IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FLAGSTAFF ARTS AND LEADERSHIP ACADEMY, Plaintiff, vs. E.S. a Student by and through Parent(s) MICHELLE S. GRUA, Defendants.	)	No. 3:13-cv-8171-HRH (Prescott Division)

O R D E R

Motion for Contempt[1]
and Motion for Judgment[2]

Defendants move on an emergency basis for the issuance of a contempt citation to plaintiff for failure to comply with the court's order of September 24, 2013,[3] which denied plaintiff's motion for partial preliminary injunction and granted defendants' motion for a "stay-put" order. Defendants also move for the entry of judgment based upon the September 24 order and plaintiff's failure to pay the cost of the placement of E.S. at Maple Lake Academy ("MLA"). Plaintiff has responded,[4] and defendants have replied.[5] Oral argument has not been requested and is not deemed necessary.

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[1]Docket No. 38.

[2]Docket No. 39.

[3]Docket No. 30.

[4]Docket No. 43.

[5]Docket No. 49.

This case is an appeal brought pursuant to the Individuals with Disabilities and Education Act ("IDEA"). 20 U.S.C. §§ 1400-82. In underlying administrative proceedings, the hearing officer ordered plaintiff to pay the past and future tuition and expenses of E.S.'s attendance at MLA. Plaintiff sought a partial preliminary injunction of the foregoing, and defendants cross-moved for a stay-put order. The IDEA requires that a child "stay put" in her current educational placement pending resolution of judicial proceedings. 20 U.S.C. § 1415(j). A child's current educational placement can be, as happened here, determined administratively. In the administrative proceedings, the hearing officer confirmed that E.S.'s placement at MLA was appropriate. Where, as here, a "stay put order is entered, the school district [in this instance, plaintiff] is obligated to pay the cost of the student's current educational placement pending the resolution of the judicial proceedings." Ravenswood City School Dist. v. J.S., No. C 10-03950 SBA, 2010 WL 4807061 at *3 (N.D. Cal. Nov. 18, 2010). The court's September 24 stay-put order thus required plaintiff to "pay the cost of E.S.'s placement at MLA pending the outcome of this appeal...."[6] Because the court denied plaintiff's motion for a partial preliminary injunction in that same order, plaintiff remained obligated to reimburse Ms. Grua for E.S.'s past tuition as well.

By their emergency motion, defendants seek an order holding plaintiff in contempt of court and imposing attorney fees as a sanction pursuant to Rule 16(f)(2), Federal Rules of Civil Procedure, for failure to make any payment pursuant to the court's September 24 order. By their motion for judgment, defendants seek to reduce plaintiff's tuition and expense obligations to judgment. Defendants have submitted invoices from MLA documenting tuition charges of $176,722.00. Defendants have not documented the $792.24 of expenses through January 20, 2013.

[6]Order re Motion for Partial Preliminary Injunction; Cross-Motion for Stay Put Order at 20, Docket No. 30.

Plaintiff argues that Rule 16(f)(2) has no application to the instant situation. The court agrees. Plaintiff argues that defendant should have pursued execution or garnishment proceedings. There is not yet a judgment entered in this case to support the issuance of a writ of execution. Even if garnishment proceedings were possible based upon the court's September 24 order, that process would be a parallel and a less direct approach to the problem which confronts the parties.

Plaintiff contends that defendants' motion for contempt should be denied on factual grounds, but plaintiff has established no such facts. Plaintiff does not dispute the contention that it has made no payment whatever pursuant to the court's September 24 order. Counsel contends (but offers no proof) that plaintiff does not have the funds to pay E.S.'s ongoing tuition. That contention cannot possibly be true, for it appears that plaintiff is an ongoing, operating, charter school that is employing counsel to represent it in these proceedings. Moreover, plaintiff has heretofore represented to the court that it "is setting aside on a monthly basis as much funds as possible to an account to pay MLA tuition and parent's reimbursement...."[7] That representation was made August 9, 2013. Now, as of October 22, 2013, plaintiff contends that it is "unable to pay" anything toward E.S.'s tuition.[8] Based upon what is presently before the court, plaintiff has an allocation of resources problem, not an absence of resources.

Counsel's contention that this court's September 24 order has not been ignored would appear to be true in only one sense: plaintiff has taken an interlocutory appeal to the Ninth Circuit Court with respect to the September 24, 2013, order. Federal law makes provision for such an interlocutory appeal, but that appeal does not absolve plaintiff of its obligations under the September 24 order.

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[7]Docket No. 24 at 10.

[8]Docket No. 43 at 2.

"When a notice of appeal is filed, jurisdiction over the matters being appealed normally transfers from the district court to the appeals court." Mayweathers v. Newland, 258 F.3d 930, 935 (9th Cir. 2001). "'The district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo.'" Id. (quoting Natural Resources Defense Council, Inc. v. Southwest Marine Inc., 242 F.3d 1163, 1166 (9th Cir. 2001)). "The district court's exercise of jurisdiction should not 'materially alter the status of the case on appeal'" and the district court does not have jurisdiction "to adjudicate anew the merits of the case." Id. (quoting NRDC, 242 F.3d at 1166).

Exercising the court's jurisdiction as to the pending motions will not materially alter the status of the case on appeal nor would it be a new adjudication on the merits of the case. Rather, defendants request that the court enforce the order that is being appealed by finding plaintiff in contempt. The court "has jurisdiction to impose contempt sanctions for disobedience of an order currently on appeal." Red Ball Interior Demolition Corp. v. Palmadessa, 947 F. Supp. 116, 120 (S.D.N.Y. 1996).

"'The standard for finding a party in civil contempt is well settled: the moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply.'" In re Bennett, 298 F.3d 1059, 1069 (9th Cir. 2002) (quoting FTC v. Affordable Media, 179 F.3d 1228, 1239 (9th Cir. 1999)).

Plaintiff has not disputed that it has not yet paid for any of the cost of E.S.'s placement at MLA. Plaintiff however contends that it does not have sufficient funds to pay the costs it was ordered by the court to pay. Plaintiff has offered no proof that it cannot pay E.S.'s tuition. The court finds that plaintiff is in civil contempt for failure to pay E.S.'s tuition through October 31, 2013, in the amount of $176,722.00.

Defendants' motion for a contempt citation[9] is granted. Defendants' motion for sanctions[10] is denied. Defendants' motion for judgment[11] is denied.

Plaintiff may purge this contempt citation by paying the foregoing sums on or before November 15, 2013. Plaintiff may avoid further contempt proceedings by paying E.S.'s ongoing tuition in accordance with the stay-put order.

If plaintiff fails to comply with this contempt citation within the time allotted, the court will – upon defendants' application – summarily reduce this order to a judgment and will authorize the issuance of writs of execution.

DATED at Anchorage, Alaska, this 1st day of November, 2013.

/s/ H. Russel Holland
United States District Judge

[9]Docket No. 38.

[10]Docket No. 38.

[11]Docket No. 39.