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## **Via E-Mail and Certified Mail, Return Receipt Requested**

John Huppenthal  
Superintendent of Public Instruction  
Arizona Department of Education  
1535 West Jefferson Street  
Phoenix, Arizona 85007

RE: Tucson Unified School District No. 1  
Notice of Appeal of Determination of Non-Compliance with A.R.S. §15-112 and  
Request for Hearing

Dear Mr. Huppenthal:

The Tucson Unified School District No. 1 of Pima County ("TUSD"), whose primary administrative offices are located at 1010 E. 10<sup>th</sup> Street, Tucson, AZ 85719, by and through counsel undersigned, and pursuant to A.R.S. § 41-1092.03(B), hereby appeals from your finding that TUSD is in violation of A.R.S. §15-112. Copies of your press release and findings issued on June 15, 2011 (collectively, the "Notice of Violation") are attached hereto as Exhibit A. The specific reasons for this appeal are set forth below.

### **I. The Notice of Violation Was Deficient**

A. The Notice of Violation was deficient on its face for failure to comply with A.R.S. §42-1092.03:

Chapter 311 of Laws 2010, 49<sup>th</sup> Legislature, Second Regular Session, also commonly referred to as HB2281 ("HB2281" or the "Statute") became effective either December 31, 2010

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or January 1, 2011.<sup>1</sup> HB2281 added two new statutes, A.R.S. §§15-111 and 15-112, and revised an existing statute A.R.S. §15-843. A.R.S. §15-112(D) provides that “actions taken under this section are subject to appeal pursuant to title 41, chapter 6, article 10.”<sup>2</sup> A.R.S. §41-1092.03 provides that the notice of an appealable agency action shall:

1. Identify the statute or rule that is alleged to have been violated or on which the action is based.
2. Identify with reasonable particularity the nature of any alleged violation, including, if applicable, the conduct or activity constituting the violation.
3. Include a description of the party's right to request a hearing on the appealable agency action or contested case.
4. Include a description of the party's right to request an informal settlement conference pursuant to section 41-1092.06.

The Notice of Violation issued on June 15 identified the statute that was alleged to be violated but failed to include any description of the right to request a hearing or a description of the right to request an informal settlement conference. More importantly, however, the Notice of Violation fails to “identify with reasonable particularity” the nature of the alleged violations.

B. The Notice of Violation fails to identify classes or courses that violate the statute

A.R.S. §15-112 does not prohibit a school district from offering ethnic studies programs or maintaining ethnic studies departments. In fact, it does not include the words “ethnic studies” and does not even address the existence of programs or departments. Instead, it delineates four elements that cannot be included in *any* courses or classes. See A.R.S. § 15-112(A). A.R.S. §15-112(E) specifically allows “courses or classes that include the history of any ethnic group and that are open to all students” and “that include the discussion of controversial aspects of history.” Additionally, A.R.S. § 15-112(F) provides that A.R.S. §15-112 may not “restrict or prohibit the instruction of the holocaust, any other instance of genocide, or the *historical oppression of a particular group of people based on ethnicity, race, or class.*” (Emphasis added).

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<sup>1</sup> The text of HB2281, as adopted by the Legislature and signed by the Governor, has an effective date of December 31, 2010. The State’s legislative web-site, however, recites an effective date of January 1, 2011.

<sup>2</sup> A.R.S. §§ 41-1092, *et seq.*

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The Notice of Violation fails to identify the name or location of even a single course that allegedly violates A.R.S. §15-112. Instead, it relies on excerpts of text books and quotes from the Mexican American Studies Department's web-site, which do not relate in any way to specific courses, to conclude that the entire Mexican American Studies program is out of compliance with A.R.S. §15-112. This lack of specificity makes it impossible for TUSD to identify and remedy any alleged violation.

C. The reliance on quotes from text books is misplaced

The Notice of Violation relies almost exclusively on excerpts from texts found in ethnic studies classroom, with no consideration or analysis of whether those texts are actually taught, in which classes they are used (if at all) and if they are used, how the material is presented to students. Notably, it would presumably be acceptable (and perhaps even necessary) to include Marxist texts or writings of Adolf Hitler in an American History or World History course. Those texts might include extremely disturbing content, but the inclusion of those texts in the curriculum does not mean that the objectionable content is being taught to the students. Furthermore, identifying objectionable passages from written materials, without describing their objectionable use in a particular course or class, does not provide TUSD with sufficient information regarding any violation of A.R.S. §15-112.

D. The Notice of Violation disregards the findings of an independent audit

Mr. Huppenthal contracted with Cambium Learning, Inc. to conduct a curriculum audit of the TUSD Mexican American Studies ("MAS") Department. Cambium spent nearly two months (March 7, 2011 – May 2, 2011) conducting a comprehensive audit of the MAS department and issued an audit report dated May 2, 2011, detailing its extensive review of materials and curriculum, together with site visits, classroom visits and numerous interviews with interested parties (students, parents, teachers and administrators). Although Cambium found some areas in which TUSD had failed to provide proper oversight of curriculum and materials, it found that TUSD's MAS classes were in full compliance with A.R.S. §15-112. In spite of the fact that Mr. Huppenthal contracted for the audit and prepared and approved the scope of the audit, he chose to disregard the findings of this comprehensive, independent audit in finding TUSD in violation of A.R.S. §15-112. The findings of the audit are quite extensive and provide valuable evidence in evaluating TUSD's compliance with A.R.S. §15-112.

II. TUSD is not in violation of A.R.S. §15-112.

A. TUSD has taken (and intends to continue to take) steps to ensure that its Mexican American Studies programs and courses are in compliance with A.R.S. §15-112.

On December 30, 2010, the TUSD Governing Board adopted a Resolution, attached hereto as Exhibit B, setting forth its intent to comply in all respects with HB2281. On January 3,

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2011, the day classes resumed after the holiday vacation, TUSD conducted a training session for all teachers who teach courses in the Mexican American Studies Department to familiarize them with the requirements of HB2281 and TUSD's commitment to complying with HB2281. The Notice of Violation states that the MAS Department's web-site demonstrates that the program was designed for Latino students. The following quote from the web-site demonstrates that this assertion is simply untrue: "While the Mexican American Studies Department was formed specifically to enhance the academic success of Latino students, the educational model and curriculum developed by the Mexican American Studies Department help all students." The courses are intended for all students, and do not violate A.R.S. §15-112.

B. Mexican American Studies course do not promote resentment towards a race or class of people

In support of this finding of violation, the Notice states that the auditors did not have access to a comprehensive or established curriculum. The Notice states further that there was no consistency in materials or coursework "in separate class sections identified as the [sic] being the same subject." Again, no specific course title is mentioned. This portion of the notice goes on to cite to "limited materials the auditors reviewed and materials submitted to ADE" and finds that these materials violated A.R.S. §15-112(A)(2). As noted above, specific materials are not prohibited by the statute. Furthermore, a general statement that materials refer to "white people as being 'oppressors' and 'oppressing' the Latino people" does not establish a violation of the statute. Since there is no indication of how these materials are used in a specific course or class. As noted above, A.R.S. § 15-112(F) specifically provides that the Statute may not "restrict or prohibit the instruction of . . . the *historical oppression of a particular group of people based on ethnicity, race, or class.*" (Emphasis added). To the extent that any materials cited in the Notice of Violation (although no books or texts are specifically identified) may be used in a class, the cited "quotes" do not establish that there is any violation of A.R.S. §15-112(A)(2) in the use or presentation of these materials in any particular course.

C. Mexican American Studies courses are not designed primarily for students of a particular ethnic group:

Mexican American Studies courses are open to all students in the schools in which they are offered. Students of all races and ethnicities are encouraged to enroll in these courses, and to take advantage of the rigorous curriculum they provide. All ethnic studies programs in TUSD are designed to promote multi-cultural awareness among all students, foster critical thinking about important and sometimes difficult historical events, and engage students in intellectually challenging coursework using topical themes that emphasize the diversity and complexity of our community. The Notice of Violation focuses on the actual enrollment in these courses, as compared to district-wide Hispanic enrollment. This ignores two significant factors – first, many of the schools in which Mexican American Studies classes are offered have a higher Hispanic enrollment than the district average. A more appropriate comparison is between Hispanic

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enrollment at a particular school and Hispanic enrollment in that school's Mexican American Studies classes. Second, actual enrollment in a course has no relationship to the design or intent of the District in creating the course. It is undisputed that students other than Hispanics enroll in MAS classes, and that all students are permitted and encouraged to enroll. There is no evidence of a violation of A.R.S. §15-112(A)(3).

Additionally, all of TUSD's ethnic studies programs are integral to the effective implementation of TUSD's obligations under the post-unitary status plan that went into effect when the federal court lifted its desegregation order in December 2009. As noted above, these programs are not designed primarily for students of a particular ethnic group. They are, however, an important tool in TUSD's efforts to ensure schools are operating in a non-discriminatory manner in that they demonstrate to all students that different ethnic backgrounds are valued and respected in TUSD and that the interdisciplinary study of different cultures is important to the academic success of individual students as well as to the preservation of an integrated academic community.

D. Mexican American Studies courses treat all pupils as individuals

A.R.S. §15-112(A)(4) prohibits course or classes that "advocate ethnic solidarity instead of the treatment of individuals." The Notice of Violation fails to include any specific citations or references to ways in which any MAS class violates this statute. Again, there are general references to "curriculum and materials," which allegedly "emphasize the importance of building Hispanic nationalism and unity." Contrary to the findings in the Notice of Violation, Cambium's audit found that "no evidence as seen by the auditors exists to indicate that instruction within Mexican American Studies Department program classes advocates ethnic solidarity; rather it has been proven to treat student as individuals." Cambium Audit at p. 63. The Notice of Violation does not present any evidence to support a finding contrary to the finding of the auditors ~~after~~ who **had review ed** course materials and visited numerous MAS classes.

III. HB2281 is void for vagueness.

Under the vagueness doctrine, a law is unconstitutional if it "(1) does not allow a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) lacks explicit standards, thus permitting arbitrary or discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). A law can be vague on its face and/or vague as applied. HB2281 is vague in both ways.

HB2281 does not provide that a school district cannot offer ethnic studies programs. Instead, it delineates four elements that cannot be included in any courses or classes. See A.R.S. § 15-112(A). The Statute goes on to specifically allow "courses or classes that include the history of any ethnic group and that are open to all students" and "that include the discussion of controversial aspects of history." A.R.S. §15-112(E). Additionally, A.R.S. § 15-112(F) provides

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that the Statute may not “restrict or prohibit the instruction of the holocaust, any other instance of genocide, or the *historical oppression of a particular group of people based on ethnicity, race, or class.*” (Emphasis added).

A. HB2281 is vague on its face:

It is unclear on the face of A.R.S. §15-112 what would violate the elements in subsection A. For example, studying the history of slavery in the United States may engender feelings of resentment among some students, even though that is not the intended result of the curriculum, and thus may be construed as a violation of subsection A(2). A.R.S. §15-112 gives no guidance as to how a district must structure its curriculum to ensure it is not perceived as “promot[ing] resentment toward a race or class of people” while trying to teach students about important historical events that involve systemic oppression of one race or class of people by another. A.R.S. §15-112 is simply too vague for TUSD to have reasonable notice as to what it may or may not do to comply.

B. A.R.S. §15-112 is vague as applied to TUSD:

TUSD has made and will continue to make diligent efforts to ensure that its courses, which are expressly allowed by A.R.S. §15-112 (E) and (F), do not include the elements prohibited by A.R.S. §15-112(A). In spite of these steps, Mr. Huppenthal maintains that the program is in violation, but gives no indication of what steps would be necessary to bring it into compliance. In the Notice of Violation, Mr. Huppenthal fails to identify any act or policy of TUSD that runs afoul of A.R.S. §15-112, but rather includes general citations to “curriculum and materials” that may be used in some of the department’s classes. He does not identify the class or classes in which the alleged violations occurred. The MAS Department offers numerous courses at numerous grade levels. Each of these courses must be evaluated individually to determine compliance with A.R.S. §15-112. If the only standard for violation of A.R.S. §15-112 is general citations to materials that may not even be used in a particular class (or any class), it is impossible to determine what acts would result in compliance. Furthermore, the standard for finding a violation cannot be that the Superintendent of Public Instruction thinks that “violations” have occurred as a result of limited anecdotal evidence and general excerpts from texts and materials, along with limited information regarding the curriculum of some classes, taken out of the context of any particular class.

**IV. The Notice of Violation Exceeds the Scope of A.R.S. §15-112**

In addition to finding violations of A.R.S. §15-112, Mr. Huppenthal alleges that the District has failed to comply with A.R.S. §§15-341, 15-721 and 15-722, which outline certain obligations of the Governing Board with regard to curriculum oversight and textbook approval. While compliance with these statutes is undoubtedly within the purview of the Arizona Department of Education, failing to comply does not subject TUSD to sanctions under A.R.S.

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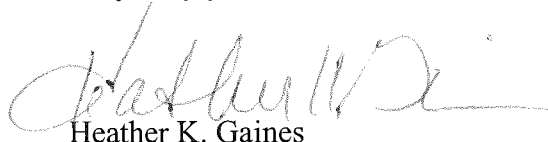
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§15-112. Accordingly, although TUSD does not agree with the Superintendent's conclusions with regard to these statutes, it is not addressing those allegations in this Notice of Appeal. The sole focus of any hearing on this appeal must be TUSD's compliance with A.R.S. §15-112, as the authority to withhold 10% of TUSD's state aid funds relates only to A.R.S. §15-112.

For the foregoing reasons, TUSD appeals from the Superintendent's findings and requests that an administrative hearing be scheduled at the earliest possible date. Please do not hesitate to contact me if you have any questions regarding the foregoing.

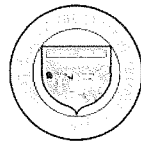
Very truly yours,



Heather K. Gaines

Enclosures

c (via e-mail): John Pedicone, Superintendent  
Martha Durkin, Lead Legal Counsel  
Carrie Brennan, Assistant Attorney General



State of Arizona  
Department of Education  
Office of John Huppenthal  
Superintendent of Public Instruction

## **Superintendent of Public Instruction John Huppenthal Statement of Finding Regarding Tucson Unified School District's Violation of A.R.S. §15-112**

### **I. Summary**

On January 1, 2011, pursuant to Arizona Revised Statutes (ARS) §15-112 (B) then Superintendent of Public Instruction Tom Horne issued a finding of violation by Tucson Unified School District's Mexican American Studies Program. Laws 2010, Chapter 311 which added ARS §15-112 became effective on January 1, 2011, the same day the initial finding was issued. Tucson Unified School District (TUSD) was not in session due to winter break at the time the violation was issued, therefore, as the new Superintendent of Public Instruction, it was incumbent upon me to determine if, in fact, TUSD was in violation of the statute post January 1, 2011.

In order to determine whether or not the Tucson Unified School District's (TUSD) Mexican American Studies Program (Program) violates any of the provisions of ARS §15-112, the Arizona Department of Education (ADE), at my direction, conducted an in depth investigation and review of the Program and its curriculum, materials, content and teaching practices. This investigation included a curriculum audit conducted by a contractor and various data submitted to and gathered by ADE. After careful examination of all the available information, I find there is a clear violation of ARS §15-112 as detailed below.

### **II. Finding**

#### **A. Relevant statute:**

**"§15-112. Prohibited courses and classes; enforcement**

**A. A school district or charter school in this state shall not include in its Program of instruction any courses or classes that include any of the following:**

- 1. Promote overthrowing the U.S. government;**
- 2. Promote resentment towards a race or class of people;**
- 3. Are designed primarily for pupils of a particular ethnic race; and**
- 4. Advocate ethnic solidarity instead of the treatment of pupils as individuals."**

#### **B. Violation - §15-112 A (2)**

During classroom observations, no established curriculum was observed by the ADE auditors. Additionally, the head of the Mexican American Studies Department (Department), which administers the Program, refused both to be interviewed by the auditors and to provide complete curriculum materials to allow for a full evaluation of the utilized curriculum and classroom teachings. The auditors were unable to review any comprehensive curriculum. Materials in the classroom were generally non-existent and no consistency in materials or coursework existed in separate class sections identified as the being the same subject.

However, the limited materials the auditors reviewed and materials submitted to ADE contained content promoting resentment towards a race or class of people which are clear violations of Subsection A (2). Our finding is based on the limited curriculum and materials reviewed at TUSD and additional materials gathered independently of the conducted classroom observations.

Examples of such content include:

- Reviewed materials repeatedly reference white people as being “oppressors” and “oppressing” the Latino people.
- Reviewed materials present only one perspective of historical events, that of the Latino people being persecuted oppressed and subjugated by the “hegemony” – or white America.

#### C. Violation - §15-112 A (3)

In addition to the reviewed curriculum materials, the Department’s website clearly indicates the Program is primarily designed for pupils of a particular ethnic race; couple this with the fact that an extraordinary percentage of students enrolled in Program classes are Hispanic (over 90%) compared to the student population as a whole, constitutes a violation ARS §15-112 A (3). The examples below are a portion of the evidence supporting this finding:

- MASD website displays a chart of the Mexican American Studies Model which is stated to be the foundation for their curriculum and is explicitly directed toward Latino students. The Model shows the focus to be academic proficiency and academic identity for Latino students to result in increased academic achievement for Latino students.
- Website clearly states the Department was “formed to specifically enhance the academic success of Latino students” although it can benefit all students, the statement demonstrates the Program and the Department exists primarily to serve Latino students.
- Much of the reviewed curriculum and materials address the reader as being of Latino or Hispanic origin and thus a part of an oppressed people.

#### D. Violation - §15-112 A (4)

Curriculum and materials reviewed also showed violations of Subsection A (4), which prohibits advocating for ethnic solidarity instead of treating pupils as individuals. Much of the evidence supporting violations of Subsection A (2) also indicate violations under this subsection, additional supporting documentation includes:

- Reviewed curriculum and materials repeatedly emphasize the importance of building Hispanic nationalism and unity in the face of assimilation and oppression.

#### E. Additional Statutory and Regulatory Violations

ADE became aware of additional statutory and regulatory violations during the in-depth review of the Department and the Program. Additionally, text and material selection for Program courses fail to conform with both statutes and TUSD Governing Board adopted policies. ADE believes these violations contributed to the current controversy and conflict surrounding the Program.

##### 1. ARS §15-341

Arizona Revised Statutes, Title 15, Article 3 delineates the powers and duties of school district governing boards; ARS §15-341 lists the general powers and duties of such boards.

- Subsection 2 requires governing boards to exclude from schools all books, publications, papers or audiovisual materials of a sectarian, partisan or denominational character. Much of the curriculum and material reviewed was of a partisan nature; in fact the intent of some materials is partisanship and political organization.
- Subsection 5 directs governing boards to set the curriculum and other criteria required to promote pupils from one grade to the next and for graduation as long as it conforms to the minimum criteria set by the State Board of Education (ARS §15-701 and §15-701.01). Local governing boards may require additional curriculum and criteria. Many of the high school course offerings from the Department are offered for credit towards graduation.

## 2. ARS §15-721 and §15-722

These sections of statute govern courses of study for elementary (§15-721) and high schools (§15-722). Both sections require school district governing boards to approve the course of study and the basic textbook for each course. Additionally, if a course does not include a basic text, the governing board must approve all supplemental books to be used in the course prior to approving the course. Additional duties are prescribed under these sections of statute for governing boards to maintain authority over texts and supplemental materials used in all courses and subject them to public review prior to adoption. For these purposes “textbooks” include all printed materials, digital content and related printed and non-printed material for use by pupils in a classroom.

- Our review of Tucson Unified School District Governing Board agendas dating back to January 2002 show no such review or adoptions took place for the actual courses of study. No evidence was found to support the TUSD Governing Board has reviewed any of the texts or supplemental materials used in many of the Program’s courses.
- Although district adopted textbooks appear to be used in the courses, official textbook and supplemental materials adoptions for both Language Arts and Social Studies do not include many of the books and materials observed by the auditors or those submitted to ADE for review.
- Additionally, this failure to review and adopt material is also a violation of the TUSD governing board’s own adopted policy IJJ which states, in part: “The Board will approve the course of study, the basic text materials including digital materials for each course, and all units recommended for credit under each general subject title prior to implementation of the course. The Board will also approve and adopt all new text and supplementary materials.”

As a result of the above findings, it is hereby ordered that the TUSD Board has 60 days to bring the Mexican American Studies Program into compliance with ARS 15-112. Failure to do so shall result in the withholding of 10% of state funds.

**Official Statement of Superintendent of Public Instruction John Huppenthal on His Determination Regarding the Tucson Unified School District's Violation of A.R.S. §15-112**

June 15, 2011

Thank you Andrew and thank you Associate Superintendent Hrabluk for your analysis. Good afternoon everyone, I would like to thank you all for coming today.

In my role as State Superintendent of Public Instruction, I have a legal responsibility to uphold the law and a professional imperative to ensure every student has access to an excellent education.

For those of you who know me, I try to approach each issue carefully, making sure that I have reviewed all information, data and facts possible before coming to a decision.

That is why I carefully deliberated on my determination on whether or not the Tucson Unified School District was in compliance with Arizona Revised Statute § 15-112.

As Associate Superintendent Hrabluk outlined with great clarity, the Tucson Unified School District Governing Board failed to provide the statutorily required curriculum development and oversight of its Mexican American Studies Program.

The Tucson Unified School District Governing Board failed to adhere to its own adopted policies on curriculum development and its text and materials approval process.

In order to determine whether or not Tucson Unified School District's Mexican American Studies Program violates any of the provisions of A.R.S. §15-112, the Arizona Department of Education, at my direction, conducted an investigation and review of the Program and its classroom materials and instructional content.

I want to first address the foundation for my decision and the independent curriculum audit. This audit was a limited part of the overall investigation that the Department had conducted. I specifically had several concerns with the audit:

First, two-thirds of the final audit report was beyond the scope of the legal determination I am making today.

Second, the Tucson Unified School District Administration knew which week the on-sight classroom reviews and interviews would be taking place. In addition, only 37% of the Mexican American Studies Program classrooms were observed. Most classrooms were visited just once and for only 30 minutes.

I want to stress that few materials were available to be observed in the classroom or were provided to the auditors.

Finally, while invited to participate in the curriculum audit process, key leadership in the Mexican American Studies Department refused to cooperate – including the Director of the Department.

Despite these limitations, we were able to accumulate substantial information from many sources. I used the facts found within that information to render my determination today.

Before I declare my findings, I will lay out the relevant state statute.

A.R.S. §15-112 reads as follows: Prohibited courses and classes; enforcement

A. A school district or charter school in this state shall not include in its Program of instruction any courses or classes that include any of the following:

1. Promote overthrowing the U.S. government;
2. Promote resentment towards a race or class of people;
3. Are designed primarily for pupils of a particular ethnic race; and
4. Advocate ethnic solidarity instead of the treatment of pupils as individuals.”

It is important to note that a violation of any one of these four provisions constitutes a violation of the entire statute.

I find Tucson Unified School District in Violation of §15-112 A (2) – promote resentment towards a race or class of people

The materials gathered by, and submitted to, the Arizona Department of Education, as well as the materials the auditors reviewed contained content promoting resentment towards a race or class of people.

Just a few examples of the evidence supporting this finding include:

Reviewed materials repeatedly refer to white people as being “oppressors” and “oppressing” the Latino people.

Reviewed materials present only one perspective of historical events – that of the Latino people being persecuted, oppressed and subjugated by the “hegemony” – otherwise known in this material as white America.

I find Tucson Unified School District in Violation of §15-112 A (3)— are designed primarily for pupils of a particular ethnic race

In addition to the reviewed classroom materials and instructional content, the Mexican American Studies Department website clearly indicates the Program is primarily designed for pupils of a particular ethnic race.

Just a few examples of the evidence supporting this finding include:

The TUSD Mexican American Studies Department website itself. It displays a chart of its Mexican American Studies Model which is the foundation for its program and is explicitly designed for Latino students.

Much of the reviewed materials address the reader as being of Latino origin and thus a part of an oppressed people.

This finding is supported by the fact that an extraordinary percentage of students enrolled in Program classes are Latino – over 90% – compared to the Latino student population at Tucson Unified School District, which is 60%

I find Tucson Unified School District in Violation of §15-112 A (4) – advocate ethnic solidarity instead of the treatment of pupils as individuals

Please note that much of the evidence supporting violations of Subsection A (2) also indicate violations under subsection A (4).

An example of the evidence supporting this finding includes:

Reviewed Mexican American Studies Program materials repeatedly emphasize the importance of building Latino nationalism and unity versus identifying students as individuals.

As a result of the investigation and review of the Mexican American Studies Program and its classroom materials and instructional content, I find there is substantial evidence of a clear violation of Arizona Revised Statute Section 15-112 by the Tucson Unified School District.

The Tucson Unified School District Governing Board has 60 days to bring the Mexican American Studies Program into compliance with A.R.S. §15-112.

Failure to do so shall result in the withholding of 10% of the monthly apportionment of state aid to Tucson Unified School District until such time as they come into compliance.

I will now take a few questions.