

and Conclusions of Law and to Alter or Amend Judgment. On July 24, 2008, this Court responded by amending its findings of fact and conclusions of law and ordered Defendants to “establish a monitoring system and establish a language program that fulfill the requirements of the Equal Education Opportunity Act [EEOA], 20 U.S.C. § 1703(f)” for the 2009-10 academic year and thereafter. (Final J. 1.) Towards the end of satisfying the Order, the Court further ordered Defendants to “submit a monitoring plan addressing the failures of [the Performance Based Monitoring Analysis System (PBMAS)] and to submit a proposed new language program for secondary LEP students by January 31, 2009, or earlier, if an earlier date is necessary to begin implementing modifications to monitoring and the secondary program by the 2009-2010 academic year.” (*Id.*)

On August 18, 2008, Defendants filed a Notice of Appeal as to this Court’s July 24, 2008, Memorandum Opinion and Final Judgment. Defendants now ask this Court to stay its Order pending appeal to the Fifth Circuit.

ANALYSIS

“While F.R.C.P. Rule 62(c) authorizes the Court to grant the affirmative relief requested by the . . . defendants, the decision is one within the Court’s discretion, and because ‘such an action interrupts the ordinary process of judicial review and postpones relief for the prevailing party . . . , the stay of an equitable order is an extraordinary device which should be granted sparingly.’” *United States v. Louisiana*, 815 F. Supp. 947, 948 (E.D. La. 1993) (quoting *United States v. Texas*, 523 F. Supp. 703, 729 (E.D. Tex. 1981)). This is especially true in cases such as the instant case where the rights of minority schoolchildren to equal educational opportunities are involved. *See Louisiana*, 815 F. Supp. at 948-49 & n.5 (collecting cases).

In determining whether to grant a stay of this Court's remedial order pending appeal, the Court must consider four factors: "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). However, the movant "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

A. Likelihood of Success on the Merits

Defendants have neither demonstrated a likelihood of success on the merits nor a substantial case on the merits. On July 24, 2008, this Court issued a lengthy opinion explaining why it amended its previous findings of fact and conclusions of law, ultimately finding that Defendants' actions denied LEP students equal educational opportunity in violation of the EEOA. In their motion, however, Defendants do not set out their specific disagreements with the Court's conclusion or provide any analysis of the perceived deficiencies that might undermine such conclusion. Defendants do not offer any new legal support for their assertion that the Court's conclusion was incorrect or even attempt to rehash old arguments that were considered and rejected. Instead, Defendants' sole argument that they have established a substantial case on the merits is that this Court initially ruled in their favor. However, in their Motion to Amend Findings of Fact and Conclusions of Law and to Alter or Amend Judgment, Plaintiff-Intervenors detailed precisely why the Court initially incorrectly analyzed this case, and the Court largely agreed. The errors cited by Plaintiff-Intervenors went unchallenged by Defendants, who neither responded to Plaintiff-

Intervenors' motion to amend nor to the Court's encouragement "to submit motions under Rules 52(b) and 59, particularly in regard to changed circumstances" in its July 24, 2008, Final Judgment. Defendants have thus failed to present anything to the Court which would suggest that its decision was in error and have, therefore, utterly failed to show even a substantial case on the merits. *See Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 74 (D.D.C. 2008) ("[Plaintiff]'s motion for a stay and injunction offers no points of law that undermine the Court's holdings or demonstrate any likelihood that [Plaintiff] will prevail on its appeal.").

B. Irreparable Injury

Defendants assert that they cannot comply with the Court's Order to devise and implement modifications to the monitoring and secondary program by the 2009-10 academic year without additional appropriations and legal authority from the Texas legislature, which convenes in January. Thus, if the Court does not grant a stay, Defendants will likely be unable to comply with the Court's Order and risk contempt.

The Court, however, regards Defendants' assertions and the affidavit they submitted in support thereof with great circumspection. Defendants fail to provide any specifics to bolster their conclusory assertions. Defendants do not identify the proposed language or monitoring programs they have developed, the resources they need to begin implementing modifications at the beginning of the 2009-10 school year, or why the resources currently available to the agency are insufficient.¹

¹ In their reply brief, Defendants simply assert that "[t]he July 24th order self-evidently requires additional staff and funding," and provide examples of modifications required by the Court Order that would necessitate such additional funding. (Defs.' Reply 3.) Defendants assert (without citation to the record) that the Court's Order calls for an increase in onsite monitoring, requiring increased TEA personnel. However, the Court's Memorandum Opinion explicitly states that "onsite monitoring is not required by the EEOA" and "a data based monitoring system could constitute appropriate action." *United States v. Texas*, 572 F. Supp. 2d 726, 765 (E.D. Tex. 2008). Defendants also assert that additional

Defendants also fail to explain why they cannot seek the additional legislative authority they assert they require. Moreover, as this Court has already found and as Plaintiff-Intervenors convincingly show, it appears that Defendants already have broad authority under the Texas Education Code to effect the changes necessary to comply with the Court's Order. *See United States v. Texas*, 572 F. Supp. 2d 726, 765 (E.D. Tex. 2008) ("Under Texas law, TEA is required to 'administer and monitor compliance with education programs required by federal or state law' and is required to evaluate and monitor the effectiveness of the state's LEP programs through PBMAS.' [TEX. EDUC. CODE] at §§ 7.021(b)(1), 29.062(a). . . . TEA also has enforcement powers over districts and schools to ensure compliance with state standards. *Id.* at § 29.056."); (Pl.-Intervs.' Resp. 8-12). In any event, all Defendants have been ordered to accomplish by January 31, 2009, is to submit a plan for compliance with the EEOA. If such a plan does indeed require additional resources and legislative authority, such issues can be addressed at that time.

Defendants also argue that they will suffer irreparable injury if a stay is not granted because compliance with the Court's Order risks mootng the appeal. This argument is unpersuasive. Even if this Court approves Defendants' plan for compliance and issues an injunction ordering it into effect, if Defendants prevail on appeal, the appellate court could provide relief in the form of the dissolution of the injunction. Thus, compliance with the Court's Order does not risk mootng Defendants' appeal. Defendants retain the opportunity to challenge this Court's decision, and if

staffing will be necessary because "the order criticizes TEA for not employing enough personnel with what it regards as the requisite bi-lingual education credentials." (Defs.' Reply 3.) Acquiring a staff with the requisite bi-lingual education credentials, however, need not entail *additional* staffing. TEA can simply replace those individuals in need of such credentials or require them to attain such. It is thus not self-evident to the Court that its Order will require additional staff and funds, and it is especially difficult for the Court to evaluate such a claim in light of the fact that TEA has offered no evidence of the programs TEA has discussed or developed to comply with its obligations under the EEOA.

Defendants are successful on appeal, they will be free to return to their old ways.²

Accordingly, Defendants have failed to make a showing of irreparable injury if the stay is not granted.

C. Harm to Other Parties and the Public Interest

Plaintiff-Intervenors, as representatives of all persons of Mexican-American descent or nationality within Texas, and the public at large will be substantially harmed by granting Defendants' requested stay. In its July 24, 2008, Memorandum Opinion, this Court found that "[s]econdary LEP students in bilingual education fail terribly under every metric" and that this failure is being masked by a deficient monitoring system. *Texas*, 572 F. Supp. 2d at 765-69, 778. Plaintiff-Intervenors' Motion for Further Relief was filed more than two years ago, and further delaying the implementation of an effective monitoring system and secondary program will only subject Texas' substantial LEP secondary student population to yet another year of a failed program and continue to deny them equal educational opportunities. The time has come to put a halt to the failed secondary ESL program and monitoring system. As stated by Plaintiff-Intervenors:

[T]he denial of the stay [will] force Defendants to comply with their obligations under federal law and in doing so, effectuate the necessary changes to the current

² Defendants complain that if they prevail on appeal "state educational policymakers will be faced with the dilemma of whether to go through the (realistically anticipated) disruption and turmoil of substantially changing systems yet again . . . in order to restore the system vindicated on appeal . . . or to accept the discredited court-imposed system as a *fait accompli*." (Defs.' Reply 3.) First, Defendants need not "scrap" their monitoring and secondary LEP programs and replace them with significantly different ones. In its July 24, 2008, Memorandum Opinion, the Court indicated that modifications to Defendants' current monitoring and secondary LEP programs may be sufficient. *See Texas*, 572 F. Supp. 2d at 755 ("A modified PBMAS system that relies primarily on data collection and review can pass constitutional muster without primarily relying upon onsite intervention."); *Id.* at 782 ("As a nonbinding option, the secondary LEP program could consist of a variation of the current ESL program with substantially enhanced remedial education."). Second, in order to show irreparable injury, "[t]he evidence must show something more than mere financial and administrative difficulties." *Louisiana*, 815 F. Supp. at 954 (citing *Buchanan v. Evans*, 439 U.S. 1360, 1365 (1978) (Brennan, J., in chambers)).

system in time for the upcoming 2009-10 school year. These reforms can only work to serve the public interest by allowing LEP students to access equal opportunities to succeed in the classroom beginning in the fall of 2009 from which the State of Texas, in turn, could reap the benefits.

(Pl.-Intervs.' Resp. 14-15.)


The Court thus finds that the balance of equities weighs heavily in favor of denying the stay.³

CONCLUSION

Defendants have utterly failed to satisfy one, much less all, of the requirements for granting a stay pending appeal. It is therefore

ORDERED that Defendants' Motion for Stay of Proceedings Pending Appeal shall be, and hereby is, DENIED.

SIGNED this 18th day of December, 2008.



William Wayne Justice
Senior United States District Judge

³ Tellingly, Defendants do not argue that Texas' LEP student population will not be harmed by granting the stay nor do Defendants even address whether the public interest will be served by granting the stay.