants are violating the EEOA because the State has failed to take appropriate action to remedy language barriers in NUSD, in that, despite the adoption of a recognized LAU program in NUSD, the State has failed to follow through with practices, resources and personnel necessary to transform theory into reality.

The Defendant contends that the Court exceeded its power. The Court disagrees. The Court enjoined the AIMS test as a graduation requirement for ELL students due to the Plaintiff's motion for injunctive relief. The Plaintiffs argued that the State had failed to provide ELL students with the proper tools needed to pass the AIMS test for nearly six (6) years. Enjoining the AIMS test was equitable relief.

Defendant argues that a stay pending appeal is warranted because vital and broad public interests are at stake, irreparable harm is both certain and imminent, and there are debatable legal issues. Defendant contends that this Court's Order is not based on any factual predicates, exceeds the power of this Court, and improperly permits a collateral attack on a final judgment through the use of a contempt proceeding. Further, the Defendant states that the Court exceeded its legal authority under the United States Constitution. The Court disagrees.

The Court Order filed on December 16, 2005, addressed Defendant's principal argument, that vital and broad public interests are at stake, and irreparable harm is both certain and imminent. However, due to the debate between the Arizona State Legislature and the Governor of the State of Arizona, the Defendants have failed to comply with this Court's January 2000 Order and the January 2005 Order.

Plaintiffs argued that it is a matter of fundamental fairness, that ELL students should not be required to pass the AIMS test as a graduation requirement when, for the last six (6) years, the State has failed to provide them with the programs they need to acquire the State's academic standards and pass the AIMS test. The Court agreed with Plaintiff's argument during the October 2005 hearing. The injunction imposed in the December 2005 Court Order, redresses the harm imposed on ELL students due to the State's arbitrary and capricious ELL program and the State's failure to properly fund the ELL program for over six (6) years. As such, the Court finds that Defendant has not satisfied the first criteria for the issuance of a stay.

III. Irreparable Injury

Defendants argue that irreparable harm is certain and imminent due to the enjoining of the AIMS test. However, Defendant Thomas Horne does not state how he is in fact harmed by the injunction. Also, the potential harm that the State will suffer under this Court's Order is speculative. Moreover, Defendant State of Arizona has not filed a motion to stay the enjoining of the AIMS test nor delineated the harm if any, they have suffered as a result of the injunction. Finally, the AIMS test as a graduation requirement did not come into effect until this year. Thus, the hardship and irreparable harm the State may endure as a result of the injunction is negligible when compared to the irreparable harm ELL students have suffered for nearly six (6) years due to the State's inaction. As such, the Court finds no irreparable harm as it pertains to any of the Defendants in this case.

IV. Irreparable Injury to Plaintiffs and Public Interest

The Defendant asserts that enjoining the State from requiring ELL students to pass the AIMS test as a prerequisite to graduation from high school will have no effect on funding. The Court agrees. The Defendants fail to explain how their inaction (failure to comply with both the January 2000 and January 2005 Court Orders) **does not** effect ELL students. The Defendant's failure to properly fund ELL education and then require ELL students to pass an English based AIMS test is fundamentally unfair. As mentioned above, nearly six (6) years have passed and the State has yet to comply with any of the Court's Orders in this matter.

The Defendant argues that the Court did not take into account broad public interests or potential harm to ELL students. The Court disagrees. The lack of compliance by the State in this matter has a disheartening effect on ELL students and the public as a whole. The enjoining of the AIMS test as a prerequisite for graduation helps ELL students and redresses the injury caused to them by the State's inaction. Consequently, ELL students who are due to graduate and have successfully passed all of their high school

subjects will receive their diplomas, be allowed to continue on to college, and become contributing members of our society.

A. Collateral Attack

Defendant states that Plaintiff's request for an injunction of the AIMS test is a collateral attack on the Court's January 2000 Judgment. The Court disagrees. In general, a party in contempt cannot collaterally attack the underlying order in a contempt proceeding. *Hook v. State of Ariz.*, 907 F.Supp. 1326, 1338 (D.Ariz.,1995) *See Halderman v. Pennhurst State Sch. & Hosp.,* 673 F.2d 628, 637 (3d Cir.1982), *cert. denied,* 465 U.S. 1038, 104 S.Ct. 1315, 79 L.Ed.2d 712 (1984). The January 2000 Court Order found that the Plaintiffs had not established a *prima facie* case as it pertains to ELL students and the AIMS test. Plaintiffs are precluded from raising a disparate treatment argument in subsequent litigation. Plaintiffs did not argue disparate treatment during the December 2005 hearing, nor did the Court consider disparate treatment upon ruling on Plaintiff's request for an injunction. Moreover, as mentioned *supra* the State's inaction and non-compliance with the Court's January 2000 and January 2005 Court Orders, prompted the Court to enjoin the AIMS test as a graduation requirement. As such, *res judicata* does not apply because the enjoining the AIMS test as a graduation requirement is a result of nearly six (6) years of non-compliance by the Defendants in this case. The Court finds that the Plaintiffs did not make a collateral attack. The enjoining of the AIMS test is a natural consequence in the Defendant's failure to provide funding in a non-arbitrary and capricious manner for ELL students.

B. Court Exceeded Its Sanction Powers

The Defendant argues that the Court imposed a sanction that is not designed to coerce the State into enacting into law a rational funding scheme for ELL students. The Court disagrees. " The Supreme Court has repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases. . . ." *Federal Trade Com'n v. Productive Marketing, Inc.,* 136 F.Supp.2d 1096

(2001), 1104-1105 (C.D.Cal.,2001) quoting *SEC v. Wencke,* 622 F.2d 1363, 1371 (9th Cir.1980). On July 26, 2005, Plaintiffs filed a Motion for Injunctive Relief (Docket No. 293). Also, on August 2, 2005, Plaintiffs filed a Motion for Sanctions against the Defendants (Docket No. 296). The sanction the Court imposed on the Defendants for non-compliance of the January 2000 Judgment and the January 2005 Court Order was issued to prompt the Defendants to appropriately fund the ELL program. The enjoining of the AIMS test as a graduation requirement was imposed to prevent further harm of ELL students until the Defendants provided appropriate funding for the ELL program and a reasonable time line in which ELL students could obtain proficiency in the English language for AIMS testing.

C. Bona Fide Attempt to Comply with the Court Order of January 28, 2005

The Defendant argues that the Court did not exercise caution in citing the Defendant with Contempt and imposing sanctions. The Court disagrees. The Defendant states that there were good faith attempts to meet the deadline yet the Governor vetoed the bill. "A party cannot disobey a court order and later argue that there were 'exceptional circumstances' for doing so. This proposed 'good faith' exception to the requirement of obedience to a court order has no basis in law." *Hook v. State of Ariz.,* 907 F.Supp. 1326, 1340 (D.Ariz.,1995) (quoting *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987). In this case, the Defendants had almost six (6) years to comply with the January 2000 Judgment. The Defendants have yet to comply with the January 2000 Judgment, the January 2005 Order, nor the December 2005 Order. The argument that the Arizona State Legislature could not comply with the Court Order due to philosophical differences with the Governor of the State of Arizona does not move the Court to stay the injunction. Moreover, the fact that the National Conference of State Legislatures ("NCSL") cost study was discredited does not move the court to stay the injunction.

Defendant contends that the No Child Left Behind Act ("NCLB") has changed the financial landscape for ELL funding. However, "schools participating in a school-wide

program shall use funds available to carry out this section only to supplement the amount of funds that would ... be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with disabilities and children with limited English proficiency." No Child Left Behind Act, P. L. 107-110, Secs. 1114(a)(2)(B).

Defendants have yet to show how the change in circumstances of current funding and NCLB and its relationship to the ELL students does not supplant the level of Federal, State, and local public funds. "Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children and youth and in no case to supplant such Federal, State, and local public funds." No Child Left Behind Act, P. L. 107-110, Secs. 3115(g). As such, Defendant has failed to move the Court to stay the injunction.

V. Conclusion

For the foregoing reasons, the Court concludes that Defendant has failed to satisfy the standards for a stay pending an appeal. The State has failed to comply with federal law for nearly six (6) years. Accordingly, **IT IS ORDERED** that Defendant's Motion for Stay is **DENIED.**

DATED this 16th day of March, 2006.

Raner C. Collins
United States District Judge