United States F I L E D
Court of Appeals
Fifth Circuit
January 28, 2009

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-40858

UNITED STATES OF AMERICA

Plaintiff - Appellee

GI FORUM; LULAC

Intervenor Plaintiffs - Appellees

v.

STATE OF TEXAS; TEXAS EDUCATION AGENCY; J W EDGAR, Commissioner of Education

Defendants - Appellants

Appeal from the United States District Court
for the Eastern District of Texas, Tyler

Before KING, DENNIS, and OWEN, Circuit Judges.
PER CURIAM:

IT IS ORDERED that defendants-appellants' Motion for Stay Pending

Appeal is GRANTED.

The district court's judgment on appeal ordered defendants, "for the 2009–2010 academic year and thereafter, . . . [to] establish a monitoring system and [to] establish a language program that fulfill the requirements of the Equal Education Opportu ordered "to submit a monitoring plan addressing the failures of [defendants' Performance Based Monitoring Analysis System] and to submit a proposed new language program for secondary . . . students [with limited English proficiency] 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."

In determining whether to stay pending appeal a district court's judgment under Fed. R. App. P. 8, the court considers 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). Though the movant must meet each part of this test, he "need not always show a probability of success on the merits; instead, 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. Unit A Jun. 1981) (internal quotation marks omitted).

Defendants have shown that they have a substantial case on the merits and that a serious legal question is involved, specifically whether defendants' monitoring system and the language program for secondary LEP students in more than 1,000 school districts in Texas comply with § 1703(f).

As for the equities, plaintiffs-intervenors are correct that any deprivation of educational opportunities in the current system weighs in their favor. However, at this point, on balance, the equities weigh in defendants' favor. Plaintiffs-intervenors incorrectly argue that this court should deny the motion for stay because defendants "need only submit a plan to the district court by the deadline, which would not require any legislation or additional resources." In its Order denying defendants' motion for stay, the district court bought that argument, adding that "[i]f such a plan does indeed require additional resources and legislative authority, such issues can be addressed at that time." Such a conclusion inaccurately describes all that the district court's judgment demands of defendants and understates the magnitude of the effort that defendants are required to make in order prudently to comply with the district court's judgment. Though the court did order defendants to submit a monitoring plan by January 31, 2009, the court also ordered that for the 2009–2010 academic year and thereafter, defendants establish a monitoring system and a language program that fulfill the requirements of § 1703(f). In creating such a plan and language program and ultimately submitting it to the district court, defendants clearly must address *ex ante* a wide variety of concerns, including funding, personnel changes, and their legislative authority to carry out such a plan and program.[2] A

state simply cannot submit a plan to a federal court without having first considered all these factors. Thus, the balance of equities weighs "heavily in favor of granting the stay."

Defendants have made a strong showing of irreparable injury if the stay is not granted. They argue that, while their case is pending on appeal, they would have to "implement changes that . . . are not likely to be insubstantial." Indeed, if defendants' failure is as severe as the district court has described, defendants will need to create a new plan for monitoring over 1000 school districts in Texas and a new language program for secondary LEP students in those districts. Furthermore, if defendants ultimately prevail on appeal, they will be faced with a dilemma: either continue the severe disruption of completing the change or revert to their previous system. The former option, they contend, might render meaningless whether defendants prevail on appeal. The latter option could mean "eliminating staff positions added just to comply with the order."

To minimize the harm that a stay could involve for the equal educational opportunities of secondary students with limited English proficiency, we will expedite this appeal.

IT IS ORDERED that this appeal be expedited and that this case be placed on the oral argument calendar for June 2009. The Clerk is ORDERED promptly to issue a briefing schedule that will facilitate a June argument. No extensions will be granted. The record on appeal for docket entries in 2003 and following years is now available on line. In the event that any party wishes to include in the record on appeal any item included in the docket but not available on line, the party should file with its principal brief four copies of an Appendix including such item.

The parties are ORDERED to include in their respective briefs argument addressing whether the district court's judgment is an appealable order, a point brought up in note 3 to the letter brief dated January 26, 2009, filed by the United States.

[1] "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by. . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f).

[2] Defendants allege that they may not have authority to carry out the relevant changes under Texas Education Code § 7.028, which provides that an "agency may monitor compliance with requirements applicable to a process or program provided by a school district, campus, program, or school granted charters only as necessary to ensure . . . compliance with federal law and regulations."