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ATTORNEY AT LAW, PLLC

March 21, 2011

Hand Delivered

John J. Pedicone, Ph.D.
Superintendent
c/o TUSD Legal Department
Tucson Unified School District
1010 East Tenth Street
Tucson, Arizona 85719

Re: Huppenthal Audit of TUSD Mexican American Studies

Dear Dr. Pedicone:

I write concerning the recent revelation that TUSD has acquiesced to an audit of the Mexican American Studies Department by Superintendent of Public Instruction Huppenthal. This audit purports to investigate compliance with HB 2281 (A.R.S. § 15-112) and is scheduled to commence today. The scope of the audit is not limited to the aforementioned statute, lacks any legal basis to occur as agreed to and is devoid of any indicia of legitimacy. This audit is premature, of questionable legality and a shameful waste of taxpayer dollars. This audit should immediately cease and desist for the reasons set forth herein. Should TUSD choose to proceed with this audit, then you should expect a legal challenge to such a course of conduct.

The OFFER published by the Arizona Department of Education ("ADE") provides that the successful bidder will conduct a number of questionable evaluations and audits. One is to evaluate compliance with A.R.S. § 15-112. This statute is devoid of any specific audit authority. In fact, this statute provides no procedures for investigation nor does it define any of the conduct prohibited. In addition, the statute provides no guidance for any evaluation of the application of this statute to any specific program. Tom Horne, while Superintendent of Public Instruction made no secret that HB 2281 was passed specifically to end "Raza Studies" at TUSD. Superintendent Huppenthal campaigned for his office making the same promise.

Why you as the Superintendent of TUSD would ignore your duty to serve and protect TUSD's students and parents, of which over 63% are Hispanic, is deeply troubling. Knowing that A.R.S. § 15-112 provides no authority for any audit and that those statutes which provide for such do not apply to the Mexican American Studies issue, you have none the less consented to a procedure that lacks any statutory or regulatory basis. A.R.S. § 15-112 does not authorize the type of invasion you have agreed to of any TUSD teacher's workplace or work product. Nor does it allow for any such intrusion into any TUSD student's right to privacy. See eg., A.R.S. § 15-141, educational records, A.R.S. § 15-239, department of education school audits, A.R.S. § 15-240, using of subpoenas by the department of education for their investigations, A.R.S. § 15-537, on evaluating the performance of teachers and A.R.S. § 15-741, pupil assessments.

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It is also clear that the scope of the investigation is a violation of the federal mandates set forth in the Family, Educational and Privacy Rights Act of 1974, 20 U.S.C. §§ 1232g, 1232h and 1232i. The type of data gathering activities called for by an administrative head of an education agency are statutorily forbidden by this Act unless otherwise authorized by law. The interviews of students and parents, the information gathering, and the selection of those individuals as described in the Offer clearly do not take into consideration the affected student's right to privacy and federal protections governing the use, dissemination and protections of their information.

You are also aware this audit encompasses the primary issues that are the focus of pending litigation. A civil complaint was filed in federal court on October 18, 2010, *Acosta, et. al. v. Horne, et al*, 4:10-cv-00623. This action, brought by ten MAS teachers and the MAS Director, are eleven plaintiffs who work for TUSD. The Plaintiffs cannot be penalized for asserting and exercising their constitutional rights, either in filing and pursuing this litigation or in filing this objection to the investigation at issue.

TUSD as their employer cannot force them to waive their rights nor sanction or discipline them for their lawful conduct. See, *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick* the court stated: "For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. (citations omitted)

Acosta challenges the constitutionality of A.R.S. §15-112 as void for vagueness and otherwise unconstitutional. This action seeks appropriate injunctive relief to insure that the actions complained of cease to continue. Unfortunately, despite the filing of the complaint, the harassment has not only continued but under your leadership, TUSD has become an active participant. (It is also unclear why you would agree to an audit of conduct that neither you or anyone else at TUSD can define.)

In a circumstance such as this one, the party defendant must conduct himself in his interactions with the Plaintiffs within the guidelines of the Federal Rules of Procedure, local statutory mandates, and other rules of conduct. Superintendent Huppenthal is free to pursue his "investigation" by engaging in authorized activities such as depositions, request the inspection of documents, or make a request to inspect the premises under the Federal Rules of Civil Procedure. See Rules 26 to 36, FRCP.

You also need to realize that the course of action you have agreed to has an undeniable appearance of impropriety. The attorneys for Superintendent Huppenthal and TUSD must comport with the Rules of Professional Responsibility. Arizona Rules of Professional Conduct Rules 1.7, 1.9, and 1.11 discuss situations where a lawyer representing a governmental agency engages in concurrent conflicts of interest. Here, statutes and regulations circumscribe the extent to which the government agency may give their consent for representation. Tom Horne, the current State Attorney General

and former Superintendent of Public Instruction is a named Defendant. Horne was a named defendant for a number of reasons, including but not limited to his exercise of discretionary power to declare TUSD's Mexican American Studies program in violation of A.R.S. § 15-112. (Not only did he find the program in violation of this statute before it was even in effect but also found that the only method of curing the violation was a complete elimination of this program.) He also concedes in his FINDING BY THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF VIOLATION BY TUCSON UNIFIED SCHOOL DISTRICT PURSUANT TO ARS 15-112(B) that he authored the first draft of the law.

The attorney ethics rules identified above, regarding conflict of interest exist for a number of policy reasons. However, one that seems clear here is that the dual roles may affect the attorney's performance of their professional functions. One of the comments to rule 1.7 indicates at [8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. Under comment [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advise. In looking at this situation, two other rules of Professional Conduct come to mind. One is ER 4.4, respect for rights of others and the other ER 3.4, fairness to opposite party and counsel. Under ER 4.4 a lawyer shall not use means that have no substantial purpose ...or use methods of obtaining evidence that violate the legal rights of such person.

The *Acosta* plaintiffs are represented by counsel, thus it is requested that any and all further communications with them in regards to the subject matter of this litigation be conducted only through undersigned counsel. Arizona Rule of Professional Conduct, ER 4.2, must govern all future communications. It should also be noted that this rule applies to employees and agent's of parties, thus, proceeding with this audit is a clear violation of this mandate which precludes communications with a represented party. Please refer to comment [1]" This rule does not prohibit communication with a party, or an employee or agent of a party, *concerning matters outside the representation*. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer from communicating with a nonlawyer representative of the other regarding a *separate matter*." (emphasis added).

In a time of fiscal crisis it is difficult to understand how you would agree to be part of this \$170,000 effort to end TUSD's Mexican American Studies program. Public education has historically failed Hispanics; TUSD is no exception. There are many reasons for this. In an era when we should focus on expanding the success of Mexican American Studies, TUSD's current Board President is telling our community that the

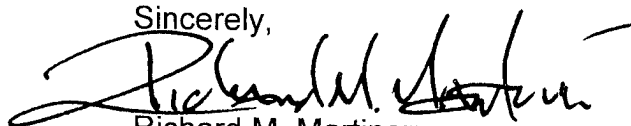
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success of the program is questionable, the "data is not conclusive". He comments published today make clear his intent to end the only program that is making a real difference for students of color.

Whether you agree with or support Mexican American Studies is not the immediate issue. Irrespective of your position, federal and state law must be complied with. Please confirm without delay that TUSD's cooperation with the audit will cease immediately or at a minimum comport with all applicable legal mandates. If we are unable to agree to acceptable legal boundaries, then your agreement to allow the assigned Judge to resolve this matter is requested.

Your time and consideration is appreciated. Please advise immediately of TUSD's decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Martinez", with a long horizontal flourish extending to the right.

Richard M. Martinez
Counsel for the Acosta Plaintiffs

cc via e-mail:

TUSD Governing Board
Tom Horne, Attorney General, via
Kevin Ray, Education & Health Section Chief Counsel
Jennifer Pollock, Education Unit Chief Counsel
Carrie Brennan, Assistant Attorney General