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8 IN THE OFFICE OF ADMINISTRATIVE HEARING

9 FOR THE STATE OF ARIZONA

10 In the Matter of the Hearing
11 of the Appeal by:

No. 11F-002-ADE

12 Tucson Unified School District
13 Number 1.

MOTION TO QUASH

Assigned to: Lewis K. Kowal, ALJ

14 Curtis Acosta and Sean Arce, by and through their counsel undersigned,
15 hereby request that the subpoenas served on Monday, July 25, 2011 (Acosta) and
16 Thursday, July 28, 2011 (Arce) compelling their attendance at a deposition be
17 quashed.¹ (Mr. Acosta's deposition was noticed for August 4, 2011 at 1:30 p.m. and
18 Mr. Arce's for August 5, 2011 at 9:00 a.m.) The subpoenas were improperly
19 requested, defective, and represent an abuse of discovery.²

20 The authority to issue a subpoena is provided in A.R.S. § 41-1062(A).
21 Subsection (A)(4) provides that the party requesting the subpoena must establish a
22 reasonable need for the deposition testimony.³ The Office of Administrative Hearing's
23 published practice pointers makes clear that discovery is very limited in an
24 administrative proceeding and that a deposition subpoena should issue only in those
25 instances when a witness is **unavailable** to testify at the hearing.⁴ This limitation is
26 consistent with R2-19-113(E)(2), which provides that a subpoena **shall** be quashed

27 ¹ Neither Mr. Acosta or Mr. Arce are parties to the TUSD appeal.

28 ² Mr. Acosta and Mr. Arce are named Plaintiffs in *Acosta, et. al. v. Huppenthal*, CV 10-623 TUC AWT. Mr. Huppenthal is represented by the same attorneys in both matters. The *Acosta* case is pending in federal district court; the case is a declaratory judgment action challenging the constitutionality of HB 2281 (A.R.S. §§ 15-111 & 112).

³ A.R.S. § 41-1062(A) also expressly modifies and limits A.R.S. § 12-2212.

⁴ See, *Discovery-The Key to Unlocking the "Mystery" Behind an Administrative Hearing*, by Sondra J. Vanella, Administrative Law Judge, Vol. 21, October 2001. (Available on the Arizona Office of Administrative Hearings website.)

1 when the desired testimony or evidence may be obtained by an alternative method.
2 No showing of necessity or unavailability has been made with respect to Mr. Acosta
3 or Mr. Arce.⁵ There has also been no showing as to why there is no “alternative
4 method”.⁶ See also, *Lathrop v. Arizona Board of Chiropractic Examiners*, 182 Ariz.
5 172, 182, 894 P.2d. 715 (App. 1995).

6 A.R.S. § 41-1062(A)(4) makes clear that the service of a subpoena must
7 comport with Rule 45, Ariz.R.Civ.P. Thus, it must be in the form mandated by Rule 84,
8 Form 9. This did **not** occur. Mr. Acosta and Mr. Arce were served with a subpoena
9 that failed to comply with Rule 84, Form 9, thus the required notice of rights and
10 remedies was not provided. As noted, Mr. Huppenthal’s attorneys in this matter are
11 currently involved in federal court litigation on the very subject matter of the pending
12 TUSD appeal. Their failure to contact counsel or provided him with a copy of either
13 subpoena is questionable and certainly below the standard of what is expected.

14 Discovery in the *Acosta* case is governed by the Federal Rules of Civil
15 Procedure. Depositions have yet to be scheduled. Mr. Huppenthal cannot use the
16 TUSD appeal, which absent the requisite showing does not provide for pre-hearing
17 depositions, as an excuse to take the deposition of Mr. Acosta or Mr. Arce on two
18 separate occasions. Such a purpose, motive and method are outside the scope of
19 permissible discovery.

20 Mr. Acosta and Mr. Arce are plaintiffs challenging HB 2281 and believe the
21 Finding issued by Mr. Huppenthal is unconstitutional and the product of a racist office
22 holder. While in the state legislature he voted to pass HB 2281 and then campaigned
23 for his current position on a pledge to “Stop La Raza” , a vow to deny Latino students

24 ⁵ TUSD does not represent Mr. Acosta or Mr. Arce, and their interests in the subject
25 mater of the appeal are distinct and certainly adverse to that of Mr. Huppenthal. The same is
26 true for Mr. Stegman. Thus, TUSD’s attorneys are in no position under the Rules of
Professional Conduct to represent, speak for or bind any of the *Acosta* plaintiffs.

27 ⁶ Neither Mr. Acosta, Mr. Arce or their counsel has been contacted as to any potential
28 hearing date to provide testimony. The same is true as to what topics or information they may
be examined about.

1 the opportunity to continue to enroll in TUSD courses that focused on their culture,
2 history, language and arts.

3 This bias is also demonstrated by Mr. Huppenthal's unwillingness to accept the
4 results of his **own** audit of the Mexican American Studies program at TUSD by
5 Cambium. This audit was done at taxpayer expense for well over \$100,000 and
6 concludes that there was **no evidence** found that the program violated HB 2281. Mr.
7 Huppenthal issued his Finding of June 15, 2011 after he had received the Cambium
8 Audit Report.⁷ This Finding is the subject matter of the TUSD appeal as they seek to
9 derail Mr. Huppenthal's imposition of a 10% state aid sanction.

10 At hearing, it is Mr. Huppenthal who bears the burden of proving by a
11 preponderance of evidence that HB 2281 has been violated in the manner he alleges.
12 Since his finding is limited to books, text, and a web page, with no indication that any
13 of the materials he finds offensive were used in any classroom after December 31,
14 2010, the effective date of HB 2281, it is unknown why any of the two depositions are
15 needed. Neither Mr. Acosta or Mr. Arce are named in the Huppenthal Finding and
16 there is no indication that any of his allegations involve them.

17 There is no basis for taking the depositions of Mr. Acosta or Mr. Arce. They
18 were requested in violation of the applicable statute, regulations, case law, and
19 applicable procedures of the Hearing Office.

20 For the reasons noted above, it is respectfully requested that both subpoenas
21 be quashed.

22 Respectfully Submitted this 29th day of July 2011.

23 s/ Richard M. Martinez
24 RICHARD M. MARTINEZ, ESQ
25 Counsel for the Plaintiff

25 COPY sent via E-Mail and USPS
26 First Class Mail this 29th day of July

27 ⁷ Mr. Huppenthal has not only ignored the Cambium Audit Report, he withheld the
28 Report from the public for six weeks while he huddled with his staff and lawyers to
concoct a Finding that alleged a violation of HB 2281.

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s/Richard M. Martinez, Esq.