

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 IN THE MATTER OF THE HEARING
4 OF AN APPEAL BY:

5 TUCSON UNIFIED SCHOOL DISTRICT
6 NO. 1

No. 11F-002-ADE

**ADMINISTRATIVE
LAW JUDGE DECISION**

7
8
9 **HEARING:** August 19, 2011, August 23, 2011, September 14, 2011, and
10 October 17, 2011. The record closed on December 16, 2011.

11 **APPEARANCES:** Bryan Murphy, Esq. and Melissa Iyer, Esq. for the Arizona
12 Superintendent of Public Instruction and the Arizona Department of Education; Lisa
13 Anne Smith, Esq., Heather K. Gaines, Esq., and Sesaly O. Stamps, Esq. for the Tucson
14 Unified School District No. 1

15 **ADMINISTRATIVE LAW JUDGE:** Lewis D. Kowal

16
17 **OVERVIEW OF ISSUES AND CONCLUSION**

18 At issue is not whether the MAS program should be suspended, dismantled, or
19 terminated, or whether the MAS program has achieved a certain level of academic
20 success, or whether the MAS program is an effective program, or whether MAS classes
21 are being taught in accordance with State standards.

22 This hearing was held solely to determine whether Superintendent John
23 Huppenthal's June 15, 2011 determination that the Mexican American Studies ("MAS")
24 program in the Tucson Unified School District No. 1 ("District") violates Arizona Revised
25 Statutes ("A.R.S.") §§ 15-112(A)(2) by promoting racial resentment, (A)(3) by being
26 designed primarily for one ethnic group (Mexican Americans),¹ or (A)(4) by advocating
27 ethnic solidarity instead of treating pupils as individuals.

28 The Administrative Law Judge concludes that as of January 1, 2011, and as of
29 the hearing dates, which were held more than 60 days from Superintendent

30

¹ For purposes of this decision, as reflected in the evidentiary record and references made by the parties, the use of the terms Mexican American, Chicano, Xicano, Latino, Raza, and Hispanic are used interchangeably.

1 Huppenthal's June 15, 2011 determination, the MAS program had one or more courses
2 or classes that violate A.R.S. §§ 15-112(A)(2), (3), and (4). The Administrative Law
3 Judge also concludes that grounds exist for the Superintendent of Public Instruction and
4 the Arizona Department of Education (collectively referred to herein as the "Department"
5 unless otherwise noted) to withhold 10% of the monthly apportionment of state aid
6 unless the District comes into compliance with A.R.S. § 15-112. See A.R.S. § 15-
7 112(B).

8 **APPLICABLE LAW**

9 A.R.S. §15-112 provides:

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

- 13 1. Promote the overthrow of the United States government.
- 14 2. Promote resentment toward a race or class of people.
- 15 3. Are designed primarily for pupils of a particular ethnic group.
- 16 4. Advocate ethnic solidarity instead of the treatment of pupils
17 as individuals.

18 B. If the state board of education or the superintendent of public
19 instruction determines that a school district or charter school is
20 in violation of subsection A, the state board of education or the
21 superintendent of public instruction shall notify the school
22 district or charter school that it is in violation of subsection A. If
23 the state board of education or the superintendent of public
24 instruction determines that the school district or charter school
25 has failed to comply with subsection A within sixty days after a
26 notice has been issued pursuant to this subsection, the state
27 board of education or the superintendent of public instruction
28 may direct the department of education to withhold up to ten
29 per cent of the monthly apportionment of state aid that would
30 otherwise be due the school district or charter school. The
department of education shall adjust the school district or
charter school's apportionment accordingly. When the state
board of education or the superintendent of public instruction
determines that the school district or charter school is in
compliance with subsection A, the department of education
shall restore the full amount of state aid payments to the school
district or charter school.

C. The department of education shall pay for all expenses of a
hearing conducted pursuant to this section.

D. Actions taken under this section are subject to appeal
pursuant to title 41, chapter 6, article 10.

- 1 E. This section shall not be construed to restrict or prohibit:
2 1. Courses or classes for Native American pupils that are
3 required to comply with federal law.
4 2. The grouping of pupils according to academic performance,
5 including capability in the English language that may result in a
6 disparate impact by ethnicity.
7 3. Courses or classes that include the history of any ethnic
8 group and that are open to all students, unless the course or
9 class violates subsection A.
10 4. Courses or classes that include the discussion of
11 controversial aspects of history.
12 F. Nothing in this section shall be construed to restrict or
13 prohibit the instruction of the holocaust, any other instance of
14 genocide, or the historical oppression of a particular group of
15 people based on ethnicity, race, or class.

11 WITNESSES

12 The Department's Witnesses

- 13 a. John A. Stollar, Jr., the Department's Chief of Programs and Policy ("Department
14 Program Chief Stollar"), holds a graduate degree in the field of education and has been
15 a teacher and school administrator in Arizona for over 30 years.
- 16 b. Dr. Mark Stegeman is the President of the District's Governing Board who holds
17 a doctoral degree in economics from the Massachusetts Institute of Technology
18 ("District Board President Stegeman").
- 19 c. Charles Michael Hicks is a member of the District's Governing Board ("District
20 Board Member Hicks").
- 21 d. Kathy Hrabluk, Associate Superintendent of the Department ("Department
22 Associate Superintendent Hrabluk"), holds a Master's degree in curriculum and
23 instruction and has 23 years of experience as a teacher, a district and state
24 administrator with experience in curriculum development.
- 25 e. Dr. John J. Pedicone is the Superintendent of the District, ("District
26 Superintendent Pedicone").
- 27 f. Mary Stevenson is a parent of a student who attended a high school MAS
28 government class taught at Rincon High School during the 2009-2010 year ("Parent
29 Stevenson"). Parent Stevenson is also an English Language Development teacher for
30 the District who teaches primarily refugee students.

1 g. Martin Sean Arce is the District's current director of the MAS Department ("MAS
2 Director Arce").

3 h. Dr. Sandra Stotsky ("Dr. Stotsky"), is a tenured and chaired professor in the
4 Department of Education Reform at the University of Arkansas. She holds a doctoral
5 degree in education from Harvard Graduate school of Education. She has served as a
6 senior associate commissioner with the Massachusetts Department of Education and
7 has published on the subject of K-12 curriculum development.

8 The District's Witnesses

9 a. Dr. Abel Morado is the principal of Tucson High Magnet School ("Principal
10 Morado").

11 b. Dr. Jeffrey F. Milem ("Dr. Milem") is a professor in Leadership for Educational
12 Policy and Reform and the head of the Department of Educational Policy Studies and
13 Practice at the University of Arizona. He is also the chair of the Center for the Study of
14 Higher Education.

15 c. Dr. Maria Menconi is the District's Deputy Superintendent ("District Deputy
16 Superintendent Menconi"). She has numerous degrees and completed her doctoral
17 work at New Mexico State University in educational management and development. A
18 majority of her post-doctoral work was done at Harvard in the area of educational
19 management and development. She has been in public education for 39 years, 25 of
20 those have been as an administrator at various schools in Arizona and other states.
21 She spent five years as a leadership consultant for the Arizona Department of
22 Education.

23 d. Julie Elvick-Mejia, a third grade teacher for the District at Ochoa Elementary
24 School ("Teacher Elvick-Mejia"), has worked with the teachers from the MAS program
25 for the past thirteen years.

26 FINDINGS OF FACT

27 Procedural History

- 28 1. The MAS program in the District began in or about the spring of 1998.
- 29 2. For the 2011Spring Semester, the MAS program offered classes in Literature,
30 American History, American Government, Art, and General Chicano studies.

1 3. At the elementary school level, the MAS classes were conducted through classes
2 arranged by either the principal or teacher of the elementary school. In regular classes,
3 the District had MAS teachers who co-taught various topics through a Mexican
4 American perspective that were integrated into the normal lesson plans.

5 4. At the middle school level, the MAS classes that were offered as electives
6 included Literature, Mathematics, Chicano Studies, and Independent Study Course.

7 5. At the high school level, the MAS classes were offered in Literature, American
8 History, American Government/Social Justice, and Chicana/o Art, and could be used to
9 satisfy graduation requirements.

10 6. A.R.S. § 15-112 was enacted by the Arizona Legislature in the spring of 2010
11 and took effect on December 31, 2010.

12 7. On December 30, 2010, prior to the effective date of the law, the District's
13 governing board passed a resolution that mirrored specific provisions of A.R.S. §
14 15-112.

15 8. In January, 2011, the District conducted a training session for all teachers who
16 teach courses in the MAS Department to discuss the governing board's resolution that
17 addressed certain provisions of A.R.S. § 15-112.

18 9. On January 3, 2011, then-Superintendent of Public Instruction Tom Horne issued
19 his finding that the District's MAS program was in violation of A.R.S. § 15-112.

20 10. John Huppenthal ("Superintendent Huppenthal") became Superintendent of
21 Public Instruction at the beginning of January 2011.

22 11. The Department had received complaints from members of the Tucson
23 community regarding the manner in which educational instruction was being conducted
24 in the MAS program. The Department did not receive any similar complaints regarding
25 any other ethnic studies in the District. The Department is required by statute to
26 consider and investigate complaints relating to public schools. See A.R.S. § 15-231.01.

27 12. Superintendent Huppenthal decided to initiate an investigation of the District's
28 MAS program to reach his own conclusion whether the District's MAS program was in
29 violation of A.R.S. § 15-112.
30

13. The Department contracted for the services of an outside auditor, Cambium Learning, Inc. ("Cambium"),² to conduct an independent curriculum audit of the MAS program.

14. The scope of review set by the Department required that Cambium evaluate whether the MAS program curriculum was in compliance with A.R.S. § 15-112. The auditors were also to determine whether the MAS classes were designed to improve student achievement and whether student achievement had actually occurred.³

15. Although the Department contracted with Cambium to perform the audit, Cambium subcontracted all of the work to the National Academic Educational Partners ("NAEP").⁴

16. In March 2011, NAEP proceeded to perform the curriculum audit of the District's MAS program.

17. The Department required the audit be completed within 60 days so that a decision could be communicated to the District by the end of the 2011 Spring Semester.

18. The Cambium auditors found that the MAS classes did not violate A.R.S. §15-112, and such findings were reported in the Cambium Report (Exhibit A at CAM 001657).

19. Because of the concerns the Department had regarding the conclusions reached in the Cambium Report based upon the data contained therein, as well as the limited information auditors were given access to, the Superintendent decided to conduct an independent review of the MAS curricular materials before making a determination whether the District was operating its MAS program in compliance with A.R.S. § 15-112.

20. The Department requested that the District provide it with the textbooks and materials that were being used in the District's MAS program.

² Witnesses made references to Cambium Learning Group and Cambium, and the final audit report (Exhibit A) made reference to Cambium Learning, Inc. There was no issue raised at hearing or evidence presented that would indicate that Cambium, Cambium Learning, Inc., and Cambium Learning Group are not the same entity.

³ For purposes of this hearing, the only relevant issue in the Cambium Report is whether the MAS Department's curriculum was in compliance with A.R.S. § 15-112.

⁴ Even though NAEP conducted the audit, the parties referred to the results of the audit as the Cambium Report, and for purposes of this decision, no distinction is made with respect to NAEP and Cambium regarding the audit activities, the audit results, or the report.

1 21. The Department reviewed the Cambium Report, and all materials reviewed by
2 the auditors, as well as independently compiled materials and textbooks from the MAS
3 program obtained through a subpoena issued from the Arizona Attorney General's
4 Office directed to the District, production of documents made by the District in response
5 to the Department's request for materials used in the MAS program, and materials
6 submitted to the Department from the Tucson community.

7 22. On June 15, 2011, Superintendent Huppenthal issued a determination that the
8 District's MAS program violated A.R.S. §§ 15-112 (A)(2),(3), and (4). Superintendent
9 Huppenthal provided a description of the rationale for his decision and attached to the
10 determination a list of excerpts from textbooks and materials that the District presented
11 to the Department.

12 23. Superintendent Huppenthal specifically noted in the June 15, 2011 determination
13 that his findings were limited and that the investigation was hampered by a lack of
14 cooperation from the MAS Director and the District's failure to provide a written
15 curriculum for each of the classes offered as a part of the MAS program.

16 24. The District appealed the Superintendent's June 15, 2011 determination, which
17 brought this matter for hearing before an Administrative Law Judge with the Office of
18 Administrative Hearings, an independent State agency.

19 **MAS Program**

20 25. In the fall of 2008, MAS Director Arce became the Director of the MAS program.
21 He reported directly to the District's Superintendent until March 2011. In his capacity as
22 director, MAS Director Arce has a supervisory role over the pedagogy and curriculum
23 used in the MAS program. MAS Director Arce is responsible for the evaluation of MAS
24 teachers.

25 26. Prior to being appointed as the director, MAS Director Arce taught American
26 History/Mexican American Perspectives and served as a curriculum specialist for the
27 MAS Department from 2000-2008.

28 27. MAS Director Arce acknowledged that to advocate for Chicano or Mexican civil
29 and human rights in an MAS class would be inappropriate.
30

1 28. It is undisputed that from January 1, 2011 through June 15, 2011, the MAS
2 program did not have a comprehensive written curriculum and did not have textbooks or
3 materials that had been approved by the District's governing board.

4 29. During the time period at issue, MAS teachers had access to certain textbooks
5 and materials that were accessible on a shared computer server, some of which were
6 shown during the hearing to follow the pedagogy of the MAS program.

7 30. MAS Director Arce testified that since the enactment of A.R.S. § 15-112, there
8 have not been any major changes in the curricular materials available to MAS teachers
9 on the computer server.

10 31. The MAS teachers had discretion as to which materials could be used in their
11 classes to supplement textbooks, if textbooks were used.

12 **Cambium Report**

13 32. Cambium's curriculum audit consisted of reviewing textbooks and materials
14 used in the MAS program, classroom observations, interviews with MAS teachers and
15 students, and focus groups.

16 33. District Deputy Superintendent Menconi testified that in her experience, a
17 curriculum audit should include a comprehensive review of written curriculum, teachers'
18 lesson plans or units utilized in the curriculum, textbooks, student assessments, and
19 sample student work in conjunction with classroom observations.

20 34. District Deputy Superintendent Menconi was the primary point of contact for the
21 auditors.

22 35. District Deputy Superintendent Menconi delegated to MAS Director Arce the
23 responsibility to compile materials requested by the auditors. District Deputy
24 Superintendent Menconi transmitted the materials compiled by MAS Director Arce to
25 the auditors via a flash drive or CD without having reviewed the materials.

26 **The District failed to produce certain documents**

27 36. During the audit, the auditors requested that the District provide teachers' lesson
28 plans and sample student work.

29 37. MAS teachers told auditors that "student works [were] not retained, rather [they
30 were] sent home instead." Ex. A at 65 [CAM 001721]. However, some MAS student
work samples were retained and produced by the District during the course of discovery

1 in this matter and were presented as exhibits. After the filing of its appeal and the
2 commencement of discovery in preparation for the instant hearing, the District produced
3 at least 10,000 pages of written curriculum for all grade levels and sample student work
4 from MAS classes conducted in the spring of 2011.

5 38. Auditors were informed that there was no District policy “specifying a consistent
6 practice for daily or cumulative lesson plan retention,” and it was common practice for
7 the MAS high school teachers to “write the plan on the board.” Ex. A at 65 [CAM
8 001721]. However, MAS Director Arce testified that there is a district-wide policy
9 requiring lesson plans and syllabuses to be in writing and approved.

10 39. Because the auditors were not provided with lesson plans or sample student
11 work, the scope and sequence of [MAS] lessons could not be determined nor could it be
12 evidenced through student work samples.” Ex. A at 65 [CAM 001721].

13 40. Department Associate Superintendent Hrabluk explained that the “scope and
14 sequence” of lessons, an understanding of State standards, and a pacing guide that
15 would outline how the materials would be taught during the school year are necessary
16 parts of a sound curriculum. Department Associate Superintendent Hrabluk, Day 1
17 (p.m.) at 136:16-25; 137:1-2.

18 Classroom Visits by Auditors

19 41. The audit team observed classroom instruction and reviewed curriculum and
20 materials in eleven schools served by the MAS Department. Exhibit A at 16, [CAM
21 001672]. The auditors observed about 34% of MAS classes or courses.

22 42. The classroom observations were to be unannounced. The purpose of
23 conducting unannounced classroom visits was to ensure that the auditors obtained a
24 reliable and authentic observation of MAS classes as they regularly occur.

25 43. Department Program Chief Stollar testified that if teachers know in advance that
26 they are going to be observed, they have a tendency to change their lesson so that it
27 might not be representative of what is actually taught.

28 44. District Deputy Superintendent Menconi communicated to principals the time
29 frame for when the auditors would be conducting classroom visits and did not know
30 whether the principals informed teachers of when the auditors were coming.

1 45. MAS Director Arce testified that he told the MAS teachers the auditors were
2 going to make unannounced observations of their classes.

3 Elementary School Classes Observed

4 46. The auditors did not observe any MAS classes being taught at the elementary
5 school level by a MAS teacher because none of the elementary MAS teachers were
6 available or teaching MAS classes at the time the auditors visited the elementary
7 schools. Ex. A at 72 [CAM 001728].

8 Middle School Classes Observed

9 47. The audit team attempted to observe three MAS middle school classes. In one
10 of the middle school classes, the teacher was on her “planning time with no students.”
11 Ex. A at 75 [CAM 00173].

12 48. In a middle school class for bilingual education, the students were engaged in a
13 math lesson because their traveling MAS teacher was unavailable. *Id.* at 76 [CAM
14 001732].

15 49. Auditors only observed one middle school class that actually was engaged in a
16 lesson. The class was about the Mexican American Revolution. *Id.*

17 High School Classes Observed

18 50. The auditors observed five Latino Literature classes offered to the District’s high
19 school students. Ex. A at 80 [CAM 001736]. Of those five classes, one had a substitute
20 teacher, who showed a video to the class. *Id.* at 81 [CAM 001737]. Another class had a
21 guest speaker who spoke about potential grant and scholarship opportunities for
22 college. One class had a writing lesson that the auditors believed had been staged for
23 their review *Id.* at 82 [CAM 001738]. In the remaining two classes, the auditors
24 observed the students interacting with selected literature. *Id.* at 81-82 [CAM 001737-
25 001738].

26 51. The auditors observed six of the sixteen MAS history classes offered at the
27 District. The auditors noted that the history lessons for every class covered different
28 subjects. Ex. A at 86 [CAM 001742].

29 52. In the four American Government/Social Justice Education Project classes that
30 the auditors observed, the students were engaged in completing projects. The auditors
noted that “[t]he main component in each of these classes was a desire to know and

1 understand current events relevant to students, and the research and discussion
2 strategies necessary to report findings and accept varying opinions.” Ex. A at 90 [CAM
3 001746].

4 53. The auditors noted that the “content” of students’ Chicano artwork in MAS art
5 classes is “derived from social commentary, political statements, and social justice
6 issues from a multicultural perspective.” *Id.* at 93 [CAM 001749]. Although the auditors
7 did not observe any textbooks, use of magazines and art reference books were
8 “evident.” Ex. A at 93-95 [CAM 001749-001751].

9 The Focus Groups

10 54. Focus group interviews were conducted with teachers, students, parents,
11 community members, District administrators and board members. Exhibit A at 16
12 [CAM001672].

13 55. Deputy Superintendent Menconi requested that MAS Director Arce help
14 coordinate a focus group interview with the Mexican American Studies community
15 advisory board, an advocacy group supportive of the District’s MAS program. MAS
16 Director Arce did not, however, provide such assistance.

17 56. Although the focus group participants were supposed to be randomly selected,
18 advocates of the MAS program were responsible for selecting some of the participating
19 students. Therefore, the focus group interviews were biased.

20 Curriculum Units

21 57. The auditors noted in the Cambium Report that they only obtained nine MAS
22 curriculum units during the course of the audit. Ex. A at 32 [CAM 001688]. The
23 auditors reviewed two additional curricular units during classroom visitations. *Id.*

24 58. When testifying as to the amount of information the Department received
25 regarding curriculum units, Department Program Chief Stollar defined a curriculum “unit”
26 as one week of lessons. He testified that one semester would include approximately 18
27 weeks of lessons. Department Program Chief Stollar, Day 1 (p.m.) at 13:8-19.
28 According to Department Program Chief Stollar’s estimate, the MAS program courses
29 include more than 180 units taught to students each semester.
30

1 59. Department Program Chief Stollar opined that under such an analysis, the
2 auditors were provided with less than 20% of the written curriculum units used in the
3 courses offered by the MAS program.

4 60. Many of the curriculum units that were produced in response to discovery
5 requests made by the Department for the instant hearing were not previously produced
6 to Cambium or to the Department. However, based on what was produced, the auditors
7 found that three out of the nine total MAS curriculum units “contain an overabundance
8 of controversial commentary inclusive of political tones of personal activism and bias.”
9 Ex. A at 34 [CAM 001690].

10 61. Department Associate Superintendent Hrabluk testified that from reviewing
11 written curriculum minutes, she can tell whether a lesson is being delivered in a biased
12 or inappropriate manner. Department Associate Superintendent Hrabluk further
13 testified that from her review of the MAS materials, the MAS program was in violation of
14 A.R.S. § 15-112.

15 **The Department’s Reaction to the Cambium Report**

16 62. A major concern the Department had with the Cambium audit was that while the
17 Cambium Report found certain flaws in the curriculum and organizational structure of
18 the MAS program, it reached conclusions that did not comport with those findings. The
19 Department was also concerned that the person in charge of the MAS program, MAS
20 Director Arce, had been requested to meet or speak with the auditors but did not do so.

21 63. The auditors provided several citations to some of the “questionable” content in
22 the curriculum units they were provided with, and they noted that there were books that
23 might be inappropriate for student use. Ex. A at 35-37 [CAM 001691-001693].

24 64. The auditors also noted that “[t]here [was] no direct connection of required
25 reading texts or suggested reading texts in every curriculum unit. Therefore, the audit
26 team [could not] determine whether all books are currently in use.” *Id.* at 37 [CAM
27 001693].

28 65. Based upon her review of the Cambium Report, Department Associate
29 Superintendent Hrabluk felt that the report on classroom observations was extremely
30 limited.

66. Department Associate Superintendent Hrabluki testified that the purpose of a classroom observation is to confirm that written curriculum is being followed.

67. Department Associate Superintendent Hrabluk testified that without a complete, written curriculum, a classroom observation can only provide a brief 20-30 minute “window of viewing” of what is being taught on the day and time that the class is visited. Department Associate Superintendent Hrabluk, Day 2 (a.m.) at 15:3-5.

68. Department Associate Superintendent Hrublak testified that she thought it strange that the MAS history classes observed by the auditors covered different subjects because all six classes were for the same grade level and offering the same core credit for American History.

MAS Website

69. MAS Director Arce testified that while the MAS classes had been originally designed primarily for Mexican American students, the MAS classes address the needs of the lowest-performing students in the District and the classes are designed to benefit all students.

70. The MAS website contains the following passage: “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.” Exhibit G at DMYL TUSD 015240.

71. According to the MAS website, the program’s “mission” is to “advance the interests of Raza populations within TUSD [the District].” Ex. 3 at 3.

72. The MAS website describes the purpose and design of its academic model, referred to as “critically compassionate intellectualism.” Ex. 3 at 6. The website text states that “for Latino students,” the model is designed to create “both a Latino academic identity and an enhanced level of academic proficiency. The end result is an elevated state of Latino academic achievement.” *Id.*

73. The MAS website also includes the following statements: “The department is firmly committed to the following with an academic focus . . . Working towards the invoking of a critical consciousness within each and every student . . . , Providing and promoting teacher education that is centered within Critical Pedagogy, Latino Critical

1 Race Pedagogy, and Authentic Caring ..., and “Promoting and advocating for social and
2 educational transformation.” Exhibit 3 at 1-2.

3 **MAS Pedagogy**

4 74. The Department contended that the pedagogy of the MAS program is relevant in
5 determining whether the MAS program, the materials used, and the teaching materials
6 of the MAS teachers violate A.R.S. § 15-112. Further, during the hearing the parties
7 addressed the pedagogy of the MAS program and how it relates to certain materials
8 and the provisions of the statute.

9 75. Pedagogy” is an educational term defined as “the art and science of teaching.”
10 Department Program Chief Stollar, Day 1 (a.m.) at 35:17-22; Department Associate
11 Superintendent Hrabluk, Day 1 (p.m.) at 139:11-16. Both the Superintendent’s
12 witnesses as well as the District’s administrators agreed that pedagogy is specifically
13 designed to impact or influence student learning.

14 76. Testimonial evidence presented at the hearing, in conjunction with excerpts from
15 texts, curriculum, assessments, and student work, demonstrates that MAS classes
16 cause students to develop a sense of racial resentment toward the “white oppressor” or
17 “dominant” group. The philosophy of “us against them” is a persistent theme that exists
18 within the MAS program.

19 77. District Board President Stegeman testified that “the intellectual foundation of
20 the [MAS] curriculum is that there is an upper class and a lower class which is
21 substantially but not exactly identified with ethnicity.” District Board President
22 Stegeman, Day 1 (p.m.) at 82:4-8.

23 78. Dr. Augustine Romero (“Dr. Romero”), a former MAS program director, and MAS
24 Director Arce have significantly influenced the pedagogy of the MAS program. In
25 particular, the Department referenced an article co-authored by Dr. Romero and MAS
26 Director Arce entitled “Culture as a Resource: Critically Compassionate Intellectualism
27 and its Struggle Against Racism, Facism, and Intellectual Apartheid in Arizona” (Ex. 5 at
28 ADE 000919) to show the educational philosophy underlying the MAS program. *Id.* at
29 ADE 000919.

30 79. In contrast to the Department’s position, the District asserted that Exhibit 5 is an
academic article authored by Dr. Romero, and in part by MAS Director Arce when MAS

Director Arce was a graduate student, and it does not represent the views of the District or pedagogy of the MAS program. The District's position overlooks the facts that the program's pedagogy was developed by Dr. Romero and MAS Director Arce and that the article addresses what has in fact developed in the MAS program. Further, it is uncontroverted that nothing has changed in the MAS program's pedagogy from its inception through the effective date of A.R.S. § 15-112.

80. In the article, Dr. Romero and MAS Director Arce state that "we will break this paper into three sections: The Social and Historical Context, our Barrio Pedagogy, and the implications of the Critically Compassionate Intellectualism model (CCI) and advancement of the MASD."⁵ Ex. 5 at ADE 000920.

81. As represented on the MAS website as well as in the article, the "barrio pedagogy" used in the MAS program utilizes "critical Latino race" theory and "critical pedagogy" as the foundation of MAS classes. Ex. 3; Ex. 5 at ADE 000945-000946; MAS Director Arce, Day 2 (p.m.) at 31:20-32:16; District Superintendent Pedicone, Day 2 (a.m.) at 87:9-13.

82. According to MAS Director Arce, "critical race theory utilizes a racimized⁶ lens to look at different issues, different problems within our society." MAS Director Arce, Day 2 (p.m.) at 61:4-7.

83. MAS Director Arce and Dr. Romero state in the article that the rationale behind this "racismized" pedagogy is premised upon the belief that "the United States of America was founded and constructed on racism" and that "[f]rom its inception, America and Americans have operated on the belief that whites were superior to all other races." (Ex. 5 at ADE 000926). They urge that the role of the "critical educator" at the District is not merely to teach students, but to use the classroom to encourage activism.

⁵"MASD" is a defined term. In the article (Ex. 5 at ADE 000919), "MASD" is defined by MAS Director Arce and Dr. Romero as "the Tucson Unified School District's (TUSD) Mexican American Studies Department (MASD)."

⁶ This term was shown to have been created by Dr. Romero/MAS Director Arce, as evidenced in Exhibit 5, and the spelling of this term in the transcript of this proceeding is different than how it is spelled in Exhibit 5.

84. MAS Director Arce testified that “critical pedagogy” is “steeped in Paulo Freire’s outlook on education wherein you see students not as empty receptacles but as bearers of knowledge that come into class.” MAD Director Arce, Day 2, (p.m.) at 154:16-19.

85. Dr. Romero and MAS Director Arce summarized the MAS pedagogy as follows:

In this pursuit of social justice we as well as our students constantly engage in the exercises of problemization and tri-dimensionalization of reality. We borrow both exercises of Freire, and we have modified these exercises to meet our needs. . . . A modification to this process is our deliberate attempt to ‘racismize’ this process by asking our students to insert the race and racism variables to this Freirean exercise.

Ex. 5 at ADE 000947 (emphasis added).

86. District Superintendent Pedicone testified that based upon conversations with MAS Director Arce, the article’s description of the MAS pedagogy cited above is an accurate description of what is being utilized in the MAS program today.

87. Dr. Romero and MAS Director Arce address in the article the role of the critical educator:

The critical educator cannot wait for the dominant group or the American structure to correct itself. The critical educator must understand that the oppressors cannot see the nature of their ways. Given this understanding, it is my belief that the dominant group is incapable of critical reflection or redemptive remembering, both of which are required for the creation of a truly egalitarian structure. Because of their linear thought and messianic self image, however, the dominant group is unable to reflect upon its actions; therefore, all it sees is the American structure it created.

Ex. 5 at ADE 000927 (emphasis added).

88. District Superintendent Pedicone confirmed that this quote contains “an accurate description of what the critical educator is called to do in the Mexican American studies programs at TUSD.” District Superintendent Pedicone, Day 2 (a.m.) at 89:8-91:6.

Opinions of Expert Witnesses

Dr. Milem’s Testimony

89. Dr. Milem established himself to be an expert in ethnic studies and testified on behalf of the District regarding the importance of ethnic studies in the educational system.

1 90. Dr. Romero and MAS Director Arce's article notes that in pursuing social justice,
2 they and their students engage in exercises of problemization that deliberately attempt
3 to "racismize" the process and use "barrio pedagogy." See Ex. 5 ADE at 000928;
4 000919.

5 91. Although Dr. Milem had reviewed MAS Director Arce and Dr. Romero's article,
6 he was not familiar with the terms "racismize" or "barrio pedagogy."

7 92. Dr. Milem acknowledged that he is not an expert on the "critically compassionate
8 intellectualism" model upon which the MAS program is based. See Ex. G at DMYL
9 TUSD 015237.

10 93. Dr. Milem testified that ethnic studies classes "are not designed inherently for
11 students of any one group." Milem, Day 3, (p.m.), at 9:16-10:19.

12 94. Dr. Milem testified that there are benefits of ethnic studies to "white" students
13 who take the classes, as well as for students of color, and that ethnic studies enhance
14 critical thinking and academic achievement.

15 95. Dr. Milem also testified that for Anglo students, ethnic studies classes can initially
16 create a sense of disequilibrium by challenging "their world view about a lot of issues,"
17 but that over time, with appropriate instruction, such "disequilibrium" would generally be
18 resolved. Milem, Day 3, (p.m.), at 5:11-20; 8:14-21. However, Dr. Milem did not know
19 whether the specific instruction in MAS classes or the specific MAS curriculum would
20 bring the "disequilibrium" to a resolution due to his lack of knowledge of the actual
21 instruction. *Id.* at 44:9-13.

22 96. Dr. Milem testified that the use of critical race theory and critical pedagogy in
23 ethnic studies courses would not promote racial resentment or advocate ethnic
24 solidarity.

25 97. Dr. Milem opined that teaching students about historical facts of oppression and
26 racism does not promote racial resentment, and, in fact, "the failure to teach this part of
27 our history is more likely to promote that resentment." *Id.* at 12:7-13.

28 98. Dr. Milem further testified that his knowledge of the MAS program comes from
29 interactions he has had with MAS Director Arce, discussions with students who have
30 been enrolled or are enrolled in MAS classes, teachers who taught MAS classes, and
his involvement and a review of material presented at the Transformative Education, a

summer institute for professional development provided to MAS teachers by the District in conjunction with the University of Arizona.

99. Dr. Milem acknowledged that he had not reviewed all of the materials that were submitted into evidence at the proceeding, had not reviewed all of the materials used in MAS classes, and had not observed any MAS classes.

100. The Administrative Law Judge finds that Dr. Milem's testimony is of extremely limited value with respect to the issue of whether the MAS program violates A.R.S. § 15-112(A), Dr. Milem's testimony focused mainly on ethnic studies generally and, to the extent it involved the MAS program specifically, he had minimal knowledge of the MAS curriculum or what is being taught in MAS classes.

Dr. Stotsky's Testimony

101. Dr. Stotsky, who testified on behalf of the Department, established herself to be an expert in K-12 standards and curriculum. She acknowledged that she is not an expert in ethnic studies, critical race theory, or critical pedagogy.

102. Dr. Stotsky opined that the materials presented in the hearing exhibits were not academically beneficial because they did not attempt to develop critical thinking.

103. Dr. Stotsky testified that, to her knowledge, critical race theory is not used in the K -12 grade level classes.

104. Dr. Stotsky reviewed Exhibit 5 and testified that she has never seen "barrio pedagogy" used in the K- 12 grade level.

105. In contrast to Dr. Milem's testimony, Dr. Stotsky testified that disequilibrium is not used very much in the classroom setting, although she acknowledged that it has in the past been used in science classes.

106. Dr. Stotsky also testified that disequilibrium is a theoretical and clinical psychology that refers to stages in the development of the thinking process but that disequilibrium is not a curriculum theory.

107. Dr. Stotsky further testified that from the materials she reviewed, including her review of Dr. Milem's testimony, she could find no evidence to suggest that resolution of disequilibrium would occur or that there is any benefit to non-Mexican American students.

108. With respect to Freire's philosophy that is applied in the MAS program, Dr. Stotsky explained that Freire dealt with illiterate adults in Brazil and did not focus on K-12. She is unaware of any academic or empirical effectiveness of any program or curriculum that has used Freire's pedagogical approach to K-12 education.

109. Dr. Stotsky testified what was lacking in the MAS program was a balanced approach, meaning one that offers more than one perspective or view (i.e., that it was not biased). Dr. Stotsky opined that the MAS materials she reviewed identified Latinos identified as the oppressed and "Whites" as the oppressor, and were designed to arouse emotion in the Latinos.

110. Dr. Stotsky testified that based on her review of the materials, she believes at least some MAS classes violate A.R.S. § 15-112 by promoting racial resentment, and advocating ethnic solidarity instead of treating students as individuals. She further testified that she believes that the MAS classes are designed for students of a particular ethnic group.

Opinions of Other Witnesses

111. District Board President Stegeman testified that based on his observations at the high school MAS classes, the classes are primarily for Latinos, and he is concerned that MAS classes promote racial resentment, and advocate ethnic solidarity instead of treating students as individuals. District Board President Stegeman expressed his belief that the MAS program should be terminated and rebuilt.

112. District Board Member Hicks testified as to his belief that the MAS program constitutes a form of "racial indoctrination," that the District is operating the MAS program in violation of A.R.S. § 15-112, and the program must come to an immediate end. District Board Member Hicks, Day 1, (p.m.) at 109:5-11, 111:5-20.

113. District Superintendent Pedicone testified that the District's other board members believe that the MAS classes do not violate A.R.S. § 15-112.

114. Both District Superintendent Pedicone and District Deputy Superintendent Menconi testified to having observed certain MAS classes and did not observe that the classes violated A.R.S. § 15-112.

115. MAS Director Arce testified regarding his belief that "critically compassionate intellectualism," one of the pedagogical approaches used in the MAS program, does not

1 promote ethnic solidarity and does not promote racial resentment. MAS Director Arce
2 further testified that the MAS classes do not promote resentment of Anglos by Latino
3 students, and that the MAS classes are designed to benefit all students, not just Latino
4 students.

5 Classroom Materials and Observations of Teachers

6 Elementary School

7 116. Several lesson plans show that “barrio pedagogy” is being used at the
8 elementary school level. In particular, the opening slide of a PowerPoint™ presentation
9 entitled “Birth of the Mestizo.” includes a poem describing Mexican American people as
10 a people “born from an act of rape” and “born to revolt.” Exhibit 8(C) at DMYL TUSD
11 000848-000929.

12 117. On the last page of the above-mentioned PowerPoint™, one of the final slides
13 depicts two young, smiling children protesting at a TUSD Chicano Studies rally in June
14 2002, and can be viewed as encouraging political activism by young children. *Id.* The
15 evidence of record indicates that this PowerPoint™ is used in a lesson unit entitled
16 “Foundations of the Xicano Movement” which is suggested for students from grades 4-
17 7. Ex. 8(B) at DMYL TUSD 001308.

18 118. District Board President Stegeman and District Board Member Hicks testified
19 regarding their opinion that it was not age appropriate to use the PowerPoint™ in the
20 education of elementary school students.

21 119. In an elementary lesson authored by current MAS elementary teacher Alzira dos
22 Santos Duncan entitled, “America Without Borders,” (Ex. 8(A) at DMYL TUSD 000643-
23 000746), Ms. Duncan referenced “Mjminute Men, immigration reforms, walk-outs and lots
24 of demonstrations in support of immigrants, reaffirming that they are not alone in their
25 struggle for freedom.” *Id.* at DMYL TUSD 000646. Ms. Duncan expressed hope that
26 “with a little knowledge students will be able to comprehend some of the actions and
27 reactions of our people.” *Id.* (emphasis added).

28 / / /

29 / / /

30 / / /

120. The “America without Borders” lesson unit concludes with a lesson instructing students on “Aztlan.” Ex. 8(A) at DMYL TUSD 000719.⁷ In this lesson, the “objectives” are to teach students to “locate on the U.S. map where the Aztecs used to live,” to “name the states that once belonged to Mexico,” and to “define Aztlan.” *Id.* The “Focusing Question” students are asked to discuss during this lesson is “Who is the real immigrant?” *Id.* Students are then shown a copy of the “1847 Disturnell Map.” *Id.* at DMYL TUSD 000721. The map is described as a representation of the “ancient homeland of the Mexican people . . . in what is today Arizona, near the Colorado River.” *Id.* at DMYL TUSD 000722.

121. MAS teacher Jose Gonzalez’s elementary lesson unit, which is entitled, “Quetzalkoatl: Mi Cuate, Mi Otro Yo,” purports to demonstrate that the “golden rule”, i.e. “treat others as you would like to be treated,” is imbued with the same resentful and “racismized” MAS philosophy that Latinos have been oppressed by the “White Race,” and that Latinos have been dehumanized, and stripped of their humanity, culture and language by white people. Ex. 8(D) at DMYL TUSD 001453-001517. In this MAS lesson unit, Mr. Gonzalez elaborates on this rationale as follows:

My rational [*sic*] to expose children to these events are two fold. The first is centered on the concept of ReHumanizing and the process one endeavors to regain that humanity. . . . Secondly, as a historian, what is frightening to me is that History does tend to repeat itself. If we do not learn from our past mistakes, we are bound to repeat those mistakes. . . . Are we as a country going back to “Americanization” schools? We must teach our children the truth be it good or not.

Id. at DMYL TUSD 001455. (emphasis added)

122. In Lesson 4 of the unit on “Assimilation, 1C classes, and Its Attack on Identity,” students are asked to answer the focus question, “How has the United States treated Mexican American Students?” *Id.* at DMYL TUSD 001465.

123. At the conclusion of Lesson 4 is a “Teaching Points Cheat Sheet” to assist the teacher in directing the students’ discussion of the book “Te Recuerdo Tata Pina” that students are required to read. In Mr. Gonzalez’s “teaching points,” he quotes an

⁷ Program Chief Stollar testified that Aztlan is the “birthright land of Mexican Americans that, from the articles I read, was taken from them. And, therefore, is their land forever.” Department Program Chief Stollar, Day 1 (a.m.) at 57:14-18.

1 excerpt from the book wherein a teacher, Miss Hernandez, yelled at a Mexican
2 American child for speaking Spanish “on school grounds.” Ex. 8(D) at DMYL TUSD
3 001500. Mr. Gonzalez describes Ms. Hernandez as a “self hater,” “unaware,” and that
4 she “did not like who she was as a person.” *Id.* In contrast, Mr. Gonzalez describes
5 “Marielita” -- the student who spoke Spanish in class -- as “strong” and “beautiful”
6 because she has embraced the “four sacred elements” and her “indigenous” identity:

7 124. Teacher Elvick-Mejia testified that MAS teachers had students perform research
8 on the history of some of the leaders of the Chicano movement, which appeared to
9 come from a single page from one lesson, Exhibit 8(B) at DMYL TUSD 001338.

10 Teacher Elvick-Mejia also testified that her third grade students are given lessons about
11 the “four sacred elements” that refers to everyone’s uniqueness, referenced in a portion
12 of Exhibit 8D, Lesson 1. These were the only two parts of the lessons in Exhibit 8 that
13 Teacher Elvick-Mejia remembered being used in her classroom.

14 125. Teacher Elvick-Mejia explained that she co-taught a lesson with MAS teacher
15 Norma Gonzales (“MAS Teacher Gonzales”), where students learned about and made
16 “codices” as a part of the elementary MAS curriculum to explore “their identity.” Elvick-
17 Mejia, Day 3, (a.m.) at 157:5-158:2.

18 126. MAS Teacher Gonzales presented the “codices lesson” that was described by
19 Teacher Elvick-Mejia as a model lesson at the 12th Annual Institute for Transformative
20 Education. Ex. B at DMYL TUSD 014866. In the “introduction,” MAS Teacher
21 Gonzales explained the basis for her lesson on “codices” as follows:

22 This unit has been created to provide teachers and students with an
23 indigenous rooted process of attaining self-love centered on the
24 Tlamanalcayotl philosophy of life. The formation of this identity is crucial
25 particularly for Mexicans as we have been stripped of our cultural identity
26 through colonization.

27 *Id.* (emphasis added).

28 127. Teacher Elvick-Mejia explained that in the above-mentioned lesson, students
29 could explore their identity, and that it is premised upon self-love. However, MAS
30 Teacher Gonzales’ written description shows that the concepts of “identity” and “self-
love” are tied to a “Chicano” identity.

128. Teacher Elvick-Mejia testified regarding her belief that the MAS lessons presented in her classroom were designed to benefit all races and ethnicities and strengthen the individual identities of the students.

Middle School

129. MAS Director Arce described the middle school program as “Chicano studies courses that are stand alone courses in the areas of -- currently in the areas of social studies as elective courses, where the overview of Mexican American history, culture, music, arts and these classes usually last a semester.” MAS Director Arce, Day 2, (p.m.) at 143:23 – 144:3.

130. MAS Director Arce testified that the MAS middle school classes emphasizes En Lak’ech, a Mayan saying that can be referred to as the Golden Rule (*i.e.*, treat others as you would like to be treated). MAS Director Arce explained that this is a “self-regulating statement or pedagogical tool that teachers use at the middle and high school levels so that students can really focus on the task at hand.” MAS Director Arce, Day 2, (p.m.) at 144:15 – 145:6.

131. In a lesson entitled, “Language and Media as Tools of Empowerment,” students study work by hip hop artists such as “Aztlán Underground” that celebrates having seen “through the lies of that Western culture.” Ex. 9(A) at DMYL TUSD 001699 and referenced at Ex. 9(D) at DMYL TUSD 001738.

132. Another poem entitled, “Somos Mas Americanos,” states: “I want to remind the racist whites: I didn’t cross the border, the border crossed me. . . . We are more America the (*sic*) the sons of the Anglo-Saxons. . . . Even though it hurts our neighbor, we are more American than all of the White people.” Ex. 9(C) at DMYL TUSD 001853. (emphasis added).

133. The introduction to the “Building the Bridges Toward Solidarity” unit states that the purpose of this lesson “highlights the connectedness and interconnectedness amongst Black and Brown people.” Ex. 9(D) at DMYL TUSD 001725-001798. The unit also addresses the brutalities that the Black and Brown people have suffered by the American justice system. See Ex. 9(E) at DMYL TUSD 002284.

134. The “Building the Bridges Toward Solidarity” unit appears to advocate ethnic solidarity among black and brown people while the white people are excluded from the

1 “bridges toward solidarity” that the students are encouraged to build. See also Ex. 12 at
2 84, (excerpt from MAS critical race theory textbook under Questions and Comments–
3 “Would it not be logical for blacks [sic], Latinos, Asians, and Native Americans to unite
4 in one powerful coalition to confront the power system that is oppressing them all?”).

5 135. According to District Deputy Superintendent Menconi, although some of the
6 middle school materials contain graphic photos, they present historical facts and
7 “there’s no way to have a discussion about the history of our country without at some
8 point getting to those pictures” and if teachers do not introduce it, the students will and
9 “it’s far more to our benefit as a classroom for [the teacher] to be in control of how that’s
10 presented and how that’s discussed.” District Deputy Superintendent Menconi, Day 3,
11 (p.m.) at 96:49 – 97:6.

12 136. District Deputy Superintendent Menconi testified that teaching students about
13 acts of violence against Mexican Americans is “part of where we’ve been and who we
14 are” and is a critical part of history. District Deputy Superintendent Menconi, Day 3,
15 (p.m.) at 97:18 – 98:3.

16 137. Middle school lesson units that the District provided to the Department contain a
17 lesson drafted by Mr. Gonzalez entitled, “From Cortes to Bush: 500 Years of
18 Internalized Oppression Part 1.” Ex. 9(F) at DMYL TUSD 005430. This Lesson is
19 suggested for both middle and high school students at grades 7-12 and includes the
20 following introduction:

21 In 1521, the Aztec’s [sic] and the indigenous people of the Americas went
22 from being a people with human rights, to a people without any human
23 rights. 500 years later nothing has changed. Indigenous people and our
24 offspring have been dealing with a colonization process, which has
25 wreaked havoc on our lives. First by Spain in 1521, and then by the
26 United States in 1848. . . . Five centuries of being at the bottom of the
27 social, political, and economic rung have devastated our humanity.
28 Mexican children being told by their parents to “stay out of the sun” for
29 fear of getting too dark, not “white” enough. . . . Our minds and souls and
30 have been damaged and now it is time to regain and re-affirm our
humanity.

Ex. 9(F) at DMYL TUSD 005431) (emphasis added).

1 High School

2 American History/Mexican Perspective

3 138. The American History/Mexican American Perspectives classes are offered to
4 students at six high schools in the District including sixteen sections or classes as of
5 January 2011. Ex. A at 85[CAM 001740].

6 139. The American History/Mexican American Perspectives classes use *The*
7 *American Vision*, the District-adopted textbook that is used in all American History
8 classes throughout the District.

9 140. District Deputy Superintendent Menconi estimates that *The American Vision* is
10 used for 50% of the instruction in these courses, and that supplemental materials are
11 used 50% of the time because *The American Vision* “is, like most history books, a
12 survey book” and supplemental materials have to be used. District Deputy
13 Superintendent Menconi, Day 3, (p.m.) at 80:11-25.

14 141. Dr. Stotsky testified that the textbook utilized in the MAS American Government
15 class is one of the best textbooks available for teaching on the topic.

16 142. The Department asserted that high school MAS classes have pervasive themes
17 of ethnic solidarity, racial resentment, and activism. The Department cited as an
18 example one MAS history lesson about the Great Depression that contains an
19 introduction that references the “‘Mexican’ scare now spreading across the United
20 States” and comments that “in hard times, such as the Great Depression, the
21 deportation of Mexicans was a justifiable policy rooted in the nation’s interest.” Exhibit
22 10(E) at DMYL TUSD 005233.

23 143. The above-mentioned lesson includes a statement that “Mexicans have been
24 historically viewed as outside of America’s white founders, thus not part of the chosen
25 or entitled” and that racial prejudice against Mexicans “will only grow as the number of
26 Mexicans in the United States continues to approach the 102 million projected to be part
27 of America’s population by 2050.” *Id.* at DMYL TUSD 005233-005234.

28 144. Of the six unit concepts of the above-mentioned lesson, some units discuss
29 blaming Mexicans for the Great Depression, connecting current anti-Mexican
30 sentiments with the anti-Mexican sentiments that existed during the Great Depression,

the “Bisbee deportations as a demonstration of racist patterns,” and “the need for positive student agency.” *Id.* at DMYL TUSD 005236; 005242,005243, and 005259.

145. In another MAS history lesson authored by MAS Director Arce, entitled, “Panche Be –Seeking the Root of the Truth,” students taught that myths about the history of the Mexicano/Chicano people have been used to justify the atrocities that have been and continue to be committed against them. Ex. 10(F) at DMYL TUSD 005360-005429. Students are required to read an article titled, “The ‘H’ Word.” *Id.* at DMYL TUSD 005408, which emphasizes the ethnic identity of “the Raza,” notes that in all government documents “Raza” are referred to as “Hispanics”, and “[i]n the United States, there are seemingly no more Mexicanos, Chicanos, or Centro Americanos or Puertoriquenos, etc...only generic and seemingly ruthless Hispanics.” Ex. 10(F) at DMYL TUSD 005408-005409. The article also states:

It is the descendants of these Plymouth Rockers who want to once again Americanize those whom preceded them - Native Americans, Puerto Ricans and la Chicanada - particularly those who use the X - because they know its significance; indigenous. They do this because it is we who remind them of their immigrant past and perhaps we also remind them that despite their best efforts to annihilate our cultures, they remain alive and vibrant.

Id. at 005410.

146. In another MAS history lesson on the Treaty of Guadalupe Hidalgo (“Treaty”), students are taught that the Treaty should be used as a legal precedent to support some form of restitution for the “descendents” of Mexicans. Ex. 10 (D) at DMYL 004859. The lesson also states that “Mexican treatment, particularly in relationship to land disputes, at the hands of whites has also historically been marked by the use of force, fraud and exploitation.” *Id.* at 004859.

147. In one student essay about the Treaty, a student wrote: “All the laws that have been occurring here in Arizona such as SB1070 not only makes us wonder what would of happened if the U.S. would of [sic] never bought the states from Mexico, but makes us realize that step by step they want to get rid of Mexicans like they did back then.” Ex. 15 at DMYL TUSD 009577.

American Government/Social Justice Project⁸

148. Seven sections of the MAS government class are offered to students at four high schools within the District. Ex. A at 89-90 [CAM 001745-001746].

149. “Themes” of this class, as described in the most current draft pacing guide, include “Conscientization,” “Freirean thought and practice,” and “Razalogia.” (Ex. 23 at TUSD 36.) Students are also taught “critical race theory.” *Id* at TUSD 37. Students are taught that, with respect to the existence of inequalities, to look “beyond the magical and naïve stage” and “look at structural and systematic boundaries” to address social injustices. Ex. 10(J) at DMYL TUSD 006132.

150. One MAS student’s work describes her experience with the MAS program as analogous to the popular movie, the “Matrix.” According to this student, she “took the pill. . . . Now we can’t go back, but this is better because now we see the matrix. They can’t fool us.” Ex. 5 at ADE 00954. MAS Director Arce/Dr. Romero explain that this “Matrix” analogy is one that is used in MAS classes:

Our students came to understand that if they took the pill of critical consciousness they, like Neo, who took the red pill, would be able to see the world in the most critical or truest form. However, if they did not take the pill of critical consciousness, they would remain in their naïve or magical realities.

Id.

151. Similarly, a social justice PowerPoint™ presentation entitled “Social Justice, Social Transformation and Cultural Competency” authored by Dr. Romero, defines the general term “racism” as a “doctrine of racial supremacy that advocates the superiority of one race over all others. Within the United States of America’s political, social, educational and economic systems [*sic*]. White supremacy is most often advocated, reproduced and perpetuated.” Ex. 2(E) at TUSD 001320.

152. Dr. Romero’s “social justice” presentation includes the definition of “inequality of language theory,” positing that white, English-speaking individuals are protected by civil rights statutes, but ethnic and racial minorities are not. Ex. 2(E) at TUSD 001322. The same definition of inequality of language theory is also on a hand-out provided to MAS teacher Curtis Acosta’s class. See Ex. 20 at DMYL TUSD 000348.

⁸ See *infra* ¶¶ 181-185; Parent Stevenson’s testimony regarding her daughter’s MAS government class.

153. Dr. Romero's PowerPoint™ includes descriptions of the various theories utilized in the social justice classroom. One reference cited by Dr. Romero is to Angela Valenzuela's "subtractive schooling" theory:

Subtractive Schooling: Angela Valenzuela

The American dual strategy of condemnation and exclusion best defines the Latinos experiences when they attempt to become members of the educated population within the American system of racism. Historically the Latino has been excluded from the education system or they have been admit[ted] into what can be called "Americanization Camps," wherein they are raped of their culture and language. And after these violations take place the Latino feels inferior and defenseless. Which leads to the belief that education is not something that cannot [sic] be theirs. The above mentioned has been conducted in an attempt to control, perpetuate, and elevate the level of white supremacy within the United States of America.

Ex. 2(E) at TUSD 001323 (emphasis added).

154. District Board President Stegeman observed Jose Gonzalez's MAS Government class on March 4, 2011, and testified that "[t]here was political content, but it wasn't ethnically based that I remember." District Board President Stegeman, Day 1, (p.m.) at 94:25- 95:15.

155. District Board President Stegeman recorded the text of a PowerPoint™ slide open on Mr. Gonzalez's computer in the classroom, stating the intent "[t]o expose the facade put forth by educational institutions and society in order to maintain segregation among students and citizens." *Id.* at 52:8-53:7. However, District Board President Stegeman testified that the slide was not shown to the class.

156. District Board President Stegeman testified that he did not take away any impression that Mr. Gonzalez's class was promoting resentment on the basis of race.

157. District Board Member Hicks observed MAS social justice education projects class taught by Sally (Sara) Rusk and testified that he did not observe "any discussion or curriculum that [he] believed promoted racial resentment." District Board Member Hicks, Day 1, (p.m.) at 122:21 – 123:11.

158. District Board President Stegeman testified that on a wall outside of a classroom was student artwork that had a swastika instead of the star of the State that indicated racism to him. District Board President Stegeman, Day 1, (p.m.) at 92:5- 93:4; See last

page of Exhibit 20. According to Sara Rusk, an MAS teacher, the artwork referenced by District Board President Stegeman was student work that was posted in the Spring Semester of 2011. See Declaration of Sara Rusk, Exhibit 28.

Chicana/o Art

159. The District did not produce to the Department a textbook list for the Chicana/o Art classes it offers. District Deputy Superintendent Menconi testified that there was no book list produced for the Chicana/o Art classes because those classes are studio art classes and do not use a book.

Latino Literature⁹

160. Drafts of the Pacing Guides for the MAS junior and senior Latino Literature courses demonstrate that elements of critical race theory and critical pedagogy encompass a significant portion of the course.

161. Proposed required reading for these classes include “Justice: A Question of Race,” by Roberto Rodriguez and “Mexican Whiteboy” by Matt de la Pena. Ex. 23 at TUSD 28; 33.

162. Juniors in Latino Literature appear to study “Our History-Indigenous Roots and the Mexican Revolution Novels.” *Id.* at TUSD 30.

163. Senior Latino Literature students appear to devote an entire quarter of the semester to “Critical Race Theatre,” in which they are required to “critically dissect and identify components of critical race theory through literary works.” *Id.* at TUSD 32.

164. Student assessments from these courses show that the focus of Latino Literature is the oppression of Mexican Americans by the White European race.

165. As an example, one second semester final exam for a Latino Literature course used in the spring of 2011 tests students with the following essay prompt:

All year long we have read stories where the Mexican-Americans were discriminated against, taken advantage of, oppressed, etc. We are destined to repeat history if we don't do something to change it. Reflect on what we have read about this year and in an essay, write about what we can do as a group to change things? What will you do as an individual to change things? Select one of the pieces we have read this year that best reflects the point that you are trying to make in your essay.

⁹ See *infra* ¶¶175-180, Board President Stegeman's testimony regarding classroom observations of a Latino Literature class.

1 Ex. 14 at DMYL TUSD 007421 (emphasis added).

2 166. MAS Director Arce testified with respect to the Latino Literature classes at the
3 middle school and high school level that “something that differentiates those classes is
4 the real comparative approach, looking at things from different groups, comparing
5 themes from a Latino author, with that of an African-American author, a Native
6 American or Anglo author, and having the students identify those universal themes
7 throughout literature.” MAS Director Arce, Day 2, (p.m.) at 146:21-147:2.

8 167. The District asserted that none of the books utilized in the Latino Literature 7 or 8
9 classes were included in the Department’s summaries that support a finding of violation
10 of A.R.S. §15-112. Department Associate Superintendent Hrabluk testified that was
11 because none of them were submitted to the Department in response to the
12 Department’s request.

13 168. The District contended that of the 48 books listed for Latino Literature 5/6, only
14 one book, *A Message to Aztlan*, was included in the Department’s summaries. District
15 Superintendent Pedicone testified that he became aware that some constituents had
16 concerns that *A Message to Aztlan* contained inappropriate content. He further testified
17 that the District only has four copies of that book.

18 **Tucson High Magnet School**

19 169. Principal Morado testified that at Tucson High Magnet School, MAS classes
20 either begin or end with clapping along with the recitation of words. He does not believe
21 that this promotes ethnic solidarity or racial resentment.

22 170. Principal Morado acknowledged that, other than athletics, the MAS classes are
23 the only classes he is aware of at Tucson High Magnet School that has clapping
24 accompanied by the recitation of words.

25 171. In addition to formal evaluations, Principal Morado and the assistant principals
26 conduct unannounced classroom visits throughout the school year.

27 172. Principal Morado conducted at least two brief visits of MAS classes during the
28 spring of 2011. Principal Morado did not observe any evidence during the visits that the
29 classes were promoting racial resentment or teaching ethnic solidarity, instead of
30 treating students as individuals.

1 173. Principal Morado testified that if an assistant principal had a concern based on an
2 evaluation that a teacher was promoting resentment or teaching ethnic solidarity instead
3 of treating students as individuals, Principal Morado would expect that concern to be
4 brought to his attention. None of the evaluators brought any such concerns to Principal
5 Morado's attention during the 2010-11 school year.

6 174. In all of the years that Principal Morado has been visiting MAS classrooms, he
7 has never observed anything that would cause him any concern that the classes were
8 promoting racial resentment or promoting ethnic solidarity instead of treating students
9 as individuals.

10 175. District Board President Stegeman attended a Latino Literature class conducted
11 by Curtis Acosta at the Tucson High Magnet School on March 23, 2011. He took notes
12 contemporaneously during his observations of the course and collected handouts
13 available in Mr. Acosta's classroom. Ex. 20 [District Board President Stegeman Notes]
14 at DMYL TUSD 000344.

15 176. District Board President Stegeman testified that he observed Mr. Acosta and his
16 students began chanting and clapping in unison at the beginning of the class. In his
17 notes, District Board President Stegeman commented that along with their clapping and
18 chanting, the students recited a long, memorized speech that was "something like a
19 prayer." District Board President Stegeman, Day 1 (p.m.) at 55:13-56:11. District Board
20 President Stegeman noted that the students collectively chanted, "we must be willing to
21 act in a revolutionary spirit." *Id.* at 56:6-9.

22 177. After the chanting, and clapping, District Board President Stegeman observed
23 that Mr. Acosta engaged in a "hard sell" to encourage students to attend a Cesar
24 Chavez march the following Saturday. *Id.* at 78:14-79:79:1.

25 178. District Board President Stegeman testified regarding his belief that Mr. Acosta
26 pressured his students to engage in political activism by reminding them that "we are
27 still in the struggle." *Id.* at 60:21-61:6; 77:25-78:6.

28 179. District Board President Stegeman described the Latino Literature class as "a
29 cult," "pure political proselytizing," and "a political rally." Ex. 20 at DMYL TUSD 000344;
30 District Board President Stegeman, Day 1 (p.m.) at 77:18-78:13. District Board
President Stegeman noted with respect to the class that "[t]his is not critical thinking. It

1 does teach resentment.” Ex. 20 at DMYL TUSD 000345; District Board President
2 Stegeman, Day 1 (p.m.) at 81:18-25.

3 180. District Board President Stegeman also collected a copy of Mr. Acosta’s class
4 handout for the day, which included a single sheet of paper containing a series of
5 definitions. Ex. 20 at DMYL TUSD 000348. The handout contained a definition of the
6 “Inequality of Language Theory” attributed to Richard Delgado. *Id.* Under this
7 definition, “equality” is defined by race and ethnicity—“If you are white, English-
8 speaking, and your ancestors came from the right region of the world, all the equality
9 amendments and civil rights statutes apply to you. If you are of a different hue or origin
10 and/or prefer to speak a language other than English, you cannot insist on equal
11 treatment or equal protection of the law.” *Id.*

12 **Rincon High School**

13 181. Parent Stevenson testified about her daughter’s experience in an MAS
14 government class at Rincon High School taught by MAS Teacher Mr. Gonzalez during
15 the 2009-2010 school year.

16 182. Though the particular class predated the effective date of the statute, both
17 District Superintendent Pedicone and MAS Director Arce confirmed that MAS classes
18 were offered and conducted in the same manner in 2011 as they were in the previous
19 year.

20 183. Parent Stevenson was excited that her daughter was planning to enroll in a Raza
21 studies class because she thought it would give her daughter a different perspective of
22 the different cultures in Arizona. Parent Stevenson expressed her support for ethnic
23 studies programs in the District.

24 184. Parent Stevenson testified that her daughter reported to her that Mr. Gonzalez’s
25 government class was being conducted in an extremely biased manner. The daughter
26 told her that the class presented “how the Anglo-Saxons had treated other people badly,
27 particularly Chicano people.” Parent Stevenson, Day 2 (a.m.) at 152:2-152:4. Her
28 daughter (who is Caucasian) reported to her that “[b]y the end of the class, the other
29 students, most of the other students would not talk to her at all, except the students who
30 were not of Hispanic background, Mexican background.” *Id.* at 152:20-23.

185. Based upon her daughter's experience as relayed to her, Parent Stevenson opined that her daughter's MAS class promoted racial resentment and ethnic solidarity.

Addressing Deficiencies Existing in the MAS Program

186. In his August 16, 2011 deposition, Superintendent Huppenthal, stated that in order for the District to come into compliance, the District, among other things, would need to develop a detailed curriculum, identify the class materials and textbooks that would be used, and obtain input from the Tucson community. See Exhibit F, 88:19-89:4

187. Deputy District Superintendent Menconi testified that the District is in the process of rectifying the deficiencies that the auditors noted.

188. District Deputy Superintendent Menconi is working towards identifying those materials that are in use in MAS classes that have not been approved by the District's governing board and intends to obtain board approval of such materials.

189. District Deputy Superintendent Menconi is working with MAS Director Arce to create Pacing Guides for the MAS American History course and the Junior and Senior Latino Literature courses. District Deputy Superintendent Menconi is not satisfied with the Pacing Guides, and they are undergoing further revisions.

CONCLUSIONS OF LAW

1. In this proceeding, the Department bears the burden of proving by a preponderance of the evidence that there is a violation of A.R.S. § 15-112, and that pursuant to A.R.S. § 15-112(B), it is appropriate to withhold 10% of the monthly apportionment of state aid until the District has come into compliance with the law. See A.R.S. § 41-1092.07(G)(3); Arizona Administrative Code R2-19-119(B)(1).

2. A preponderance of the evidence is "such proof as convinces the trier of fact that the contention is more probably true than not." Morris K. Udall, ARIZONA LAW OF EVIDENCE § 5 (1960). It is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

3. The Department contended that it must show only that at least one MAS class or course was in violation of A.R.S. § 15-112. In contrast, the District asserted that the Department must show that all of the MAS courses or classes violate the law.

1 4. The Administrative Law Judge concludes that A.R.S. § 15-112(A) only requires a
2 finding of at least one class or course to be in violation of the law for A.R.S. § 15-112(B)
3 to be applied.

4 5. The Administrative Law Judge concludes that the testimony of the Department's
5 witnesses and in particular, that of Dr. Stotsky, is persuasive that one must look at the
6 curriculum, at the teacher's lesson plans, and the work product of students to obtain a
7 picture of what is being taught in the classroom. Although the Department did not
8 conduct observations of the MAS classes, the Department's witnesses credibly testified
9 that given the viewpoints expressed in certain excerpts from materials used in the MAS
10 program, some of which are cited in the above Findings of Fact, there is no way to use
11 the materials without being in violation of the law.

12 6. The issue before this Tribunal is not whether the District's MAS curriculum is in
13 compliance with State standards, or whether these standards required an approved
14 written curriculum. However, the consequence of the District's failure to provide
15 appropriate oversight, and to have a written curriculum and approved textbooks,
16 contributed to the MAS program's lacking any direction other than the pedagogical
17 approach adopted by MAS Director Arce and other MAS teachers. Such pedagogical
18 approach exceeded what is permitted to be taught under A.R.S. § 15-112.

19 7. The examples from the MAS program cited in the above Findings of Fact, as well
20 as the weight of the testimony presented, establish that the MAS program has classes
21 or courses designed for Latinos as a group that promotes racial resentment against
22 "Whites," and advocates ethnic solidarity of Latinos.

23 8. Although the District argued and presented evidence to show there are schools
24 and MAS classes that are not in violation of the law, such evidence does not prevail
25 over the Department's evidence that showed that the MAS program has at least one
26 class or course that is in violation of A.R.S. §§ 15-112(A)(2), (3), and (4).

27 9. The Department maintained that although historical oppression may be taught, it
28 may not be taught in such a manner as to promote racial resentment or advocate ethnic
29 solidarity. The District argued that historical oppression can be taught regardless of
30 whether it promotes racial resentment or advocates ethnic solidarity. See A.R.S. § 15-
112(F).

10. The Administrative Law Judge concludes that A.R.S. § 15-112(F) permits the historical (objective) instruction of oppression that may, as a natural but unintended consequence, result in racial resentment or ethnic solidarity. However, teaching oppression objectively is quite different than actively presenting material in a biased, political, and emotionally charged manner, which is what occurred in MAS classes. Teaching in such a manner promotes social or political activism against the white people, promotes racial resentment, and advocates ethnic solidarity, instead of treating pupils as individuals.

11. The District contended that the Superintendent Huppenthal's determination does not comply with A.R.S. §15-112 in that it does not identify specific courses or classes that violate A.R.S. § 15-112, and does not provide sufficient information for the District to cure the violations.

12. Notices of violations must "[i]dentify with reasonable particularity the nature of any alleged violation" and "the conduct or activity constituting the violation." A.R.S. § 41-1092.03(A)(2).

13. Superintendent Huppenthal's determination provided his bases for finding the violations and provided as an attachment a chart citing to specific materials.

14. The Administrative Law Judge concludes that the Superintendent's June 15, 2011 determination provided sufficient notice to the District of the violations of A.R.S. § 15-112.

15. Testimony was elicited from the Department's witnesses as to whether certain material was age appropriate. The Administrative Law Judge does not address whether such material was age appropriate because the evidence did not show that the use of such material in a classroom violates A.R.S. § 15-112(A).

16. While evidence was presented that the MAS program should be dismantled and re-constructed from the ground up, A.R.S. § 15-112 does not require that the Superintendent or the Administrative Law Judge address how the District must come into compliance with the law. What is required and has been addressed in this Decision is whether the District violates A.R.S. § 15-112(A)(2), (3), or (4).

17. The District contended that A.R.S. § 15-112 is unconstitutional for vagueness as it has been applied by the Department. The crux of the District's argument is that there

are no standards in the statute and, thus, the law may be enforced in an arbitrary or discriminatory manner. The Department maintained that the statute is clear on its face or as applied because it has standards that permit the historical teaching of oppression and set forth with specificity acts that would be in violation of the law.

18. The evidence of record showed that the only complaints made against an ethnic studies program that the Department received are ones made regarding the MAS program. Thus, there was no credible evidence that showed that A.R.S. § 15-112 is being enforced in an arbitrary or discriminatory manner.

19. Although framed as being a constitutional challenge to the statute as applied, the District's argument is really one that challenges the statute on its face in terms of vagueness. A.R.S. § 15-112 has not been shown to have been declared unconstitutional by any court and the law must be given effect by this Tribunal.

20. Based on the above, the Administrative Law Judge concludes that the Department has sustained its burden of proving by a preponderance of the evidence that as of January 1, 2011, and as of the hearing dates, the District's MAS program had at least one or more classes or courses that were in violation of A.R.S. §§ 15-112(A)(2) (promoting racial resentment), (A)(3) (being designed primarily for one ethnic group), and (A)(4) (advocating ethnic solidarity instead of treating pupils as individuals).

ORDER

Superintendent Huppenthal's June 15, 2011 determination is affirmed, and on the effective date of the Order entered in this matter, the Department shall withhold 10% of the monthly apportionment of state aid until the District comes into compliance with A.R.S. § 15-112.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be 5 days from the date of that certification.

Done this day, December 27, 2011.

/s/ Lewis D. Kowal
Administrative Law Judge

Transmitted electronically to:

John Huppenthal, Superintendent
Department of Education