

Nos. 06-15378, 06-15556, 06-15558
Consolidated

United States Court of Appeals
FOR THE
Ninth Circuit

Miriam Flores, individually, and a parent of Miriam Flores,
a minor child, et al., Plaintiffs-Appellees

v.

State of Arizona, et al., Defendants-Appellants.

**PLAINTIFFS-APPELLEES' ANSWERING
BRIEF TO BRIEF OF PROPOSED
INTERVENOR-APPELLANTS/AMICI CURIAE
SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES
AND PRESIDENT OF THE ARIZONA SENATE**

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SUMMARY OF ARGUMENT

The Speaker of the Arizona House of Representatives and President of the Arizona Senate (“Legislative Intervenors”) argue that the district court should have allowed an evidentiary hearing to determine whether Defendants were in contempt of the district court’s order dated January 28, 2005. However, an evidentiary hearing is only required when there are *relevant* facts in dispute. Here, there were none.

The only relevant issue in a contempt proceeding is whether the contemnor violated a specific order of the court. There is no dispute in this case that the Defendants failed to take the action required by the court’s January 28, 2005 order to comply with the judgment and subsequent orders. The judgment and subsequent orders required the Defendants to act, and they failed to do so, either by moving to terminate the case if they truly believed that compliance had been achieved or by enacting legislation that complies with the Equal Educational Opportunities Act (“EEOA”), 20 U.S.C. § 1703(f).

The Legislative Intervenors claim that increased education funding in the six years since the judgment was issued in this case have had the effect of resolving all of the deficiencies identified in the judgment. However, virtually none of the increased funding is specifically dedicated to English

language learners (“ELLs”). In any event, the judgment and the EEOA require more than general education funding increases. They require that funding for ELL programs be based upon the actual costs of providing adequate programs. It is undisputed that the Defendants have failed to enact legislation that complies with that requirement. That is the only fact that was necessary to establish a violation of the district court’s order and an evidentiary hearing would not have changed that fact.

ARGUMENT

A. THE DEFENDANTS RECEIVED DUE PROCESS AND WERE NOT ENTITLED TO AN EVIDENTIARY HEARING.

The Legislative Intervenors complain that they were entitled to an evidentiary hearing to show that the requirements of the judgment had either been satisfied or were rendered moot as a result of “enormous changes in the Arizona education scene since 2000.” Amicus Brief (“AB”) at 4-6. If the Legislative Intervenors or any of the Defendants had wanted to demonstrate that the judgment had been satisfied, they should have filed an appropriate motion to that effect. Indeed, they finally did so more than four months after the hearing was held, in connection with the Plaintiffs’ Motion for Sanctions, and more than two months after the district court issued its order on December 16, 2005. Clerk’s Record (“CR”) 382, 422. That motion was

denied by the district court and is the subject of another appeal by the Legislative Intervenors. CR 448.

The Plaintiffs' Motion for Sanctions was predicated on the undisputed fact that the legislature had failed to take action to comply with the Equal Educational Opportunities Act ("EEOA") as required by the judgment in this case. 20 U.S.C. § 1703(f). As a matter of law, the Defendants were required by the judgment to establish systemic funding for English language learner ("ELL") programs that was not arbitrary, capricious or inadequate. *Flores v. State of Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000). They had failed to do so. That is true despite the completion of two cost studies during the six-year period between the judgment and the sanctions which both recommended substantial increases in funding for ELL programs in excess of \$1,000 per student. The legislature has refused to act upon those cost studies and finish the job it began with the interim legislation enacted in 2001 and approved by the district court in 2002. CR 257.

The Legislative Intervenors claim that the "enormous changes" that they would have proven to the court had they been given an opportunity have somehow rendered Arizona's funding system for ELL programs non-arbitrary. AB at 6. It is difficult to imagine a more arbitrary process than selecting a funding level out of thin air and then pointing to unrelated

funding to assert that the arbitrary funding system had somehow been transformed and was now adequate.

The single issue raised by Plaintiffs' Motion for Sanctions was whether the Defendants had enacted legislation for ELL students that was based on the cost of providing instruction to them. It is undisputed that they had failed to do so (and have still failed to do so). Moreover, it is undisputed that they have failed to even take the first step and adopt standards for ELL programs so that the cost of providing those programs can be accurately assessed. *See Flores v. State of Arizona*, 172 F. Supp. 2d 1225, 1238 (D. Ariz. 2000) ("For the state to adopt appropriate practices and allocate adequate resources, it must first establish minimum standards for providing *Lau* funding and program oversight.").

The district court's orders have been clear that the Defendants' obligation is to establish funding based upon the cost of providing programs to ELL students. Instead of doing that, the Legislative Intervenors want to back into compliance. They refuse to develop a rational funding system based on costs, but instead point to other funding changes unrelated to ELL students as if that would remove the arbitrariness from the ELL funding system. It is for that reason that an evidentiary hearing would have been pointless. Even if the Defendants had proven everything they say they

could, that would not change the fact that the funding system for ELL students was arbitrary.

The Legislative Intervenors claim that, at a minimum, the district court should have required the parties to file affidavits framing the specific fact disputes from which it could have determined whether an evidentiary hearing was warranted. However, the Defendants were not prohibited from submitting affidavits and, indeed, the state and the Superintendent submitted voluminous factual material to the court in the three months between the Plaintiffs' motion and the hearing on that motion. CR 303, 311, 312, 317, 329. In light of those submissions, it is difficult to see how the Legislative Intervenors could complain that the court did not require the parties to file affidavits when the district court indulged their every request to do so.

The Legislative Intervenors claim that the Defendants specifically requested an evidentiary hearing. AB at 5. That request, however, was neither timely nor in writing. Rather, it came in the form of an oral request at the hearing conducted by the court on Plaintiffs' Motion for Sanctions and Motion for Injunctive Relief. The district court was not required to honor that request as a matter of due process, especially when the basic fact of noncompliance was not in dispute. In any event, the oral request at the hearing held three months after the motions had been filed for a *further*

hearing was too little and too late and would have only delayed those proceedings even more than they had been.

B. THE JUDGMENT HAS NOT BEEN SATISFIED OR RENDERED MOOT.

Legislative Intervenors claim that “enormous changes in the Arizona education scene since 2000” have rendered the judgment in this case either satisfied or moot. AB at 6. As they did in the district court, the Legislative Intervenors want this Court to ignore the reality that the “enormous changes” they cite have nothing to do with ELL students, and that none of the legislation upon which they rely has changed the fact that Arizona underfunds education generally and, more importantly for this case, fails to specifically address the needs of ELL students.

Legislative Intervenors cite several pieces of legislation, including the implementation of Students FIRST, the Proposition 301 sales tax increase and the enactment of No Child Left Behind, to support their contention that the judgment has been satisfied or rendered moot. The claim is without any basis in law or fact.

1. The Implementation of Students FIRST Does Not Satisfy the Judgment.

The legislature enacted Students FIRST in 1998 in response to orders of the Arizona Supreme Court that had determined the Arizona school

finance system was unconstitutional. *Roosevelt Elementary School District v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994); *Hull v. Albrecht*, 190 Ariz. 520, 950 P.2d 1141 (1997); *Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998). Students FIRST was designed to address constitutional defects in Arizona's system of school construction and renovation.¹

This is not the first time that the Defendants in this case have attempted to rely on Students FIRST as a source of funding for ELL students. The issue has previously been briefed and was discussed at trial. CR 161. Students FIRST totally ignores the needs of English language learners. When the School Facilities Board was in the process of developing minimum adequacy guidelines for school buildings and facilities, counsel for the Plaintiffs requested that the need for additional ELL classrooms be addressed in the guidelines. CR 418, Exhibit 2. That request was rejected and the guidelines ultimately adopted as rules by the School Facilities Board

¹ It is more than a little disingenuous for the Legislative Intervenors to claim that Students FIRST has fully addressed school districts' construction and renovation needs when the legislature itself has failed to fund the legislation. In only one year since the enactment of Students FIRST has the legislature fully funded the formula to maintain existing school facilities. *Roosevelt Elementary School District v. State of Arizona*, 205 Ariz. 584, 74 P.3d 258 (App. 2003). Litigation is pending to enforce the state's funding obligation, and the matter is currently set for trial beginning October 30, 2006. *Roosevelt Elementary School District v. State of Arizona*, Maricopa County Superior Court, Case Nos. DV1999-019062, 2002-011568 (Consolidated).

failed to include any provision regarding the need for additional ELL classrooms. *See* Ariz.Admin.Code § R7-6-101 *et seq.*

Finally, even the Superintendent of Public Instruction, himself a Defendant in this action, apparently disagrees with the Legislative Interveners on the effect of Students FIRST. In his five-year strategic plan, his Department reports that “schools (in Arizona) desperately need repairs.” The Department further states that 64 percent of Arizona’s schools have at least one inadequate building feature (e.g., roofs, plumbing, electric wiring), and 69 percent have at least one unsatisfactory environmental condition (e.g., poor air quality, poor heating, too much noise). CR 418, Exhibit 1.

2. The Passage of Proposition 301 Does Not Include Any Monies for ELLs That Might Satisfy the Judgment.

Like the Students FIRST claim, the Defendants have previously pointed to Proposition 301 as somehow changing the school finance landscape in Arizona. CR 235. Just as with Students FIRST, the claim is simply untrue.

Proposition 301 was approved by Arizona voters in 2000. Voters approved an increase of \$.006 to the state sales tax principally to increase teacher salaries throughout the state. The Proposition requires that 60 percent of the funds generated be dedicated to increasing the salaries of

existing teachers. Ariz.Rev.Stat. § 15-977. The funds could not be used to hire new teachers.

More importantly for this case, the use of Proposition 301 funds (after allocating 60 percent for teacher salaries) is restricted. The district court has already noted that although the legislature had originally included funding for ELL programs as a permissible use of Proposition 301 funds, the initiative was amended to omit ELL programs from the menu of permissible expenditures of Proposition 301 monies. CR 209 at 3.

3. The Enactment of No Child Left Behind Does Not Satisfy the State's Obligation to Adequately Fund ELL Programs.

Legislative Intervenors cannot rely on No Child Left Behind to satisfy their funding obligation. Over and above the fact that only a small portion of funding under No Child Left Behind is specifically designated for ELL students, none of the funding in that legislation can be used to supplant the state's obligation to adequately fund programs for ELLs. See District Court Order, CR 448 at 4-7, *citing* 20 U.S.C. §§6314(A), 6613, 6613(f) and 6825(g).

The Legislative Intervenors claim that the cumulative effect of these changes has been to rectify the deficiencies in the Nogales Unified School District. Of course, that is not the issue, because the district court's

declaratory judgment and subsequent orders have made it clear that the state must fund ELL programs for students throughout Arizona based on their costs. Moreover, it is impossible for Legislative Intervenors to claim that the deficiencies in Nogales or anywhere else have been remedied when the state has not established any standards for addressing any of the deficiencies. The Legislative Intervenors can do no more than broadly assert that because additional funds have been introduced into the school finance system, ELL students must have benefited in some vague way. The judgment in this case requires more than that.

C. THE DEFENDANTS HAVE KNOWN FOR YEARS WHAT IS NECESSARY TO COMPLY WITH THE JUDGMENT AND THE PLAINTIFFS HAVE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANTS HAVE FAILED TO COMPLY.

The Legislative Intervenors argue that the January 28, 2005 order was not sufficiently specific to form the basis for the district court's later imposition of sanctions. It is astonishing that it took six years for the legislature to decide that it does not know what it needs to do in order to comply with the judgment. That was not the case in 2001, when the legislature enacted House Bill 2010 to address the judgment in this case on an interim basis. Act of Dec. 19, 2001, ch. 9, 2002 Ariz. Laws 2nd Spec. Sess. It was in that legislation that the legislature acknowledged its

responsibility to determine the costs of providing ELL programs and established an interim funding level until a cost study was completed and evaluated by the legislature. *Id.*, §§ 8, 17. The only thing that has really changed since then is the fact that the cost study was completed, and it recommended funding levels that the legislature is unwilling to adopt. The Legislative Intervenors' strategy since then has been to discredit the cost study and claim that all the problems with ELL funding and programs have simply disappeared.

The Legislative Intervenors complain that the district court never told them what they needed to do to satisfy the order of January 28, 2005 and “never defined the requisite funding level . . .” AB at 12. However, that is not the function of the district court, and it has properly refused to dictate to the Defendants either a funding level or the content of programs for ELL students that should be established.

In that vein, the Legislative Intervenors complain that the unarticulated but underlying assumption is there should be a set statewide level for ELL instruction without regard to differences among school districts. AB at 12. The district court has never said that, properly leaving it up to the legislature to determine appropriate funding levels. If needs are different among school districts, then the legislature should establish funding

levels accordingly. The overarching problem in this case is that they have done nothing: they inconsistently claim that the court has declined to tell them what to do, while at the same time asserting that the court has exceeded its authority. This is clearly a “heads we win, tails you lose” proposition for the Legislative Intervenors.

The Plaintiffs acknowledge that their burden was to show by clear and convincing evidence that the Defendants had failed to comply with the court’s judgment and subsequent orders. In this case, despite the Legislative Intervenors’ misdirection to the contrary, the burden was a simple one to satisfy. The Defendants had been ordered to enact legislation addressing the judgment during the 2005 legislative session. They failed to appeal that order and then failed to comply with it. The state’s failure to enact legislation has never been disputed, and that was the only fact that Plaintiffs needed to establish in order to show noncompliance.

D. PLAINTIFFS DID NOT IMPEDE DEFENDANTS’ COMPLIANCE.

Finally, the Legislative Intervenors concede their inaction but complain that it was the Plaintiffs’ fault. Specifically, they argue that the Plaintiffs sent a letter to the Governor asking her to veto the bill that was passed by the legislature at the end of 2005 legislative session. AB at 15. That bill, however, did not satisfy the judgment, which is why the Plaintiffs

asked the Governor to veto it. The Governor did veto the bill, and the legislature did not have the votes to override the veto. Because the legislature did not even attempt to pass a bill that would satisfy the Governor, the Defendants were in contempt of the court's January 28, 2005 order to comply with the judgment by the end of the legislative session. The Legislative Intervenors' theory is that the Plaintiffs cannot complain about the Defendants' inaction because the Plaintiffs somehow caused it by asking the Governor to veto legislation that would not satisfy the judgment.

There are too many things wrong with this argument to waste the Court's time with any extensive response. Suffice it to say that requesting the Governor to veto defective legislation is not the same as requesting inaction. The Plaintiffs have sought compliance with the judgment for over six years. They should not be penalized for their efforts to resolve this matter at the state level to avoid further litigation and delay.

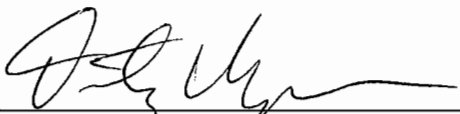
CONCLUSION

Plaintiffs request that the Court affirm the district court's order dated December 16, 2005. Further, Plaintiffs request that the Court award them their costs and attorneys' fees associated with this appeal for the reasons stated by the district court in its December 16, 2005 order. CR 335 at 10-11,

14. *See Hall v. Cole*, 412 U.S. 1 (1973); *Donovan v. Northern Burlington, Inc.*, 781 F.2d 680, 682 (9th Cir. 1986).

RESPECTFULLY SUBMITTED this 14th day of June, 2006.

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CERTIFICATE OF COMPLIANCE

I, Timothy M. Hogan, do hereby certify that Plaintiff-Appellees' Answering Brief to Brief of Proposed Intervenor-Appellants/Amici Curiae Speaker of the Arizona House of Representatives and President of the Arizona Senate is in compliance with the type-volume limitation and typeface requirements of Federal Rules of Appellate Procedure, Rule 34(a)(7), and Ninth Circuit Rule 32-1, because this brief contains 2814 words, excluding parts of the brief exempted by Rule 32, and has been prepared in a proportionally spaced typeface using Times New Roman, 14 point.

DATED this 14th day of June, 2006.

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PROOF OF SERVICE

I, Timothy M. Hogan, hereby certify that on June 14, 2006, an original and 15 copies of Plaintiff-Appellees' Answering Brief to Brief of Proposed Intervenor-Appellants/Amici Curiae Speaker of the Arizona House of Representatives and President of the Arizona Senate were filed with the Clerk of the United States Court of Appeals for the Ninth Circuit by depositing with the United States Postal Service by First Class Mail to:

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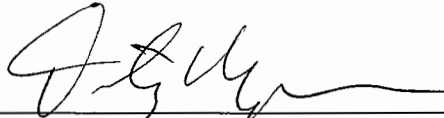
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