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., Defendants.	No. CV 92-596-TUC-RCC **ORDER**

Pending before the Court is the Plaintiff's Motion for Civil Contempt (Docket No. 671). The Motion has been fully briefed by the parties and the Court held a non-evidentiary hearing on this matter on August 27, 2007.

Civil contempt sanctions are non-punitive and avoidable, as such there are fewer procedural protections required before the imposition of such sanctions. *U.S. v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999) (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994)). Therefore, a court may impose sanctions in an ordinary civil proceeding upon notice and an opportunity to be heard. *Id.* at 827, 114 S.Ct. 2552. The Plaintiff specifically sought sanctions against the Legislative-Intervenors for contempt. However, the Plaintiff's motion clearly seeks contempt sanctions for the failure to comply with the Court's Order on March 22, 2007. All the Defendants were

present at the hearing and all Defendants responded to the Plaintiff's motion. As such the Court finds it appropriate to consider the motion for civil contempt against all the Defendants.

This case has been pending before the Court since August 20, 1992. However, the actions relevant to the Plaintiff's Motion for contempt have occurred since the March 22, 2007 Order was issued. After an evidentiary hearing, the Court found HB 2064 impermissibly imposed a two-year limitation on funding for English Language Learners (ELL) instruction and impermissibly took into consideration federal funds received under the Elementary and Secondary Education act in determining the amount of funding available to districts and schools. Additionally, the Court found although HB 2064 instituted a system of cost-based funding using instructional models to be developed by a task force to be implemented for the 2007-2008 school year, until the task force models were funded, the ELL programs still were funded arbitrary and capriciously and bore no rational relation to the actual funding needed to insure ELL students the mastery of the State's academic standards. The Court ordered the State to comply with the Original Order by the end of the 2007 Legislative Session.

Prior to the end of the 2007 Legislative Session no action was taken to comply with the Original Order. According to the Legislative-Intervenors on September 20, 2007, the ELL instruction models were approved by the Task Force and finally able to be published to all Arizona school districts. However, since the models were not approved until after the 2007-2008 school year had begun, the Legislative-Intervenors contend the earliest schools could receive funding rationally related to help ELL students overcome their language barriers that impair their equal participation in public schools is the beginning of the 2008-2009 school year.

A party can be held in civil contempt when there is clear and convincing evidence a party willfully violated a specific and definite order of the Court. *F.T.C. v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999).

In this case, there was a specific and definite order of the Court. The Court's March 22, 2007 Order, "[o]rdered that the State has until the end of the current Legislative Session to comply with the Original Order." The Original Order found the State's funding of the ELL programs bore no rational relation to the actual funding needed to insure the ELL students could achieve mastery of the State's academic standards. In the March 22 Order, the Court held HB 2064 was not in compliance with the original order in three ways.

First, HB 2064 impermissibly imposed a two-year limitation on funding for English Language Learners (ELL) instruction. The Court's Order, until altered, amended, or vacated, invalidated this provision.

Second, HB 2064 impermissibly took into consideration federal funds received under the Elementary and Secondary Education act in determining the amount of funding available to districts and schools. The Court's Order, until altered, amended, or vacated, invalidated this provision. Although the Structured English Immersion Budget Request Form sent to the schools requests information about federal funds and describes the Federal funds as off-sets, so long as the federal funds are not considered when the State appropriates a rational amount of funds for the ELL programs there has been no contempt of the Court's Order with regard to this provision.

Finally, the Court found that "[o]nce the State has chosen an instructional method, it must provide sufficient funding to implement that method." The Court's Order did not appropriate these funds. It is undisputed when the Legislative Session ended these funds still were not appropriated nor was there any attempt to appropriate these funds. Therefore, by clear and convincing evidence the State willfully violated the clear and specific March 22 Order of the Court.

Once the moving party has shown the willful violation of a clear and specific order, the burden shifts to the contemptuous party to show why they were unable to comply. *Affordable Media*, 179 F.3d at 1239. In this case, the State, which includes the Legislative and Executive branches, can certainly comply with the Order of appropriating funds for the ELL programs. The State's only defense to inability to comply is that they were unable to

accumulate the required information from the schools in order to rationally fund the new models for the ELL programs.

According to the Legislative-Intervenors, now that the models have been published to the schools, the only steps remaining are for the school districts to complete the budget forms and submit them to the Superintendent who will then submit them to the legislature. The Legislature can then appropriate the funds and the Governor can approve them. As the Legislative-Intervenors admit, it is possible for the ELL programs to have the rational amount of funds appropriated for the 2008-2009 school year by the end of February 2008. Therefore, IT IS HEREBY ORDERED:

The Plaintiff's Motion for Civil Contempt (Docket No. 671) is GRANTED.

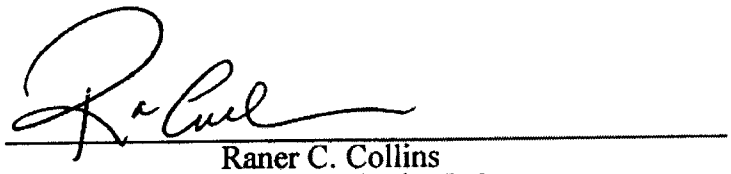
FURTHER, the State of Arizona is ORDERED to appropriate funds for the ELL Programs that are rationally related to helping ELL students overcome their language difficulties in compliance with the Court's March 22, 2007 Order by March 4, 2008.

FURTHER, if on March 4, 2008, the State fails to comply with this Order, the Court will then levy appropriate sanctions.

FURTHER, it is ORDERED that all Defendants, including the State of Arizona, the Superintendent of Public Instruction, the State Board of Education, and the Legislative-Intervenors use their best efforts within the powers granted to them by the Arizona Constitution, Arizona Statutes, and the Arizona Regulations to ensure compliance with the March 22, 2007 Order by March 4, 2008.

FURTHER, since the Plaintiff's Motion for Civil Contempt is granted, it is therefore ORDERED the Defendants are to pay Plaintiff's reasonable attorneys' fees in connection with the prosecution of this civil contempt proceeding. Plaintiff's counsel is to submit calculations for said attorney's fees and a proposed order for the Court to approve.

DATED this 10th day of October, 2007.



Raner C. Collins
United States District Judge

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., Defendants.	No. CV 92-596-TUC-RCC **ORDER TO AMEND ORDER**

Pending before the Court is the State of Arizona's Motion to Amend/Correct the Court's Order (Docket No. 700) and the Superintendent's Motion for New Trial and/or Amendment of Order (Docket No. 701).

On September 21, 2007 the Court ordered the Defendants to pay Plaintiff's Reasonable Attorney Fees. The Court now clarifies that Order so it does not apply to either the State of Arizona or the State Board of Education. Neither the State of Arizona nor the State Board of Education requested an evidentiary hearing nor supported the Legislative Intervenors' Motion to Purge Contempt.

The Ninth Circuit Court of Appeals only mandated an evidentiary hearing because it was requested by the Legislative Intervenors and the Superintendent. But for the acts of the

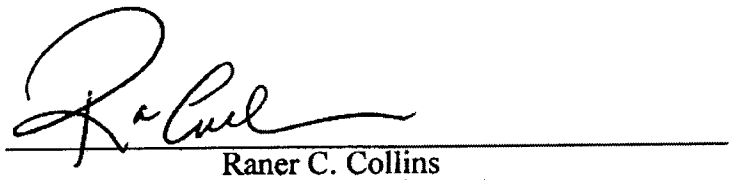
Legislative Intervenors' Motion to Purge Contempt and the Superintendent's support of the Motion, the Plaintiff would not have incurred the previously awarded attorney fees.

Therefore,

1) The State of Arizona's Motion to Amend is GRANTED; the Court clarifies its Order Awarding Attorneys' Fees (Docket No. 698) so the State of Arizona and the State Board of Education are not liable for the Plaintiff's attorneys' fees.

2) The Superintendent's Motion for New Trial and/or Amendment of Order is DENIED.

DATED this 10th day of October, 2007.



Raner C. Collins
United States District Judge