

Seattle University School of Law

Seattle University School of Law Digital Commons

Fred T. Korematsu Center for Law and Equality

Centers, Programs, and Events

7-20-2017

Gonzalez v. Douglas Trial Transcript of Proceedings, Day 9

Steven A. Reiss

Weil Gotshal & Manges LLP

Luna N. Barrington

Weil Gotshal & Manges LLP

David Fitzmaurice

Weil Gotshal & Manges LLP

Richard M. Martinez

Law Office of Richard M. Martinez

Robert Chang

Fred T. Korematsu Center for Law & Equality

James W. Quinn

JW Quinn ADR, LLC

Follow this and additional works at: https://digitalcommons.law.seattleu.edu/korematsu_center



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Reiss, Steven A.; Barrington, Luna N.; Fitzmaurice, David; Martinez, Richard M.; Chang, Robert; and Quinn, James W., "Gonzalez v. Douglas Trial Transcript of Proceedings, Day 9" (2017). *Fred T. Korematsu Center for Law and Equality*. 67.

https://digitalcommons.law.seattleu.edu/korematsu_center/67

This Report is brought to you for free and open access by the Centers, Programs, and Events at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Fred T. Korematsu Center for Law and Equality by an authorized administrator of Seattle University School of Law Digital Commons.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NOAH GONZÁLEZ; JESÚS)	Case No. 4:10-cv-00623-AWT
GONZÁLEZ, his father and)	
next friend, et al.,)	
)	
Plaintiffs,)	
)	Tucson, Arizona
vs.)	June 20, 2017
)	
DIANE DOUGLAS,)	
Superintendent of Public)	
Instruction, in her)	
Official Capacity; et)	
al.,)	
)	
Defendants.)	

Before the Honorable A. Wallace Tashima

Transcript of Proceedings

Bench Trial Day 9

Proceedings reported and transcript prepared by:

A. Tracy Jamieson, RDR, CRR
Federal Official Court Reporter
Evo A. DeConcini U.S. Courthouse
405 West Congress, Suite 1500
Tucson, Arizona 85701
(520)205-4266

Proceedings reported by stenographic machine shorthand;
transcript prepared using court reporting software.

1 APPEARANCES

2 On Behalf of the Plaintiffs:

3 Weil, Gotshal & Manges, LLP
4 STEVEN A. REISS, ESQ.
LUNA N. BARRINGTON, ESQ.
767 Fifth Avenue
5 New York, NY 10153-0119
(212) 310-8000
67 Law Office of Richard M. Martinez
RICHARD M. MARTINEZ
8 P.O. Box 43250
Tucson, AZ 85733-3250
9 (520) 609-635210 Seattle University School of Law
11 Ronald A. Peterson Clinic
ROBERT S. CHANG, ESQ.
12 1215 E. Columbia St., Law Annex
Seattle, Washington 98122-4130
13 (206) 398-4025

14 On Behalf of Defendants:

15 Office of the Attorney General
16 LESLIE KYMAN COOPER, ASSISTANT ATTORNEY GENERAL
1275 W. Washington Street
17 Phoenix, AZ 85007-2997
(602) 542-8349
1819 Ellman & Weinzwieg, LLC
ROBERT ELLMAN, ESQ.
330 E. Thomas Road
20 Phoenix, AZ 85012
(480) 630-6490
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF COURT PROCEEDINGS

PAGE

Defense motion for judgment on partial findings under Rule 52(c) 36

INDEX OF EXAMINATIONS

WITNESSES:

PAGE

ANGELA VALENZUELA (RESUMED)

Cross-Examination (Continued) By Ms. Cooper 6
Redirect Examination By Ms. Barrington 15
Recross-Examination By Ms. Cooper 23

THOMAS M. HALADYNA

Cross-Examination By Mr. Reiss 38
Redirect Examination By Ms. Cooper 79
Recross-Examination By Mr. Reiss 92

ELLIOTT HIBBS

Direct Examination By Mr. Ellman 94
Cross-Examination By Mr. Reiss 147
Redirect Examination By Mr. Ellman 183
Recross-Examination By Mr. Reiss 188

INDEX OF EXHIBITS RECEIVED

NO.

PAGE

ED

38

217

69

538

132

561-

9

568

1

2

P R O C E E D I N G S

3

(Proceedings commenced at 9:06 a.m., as follows:)

4

THE COURT: Good morning. Let's all be seated. So we are in order and the witness is on the stand. Good morning.

6

THE WITNESS: Good morning.

7

THE COURT: I think we're just about finishing up the cross, is that right?

9

MS. COOPER: We are. May I address one brief scheduling question?

10

11

THE COURT: You certainly may.

12

MS. COOPER: We have decided to call one fewer witness.

13

14

THE COURT: What's that mean, two instead of three?

15

MS. COOPER: Yes, that's what that means, Your Honor.

16

THE COURT: Are you still calling your -- what shall I call him, a rebuttal expert?

17

18

MS. COOPER: Correct. And he is here, Your Honor.

19

THE COURT: Then you have one more.

20

MS. COOPER: That's correct.

21

THE COURT: So your case will be shorter. So that means, wow, we'll get -- we should get through your case today at least, right?

22

24

MS. COOPER: Yes, Your Honor. Absolutely.

25

THE COURT: Then you're going to have rebuttal?

1 MR. REISS: We will have one, possibly two relatively
2 brief witnesses, Your Honor, because we assumed that today
3 would be taken up with the rest of the defense case. They're
4 available tomorrow morning, but I don't think I can get them
5 here.

6 THE COURT: You think you can or cannot?

7 MR. REISS: Cannot.

8 THE COURT: Give it a try at the noon recess, all
9 right? Are they local residents?

10 MR. REISS: One is in Sedona right now on vacation.
11 She will come back early if she has to, which, we would get her
12 in by tomorrow morning; and I'm not sure, frankly, about the
13 second.

14 THE COURT: Sedona is not that far. Anyway, your
15 other witness is where?

16 MR. REISS: I'm not sure. I believe possibly in
17 Phoenix, but I'd have to confirm that.

18 THE COURT: Well, I want you to look into it or send
19 somebody else, you know, to look into it right away, but let me
20 have a report then after the noon recess. Okay?

21 MR. REISS: Yes.

22 THE COURT: We'll see what our scheduling looks like,
23 all right?

24 MR. REISS: Yeah.

25 THE COURT: Then I guess we'll proceed with the

1 cross-examination. Is that right, Ms. Cooper?

2 MS. COOPER: Yes, Your Honor, that is correct.

3 WITNESS, ANGELA VALENZUELA, (RESUMED)

4 CROSS-EXAMINATION (CONTINUED)

5 BY MS. COOPER:

6 Q. Good morning, Dr. Valenzuela.

7 A. Good morning.

8 Q. Thank you for returning. We'll try to keep this brief.

9 Now, you testified yesterday that you received a
10 substantial number of new documents related to your work in
11 this matter.

12 A. Yes.

13 Q. And you described them as lesson plans, correct?

14 A. Units and lesson plans.

15 Q. Units and lesson plans. In fact, you received 29 new
16 documents, right?

17 A. I didn't count the number.

18 Q. They're trial Exhibits 561 through 570, and is this
19 approximately the volume of documents that you received?

20 A. Yes.

21 Q. Although there are only eight numbers there, in fact, there
22 were subparts. So that represents far more than eight or nine
23 exhibits.

24 A. Yes.

25 Q. And you reviewed those in connection with your opinion?

1 A. Yes.

2 Q. And you had not reviewed those at the time that you were
3 deposited, correct?

4 A. Correct.

5 Q. And in forming your opinions at the time that you had been
6 deposited, you were just relying on the two sets of curricular
7 materials that you had received from Sean Arce?

8 A. No, that's not correct.

9 Q. In terms of curriculum, you didn't have any other
10 curriculum materials at that point, did you?

11 A. Well, I had -- I was able to triangulate that curriculum
12 with other evidence from the case that was supplied originally,
13 but also that I gathered independently, and I mentioned these
14 items. The Curtis Acosta simulation classroom helped form my
15 opinion. So it wasn't exclusive of those materials, it was of
16 these items as well.

17 It was the ethnic studies literature, some of it specific
18 to Arizona, it was the Cambium report, and then it was more
19 than six hours of interview of four of the MAS teachers, one of
20 whom was Sean Arce himself.

21 Also, there was the Sean Arce visit to the University of
22 Texas, where we also discussed the curriculum, and where they
23 presented him and Crystal Terriquez presented all the
24 curriculum.

25 (Reporter requested a repetition of the last sentence.)

1 It was Sean Arce and Crystal Terriquez that came to UT
2 Austin. And that is in my expert witness report.

3 So it was really not solely on the basis of the curriculum
4 map or the curriculum unit that I reviewed, but also on the
5 basis of these other items that I reviewed to determine my
6 judgment of the curriculum.

7 Q. Well, at the time that you wrote your opinion and then
8 later when you were deposed, in terms of actual materials,
9 specifically from the TUSD MAS curriculum, you had two sets,
10 right?

11 A. I had the curricular map and then the other unit, yes.

12 Q. Then you received a couple of days ago 29 more documents --

13 A. Yes.

14 Q. -- containing curriculum.

15 Now, how do those documents relate to your opinion in this
16 matter here?

17 A. They really work to reinforce my initial judgment that this
18 curriculum was substantive. It was well organized. It was
19 based on standard metrics for evaluating curriculum. It
20 involved higher order thinking. It was a critical curriculum
21 that's consistent with the ethnic studies research that I am
22 familiar with and that I also reviewed for this case. It had
23 clear goals and objectives and assessments were a part of
24 what -- of the materials that I reviewed.

25 Q. So the documents you reviewed inform, relate to, and

1 support your opinion?

2 A. Yes.

3 MS. COOPER: We would move the admission of those
4 documents into evidence. We had listed them as exhibits
5 previously. I can read the numbers to the Court --

6 THE COURT: Is that -- you just referred to 561 and
7 570.

8 MS. COOPER: Yeah. 570 is already in evidence, and,
9 as I mentioned, Your Honor, that represents -- there's 561A, B,
10 C --

11 THE COURT: Right.

12 MS. COOPER: -- et cetera. But I checked this
13 morning, and I believe that the list that was given to
14 Dr. Valenzuela corresponds to -- it's 561 through 568, omitting
15 569, and then 570 was already in evidence.

16 THE COURT: All right. Any objection?

17 MR. REISS: No, objection, Your Honor.

18 THE COURT: Then without objection, 561 through 568
19 are admitted, and I understand that 570 is already in evidence.

20 MS. COOPER: Yes, Your Honor.

21 THE COURT: For now we're skipping 569, right?

22 MS. COOPER: Correct.

23 THE COURT: Let me see now. I have 569 and 70 already
24 in there. That's fine. Go ahead. And also 563E for some
25 reason.

1 MS. COOPER: At this point, Your Honor, I can't
2 provide the rhyme or reason for that.

3 THE COURT: Okay. That's fine.

4 BY MS. COOPER:

5 Q. I've placed Exhibit 561B before you, Dr. Valenzuela. Is
6 that one of the documents that you reviewed?

7 A. Yes.

8 Q. I will represent to you that testimony of the
9 administrative hearing was that this was a curriculum unit
10 available for fourth through seventh graders. All right?

11 A. All right.

12 Q. And fourth and fifth graders are commonly considered
13 elementary school students, right?

14 A. Yes.

15 Q. And sixth and seventh would be middle school students?

16 A. Yes.

17 Q. I want to ask you about some pictures. This is a series of
18 pictures, and I am going to show you that the pictures that I
19 am going to use are this, Chicanos lynched in Santa Cruz,
20 California, May 3rd, 1877, by 40 vigilantes. And then we have
21 this picture as well, but we can't -- there's no caption. And
22 I have larger, better copies of these pictures.

23 Now, how is it -- you understand that these pictures were
24 used in curriculum units for fourth graders, right?

25 A. I think that there's not enough context in what I reviewed

1 to know what was actually presented. I did see the images, but
2 I would need more context to know how any of the images were
3 used or even whether they were used.

4 Q. Well, how would you make a decision about whether or not
5 this picture was appropriate for fourth graders?

6 A. It would depend on -- we can't essentialize the fourth
7 grade classroom. We'd have to see what would be specific in
8 terms of their -- I mean, some fourth graders would be ready
9 for it and others wouldn't, and teachers would use their
10 professional judgment to arrive at that determination on
11 whether it was appropriate or not.

12 I would assume that there would be scaffolding that would
13 lead up to this, there would be literature that they reviewed,
14 maybe even a film about the lynchings. This kind of
15 information is accessible already to children on the worldwide
16 web, not unlike the violence during the Civil Rights movement.

17 Q. You understand that public school teachers have a different
18 obligation with respect to their students than the people who
19 put information on the internet, don't you?

20 A. Yeah, absolutely.

21 Q. And so what -- I am just trying to understand, how would
22 pictures like this be used appropriately with nine-year-olds?

23 A. I would have to understand the context. What's the context
24 for this?

25 Q. Do you understand the context of any of the information in

1 the exhibits that you were given yesterday?

2 A. No.

3 Q. No.

4 A. No.

5 Q. So how did you draw any conclusions about them?

6 A. I'm talking about these two notebooks.

7 Q. Right.

8 A. Right. And so in terms of the general curriculum, we can
9 only triangulate.

10 Q. Can you triangulate those pictures for me?

11 A. Well, it would be -- it would go back -- if I were, you
12 know, to draw some inferences based on very superficial
13 evidence of curriculum taught, I would draw inferences to
14 the -- from the lesson plans, and in the way that I've drawn
15 inferences in this case generally, that context matters,
16 context is so important, and if we haven't interviewed the
17 teachers about this, if we haven't looked at their lesson
18 plans, there's really very little that we can know about how
19 these images were used.

20 Q. So you can't say -- you can't tell us with any degree of
21 certainty that these images were used appropriately, can you?

22 A. Not either way. There's no context for this.

23 Q. Could you answer my question? Can you tell me, with any
24 certainty, that these pictures were used appropriately with
25 fourth grade students?

1 A. No. I can't tell either way, yea or nay.

2 Q. Now, these pictures -- by the way, would you use these
3 photos in your Saturday school?

4 A. We might very well, yes.

5 Q. What kind of process would you have to go through with the
6 Austin Independent School District in its multicultural
7 curriculum committee to use pictures like this with
8 nine-year-olds?

9 A. We do work closely with Austin Independent School District,
10 so the process would be a collegial one, a professional one, a
11 collective one.

12 Q. Right. Have you addressed photos of this nature for fourth
13 graders in that committee?

14 A. No, but we have addressed very hard topics.

15 Q. Let me show you -- those pictures came from this book,
16 which is in evidence as Exhibit 229, and the pages -- the
17 pictures are here on page 42. There we are. All right.

18 Is this a book that you have reviewed?

19 A. I own the book, and I haven't reviewed it recently, but I
20 own the book and I've read parts of it, yes.

21 Q. Do you think it's appropriate to use with elementary school
22 students?

23 A. I think it could be, yes. I think we have to rely on the
24 teachers' professional judgment in so much of this, if not all
25 of it.

1 Q. Do you think that it perhaps has questionable material that
2 should be reviewed carefully?

3 A. Yes.

4 Q. So then you would agree with the Cambium auditors in that
5 regard -- I'm showing you table, figure 18, from page 39 of
6 Exhibit 93, which is a draft Cambium audit, and the statement
7 itself is on the next page. It's a two-page table.

8 So you would agree with the Cambium auditors that, as it
9 says at the bottom, that Elizabeth Martinez's book should be
10 reviewed deeper for appropriate use in classrooms with suitable
11 age students, correct?

12 A. I would actually take issue with this because "review
13 deeper" assumes that they understand the depth of the usage,
14 and I am not convinced that they -- that there was a real
15 in-depth examination of that specific usage.

16 Q. So you don't think the Cambium auditors know what they were
17 talking about there?

18 A. Well, I don't think it's a perfect document. I don't think
19 there's any document that's perfect. And I think that
20 "appropriate" is a big word, and I think I would want to
21 observe the classroom in which it was taught or one that was
22 part of the unit within which it was taught and that there was
23 no indication that that's what they had done.

24 Q. So if you received the curriculum lesson plans and units
25 without context, how did you draw conclusions about it?

1 A. My conclusion is that -- is that we can't draw a conclusion
2 that's out of context.

3 Q. Is that true as well for the 29 documents that you received
4 this week?

5 A. The 29?

6 Q. The 29 exhibits that you received this week?

7 A. I think --

8 Q. You received them without context, right?

9 A. You can draw certain conclusions about the structure of the
10 program, the goals and objectives, the scaffolding, the higher
11 order thinking. There's those kinds of conclusions that you
12 can draw, but with respect to any specific item, such as what
13 you're referring to me right now, it's really hard to draw
14 specific inference that's outside of context.

15 MS. COOPER: No further questions at this time.

16 THE COURT: All right. Thank you.

17 Redirect, please.

18 MS. BARRINGTON: Yes. Thank you, Your Honor.

19 REDIRECT EXAMINATION

20 BY MS. BARRINGTON:

21 Q. Good morning, Dr. Valenzuela.

22 A. Good morning.

23 Q. Do you recall counsel asking you yesterday about -- or even
24 this morning -- about the Cambium report?

25 A. Yes.

1 Q. And you testified that you relied on the Cambium report in
2 part in reaching your conclusion that the MAS program was
3 taught with a pedagogically sound method, is that right?

4 A. Yes.

5 MS. BARRINGTON: Can we pull up Exhibit 93. Page 19,
6 please.

7 BY MS. BARRINGTON:

8 Q. Dr. Valenzuela, this is page 19 of Exhibit 93, which is the
9 Cambium report. If you look at -- it says here that the
10 auditors observed well orchestrated lessons as evidenced by
11 indicators within the Arizona Department of Education's
12 document of standards and rubrics for school improvement and
13 closing the achievement gap protocol created by Cambium
14 Learning.

15 Teachers and MASD curriculum specialists created lessons
16 where learning experiences were aligned with state standards
17 and incorporated targeted performance objectives within
18 multidisciplinary units for real-life applications. The
19 curriculum auditors observed teachers using researched-based
20 instructional strategies that were developmentally appropriate
21 and provided students with assignments which required the use
22 of higher order and critical thinking skills.

23 Every classroom demonstrated all students actively engaged,
24 and, when asked to work together, they all worked
25 collaboratively with each other across various sociocultural

1 backgrounds and academic abilities.

2 Do recall reviewing this portion of the Cambium report?

3 A. Yes.

4 Q. Is this the portion that you relied on in reaching your
5 conclusion?

6 A. Yes, it is.

7 Q. Thank you.

8 You were also asked a series of questions about whether
9 Common Core standards existed for social studies and whether
10 the MAS curriculum map that you reviewed aligned with
11 Common Core standards.

12 Do you recall that testimony?

13 A. Yes, I do.

14 Q. Is it your understanding that there were Common Core
15 standards for social studies at the time that you reviewed the
16 curriculum map and the curriculum unit?

17 A. Yes.

18 Q. And how did you know that there were Common Core standards
19 for social studies?

20 A. Because -- and I mentioned this yesterday -- that Olivia
21 Johnson and I, we did it together, and we looked at the
22 website.

23 MS. BARRINGTON: Can we pull up the website, please.

24 BY MS. BARRINGTON:

25 Q. Is this the Common Core website that you looked at?

1 A. Yes.

2 Q. Is this the same website that counsel read from to you
3 yesterday?

4 A. I don't recall a website from yesterday. Maybe there was,
5 but --

6 Q. She read it to you, she didn't show it to you.

7 A. Okay. Yes.

8 Q. You see here that there are, in fact, Common Core standards
9 for history social studies, correct?

10 A. That is correct.

11 Q. So Ms. Cooper was incorrect when she said that there were
12 no Common Core studies for social studies, is that correct?

13 A. Yeah, she was incorrect, and we were correct at the time.

14 Q. And you reviewed those standards in evaluating the
15 curricular map, right?

16 A. Yes.

17 Q. Is it your testimony that the curricular map that you
18 reviewed aligned with those Common Core standards?

19 A. Yes.

20 Q. And, incidentally, do you know whether this curricular map
21 also aligned with Arizona state standards?

22 A. It did.

23 Q. You were also asked a series of questions about the work
24 that you did to reach your conclusions in this case. You
25 testified that you reviewed the MAS curricular map and the MAS

1 curriculum unit. Do you recall that testimony?

2 A. Yes.

3 Q. And is that all that you did, Dr. Valenzuela, to reach your
4 conclusions in this case?

5 A. No, not at all.

6 Q. What else did you do?

7 A. I did quite a number of things. And I spent a lot of time
8 doing this. Of course, I reviewed all of the documents that
9 were given to me that were germane to the case at the time.

10 I also did -- conducted more than six hours of interviews
11 with four of the teachers, one of whom was the director as
12 well, Sean Arce, of the TUSD MAS program.

13 I also was in an ongoing way actually very familiar with
14 the case through my colleague, Dr. Julio Cammarota, who wrote a
15 couple of chapters for my book, *Growing Critically Conscious*
16 *Teachers*, of which one of the chapters was specifically about
17 the TUSD case that spoke about the curriculum that was used,
18 particularly the action research aspects of the curriculum.

19 I also took into consideration the simulation classroom
20 that I was a part of in Washington, D.C., in 2011, with Curtis
21 Acosta. I also heard about the curriculum and spent quite a
22 number of hours with Sean Arce and also Crystal Terriquez, when
23 they came to the University of Texas at Austin to present.

24 And then I read literature that has come directly out of
25 the case. I mean, it was literature based on the program,

1 different studies that were written by Augustine Romero and
2 Sean Arce, Curtis Acosta. I read all of those pieces.

3 And I also was particularly informed by the Francesca Lopez
4 case that collected data. I believe it was based on kids in
5 TUSD in 2015-'16 in five schools that looked at teachers'
6 expectations that implemented a critically conscious, you know,
7 critical curriculum on student achievement. It was very
8 informative and important. And that then helped me triangulate
9 through my very extensive review of the ethnic studies
10 literature to basically draw the conclusion on the basis of all
11 of these pieces of evidence that the pedagogy and the
12 curriculum was sound and that it predicted -- it went in the
13 direction that all of the literature, nearly all of the entire
14 breadth of literature of over maybe three decades that
15 Dr. Christine Sleeter reviewed would suggest there was a
16 definite theoretical grounding, there was a theory of action,
17 and through the triangulation of all of this evidence, I feel
18 that I was able to draw a very -- a sound, legitimate, and even
19 predictable kind of conclusion and outcome for the case.

20 Q. So it's fair to say that you did a substantial amount of
21 work besides looking at just this curricular map and curriculum
22 units to reach your conclusions. Is that fair to say?

23 A. I did a substantial amount of work, yeah. Many months,
24 yes.

25 Q. And you relied on all of this work to reach your

1 conclusions in your expert report, is that correct?

2 A. I relied on all of it, yes.

3 Q. Do you think it's important for you to do this additional
4 work even with a curriculum roadmap?

5 A. I think a curriculum roadmap in itself will tell you very
6 little, and it would be unethical and unprofessional to draw
7 conclusions wholly on that matter. I know a lot has been made
8 in the case about that, but that was really just such a small
9 aspect of the totality of evidence that I used, that I brought
10 to bear to make my judgment about the case, about the pedagogy.

11 Q. And you also testified that you reviewed additional MAS
12 curriculum units and lesson plans since you submitted your
13 expert report. Do you recall that testimony?

14 A. I'm sorry, I didn't hear that.

15 Q. You also testified that you reviewed additional MAS
16 curriculum units and lesson plans since you submitted your
17 expert report?

18 A. Yes.

19 Q. That would be the 29 exhibits.

20 A. Yes.

21 Q. If you were trying to understand the context in which these
22 materials were being taught, what would you have done?

23 A. What I would have done is I would have done what the state
24 did not do. I would have talked to the teachers. I would have
25 observed their classrooms. I would have asked for lesson

1 plans. I would have asked for unit plans. And even if they
2 didn't have a curriculum map, they had a structure, and it was
3 sequential, and even the materials that were supplied to me
4 this week used that word, that the materials -- they used the
5 word "sequentially," that the materials should be used
6 sequentially, which suggested they had an implicit curriculum
7 map. And then also the curricular map that Sean Arce
8 developed, even though it was in 2011-2012, it reflected very
9 clearly in my mind what they had been doing anyway. So it was
10 really just a rearticulation of what had been in place.

11 And what I would have also have learned, which is something
12 that was stressed in the interviews, was that they met
13 regularly. So when you have a team that is, just like in San
14 Francisco, just like in Austin, when you meet regularly,
15 there's a lot that can be assumed that actually isn't even
16 written down, but which ads, not only coherence, but profound
17 philosophical underpinnings to a program.

18 Q. Dr. Valenzuela, would you have ever taken any of these
19 materials at face value?

20 A. Absolutely not.

21 Q. In drafting your expert report in this case, did you employ
22 research methods that are accepted and well established in your
23 field?

24 A. Absolutely.

25 Q. Does anything you've heard in this courtroom change any

1 conclusion you've reached in your expert report?

2 A. Changed?

3 Q. Yeah. Does anything you've heard in this courtroom change
4 any conclusion you've reached in your expert report?

5 A. Only in the sense that it's deepened my -- it's really,
6 like, strengthened my conclusion. I was very, very pleased to
7 read these two notebooks and to go through them, because it
8 actually underscored or reinforced what I had already presumed
9 and assumed and analyzed and synthesized to be true.

10 MS. BARRINGTON: Thank you. No further questions.

11 THE COURT: Recross?

12 RECROSS-EXAMINATION

13 BY MS. COOPER:

14 Q. You testified just a moment ago that you relied on the
15 Cambium conclusion about classroom observations as part of your
16 opinion, right?

17 Did you review the appendices in the Cambium audit that
18 described their classroom observations?

19 A. It's been a while, but, yes, I did.

20 Q. So those appendices informed your opinion, correct?

21 A. Yes.

22 Q. Would you agree with me that for the classroom observations
23 to be effective in the context of the Cambium audit that it
24 would be necessary for the auditors to watch MAS teachers
25 teaching MAS subject matter?

1 A. I think that would have been very helpful, yes.

2 Q. And if the MAS teachers are not teaching MAS subject
3 matter, that's substantially less helpful, right?

4 A. Yes.

5 Q. In fact, there wouldn't be any reason to consider what the
6 MAS teachers were teaching that in this context that was not
7 related to the MAS program, right?

8 A. Can you repeat that question, please?

9 Q. It was very poor.

10 Would observations of MAS teachers teaching non-MAS
11 subjects be useful in the context of the Cambium audit?

12 A. Yes, it would be.

13 Q. And what -- and of what use would that be?

14 A. Well, I mean, it would be helpful to know what was taught
15 and how it was taught. I understand that when they were in the
16 schools that there was a lot of testing going on or they were
17 preparing for the test, and that does tend to impact curriculum
18 everywhere we -- where we -- everywhere where we see the
19 teaching of almost any curriculum. It ends up gravitating in
20 that direction when it's testing season or it's really
21 test-based, you're not going to be observe a whole lot of other
22 things, unfortunately, because of the focus on the test.

23 Q. Is it your recollection that the reason that the Cambium
24 auditors couldn't view MAS teachers teaching MAS subject matter
25 is that everybody was teaching to the test?

1 A. No. I think that -- as I recall, that was -- that was what
2 occurred to me, is that if they didn't see the MAS happening,
3 it was around testing time, and so a lot isn't happening in our
4 schools around testing time. We have a very test-focused
5 curriculum in key segments of the year, and that was an
6 inference that I drew. That was something that occurred to me.

7 Q. That's just an inference you drew.

8 A. Yeah.

9 Q. Do you know how many elementary MAS classes that were being
10 taught MAS subject matter the Cambium auditors were able to
11 observe?

12 A. No.

13 Q. And do you know how many MAS teachers teaching middle
14 school MAS classes the Cambium auditors were able to observe?

15 A. I don't remember the number.

16 Q. And do you know how many high school classes the MAS -- the
17 auditors were able to observe where MAS teaching was occurring?

18 A. No.

19 Q. If that was a very small number of classes, would that
20 affect your reliance on the Cambium audit's auditor's
21 statements that they didn't observe any problems with MAS
22 teaching?

23 A. Yeah, I'd have to review the report again. I don't
24 remember.

25 Q. Is it possible that your conclusion, your reliance on the

1 Cambium audit, insofar as it drew conclusions based on
2 classroom observations, would change as a result of
3 understanding that, in fact, the Cambium auditors reviewed --
4 viewed very few MAS teachers teaching MAS classes?

5 A. It wouldn't change my opinion because, again, I
6 triangulated with other sources of information. So inasmuch as
7 it concurred with -- you know, with the interviews and with the
8 data, the theory of action, and all the other bases for my
9 assessment, that would not change -- that would not change my
10 judgment.

11 Q. So let's talk about the common core. Are you aware that
12 the common core history standards that you were asked about a
13 moment ago are just, in fact, English language arts standards
14 applied to history?

15 A. Yes.

16 Q. But they're not specific to history.

17 A. Yeah, they're ELA standards for history, mmm-hmm.

18 Q. So they're writing standards, right?

19 A. Mmm-hmm.

20 Q. You talked about studies by -- was it Julio Cammarota?

21 A. Yes.

22 Q. Franchesca Lopez?

23 A. Right.

24 Q. Augustine Romero?

25 A. Mmm-hmm.

1 Q. Nolan Cabrera?

2 A. Right.

3 Q. Those are studies that you relied on?

4 A. And others, yes.

5 Q. Right. And all of those people are supporters of the MAS
6 program, right?

7 A. Yes.

8 Q. Did you review on -- look at any studies by people who are
9 not supporters of the MAS program?

10 A. I don't think they exist.

11 Q. Oh, everybody -- is that because there is no opposition?

12 A. Well, it's because people are writing about their
13 curriculum and their pedagogy. That's not unusual. For
14 people -- I mean I've written about our work. And it's not
15 simply that we're supporters, but we're trying to provide
16 frameworks for other scholars and for practitioners so that
17 they can also consider them in the development of their own
18 programs or in their own theorizing about the value of ethnic
19 studies.

20 Q. You understand the difference between writing about what
21 you do because you're trying to share the information so that
22 others can use it, and evaluating a program as to whether it
23 succeeds. You understand those are two different tasks, right?

24 A. Yes.

25 Q. All right. And were these people that you relied on that

1 we just mentioned, Cammarota, Lopez, Romero, and Cabrera,
2 sharing information about what they're doing, or are they
3 trying to evaluate the program as researchers?

4 A. I think, you know, I mean, in the case of Cammarota -- I am
5 sorry. In the case of Cabrera, he is very much in an
6 evaluative mode and he takes from the Dee and Penner study,
7 which is outside of this body of literature that you're now
8 citing that provides compelling evidence of the positive
9 impacts of a well designed ethnic studies program.

10 And so what Cammarota -- I'm sorry, what Cabrera does is
11 takes Dee and Penner and, to the degree that he can do this, he
12 applies the same methodology. I mean, there's limitations
13 because of the way that the data are structured, but applies
14 the same methodology or roughly similar methodology to
15 determine whether or not there are some parallels. And of
16 course, he finds that there are not only parallels, but they're
17 equally strong, positive conclusions of the impacts of the
18 curriculum.

19 Q. But we can agree that Dr. Cabrera is a supporter of the MAS
20 program, right?

21 A. Yeah.

22 Q. Are you familiar with the concept of researcher bias?

23 A. Yes.

24 Q. Did you -- and before you relied on Cammarota, Lopez,
25 Romero, and Cabrera, did you consider the question of whether

1 any of them were biased?

2 A. Of course.

3 Q. And so how did you -- how does your reliance on their work
4 take into account this bias?

5 A. Because there's -- there are decades of research on ethnic
6 studies. And most of it is -- they're case studies. They're
7 of the kind that we write for educators. And then -- and then
8 we have the Dee and Penner which is a quasi-experimental -- as
9 close as you can get to a quasi-experimental design in
10 scholarship.

11 And so -- so it was a logical kind of analysis for Cabrera,
12 to the degree that he could conduct an analysis that was
13 parallel, that -- that was objective.

14 Q. Now, when we spoke yesterday, we discussed the fact that in
15 fact there aren't very many ethnic studies programs at the K-12
16 level, right?

17 A. Not now, but there have been historically, and there's 30
18 years of research. We had a whole era of multicultural
19 education that basically got wiped out with the high stakes
20 testing that came in.

21 Q. And that's what Christine Sleeter and others are reviewing,
22 are previous decades of --

23 A. I think I --

24 Q. -- multicultural education?

25 A. Yes. And I -- well, that's also my background. And so I

1 have a very deep background that overlaps with the research
2 that Dr. Christine Sleeter reviewed, but which also informed my
3 understanding also of the general conclusions of this body of
4 scholarship.

5 Q. Has Christine Sleeter looked at the MAS program?

6 A. I don't know.

7 Q. Are you aware of any work that she's done on it?

8 A. No, I'm not.

9 Q. Have you examined -- she writes on ethnic studies, right?

10 A. Yes.

11 Q. Have you compared the curricula of ethnic studies programs
12 that she's addressing to the curricula of the MAS program?

13 A. She does it, but when she does a review, it's really like
14 pretty summative across studies, and so nothing that would be
15 comparable.

16 Q. Okay. So you can't --

17 A. For a review, it's like a literature review is what she
18 does for the National Education Association, so that's one of
19 her reports.

20 (Reporter requested a repetition of the last answer.)

21 A. It's a summative review. It's like a literature review of
22 several decades of Mexican -- of ethnic studies research, which
23 in K-12 is called multicultural education, historically.

24 Q. Christine Sleeter is writing in support of ethnic studies
25 generally, right?

1 A. Well, as an analysis of ethnic studies.

2 Q. Yeah.

3 A. So she has a very -- I mean, that her whole career has been
4 dedicated to that. So she looks at different kinds of
5 frameworks and looks at ethnic studies in different contexts.
6 And her purpose -- one of her major purposes has been to derive
7 major themes that are of importance to ethnic studies, like
8 colonization, like impacts on achievement, et cetera.

9 But it really wasn't till we had these quantitative studies
10 that we have through another methodology that, of course, is
11 widely accepted that we find some corroboration in the
12 statistical literature to corroborate or provide additional
13 corroboration to what really scholars within multicultural
14 education already knew, which was that these programs are very
15 positive because they help children, young people feel a sense
16 of belonging.

17 Q. Isn't that what you're doing here, Dr. Valenzuela, just
18 offering an opinion that corroborates what you already knew?

19 A. No.

20 Q. Are you aware of the nature of the State of Arizona's
21 request to TUSD in connection with the Cambium audit for
22 materials?

23 (Reporter requested a repetition of the last question.)

24 Are you aware of the nature of the State of Arizona's
25 request to TUSD for classroom materials related to the MAS

1 program for the Cambium audit?

2 MS. BARRINGTON: Objection, Your Honor. Outside the
3 cope of the redirect and also foundation.

4 THE COURT: It's overruled. I assume it's for
5 impeachment.

6 You may answer the question.

7 MS. COOPER: Do you need it read back?

8 THE WITNESS: Yes, please, one more time.

9 (Reporter read the previous question.)

10 THE WITNESS: And what do you mean by "nature"?

11 BY MS. COOPER:

12 Q. Are you aware that the State of Arizona asked TUSD to turn
13 over materials related to the MAS program for analysis by the
14 Cambium auditors?

15 A. No.

16 Q. So you don't know what the state asked TUSD to provide,
17 right?

18 A. Well, I know that they had to turn over materials for the
19 ALJ proceedings. That's what I was aware of.

20 Q. So you have no knowledge about what the state requested or
21 what TUSD turned over in connection with the Cambium audit?

22 A. No. I'm not sure.

23 Q. So you don't know if the Department asked for everything
24 and TUSD turned over only a small portion, right?

25 A. I just recall in one of the interviews, I think it was Sean

1 Arce saying that they just came in to the MAS office and just
2 took it, they just took everything. And so -- or took a lot.
3 It was just a very general kind of statement. And, yes, it was
4 the ADE that had done that.

5 Q. Okay. Well, you mentioned that it would be important for
6 the Cambium auditors to review everything, right, just a few
7 minutes ago when Ms. Barrington was talking to you?

8 A. Yes.

9 Q. Do you have any reason to doubt that the Cambium auditors
10 or ADE reviewed everything that they were given?

11 A. No.

12 Q. And do you have any reason to believe that the -- based on
13 your own personal knowledge, not on what you were told by
14 someone else, that in fact TUSD turned over to the Cambium
15 auditors and ADE everything in the program?

16 A. I presume they did, yeah.

17 Q. But you don't know, do you?

18 A. I was told that by Sean when I interviewed him that that's
19 what happened.

20 Q. Do you know whether the MAS director talked to the Cambium
21 auditors?

22 A. No, I don't know.

23 Q. Do you think that it would be important for a curriculum
24 director to provide information about the program that he
25 supervised to the organization that was auditing it?

1 A. Yes.

2 Q. And do you think it would be more difficult for the
3 auditors to do their job without that information?

4 A. Yes.

5 Q. Because the MAS director could provide needed context about
6 how materials, like photographs of lynchings, were used with
7 nine-year-olds, right?

8 A. Yes.

9 Q. Do you think that it would be helpful for the MAS teachers
10 to talk to the Cambium auditors?

11 A. Yes.

12 Q. Because they could provide the same context?

13 A. Yes.

14 Q. So if the Cambium auditors weren't able to talk to the MAS
15 director or the MAS teachers for any reason, that would affect
16 their ability to draw conclusions, right?

17 A. If that's what they did, yes.

18 MS. COOPER: All right. No further questions.

19 MS. BARRINGTON: No --

20 THE COURT: Ms. Barrington, anything further?

21 MS. BARRINGTON: No, Your Honor.

22 THE COURT: All right. Then this witness, I assume,
23 may be excused, right?

24 MS. COOPER: Yes, Your Honor.

25 THE COURT: Dr. Valenzuela, thank you very much for

1 your appearance, ma'am. You may step down, and you are
2 excused.

3 DR. VALENZUELA: Thank you.

4 THE COURT: Let me see now. That's plaintiffs'
5 witness. Now do plaintiffs have any more witnesses or are you
6 ready to rest?

7 MR. REISS: Your Honor, the plaintiffs rest.

8 I believe, you know, subject to -- I think we've
9 already moved in --

10 THE COURT: All right. Let's put it this way, you're
11 resting, but the Court understands you're reserving your right
12 to offer any further exhibits to complete your exhibit list.
13 All right?

14 MR. REISS: Yes, Your Honor.

15 THE COURT: We can do that later. So you're reserving
16 that right. All right, then.

17 Defense, ready to proceed or do you need a recess
18 or --

19 MR. ELLMAN: Your Honor, actually, the defense would
20 like to move at this point for judgment on partial findings
21 under Rule 52(c).

22 THE COURT: You want a judgment as a matter of law?

23 MR. ELLMAN: Yeah, a judgment on partial findings
24 under Rule 52(c), because the weight of the evidence favors a
25 finding that neither the enactment or enforcement of A.R.S.

1 15-112 was motivated by racial animus or viewpoint
2 discrimination. And I'd be happy to walk through the standards
3 and the evidence if the Court likes.

4 THE COURT: No, because.... Let me see. If I can --
5 I am a little rusty on this now. If I can, I am going to
6 reserve ruling on that.

7 MR. ELLMAN: All right, Your Honor.

8 THE COURT: I will think about it, but I will rule on
9 it certainly before the end of the case. I am going to reserve
10 ruling on that now. So then the defendants are proceeding with
11 putting on your defense case without prejudice to consideration
12 of your motion as of the time it's made. All right?

13 MR. ELLMAN: Yes, Your Honor. Thank you.

14 THE COURT: So are you ready for a witness or do you
15 need a recess or what?

16 MS. COOPER: Your Honor, our witness is here, we are
17 ready, but I would appreciate at least five minutes to --

18 THE COURT: It's almost 10:00 o'clock, so let's take
19 our mid-morning recess.

20 MS. COOPER: Thank you, Your Honor.

21 THE COURT: We are at recess.

22 (A recess was taken from 9:51 a.m. to 10:19 a.m.)

23 THE COURT: Let's all be seated. Let's see. The
24 plaintiffs have rested now. A motion was made at the end of
25 the plaintiffs' case which I am, for now, taking under

1 submission. So are the defendants ready now to put on their
2 defense?

3 MS. COOPER: Yes, Your Honor.

4 THE COURT: All right. Would you please call your
5 first witness?

6 MS. COOPER: The defendants call their expert
7 Dr. Haladyna.

8 THE COURT: Is he in the courtroom?

9 MS. COOPER: Yes.

10 THE COURT: All right, sir. Would you step forward
11 here and be sworn, please.

12 THE CLERK: Please raise your right hand.

13 THOMAS M. HALADYNA, AFFIRMED

14 MS. COOPER: Your Honor, as with the other experts,
15 Dr. Haladyna's direct testimony has been submitted. I believe
16 it's been filed, and I would request that it be marked as
17 Exhibit ED, and I would ask if I could approach the witness to
18 give him a copy.

19 THE COURT: That would be a copy of --

20 MS. COOPER: His declaration and his --

21 THE COURT: Report.

22 MS. COOPER: Yes.

23 THE COURT: Which is an exhibit to the declaration.

24 MS. COOPER: Correct, Your Honor.

25 THE COURT: That's fine. That was ED?

1 MS. COOPER: That is correct.

2 THE COURT: So that's admitted as ED.

3 Then I am sure our peculiar rules of proceeding have
4 been explained to the witness. So now we're moving directly to
5 cross-examination. So plaintiffs' opportunity to cross.

6 MR. REISS: Thank you, Your Honor.

7 Your Honor, for convenience, if I might approach the
8 witness to provide him with Dr. Cabrera's affidavit and
9 attachments. I might refer to some of them.

10 THE COURT: That's fine.

11 MR. REISS: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. REISS:

14 Q. Good morning, Dr. Haladyna. How are you?

15 A. Good.

16 Q. It's good to see you again. I'll be asking you a number of
17 questions about the declaration that you've submitted as your
18 direct testimony in this case. Okay?

19 A. Okay.

20 Q. If you don't understand any of my questions, please tell me
21 and I'll do my best to rephrase them so you do understand them.
22 Okay?

23 Now, Dr. Cabrera's -- you're commenting on Dr. Cabrera's
24 expert report, right?

25 A. Yes.

1 Q. And Dr. Cabrera's research in his report was an empirical
2 examination of the statistical relationship between taking MAS
3 classes and graduating high school and passing AIMS tests,
4 right?

5 A. That's my understanding.

6 Q. Now, just a couple of things about your background.
7 Your expertise is in educational psychology, is that right?

8 A. Yes.

9 Q. And you don't have any expertise in curriculum, right?

10 A. That's correct.

11 Q. And you don't have any expertise in Mexican-American
12 Studies, right?

13 A. That's correct.

14 Q. And you don't have any expertise in ethnic studies, right?

15 A. Say that again.

16 Q. You don't have any expertise in ethnic studies.

17 A. No.

18 Q. In your view as an educational psychologist, you think that
19 any adjustments to curriculum, even serious adjustments, have
20 virtually no effect on achievement, student achievement, is
21 that right?

22 A. No, I wouldn't say that.

23 Q. Well, let's play clip 1, if we can. This is
24 your deposition. Dr. Haladyna, I will occasionally refer to
25 the deposition that you gave. You recall that, right, I have

1 deposed you? Dr. Haladyna?

2 A. Yes.

3 Q. So this is from the deposition in this case.

4 (Video playing.)

5 Q. I asked you that question, and you gave me an answer,
6 right?

7 A. Well, I think that as an educational --

8 THE COURT: Just a minute. There is no question
9 pending. He didn't ask you to explain your answer. He just
10 asked you whether you gave that testimony.

11 THE WITNESS: Oh, yes.

12 THE COURT: He will ask you another question, believe
13 me.

14 MR. REISS: Thank you, Your Honor. That's a very good
15 prediction.

16 BY MR. REISS:

17 Q. So you remember me asking you that question and you giving
18 that answer, right, in your deposition?

19 A. No, I don't remember that. But I attest to the fact that
20 you showed it to me, so I agree.

21 Q. All right. Now, you've read Dr. Cabrera's expert report,
22 right?

23 A. Yes.

24 Q. And you've also read the article that was published in the
25 AERJ journal that was effectively -- that the expert report was

1 built on, right?

2 A. Yes.

3 Q. And I believe that those -- the -- you had both
4 Dr. Cabrera's report and that article in that binder I gave
5 you. You don't have to look at them now.

6 MR. REISS: Your Honor, they've been admitted already
7 as part of Dr. Cabrera's testimony.

8 THE COURT: Fine.

9 BY MR. REISS:

10 Q. And Dr. Cabrera performed regression analyses using four
11 years of student data from Tucson Unified School District,
12 right?

13 A. I believe so.

14 Q. And you've never done your own evaluation of that data,
15 have you?

16 A. I have evaluated the results, but I haven't analyzed the
17 data.

18 Q. So you haven't done your own analysis of the data, right?

19 A. That's correct.

20 Q. And you didn't do your own analysis because it would have
21 taken weeks, even months, to do that analysis, right?

22 A. That's correct.

23 Q. So really, as we sit here today, what you've done is read
24 Dr. Cabrera's expert report, and you've read the AERJ article,
25 right?

1 A. Yes.

2 Q. But no independent analysis, right?

3 A. That's correct.

4 Q. Dr. Cabrera used data provided by the Tucson Unified School
5 District, right?

6 A. I think so.

7 Q. And you have no basis to say that those data were
8 unreliable or suspect, right?

9 A. Actually, I do have a basis.

10 Q. And what basis is that?

11 A. Well, in other studies I've done and reported in my vitae
12 and in research meetings, many responses to standardized test
13 scores are left blank, their omits are not reached, and of all
14 strange things, the most -- the greatest amount of non-response
15 is with Spanish-speaking students. So the scores might be
16 corrupted because students simply choose not to respond.

17 Q. Okay. Can we play clip 3. Again from your deposition,
18 Dr. Haladyna.

19 (Video playing.)

20 BY MR. REISS:

21 Q. You gave that testimony in response to my question, right?

22 A. Would you like me to explain?

23 Q. No. As we sit here, you have no knowledge that any data
24 that was supplied by the Tucson Unified School District of
25 Dr. Cabrera was inaccurate or suspect, right?

1 A. That's correct.

2 Q. Thank you.

3 THE REPORTER: May I ask that the witness move the
4 microphone a little closer to you?

5 THE COURT: I guess the microphone won't stretch so
6 maybe you could move your chair a little closer. Thank you.

7 THE WITNESS: Okay. Got it.

8 BY MR. REISS:

9 Q. And you, Dr. Haladyna, have no knowledge about the MAS
10 program, do you?

11 A. Only what I read in the paper.

12 Q. Okay. Fair enough.

13 Now, in paragraph 7 of your declaration, your direct
14 testimony, you discuss cognitive ability, right?

15 A. I would have to see it. I am not sure.

16 Q. You can take a look at it. It should be --

17 A. I did -- I did discuss cognitive ability somewhere in the
18 there, in the deposition.

19 Q. As an educational psychologist, you define academic
20 achievement in terms of increased cognitive ability, right?

21 A. That's correct.

22 Q. Okay. In Dr. Cabrera's analysis, he used two empirical
23 measures of academic achievement, right? He used, one,
24 graduating from high school, right?

25 A. Yes.

1 Q. And then he used passing standard AIMS tests after initial
2 failure, right?

3 A. Yes.

4 Q. You don't think that graduating from high school measures
5 cognitive ability, do you?

6 A. I don't think I said that.

7 Q. Well, do you?

8 A. Well, right now, no.

9 Q. And you don't think passing AIMS test after previously
10 failing measures cognitive ability, right?

11 A. It doesn't measure, it indicates an increase in cognitive
12 ability.

13 Q. Okay. Now, you would agree with me, Dr. Haladyna, that
14 Mr. Cabrera's report didn't set out to or claim to measure
15 cognitive ability, did it?

16 A. Well, I don't know what he intended, but my interpretation
17 of student achievement is that it is cognitive abilities.

18 Q. Right, but that's not what Dr. Cabrera's report is about,
19 is it?

20 A. I think it is about cognitive abilities.

21 BY MR. REISS: Let's play clip 6, please.

22 (Video playing.)

23 BY MR. REISS:

24 Q. So you were asked that question and gave that answer,
25 right?

1 A. Yes.

2 Q. Now, you would agree with me that passing high school is an
3 important life event, right?

4 A. Yes.

5 Q. And by the same token, passing an AIMS test is an important
6 life event, right?

7 A. Yes.

8 Q. And for most people, graduating from high school is a proxy
9 for academic achievement, right?

10 A. I'd like to think about that some more.

11 Q. All right. Well, let me help you.

12 MR. REISS: Clip 7.

13 (Video playing.)

14 BY MR. REISS:

15 Q. Okay. So, from an education policy point of view, wouldn't
16 it be important to know if an academic program increased
17 graduation rates?

18 A. Are you saying that an academic program had the effect of
19 increasing achievement?

20 Q. Yes, well, in my view, take one measure, and wouldn't it be
21 important, from an educational policy standpoint, to know that
22 a program -- program had the effect of achieving graduation --
23 increase in graduation rates?

24 A. Okay. Can you rephrase that again? Because I think I have
25 an answer.

1 Q. Well, okay. Let me see if I -- I apologize.

2 From the standpoint of educational policy, wouldn't it be
3 important to know if a program helped increase graduation rates
4 from high school?

5 A. Yes.

6 Q. Okay. And from an educational policy standpoint, wouldn't
7 it be important to know if an educational program helped
8 increase passing on standardized AIMS tests after failure on
9 those tests?

10 A. Yes.

11 Q. Okay. Is it fair to say, Dr. Haladyna, that if a student
12 becomes more engaged in school, in schoolwork, more engaged in
13 doing homework, more engaged in attending school, more engaged
14 in attending class, they stand a better chance of graduating
15 high school? Is that fair?

16 A. I would answer your question with a little more detail than
17 you've provided. Would you like me to provide more detail?

18 Q. If you can -- if you can't answer my question "yes" or "no"
19 without providing the detail, you can provide the detail.

20 A. Okay. Students spend approximately 900 hours in the
21 classroom, and of that 900 hours, the research shows that the
22 more time spent in engaged learning, the more they learn. I
23 mean, this is pretty much a relationship between time and
24 learning.

25 So the answer to your question is yes, if the time spent is

1 engaged in learning and students are present and not absent.

2 Q. Fair enough. Now, one of your criticisms of Dr. Cabrera's
3 report -- this is in paragraph 8 of your declaration -- is
4 that, I am quoting: Dr. Cabrera does not explain how taking
5 one or more classes that did not involve mathematics
6 instruction improves mathematics achievement.

7 Right? That's one of your criticisms, right?

8 A. Yes.

9 Q. Okay. By the way, did Dr. Cabrera's report state that MAS
10 classes improve mathematics achievement? Did you find that
11 claim in his report?

12 A. I think it was a surprise finding that he reported, if I
13 remember correctly.

14 Q. Now, Dr. Cabrera did not make any causal claims about
15 taking MAS courses and increased mathematics achievement, did
16 he?

17 A. I don't remember.

18 Q. Dr. Cabrera's report really focuses on statistical
19 relationships between taking MAS courses and various measures,
20 right?

21 A. He reports relationships, but he also makes statements that
22 imply causality, and that troubled me because I thought it was
23 a little bit unwarranted --

24 Q. Okay. And --

25 A. -- being that it's a descriptive study.

1 Q. Fair enough. And I know we've discussed and I want to come
2 back to that.

3 A. Okay.

4 Q. Now, another of the issues I think -- and maybe that's too
5 strong of a word -- but another of the things that you noted
6 about Dr. Cabrera is that he should have used GPA, grade point
7 average, increases as a measure of academic achievement, right?

8 A. Yes.

9 Q. And, in fact, you think -- you believe that he overlooked
10 grade point average, right?

11 A. He didn't overlook it. He reported it, but he didn't use
12 it as one of his dependent variables.

13 Q. But, in fact, Dr. Cabrera did do an analysis of GPA trends,
14 did he not?

15 A. He did.

16 Q. Okay. And this analysis of GPA trends confirmed that the
17 GPA of students who took MAS courses rose, right?

18 A. Well, the answer to your question deserves a little more
19 surrounding discussion, because recently there's been report of
20 grade inflation, and we don't know if the grades earned in the
21 MAS classes are disentangled from achievement in grades in
22 other classes. So there may have been an inflation. We don't
23 know the grade point average of students who took the MAS
24 classes, only the actual grades they received. So I think
25 that's something you need to investigate before you answer a

1 question like that.

2 Q. You have no basis to believe that there was grade inflation
3 in the MAS courses, do you?

4 A. There's grade inflation in every course.

5 Q. Right. And if the GPA, grade point average, of the
6 students who took MAS classes increased more, as Dr. Cabrera
7 noted, than the grade point average of students who did not
8 take MAS courses, that would be meaningful, right?

9 A. I would have to study that. I'm not sure.

10 Q. Now, if the students who took MAS classes were passing the
11 AIMS tests at increasing rates and graduating from high school
12 at increasing rates, you would expect, would you not, that
13 their grade point averages were also rising.

14 A. Well, that's one thing that Dr. Cabrera didn't report, was
15 what's the correlation between the grade point average and the
16 AIMS scores.

17 Q. Okay.

18 A. So we could assume that, but we don't have any hard data
19 because he didn't report that.

20 Q. It's not an irrational assumption, is it?

21 A. No, it's not.

22 Q. Okay. And by the way, if a student doesn't pass the AIMS
23 test and doesn't graduate from high school, their grade point
24 average is sort of in the nice-to-know category, right?

25 A. That's correct.

1 Q. Now, I believe, Dr. Haladyna -- and by the way, if I
2 mischaracterize anything you've said, please tell me. That's
3 not my intention.

4 In paragraph 10 of your declaration, you discuss
5 Dr. Cabrera's decision to use pass/fail scores on the AIMS test
6 rather than the actual results, right?

7 A. Yes.

8 Q. Okay. But for purposes of the graduation, you need to pass
9 the AIMS test, right?

10 A. That's correct.

11 Q. And if you pass the AIMS test, that's what matters. It's
12 not your actual score on the AIMS test, right?

13 A. No, I think the score is very important, as I stated in
14 several documents I wrote, and it's important because it's the
15 most precise measure of achievement. And since you're making
16 the claim that achievement improved, why not use a precise
17 measure as opposed to an imprecise measure.

18 Q. So your criticism is that using GPA would have been a more
19 precise analysis?

20 A. I think my recommendation was that GPA should be combined
21 with the actual AIMS test score to form an achievement index,
22 which is very reliable and very appropriate, instead of
23 reducing the data to one in zero, pass or fail. I think that's
24 an injustice to the data that was available.

25 Q. I think, as you've just agreed with me, that passing the

1 AIMS test is very important to a student, right?

2 A. Absolutely.

3 Q. All right. And by the way, the passing score for the AIMS
4 tests changes every year, does it not?

5 A. I'm embarrassed to say I sit on the committee that
6 consults -- I consult for the Department of Education, but I am
7 not privy to the setting of the passing score. I simply look
8 at the reports.

9 But they don't change every year. I think they fluctuate
10 periodically depending upon changes in the test.

11 Q. Okay. By the way, isn't it fair to assume that if a
12 student -- then given what you just said, isn't it fair to
13 assume that a student who failed the AIMS test in 10th grade
14 but passed the AIMS test in 11th grade had an increased score
15 on the AIMS test in 11th grade? Isn't that a fair assumption?

16 A. I think that's a fair assumption.

17 Q. Okay. Now, I'm just coming back, Dr. Haladyna, to
18 something you mentioned previously, and that is whether or not
19 Dr. Cabrera is making a causal claim. And I know that was
20 significant to you, right?

21 A. Mmm-hmm.

22 Q. And do you understand Dr. Cabrera to be making a causal
23 claim?

24 A. I -- I think in reading different reports, there are times
25 when he -- he implies causality and there are times he talks

1 about a relationship.

2 Q. And --

3 A. So I sense a kind of a waffling between wanting to argue
4 that these courses improve achievement versus simply reporting
5 the facts.

6 Q. And your concern, as I understand it, with Dr. Cabrera's
7 ability to make a causal claim is that it's hard or it may be
8 not appropriate to make a causal claim without a randomly
9 selected control group, is that right?

10 A. Well, ideally -- and I think he said it and I've said it
11 and we agree totally on this -- that an experimental study is
12 appropriate but we don't do experimental studies.

13 But, on the other hand, the samples of MAS and non-MAS were
14 self-selected, and that alone, I think, causes me to think that
15 there was no real treatment here. We had volunteers who took
16 classes, and we had people who chose not to take the classes.

17 Q. And I'm going to come to that.

18 But the reason why it's hard to do causal studies in
19 education is because you don't want a study that by design may
20 disadvantage a group, right, a group that's not chosen or the
21 group that's chosen as the control group?

22 A. I'm not sure I understand your question. Do you want to
23 try to rephrase it?

24 Q. Yeah, maybe I should try to do that.

25 In education, you don't want to test a potentially

1 beneficial program by denying that program to a group of
2 control students, is that right?

3 A. Absolutely. Absolutely.

4 Q. Okay.

5 A. I think both of us have said that.

6 Q. Right. All right.

7 Now, I know that you've looked at Dr. Cabrera's article in
8 the AER Journal, right?

9 A. Yes.

10 Q. And by the way, let me just be clear. The AER Journal,
11 that stands for American Educational -- American Education
12 Research Journal, right?

13 A. It's the American Educational Research Association Journal,
14 abbreviated AERJ.

15 Q. Yeah. And the American Educational Association is a very,
16 very well respected organization, right?

17 A. It's the largest one in the world.

18 Q. And highly, highly respected, right?

19 A. Yes, of course.

20 Q. And the journal of that organization is also highly, highly
21 respected, right?

22 A. Yes, it is.

23 Q. And everything published in that journal is peer reviewed,
24 right?

25 A. Yes, it is.

1 Q. And that means it doesn't get published unless it goes
2 through a rigorous examination of other scholars in the field,
3 right?

4 A. Yes.

5 Q. Okay. Now, in that article I think it's -- maybe this will
6 refresh you. But in that article --

7 MR. REISS: Do we have the page number of the article?
8 I think it's 1191, from memory.

9 BY MR. REISS:

10 Q. That -- by the way, let me just stop there. Does that look
11 familiar to you, Dr. Haladyna, that article?

12 A. You know, I haven't read this article in a long time,
13 so....

14 Yeah, I've seen the article.

15 Q. Right, and it's -- the lead author is Dr. Cabrera, and
16 there are three other co-authors on the article. Do you see
17 that?

18 A. Yes.

19 Q. By the way, are you familiar with Jeffrey Milem at all?

20 A. No.

21 Q. How about any of the other authors?

22 A. No.

23 Q. And I believe -- yes, looking at the conclusion,
24 Dr. Haladyna, on this article, the article says: Our findings
25 establish that taking MAS courses correspond to a significant

1 increased likelihood that students would pass the AIMS test and
2 graduate from high school.

3 You accept that statement as valid, do you not?

4 A. You know, really, in reading it now -- and, of course, I
5 haven't read this in I think maybe a year -- I would say that
6 the findings established that students who volunteered for the
7 MAS courses had a significant increase in achievement.

8 Q. Okay.

9 A. So worded more precisely.

10 Q. So students who volunteered for the MAS courses had -- I'm
11 sorry -- had a significant --

12 MR. REISS: Could you read back the answer.

13 THE REPORTER: "You know, really, in reading it now --
14 and, of course, I haven't read this in I think maybe a year --
15 I would say that the findings established that students who
16 volunteered for the MAS courses had a significant increase in
17 achievement."

18 BY MR. REISS:

19 Q. And you stand by that statement?

20 A. Yes.

21 Q. Now, I know, Dr. Haladyna, you made a number of what I
22 would call technical observations about Dr. Cabrera's report,
23 and I'm not going to get into them in any detail, but just let
24 me note a couple of them.

25 In paragraph 16 of your declaration, I believe you

1 criticize Dr. Cabrera's use of covariants, and you say there
2 were, quote, hints of covariant misuse in Dr. Cabrera's study.
3 Do you recall that?

4 A. Yes, I remember that.

5 Q. But you're not saying that there was any covariant misuse,
6 are you?

7 A. What I -- what I think I said, and what I'll say now, is
8 that there is doubt in the way covariants are used. My
9 understanding of the way covariants are used is different than
10 the way he used covariants.

11 MR. REISS: Why don't we just do clip 11.

12 (Video playing.)

13 BY MR. REISS:

14 Q. And you didn't run any tests to determine whether there was
15 covariant misuse, did you?

16 A. Well, the test of covariant use and misuse is you look at
17 the literature and you look at what the experts in this field
18 recommend, and what they recommend is that you don't use a
19 battery of covariants, you use one or two covariants that are
20 highly correlated with the criterion measure.

21 And Dr. Cabrera did not report anything about how
22 covariants were combined or used, how they were adjusted. So
23 there's considerable doubt about the validity of using
24 covariants and making those adjustments. That was one of my
25 major criticisms in his work.

1 MR. REISS: Could I have clip 12.

2 (Video playing.)

3 BY MR. REISS:

4 Q. I also believe, Dr. Haladyna, that one of your concerns was
5 that there wasn't adequate evidence showing that the group of
6 MAS students, the students who took one or more MAS classes,
7 was comparable to the non-MAS group, the students who didn't
8 take MAS courses. Is that fair?

9 A. Say that again, please. I lost the train of thought there.

10 Q. Yeah. In making the comparisons that Dr. Cabrera made, you
11 had concerns whether the group of students, the MAS students,
12 the students who took MAS courses, was comparable to the group
13 being compared, which was students who did not take MAS
14 courses, right?

15 A. I had questions about the comparability. The major one was
16 that students with disabilities were almost double the number
17 in the non-MAS as they were in the MAS.

18 But the other thing is that the students who were in the
19 non-MAS were non-volunteers, and the students who were in the
20 MAS class were volunteers. And that difference was never
21 discussed and how it affects the design of any study where you
22 want to imply causality.

23 Q. But you're not saying that those two groups came from
24 different populations, are you?

25 A. We don't know.

1 MR. REISS: Clip 13.

2 (Video playing.)

3 BY MR. REISS:

4 Q. We'll get to that, Dr. Haladyna.

5 But you believe, Dr. Haladyna, that there was strong
6 evidence that the two groups came from the same population,
7 right?

8 A. No.

9 MR. REISS: Clip 14.

10 (Video playing.)

11 BY MR. REISS:

12 Q. And your concern with the sample was, I believe,
13 Dr. Haladyna, you said that the special education variable,
14 that there were more students in the non-MAS sample that had
15 taken special education, right?

16 A. Yes.

17 Q. But you accept, do you not, that special education is one
18 of the factors for which Dr. Cabrera controlled. Right?

19 A. Dr. Cabrera claims he controlled for that, but as I said
20 before in my declaration and other reports, we have no evidence
21 of how this was done. And, going back to an earlier question
22 of yours about covariant adjustment, fundamentally, you don't
23 use a battery of covariants, you use one or two covariants. So
24 we really don't know what he did, because it was never reported
25 in the AERJ article or any of his other writing.

1 MR. REISS: Maybe we ought to do 15.

2 (Video playing.)

3 MR. REISS:

4 BY MR. REISS:

5 Q. Now, let's look in a little more detail, Dr. Haladyna, at
6 some of the other factors for which Dr. Cabrera controlled. If
7 I could, Dr. Haladyna, I would direct you to -- and you have
8 the binder of Dr. Cabrera's direct testimony and its
9 attachments. If I could direct you to Dr. Cabrera's -- I
10 believe it's -- I believe it's Exhibit F in that binder. It's
11 Dr. Cabrera's expert report dated March 1st, 2016, and it's
12 corrected, March 3rd, 2017. He made some slight corrections.

13 MS. COOPER: May I ask, are you looking at the
14 corrected report?

15 MR. REISS: Yeah. I am looking at Exhibit F,
16 Dr. Cabrera's direct testimony.

17 MS. COOPER: Thank you.

18 BY MR. REISS:

19 Q. Do you have that?

20 A. Yes, what page?

21 Q. Thank you. And I would direct you to page 32 of that.

22 MR. REISS: Can we put that up?

23 BY MR. REISS:

24 Q. This is a page only a statistician could love.

25 This is one of the appendices, Dr. Haladyna, to

1 Dr. Cabrera's report.

2 A. Yes.

3 Q. I want you to look to the far left-hand corner, and first
4 there are a listing of the dependent variables, and, in my
5 layperson's understanding, those are the -- those are the
6 aspects that Dr. Cabrera is examining. Graduation, AIMS
7 scores. Right? Those are the dependent variables.

8 And then he has a number of what are independent variables,
9 right? Do you see that?

10 A. Yes. They're called independent variables, but I think
11 they're covariants. So an independent variable would be the
12 variable that defines the treatment, which would be MAS and
13 non-MAS. So, just to clarify.

14 Q. Again, as I understand it, Dr. Haladyna, the things under
15 independent variables, those are things for which Dr. Cabrera's
16 study controlled. He took those things into account in his
17 study, right?

18 A. I think that's what he reported in his research, that the
19 procedure adjusted for those covariants.

20 Q. And among the things that Dr. Cabrera's study adjusted for,
21 took into account -- and I won't go through all of them -- but
22 let's look at some of them. Let's start with free reduced
23 lunch. Do you see that, free reduced lunch? And that variable
24 was controlled for because free reduced lunch is a reasonable
25 proxy for income. Right?

1 A. Yes.

2 Q. And he noted that in the MAS group, 76.6 percent of the MAS
3 cohort were in the free reduced lunch program, 65.5 percent of
4 the non-MAS students were in that program. So the MAS cohort
5 had a higher percentage of low income students. Right?

6 A. Yeah. And the data in the next line I think supports what
7 you're saying.

8 Q. Yes. Thank you very much, Dr. Haladyna.

9 Same thing. Census block median income mean is another
10 factor that Dr. Cabrera's study controlled for. And, again,
11 there the mean for the MAS cohort was \$33,831, and the mean for
12 the non-MAS cohort was \$35,793. So the mean income for the MAS
13 families was lower than the mean income for the non-MAS
14 factor -- non-MAS cohort. Right?

15 A. Is that a question?

16 Q. Yes. I'm just asking you to confirm.

17 A. Yes.

18 Q. I'm sorry. That's always fair to ask me if I've asked you
19 a question.

20 Let's look at the next one, ELL. And "ELL" stands for
21 English language learners, right?

22 A. Yes.

23 Q. And in the MAS cohort contained 14.99 percent, English
24 language learners. The non-MAS cohort contained only 7.8
25 percent of English learning language students. Right?

1 A. Yes.

2 Q. And the next one down, GATE. G-A-T-E. As I understand it,
3 that's gifted students?

4 A. I think so.

5 Q. And the MAS cohort contained 20 percent, 20.9 percent
6 gifted students. The non-MAS cohort contained 22.9 percent
7 gifted cohort. So the non-MAS cohort actually had more gifted
8 students than the MAS cohort. Right?

9 A. Yes.

10 Q. And then finally I think this is a factor that you've
11 mentioned previously, special education. And there the MAS
12 cohort had -- 10.1 percent of its students were in special
13 education as opposed to 19.1 percent in the non-MAS cohort.
14 Right?

15 A. Yes.

16 Q. Now, Dr. Haladyna, you would agree with me that in terms of
17 predicting educational success, having a lower family income,
18 having English language learning, having fewer gifted students,
19 all of those things would lead you to believe that the MAS
20 cohort would perform less well in terms of passing AIMS tests,
21 in terms of graduating from high school than the non-MAS
22 cohort. Right?

23 A. I think on the surface most researchers would make that
24 assumption.

25 Q. Thank you.

1 Now, I believe, Dr. Haladyna -- actually, let's go back.
2 Let's just go down the page a little bit to GPA. Do you see
3 underneath school F, they have GPA? You'll see, Dr. Haladyna,
4 that --

5 MR. REISS: Better for my aging eyes. Thank you,
6 Jorge.

7 BY MR. REISS:

8 Q. You'll see that the ninth grade GPA -- and the column on
9 the left, as I think you'll recall, that's the MAS cohort. So
10 the ninth grade GPA and the MAS cohort was 2.28, as opposed to
11 the ninth grade GPA of the non-MAS cohort, which was 2.44,
12 right? Right?

13 And the tenth grade GPA for the MAS cohort was 2.14, as
14 opposed to the tenth grade GPA of the non-MAS cohort, which was
15 2.35. Right?

16 So the MAS cohort had lower ninth and tenth grade GPAs than
17 the non-MAS cohort, right? Right?

18 A. Well, I hate to make trouble here, but we're using those
19 different criteria for significance, and I made a comment
20 earlier that that's a little bit misleading. You know, you
21 have one star, you have two stars, you have three stars. But,
22 generally speaking, the answer is yes; but a qualified yes,
23 because I made a comment about this, about how disingenuous it
24 is to report significance in this manner.

25 Q. Well, the three stars next to the GPA, do you know what

1 level of statistical significance that is?

2 A. 001.

3 Q. And that's a very strong level of statistical significance,
4 right?

5 A. Yes, it is.

6 Q. And because the students who took MAS courses, the students
7 in the MAS cohort had lower grade point averages in the ninth
8 grade and had lower grade point averages in the tenth grade,
9 you would expect them to have higher failure rates on AIMS
10 tests and lower graduation rates. Right?

11 A. That would be the prediction I think that most researchers
12 would make.

13 Q. And you would agree, Dr. Haladyna, would you not, that the
14 results, the findings in Dr. Cabrera's report, that these
15 students who had lower mean income, fewer gifted students, more
16 English language learners, lower GPAs in ninth and tenth grade,
17 the fact that they ended up with higher graduation rates and
18 higher passing rates on the AIMS tests than the non-MAS
19 students, that in fact those results are remarkable. Right?

20 A. I think you're quoting me, aren't you?

21 Q. I sure am.

22 (Laughter in the courtroom.)

23 Q. You would agree, right?

24 A. It is remarkable.

25 Q. And I'm not going to, Dr. Haladyna, get into levels of

1 statistical significance. But the one thing I would say is
2 Dr. Cabrera does note in his report the various levels of
3 statistical significance that he used. Right?

4 A. Is that a question? Oh, yes, he does. He does. He marks
5 it down.

6 Q. And, by the way, in his article in the AERJ journal, he
7 also uses three different levels of statistical significance.
8 Right?

9 A. I believe so.

10 Q. And that, as you said, is a highly respected, peer-reviewed
11 journal. Right?

12 A. Yes.

13 Q. Okay. But I just -- I have to ask you this. It's another
14 nit, but I will ask you about it. I think you discussed in
15 your report -- and I apologize if I murder this
16 pronunciation -- a Bonferroni correction.

17 A. Yes.

18 Q. Okay. And I think you noted that Dr. Cabrera didn't run a
19 Bonferroni correction, right?

20 A. I didn't see one.

21 Q. Okay. But you didn't run one either, right?

22 A. Of course not.

23 Q. Okay. And your speculation was that even if he did, any
24 results or corrections would be small, right?

25 A. I don't remember that point. But I can explain what a

1 Bonferroni is. You don't want me to explain that.

2 Q. I think that -- as much as we might like to learn it, I
3 think we can skip it.

4 Now, if I could, Dr. Haladyna, I think one of the
5 reasons -- it's not really a concern, but one of the things
6 that I think intrigued you was that you did not believe there
7 was enough of a body of evidence supporting Dr. Cabrera's
8 remarkable findings, right?

9 A. That's correct.

10 Q. Okay. Now, I believe in your report, you were aware of the
11 Dee and Penner study, right?

12 A. I don't remember the name.

13 Q. It involves students in San Francisco school district.
14 Does that strike a bell?

15 A. I think I cited that, didn't I?

16 Q. You did.

17 A. Yeah.

18 Q. And I think your -- your concern at the time was that it
19 was a work in progress -- I may be mislabeling the term. But
20 it hadn't been published, that was your concern.

21 A. That's one of my concerns. And I am trying to recall the
22 article, and it's in writing there, but it may have been that
23 it was involving ethnic studies as opposed to a single ethnic
24 group.

25 Q. I think your term in your report was that it was a

1 conference paper not yet published?

2 A. A conference paper which is unpublished, yes.

3 Q. Are you aware that that report has now been published?

4 A. No.

5 Q. Okay. And you weren't aware of that when you wrote your
6 declaration to this Court, right?

7 A. That's right.

8 Q. Okay. And I will represent to you and I will show you that
9 that report has now been published in the American Educational
10 Research Journal.

11 A. (Witness handed document.) Thank you.

12 MR. REISS: Your Honor, I believe that this exhibit
13 has been previously marked as Plaintiffs' Exhibit 217. It has
14 not yet been offered into evidence.

15 BY MR. REISS:

16 Q. This article appears in the American Educational Research
17 Journal, February 2017, volume 54, number 1, pages 127 to 166.
18 And it's titled: The Causal Effects of Cultural Relevance:
19 Evidence from an Ethnic Studies Curriculum. Right?

20 A. You're asking me?

21 Q. I'm just reading the title.

22 A. I'd have to re-read the article to answer your question.

23 Q. And I'm not going to ask you to do that now. Are you
24 familiar, by the way, with Thomas Dee of Stanford University?

25 A. No, not at all.

1 Q. Okay. And you're not familiar with Emily Penner?

2 A. No.

3 Q. Okay. Thomas Dee is a professor and the associate dean for
4 faculty affairs at Stanford University's Graduate School of
5 Education. You would agree that certainly, from that
6 qualification, he would be a highly respected person in the
7 field?

8 A. I would suppose so.

9 Q. Okay. And I would actually like to just take you
10 through -- I am not going to take you through the whole
11 article, but I do want to take you through, in effect, the
12 summary of the article, because one of your concerns was the
13 lack of corroborating literature, and I want to see if this
14 literature, now published in a peer-review journal of
15 impeccable credentials, makes you more comfortable with the
16 conclusions that Dr. Cabrera reached.

17 And I am going to start, Dr. Haladyna, on the first page,
18 and I'm going to read a lot of it, but I'm going to skip. I
19 promise it won't take more than three or four minutes.

20 So let's start right under the pre-see (phonetic). It
21 says --

22 MR. REISS: Can we put this up?

23 Your Honor, I would offer the exhibit into evidence.
24 And Dr. Haladyna cites the study in his own report. This is
25 the published version of it.

1 THE COURT: Any objection?

2 MS. COOPER: We have no way of knowing whether
3 counsel's representation is true, and it would have been
4 helpful to have had this disclosed earlier. But accepting
5 counsel's statement at face value, no.

6 THE COURT: All right. On that basis, the -- this is
7 217, right?

8 MR. REISS: Yes, Your Honor.

9 THE COURT: The article that's marked as 217 -- is it
10 just the article or the entire magazine?

11 MR. REISS: No, just the article, Your Honor.

12 THE COURT: All right. The article is admitted.

13 MR. REISS: Thank you, Your Honor.

14 And I appreciate Ms. Cooper's vote of confidence.

15 BY MR. REISS:

16 Q. So let's start right at the -- right above the -- and it
17 says: The racial and ethnic gaps that exist across a variety
18 of important student outcomes in the United States are both
19 disturbingly large and stubbornly persistent. For example,
20 data from the recently released 2015 Assessment of Educational
21 Progress, NAEP, indicate that, on average, the mathematics
22 knowledge of eighth grade black and Hispanic students in public
23 schools lags behind that of their white peers by an amount
24 equivalent to roughly two to three full years of learning.

25 Continuing down a little bit. Start around here, while it

1 goes on to say: While roughly 14 percent of white students in
2 public high schools fail to graduate on time, the corresponding
3 dropout rates for black and Hispanic students are roughly twice
4 as large. Citing another study.

5 Awareness of such disparities is not new. Concerns about
6 unequal educational opportunities and outcomes have been
7 documented over several decades.

8 Then dropping down a little bit, "the striking patterns."
9 The striking patterns identified by this work have motivated a
10 broad array of aggressive federal, state, and local policies
11 that have shaped the governance and operations of public
12 schools over the past several decades.

13 Dropping down a paragraph, the paragraph beginning with
14 "over."

15 Over the same period, historians and social scientists
16 advocated for the teaching of histories of specific race-ethnic
17 groups to combat the harmful effects of segregation and a
18 neglect of diverse histories. Another citation.

19 One prominent example was the development of ethnic
20 studies, hereafter ES programs, of studies, which expanded in
21 the wake of the U.S. Civil Rights Movement. "ES" refer to
22 interdisciplinary programs of study that focus on the
23 experiences of racial and ethnic minorities with particular
24 emphases on historical struggles and social movements.

25 Next paragraph. More recently, a fast-growing and largely

1 qualitative research literature in education has focused on
2 classroom pedagogy and stressed the importance of, quote,
3 culturally relevant pedagogy, closed quote, CRP, as a
4 compelling way to unlock the educational potential of
5 historically marginalized students. Other citations.

6 The fundamental theoretical argument for CRP is that
7 instructional practices are substantially more effective when
8 differentiated to align with the distinctive cultural priors
9 that individual students experience outside of school and when
10 they also affirm both cultural identity and critical social
11 engagement.

12 Continuing on next page. I only have another couple of
13 minutes, I promise.

14 Modern ES courses provide a particularly prominent example
15 of CRP. Apart from the relevance of ES content for students
16 who are racial and ethnic minorities, ES courses often
17 incorporate other elements of CRP through their emphasis on
18 cultural identities and conscious engagement with social and
19 political issues. Other citations.

20 While some school districts are currently experiencing
21 sustained political controversy over the use of ES curricula,
22 e.g., Tucson, other major urban school districts, e.g., Los
23 Angeles and San Francisco, have begun implementing new ES
24 courses in hopes of supporting the academic achievement of
25 their diverse student populations.

1 And here we are getting to the conclusions. Next paragraph
2 down.

3 Although ES courses are proliferating, the available
4 quantitative evidence on the causal effects of ES courses and
5 culturally relevant pedagogy in general on student outcomes is
6 limited, particularly for larger scale field settings. This
7 study provides such evidence through examining the effects --
8 the effect of a ninth grade ES course piloted over several
9 years in the San Francisco Unified School District.
10 Specifically, using data on 1,405 students from five
11 school-by-year cohorts, we examine the effects of ES
12 participation for students on the margin of assignment to the
13 ES courses on several proximate academic outcomes, i.e.,
14 attendance, grade point average, and credits earned, that are
15 highly relevant for high school persistence. Our research
16 design identifies the causal -- emphasize "causal" -- effects
17 of taking ES course on key ninth grade outcomes by leveraging
18 an institutional feature that was unique to SFUSD. High school
19 students in our study cohorts were assigned to take the ES
20 course if they were identified at risk of dropping out, i.e.,
21 an eighth grade GPA below 2.0. We estimate the effects of ES
22 participation through a regression discontinuity design that
23 effectively compares outcome among students whose eighth grade
24 GPA placed them just below versus just above this threshold
25 condition. RD designs such as this can credibly support causal

1 inferences based -- because they are based on, quote, as good
2 as randomized, closed quote, assignment to treatment that
3 exists for students proximate to this threshold.

4 And here we go.

5 We find, we find, that ES participation had large, positive
6 effects on each of our student outcomes. Specifically, ES
7 participation increased student attendance, i.e., reduced
8 unexcused absences by 21 percentage points, cumulative ninth
9 grade GPA by 1.4 grade points, and credits earned by 23
10 credits.

11 These GPA gains were larger for boys than for girls, and
12 higher in math and science than in English language arts. We
13 find that these large effects are robust to a variety of model
14 specifications, as well as checks for possible confounds
15 related to treatment contrast.

16 And finally on the next page, top of the next page: We
17 also argue that these large effects are consistent with the
18 hypotheses that participation in the course reduced the
19 probability of dropping out in addition to possibly improving
20 the performance of enrolled students. Overall, our findings
21 indicate that a culturally relevant curriculum implemented in a
22 strongly supportive context can be highly effective at
23 improving outcomes among a diverse group of academically
24 at-risk students.

25 This study confirms and supports Dr. Cabrera's study, does

1 it not?

2 A. I'm not -- I'm not prepared to evaluate this study. I
3 thought we were going to evaluate Dr. Cabrera's study.

4 No, I'm not going to comment on this study, other than it
5 was published and they make strong causal statements.

6 But I'm going back to a point I made earlier. There's a
7 difference between students who volunteer for something and
8 students who don't volunteer for something, and so I would ask
9 that question in this study, as well as Dr. Cabrera's study,
10 that people who volunteer probably are going to do better in
11 school. People who don't volunteer probably aren't going to do
12 better in school.

13 Q. I don't want to quibble with you, Dr. Haladyna, but I think
14 the report I just read indicated this was not -- the students
15 didn't volunteer or not, they were chosen.

16 A. They were chosen.

17 Q. Right?

18 A. I didn't evaluate this study, so I don't know that fact.

19 Q. Certainly, it would be consistent with Dr. Cabrera's
20 findings, right?

21 A. Well, Dr. Cabrera's findings were a group that volunteered
22 and a group that didn't volunteer, and you're telling me that
23 in this study the group didn't volunteer, they were just
24 drafted. I see a difference.

25 Q. In fact, this study makes a causal claim, doesn't it?

1 A. It makes a causal claim, and we might want to question
2 that. I mean, but there are ways -- there are ways to argue
3 causality, and one way is to carefully present a theory that
4 explains why reading and writing and math scores will increase.
5 And as I have said before, I find that implausible.

6 Q. You didn't read this article before you gave your
7 declaration, right?

8 A. I reviewed this article very quickly.

9 Q. But you didn't read it before you gave your declaration in
10 this court, right?

11 A. I didn't read it before, right. I didn't read it.

12 I read -- well, let's see. It was a conference paper, so
13 what I read was an abstract of the paper.

14 Q. By the way, just getting back to Dr. Cabrera's report,
15 you're not discrediting the conclusions in Dr. Cabrera's
16 report, are you?

17 A. Well, which conclusions are you talking about?

18 Q. Well, why don't we just play clip 22.

19 A. Are you talking about causality or are you talking about --

20 Q. No, I think the conclusion I had read from his article, the
21 non-causality conclusions. You're not -- you're not
22 discrediting.

23 A. No, no. I think I said and you quoted -- you quoted me on
24 that, that the results are remarkable.

25 Q. Thank you, Dr. Haladyna.

1 In fact, you think the results are almost too good to be
2 true, right?

3 A. I think I said that.

4 Q. Yeah, you did. And let me direct you -- you, in fact, said
5 in your report, and I'll quote, correct me if I'm wrong: If
6 Dr. Cabrera's claims are true, then we have an incredibly
7 important intervention in education that will help millions of
8 students, including Mexican-American and other ethnic/racial
9 groups. Right? You said that, right?

10 A. Yes.

11 MR. REISS: Thank you, Dr. Haladyna. I have no
12 further questions.

13 THE COURT: All right. Let's see. This would be
14 redirect, right?

15 MS. COOPER: I would ask that we be permitted to take
16 our lunch break at this time early, Your Honor, so that I may
17 have time to review and discuss the study that was just given
18 to me with our expert before we proceed.

19 THE COURT: I think it's a fair request, so the
20 witness may step down for lunch. What time is it, 11:30,
21 12:30? So we'll resume at 1:00 p.m.

22 MS. COOPER: Thank you, Your Honor.

23 THE COURT: But I just want to ask, at this time now,
24 the defendants to make their inquiries on their witnesses.

25 MR. REISS: Your Honor, it's not a positive report.

1 There are two possible rebuttal witnesses. We're not sure
2 we're going to call both. One is currently in Phoenix in the
3 middle -- he is a vice principal and is in meetings all day.
4 Can't get him out of those meetings. The other is a woman who
5 is on vacation in Sedona, and I am told -- I don't even know if
6 we can get ahold of her. She's four hours away.

7 In all honesty, Your Honor, I think the odds of
8 getting one of them here today is very, very remote. I will
9 represent to the Court I do not believe their examinations will
10 be very long. I think we should be able to --

11 THE COURT: What does that mean, like an hour each?

12 MR. REISS: I think less.

13 THE COURT: 15 minutes each?

14 MR. REISS: I would think, Your Honor, they should be
15 able to be done in 30 minutes to 45 minutes.

16 THE COURT: Direct?

17 MR. REISS: Direct.

18 THE COURT: Per witness.

19 MR. REISS: Per witness.

20 THE COURT: All right.

21 MR. REISS: And I'm not committing to calling two, it
22 maybe one, Your Honor.

23 THE COURT: Let me think about that over the lunch
24 recess.

25 Now, it's 11:30 now, I'll rise to 1:00 o'clock. You

1 said you wanted time to read this report again, is that right?

2 MS. COOPER: Well, I asked that we take our lunch
3 break early --

4 THE COURT: Are you asking for extra time?

5 MS. COOPER: More than 1:00 o'clock.

6 THE COURT: You want to go till 1:30? Would that
7 help?

8 MS. COOPER: 1:30 would be perfect.

9 MR. REISS: Your Honor, I just forgot, they do have
10 another witness.

11 THE COURT: I know that.

12 MR. REISS: And I suspect -- I don't know -- if I
13 understand from Ms. Cooper, that they have about an hour of
14 direct with Mr. Hibbs?

15 MR. ELLMAN: Hour to an hour and a half.

16 MR. REISS: They have an hour to hour and a half with
17 Mr. Hibbs and I have an hour on cross. Your Honor, I think
18 we're going to be pretty much towards the end of the day.

19 MS. COOPER: I believe that Mr. Reiss is reasonably
20 correct in his representation of how much time it will take
21 this afternoon, Your Honor.

22 MR. REISS: That's about as much credit as I ever get,
23 Your Honor.

24 THE COURT: All right. We'll accept that, and then
25 we'll stand in recess until 1:30. All right?

1 MS. COOPER: Yes.

2 THE COURT: All right.

3 MS. COOPER: Thank you, Your Honor.

4 (A recess was taken from 11:31 a.m. to 1:31 p.m.)

5 THE COURT: All right. Let's all be seated. We
6 finished the cross, right? Are we ready to start redirect?

7 MR. REISS: Yes, I think the cross is finished, Your
8 Honor.

9 THE COURT: All right. Ready to start redirect?

10 MS. COOPER: Yes, Your Honor. And thank you for the
11 courtesy of the somewhat longer, earlier lunch break.

12 REDIRECT EXAMINATION

13 BY MS. COOPER:

14 Q. Dr. Haladyna, can you briefly describe your expertise and
15 work history as it relates to the opinions that you offered in
16 your rebuttal?

17 A. My qualifications and experience and background and so on?

18 Q. Yes.

19 A. I am a former elementary school teacher in Illinois and
20 California. I got my doctorate at Arizona State University,
21 and my major was -- I was in educational psychology, but I
22 majored in statistics, research, design and measurement.

23 After that, I was a faculty member of the Southern Illinois
24 University where I taught statistics and testing courses for
25 teachers in training. I also was a research professor in

1 Oregon, working on a variety of educational projects, mainly in
2 testing. And I was a test director at ATC, a test company in
3 Iowa City.

4 I was director of health programs and did a lot of work in
5 certification and licensing testing, and then I was invited to
6 join the faculty at Arizona State University in 1986, where I
7 served until I retired. And I primarily taught statistics in
8 the doctoral program and consulted with students on their
9 dissertations and taught courses in teacher education.

10 Q. Is a focus of your work learning theory?

11 A. The focus of my books -- I have many books in the field of
12 testing and educational psychology, but primarily my interests
13 are in learning theory and the development of cognitive
14 abilities in students and also the measurement of human
15 characteristics such as student achievement.

16 Q. Is your focus with respect to that work on all students of
17 all backgrounds?

18 A. Yes. Yes. My experience is considerable, and if you look
19 at my vitae résumé, I've worked with a variety of different
20 populations. In fact, I am currently working on a research
21 study dealing with student marking of answer sheets in the
22 statewide assessment in our AZ Merit, which is the test that
23 followed the AIMS test in our state.

24 Q. Have you offered a book on grade inflation?

25 A. Yes, I have. Not in grade inflation. My book on -- it's

1 on grading.

2 Q. Grading.

3 A. There's only one of two books in the world that actually
4 talk about grading, but one of the chapters is on grade
5 inflation. It's not a best seller.

6 (Laughter in the courtroom.)

7 MS. COOPER: There's a big team here. Perhaps Amazon
8 will deliver by drone this afternoon.

9 BY MS. COOPER:

10 Q. Now, you mentioned cognitive abilities. Can you briefly
11 define those, please.

12 A. As an educational psychologist, what we look at when we
13 study student learning is abilities, what we call cognitive
14 abilities. Now, you know these abilities because each of you
15 have these abilities, and you know your life history, and,
16 briefly, you know, the abilities we consider most important are
17 reading, writing, and mathematics. And we know from experience
18 and from theory that abilities we all have are very, very slow
19 growing, they're complex, they consist of knowledge and skills
20 and also the ability to combine knowledge and skills in very
21 complex ways. We call that problem solving or critical
22 thinking.

23 So, in short, what we're really concerned about is the
24 growth of students' cognitive abilities in reading, writing,
25 and math, and we have a tremendous amount of experience in the

1 way cognitive abilities grow, and we know they grow very, very
2 slowly. You can liken it to an oak tree. You know, you do not
3 see considerable spurts in reading ability, writing, or math
4 through a child's lifetime. And we have incredible amount of
5 data supporting that, including national assessment, including
6 ACT scores, including SAT scores.

7 We know from statewide assessments in every state in the
8 United States and in Europe that abilities grow very, very
9 slowly. In fact, we have charts and graphs that show that
10 whenever we see a disturbance in the growth patterns, we
11 suspect something is wrong.

12 Q. Now, is a major -- if not the major -- purpose of public
13 education in the United States education that increases
14 students' cognitive abilities, that is, the ability to read,
15 write, and do math?

16 A. I think as a former teacher and as a teacher educator and
17 as a life-long educator, my interest is in what students learn,
18 not whether they pass or fail a boundary point. Because these
19 boundary points, like graduation and the AIMS test, are
20 arbitrary pseudo classification. They really don't mean much.

21 What we really want kids, when they graduate from high
22 school, to be able to read, write, and do math and live in a
23 society, solve problems and work. And we get reports now at
24 the college level that high school graduates lack a lot of
25 reading, writing, and math abilities.

1 Q. Leaving aside for the moment the success of the efforts, is
2 it true though that a purpose of public education is
3 instruction that increases students' cognitive abilities?

4 A. I would say absolutely, yes.

5 Q. Is there any evidence in Dr. Cabrera's work that the MAS
6 program increases students' cognitive abilities?

7 A. You know, there was no mention of that, so I didn't see any
8 reference to actual achievement. All I saw was one and zero.

9 Q. And that being pass or fail --

10 A. Pass or fail.

11 Q. And the AIMS test is a test of cognitive abilities, right?

12 A. It's designed to measure cognitive abilities, yes.

13 Q. Now, you were presented with the published Dee and Penner
14 study right before lunch, correct?

15 A. Yes.

16 Q. Did you have an opportunity to review it?

17 A. Yes, I did.

18 Q. Would you say that you had an opportunity to evaluate it
19 carefully?

20 A. No.

21 Q. Based on your review though, do you have an understanding
22 as to whether the Dee and Penner study examined whether there
23 was an increase in the San Francisco USD students' cognitive
24 abilities?

25 A. Good question. Let me think about that. They make a claim

1 that grades were improved. I don't remember about test scores.

2 That's about all I can say about that.

3 Q. So if they made a claim that it increased students'

4 cognitive abilities, you didn't see it in your review?

5 A. I didn't see -- I didn't see that part of it in the review.

6 Q. Now, did you see any mention of Dr. Cabrera's work in the

7 Dee and Penner study? And by that I mean the work that was

8 discussed with you this morning with respect to TUSD's MAS

9 program.

10 A. Yeah, I think there was a fairly substantial paragraph in

11 the Dee and Penner review about Dr. Cabrera's studies. They

12 did point out some of the shortcomings in the study, and they

13 did mention something that I consider very, very important,

14 that there was an omitted variable in the analysis. And the

15 omitted variable was that the MAS students were volunteers and

16 the non-MAS students were not volunteers. And in classic

17 literature on research design, that is a fatal error.

18 Q. What do you mean by "fatal error"?

19 A. Meaning that you cannot accept the results of the study as

20 credible because there was an important variable omitted from

21 the study; the fact that students volunteered and the students

22 didn't volunteer, is there a difference. And that should have

23 been investigated, and I didn't see any report about that. And

24 that was mentioned also by the reviewers.

25 Q. The Dee and Penner reviewers.

1 A. The Dee and Penner, yes.

2 Q. So you and Dee and Penner agree about that.

3 Let me ask you, could you determine whether there were any
4 differences between the MAS program itself and the program that
5 Dee and Penner examined in San Francisco?

6 A. Well, I am not familiar with the actual composition of
7 programs, but what I read was that the MAS study was -- MAS
8 group was Mexican-American -- was one single ethnic group,
9 whereas, the ethnic studies in San Francisco and Los Angeles
10 was a broader definition than that.

11 By the way, I think in my deposition and my statements, I
12 support the study of different ethnic groups and cultural
13 diversity. I think they're very important. So I think the Dee
14 and Penner study was more aligned with what I was advocating
15 and less aligned with the study of one single ethnic group.

16 Q. Did you see an explanation or an understanding of the MAS
17 curriculum and pedagogy in Dr. Cabrera's work?

18 A. I'm sorry. I am not following your question.

19 Q. Did Dr. Cabrera's work explain the curriculum and pedagogy
20 and principals that were used in the MAS program?

21 A. No. I'm surprised because that would be a critical factor.
22 Because if you want to argue causality, you've got to describe
23 the program that's making the change.

24 In the Dee and Penner study, I thought they were very
25 meticulous in describing exactly what the curriculum, what the

1 program's intent was and what the outcomes were. So I was very
2 impressed, and, again, I did not have a lot of time to review
3 it, but I was very impressed with the way they did it.

4 Q. Did the Dee and Penner program then address the curriculum
5 and pedagogy of the ethnic studies program that was used in the
6 San Francisco study?

7 A. Yes.

8 Q. Do you find that difference between the Dee and Penner
9 study and Dr. Cabrera's study significant?

10 A. Yes.

11 Q. And why is it significant?

12 A. Well, I think that in the Cabrera study there was no
13 mention of the actual curriculum, the instruction, the
14 pedagogical approaches of the teachers, the grading policies,
15 the things that make up the guts of an instructional program.

16 Q. Now, let's talk about Dr. Cabrera's measure of student
17 achievement briefly. He used passing AIMS and graduating from
18 high school, right?

19 A. Yes.

20 Q. Those two are highly correlated, right?

21 A. I think they are correlated. But, you know, the thing is,
22 he did not present that correlation in his research.

23 Q. So those are measures of student achievement that don't
24 examine cognitive abilities, right?

25 A. Well, they're gross measures. They're very, very

1 imprecise. In other words, you throw away all the rich
2 information that's contained in a test score and in grade point
3 average and focus only on whether a score surpasses a cut score
4 or not. And so, as I pointed out in my deposition and in other
5 writing, a person could pass by one point or a person could
6 pass by 20 points. A person could fail by one point or they
7 could fail by 20 points. No matter what, the first group is
8 one and the second group is zero.

9 Q. So a person who had failed very badly could increase their
10 score by 50 points and still not pass, but have achieved
11 more -- but have achieved a score that demonstrated an increase
12 in cognitive abilities, right?

13 A. Exactly. That's exactly right. And that's the danger in
14 using one and zero, is you obscure students who have achieved a
15 lot but haven't achieved enough, and those who achieve very
16 little but just enough to pass.

17 Q. You agreed that you had stated in both your report and
18 deposition that you thought that Dr. Cabrera's data is
19 remarkable. Could you explain that statement further, please.

20 A. Well, in my experience -- and I don't know if I've revealed
21 enough about my past, but I've written about cheating in
22 standardized testing extensively. I've been in many
23 interviews, many, many places in the United States, and you can
24 Google my name and read about it. It's not very interesting,
25 but, anyway, yes, whenever you see unusual spikes in scores,

1 the first thought is cheating.

2 Q. Is that your first thought when you look at this data?

3 A. No.

4 Q. What is your first thought?

5 A. Not at all. I can't believe they would do that. Although
6 I have to admit, cheating is pretty widespread.

7 And -- but I don't think in this study it was necessarily
8 cheating. But I -- whenever you see an unusual spike in
9 scores, it just cries out for evaluation. Like why didn't
10 Tucson -- why didn't the state evaluate this wonderful testing
11 program that produced such fabulous results? Because as I
12 think I said -- and I was quoted on this -- that, you know,
13 America is waiting for such an intervention like this because
14 this is going to revolutionize education.

15 And I also said it's too good to be true.

16 Q. Well, if you don't think it was cheating on the basis of
17 the information that you have reviewed, what do you think are
18 the other possible explanations?

19 A. Well, I can only speculate, but I'll say it's the omitted
20 variable. The omitted variable was children who -- or kids who
21 volunteer for something are different than students who don't
22 volunteer. And I think that may have accounted for the
23 difference in these results.

24 Q. Did you see any effort in Dr. Cabrera's work to account for
25 that?

1 A. No.

2 Q. In fact, let's go back finally now to Dr. Cabrera's use of
3 graduation and high school -- high school graduation and
4 passing AIMS. Those are not as you said -- those are only at
5 the grossest level measures of student achievement. Right?

6 A. Yes.

7 Q. But the purpose -- is the purpose of public education
8 student achievement?

9 A. Well, as a former teacher and teacher educator, what I
10 believe in, and what I taught my students, and what I think we
11 all believe in, is that we place a lot of emphasis on student
12 growth. We look at standardized achievement test scores from
13 year to year to see if our students are growing or not growing.
14 And if they're not growing adequately, we try to figure out new
15 strategies to improve their growth. But the growth is slow,
16 and we know we know that.

17 Q. Is a measure of student achievement that just looks at high
18 school graduation and not at an increase in the ability to
19 read, write, and do math, in fact setting the bar too low?

20 A. I'm sorry. Say that again. I am not following your
21 question for a while.

22 Q. If we define student achievement as graduating high
23 school --

24 A. Yeah.

25 Q. -- without regard to an increase in cognitive abilities,

1 are we setting the bar too low?

2 A. Well, I wouldn't say we're setting the bar too low. I'd
3 say what we're doing is we're obscuring more valuable
4 information. Because when a student graduates from high
5 school, I think parents and the student want to know, "What's
6 my potential for careers? Can I go to law school? Can I go to
7 medical school? What career path am I going to follow?" And
8 based on your reading, writing, and math ability, you may or
9 may not get into law school.

10 Q. That could be a good thing or a bad thing.

11 And even if we're not talking about postgraduate education,
12 are increases in cognitive abilities as you described here
13 important for postsecondary success?

14 A. I'm sorry, is that a question?

15 Q. Even if we're not talking about postgraduate school, are
16 increases in cognitive abilities important for postsecondary
17 success?

18 A. Well, of course, they are. Because when you're in the
19 world of work, reading, writing, and math are very important.
20 When you go to college, what do college professors likely
21 complain about? The students cannot read, write, and do math
22 even though they graduated. And we get extensive discussion
23 and complaints about the lack of preparation from high school
24 graduates.

25 And I think the same is true, and you can find plenty of

1 comments in the literature about employers, and most -- in
2 fact, I consult for some of these companies. They retrain high
3 school graduates in reading, writing, and math because they're
4 not good enough. And they have all kinds of testing programs
5 in large corporations, like Microsoft or Cisco, where they
6 actually reeducate students.

7 Q. If Dr. Cabrera's study was valid, would you have expected
8 to see some kind of significant improvement in measures of
9 academic performance for TUSD over time?

10 A. You know, that's a good question. I would expect as a
11 follow-up, years -- you know, what they call in research a
12 cohort analysis is where you follow people for several years to
13 see if these sudden spurts or gains result in some positive
14 consequences down the road, like in two, three, or four years.
15 That would be a very important study, I think.

16 Q. If TUSD's -- if the performance of TUSD students lagged and
17 continued to lag over the period of time that the MAS program
18 was in effect, could we draw any conclusions about the effect
19 of the MAS program on student achievement?

20 A. I'm not sure I understand that question.

21 Q. Are you familiar with performance of TUSD students
22 generally in relation to their peers across the state?

23 A. I'm not sure. No, I don't really know.

24 Q. All right. Well, we'll leave it at that then.

25 MS. COOPER: No further questions.

1 THE WITNESS: Okay.

2 MR. REISS: Just a few, Your Honor.

3 RECROSS-EXAMINATION

4 BY MR. REISS:

5 Q. Dr. Haladyna, you, I think, said that passing AIMS tests
6 and graduation are pseudo arbitrary classifications, right?

7 A. Yes.

8 Q. They're not pseudo arbitrary classifications to the
9 students who need to pass those tests, are they?

10 A. I don't know what the students think about the test, but I
11 don't think they think very highly of the tests.

12 Q. They know they have to pass them, right?

13 A. They do.

14 Q. And they know they have to graduate, right?

15 A. Absolutely.

16 Q. Okay. You know, I think that there was some discussion of
17 the San Francisco study, and as I think you noted
18 appropriately, that that study is making causal claims, right?

19 A. Yes.

20 Q. But Dr. Cabrera's study does not make causal claims, right?

21 A. Wait. You said Dr. Cabrera does not make causal claims?

22 Q. Right.

23 A. I don't think he uses the word "claim," but I think you can
24 interpret some of his statements as supporting causality.

25 Q. Okay.

1 MR. REISS: Now, I think you asked a very good
2 question, Ms. Cooper. You said, Why didn't TUSD evaluate the
3 program?

4

5 BY MR. REISS:

6 Q. Are you aware that the program was terminated?

7 A. Mmm-hmm. Yes.

8 Q. And that would be a significant reason why they didn't
9 evaluate it, right? And when you asked about you would like to
10 see a follow-up study tracking the cohorts, that would be a
11 very good thing, right?

12 A. Yes.

13 Q. And the reason there was no follow-up study tracking the
14 cohorts is because the MASD program was terminated, and that
15 would prevent that, right?

16 A. Well, no. It wouldn't prevent it, because when you have a
17 cohort that's taken the courses, then you ask the question,
18 what are these students like in one year, two years, three
19 years, four years down the line. That's what cohort analysis
20 means.

21 Q. Right. But if the program's terminated, there's not a lot
22 of incentive to do that, right?

23 A. I think so. I think you're right.

24 MR. REISS: Thank you, Dr. Haladyna. I appreciate
25 your courtesy and being here today. Thank you.

1 THE WITNESS: Thank you.

2 MS. COOPER: No further questions, Dr. Haladyna.

3 THE WITNESS: Okay. Do I step down?

4 MS. COOPER: We've got to wait for the Judge.

5 No further questions, Your Honor.

6 THE COURT: Let's see now. Anything else of this
7 witness?

8 MR. REISS: No, Your Honor, I'm fine. Thank you, Your
9 Honor.

10 THE COURT: All right then. You may step down,
11 Dr. Haladyna. Thank you.

12 I have forgotten now. Doesn't the defendant have at
13 least one more witness?

14 MR. ELLMAN: We have one more, Your Honor. The
15 defense would like to call Elliott Hibbs.

16 THE COURT: All right.

17 MS. COOPER: Mr. Hibbs is just in the anteroom.

18 THE CLERK: If you would please step into the witness
19 stand and remain standing to be sworn. Please raise your right
20 hand.

21 **ELLIOTT HIBBS, WITNESS, SWORN**

22 **DIRECT EXAMINATION**

23 **BY MR. ELLMAN:**

24 Q. Good afternoon, Mr. Hibbs.

25 A. Good afternoon.

1 Q. Can you tell us what you do for a living, please.

2 A. I am now retired.

3 Q. What did you do before your retirement?

4 A. Well, we don't have the whole afternoon for it, but let me
5 give you just a little quick update on it.

6 I've worked most of my career in government. I started out
7 in the Iowa Department Of Revenue after getting an MBA from the
8 University of Iowa. Came down here at the beginning of 1980.
9 I was appointed by Bruce Babbitt to run the Department of
10 Revenue. Did that for seven years.

11 And subsequent to that time, I was appointed by three other
12 governors to fill high-level roles in state government and also
13 worked with three other elected officials who appointed me to
14 assist them. Altogether, I worked in nine different agencies
15 in Arizona and worked for about -- a total of about 39 years in
16 government.

17 Q. Did that include a stint as director of the Arizona
18 Department of Administration?

19 A. Yes. Actually, two stints.

20 Q. What governors were you working for?

21 A. Governor Symington and Governor Hull.

22 Q. Where were you working in the year 2011 and 2012?

23 A. The superintendent that was elected, John Huppenthal,
24 appointed me basically to be his chief operating officer, and
25 so I worked with him beginning in 2011 through early 2015.

1 Q. Had you known John Huppenthal before your appointment to
2 that position?

3 A. Yes. I knew John as a legislator back in -- I want to say
4 the early 90s. So we consulted together to create some
5 legislation. I was then at the Arizona Department of
6 Administration, and we wanted to create an incentive program
7 for state government. And he had interest in such programs as
8 well, so he and I collaborated on the creation of legislation.

9 Q. When you were working for John Huppenthal in his capacity
10 as the Superintendent of Public Instruction, did you report
11 directly to him?

12 A. Yes.

13 Q. Did you interact with him frequently in that position?

14 A. Yes.

15 Q. Did you ever hear John Huppenthal say anything that made
16 you think he held racist views?

17 A. No.

18 Q. Did you have any indication that he was biased or
19 prejudiced against Hispanic people generally?

20 A. No.

21 Q. That he was biased or prejudiced against Mexicans or
22 Mexican-Americans in particular?

23 A. No.

24 Q. Did you become aware, I believe it was in 2014, of some
25 blogs that were attributed to John Huppenthal?

1 A. Yes.

2 Q. Okay. Did those concern you?

3 A. Very much. I was flabbergasted, to say the least, when I
4 first heard about it and saw some things in the newspaper, and
5 did approach John, because I thought this is not the person
6 that I've come to know over the 20-some years before that; and
7 talked with him about it, asked him if it was true, which it
8 was, asked him what in the world he was doing.

9 His response basically was that he liked to go on the
10 liberal blogs and -- I'm going to say -- create controversy,
11 put digs in, try to get the other liberal side to be upset
12 about things. And I asked him if he had said the things that
13 he said on his blogs that were being reported. His response to
14 that basically was: Those were portions of blogs that he had
15 written. He was unhappy that he did not have the blogs in full
16 that he had written, because there was a lot more to what was
17 in the blog than what those little excerpts that were taken.
18 And the excerpts were taken out of it, evidently, in his mind,
19 and I think then I would see his point, that they were meant to
20 harm him in his reelection bid.

21 Q. Looking back on your time at the Department of Education
22 under John Huppenthal, and in light of those blog posts, do you
23 believe -- do you have any reason to believe that
24 Superintendent Huppenthal made decisions or findings regarding
25 A.R.S. Section 15-112 based on the views or attitudes expressed

1 in those blog posts?

2 A. Absolutely not. John always talked, in my mind, about what
3 was in the best interest of students to ensure that they got
4 the highest quality education, and that always was his
5 direction.

6 Q. Do you think racial or ethnic prejudice played any role in
7 his decisions regarding the enforcement of that statute?

8 A. No.

9 Q. Are you aware of a law that prohibits Arizona schools,
10 public schools, from providing instruction to students who are
11 not residents of Arizona?

12 A. Yes.

13 Q. And were you responsible in any way for enforcing that when
14 you were at the Department of Education?

15 A. Not directly. The audit group was under me as chief of
16 operations, and so I consulted or they consulted with me
17 frequently on their activities, and then we also had goals and
18 objectives for them to achieve. So, in that respect, I oversaw
19 all of their operations.

20 Q. Was the controlling factor residency or U.S. citizenship?

21 A. Residency.

22 Q. Did you enforce that requirement along all of Arizona's
23 borders?

24 A. Absolutely.

25 Q. I want to show you a demonstrative. This indicates seven

1 school districts where funding based on non-resident attendance
2 was examined, investigated, and findings regarded to that. Is
3 that correct?

4 A. Yes.

5 Q. And those school districts are located on the border with
6 Mexico, the border with New Mexico, the border with Utah, and
7 the border with California. Is that correct?

8 A. Yes.

9 Q. Were those requirements ever enforced based on the race or
10 ethnicity of the students who were attending those schools?

11 A. Absolutely not.

12 Q. Did you begin your work at the Department of Education on
13 the day that John Huppenthal took office?

14 A. Yes.

15 Q. And do you recall at that time that his predecessor, Tom
16 Horne, had made findings that the Tucson Unified School
17 District was in violation of A.R.S. 15-112?

18 A. Yes.

19 Q. Did you look at the Horne findings?

20 A. Yes.

21 Q. I want to briefly show you page 7 of those findings. This
22 is Exhibit 525.

23 Do you remember in Tom Horne's report that he identified
24 materials that he felt were inappropriate?

25 A. Oh, I can't say that I remembered it. I was not an

1 education expert. So I remember reading the letter, but I
2 couldn't have told you what the contents were.

3 Q. All right. Well, let's look at the highlighted parts of
4 it. But you do recognize this as part of his --

5 A. Yes.

6 Q. -- finding? Okay.

7 The first paragraph, there's a text called Pedagogy of the
8 Oppressed. Do you see that?

9 A. Yes.

10 Q. That's one of the materials he criticizes. In the middle
11 of your screen now is another text called Occupied America,
12 another text that he criticizes. Then finally on the same page,
13 Mexican-American Heritage is a textbook that he criticizes.

14 Do you see all those three?

15 A. Yes.

16 Q. Do you remember him also being critical of a work called
17 Critical Race Theory?

18 A. I would only have read it if it was in the -- his findings.

19 Q. All right. Was Tom Horne's finding a subject of discussion
20 among Superintendent Huppenthal's leadership team on that first
21 day?

22 A. Yes.

23 Q. And on the second day?

24 A. Yes.

25 Q. And what was the nature of those discussions?

1 A. From my perspective, what I was looking at and included in
2 part of the discussions certainly was the fact that the statute
3 15-112, whatever it was, just went into effect as we were
4 taking office, and it was difficult for me to understand how
5 violations could have occurred at that point because of the
6 fact that the statute goes into effect on that day.

7 I've been around state government, put a lot of laws,
8 helped laws get drafted, implemented a lot of statutes, and
9 typically new laws are prospective in their application. So my
10 discussion with the superintendent and with others is that,
11 while all of this may be true that was in Tom Horne's letter,
12 that we needed to do work to determine whether or not
13 violations were occurring on or after the effective date of
14 that statute.

15 Q. So your concerns had to do with the factual validity and
16 the legal validity of Superintendent Horne's finding?

17 A. Yes.

18 Q. Was any of that concern based on a perception that
19 Superintendent Horne's finding had been based on racial or
20 ethnic bias?

21 A. No. That was never discussed.

22 Q. What did you decide to do?

23 A. A couple things, I guess, I am going to say. One is we
24 looked for what the timeline requirements were. As a result of
25 those findings under the statute we needed to act, my

1 recollection, within a certain amount of time. I don't recall
2 the exact nature.

3 And then was there an ability to extend that time or to
4 modify that in some way so that we could perform what I thought
5 would be additional work that would be necessary to be done.

6 Q. Let me --

7 A. And then I also went down and talked with John Pedicone,
8 who was then the superintendent of the Tucson Unified School
9 District, about the findings and how the department would
10 respond to that and what actions would be taken, both in the
11 near term and in the next number of months.

12 Q. Well, a decision was made very quickly, wasn't it, with
13 regard to whether to simply adopt Tom Horne's findings or do
14 something else?

15 A. Definitely to do something else.

16 Q. Okay. Do you recall a press release that went out around
17 that time announcing what Superintendent Huppenthal intended to
18 do about those findings? That would have been on January 4th,
19 2011.

20 A. I don't recall it.

21 Q. Okay. If I look -- I am going to have you take a look at
22 Exhibit 60. This is an e-mail dated January 4th from Ryan
23 Ducharme --

24 A. Ducharme.

25 Q. Ducharme. -- to you, Stacey Morley, and Merle Bianchi, and

1 he references a statement sent to media. Do you see that?

2 A. Yes.

3 Q. Then I am showing you the attached statement. So I want to
4 direct your attention to the highlighted portions. Let's start
5 with the first one. It states: I have not had the opportunity
6 to review all the facts and evidence.

7 This is, again, from a media release from John Huppenthal.
8 Does that seem consistent with what was going on at that time?

9 A. Yes.

10 Q. And if we move further down the page, I want to direct your
11 attention to the highlighted portion again. He cites the
12 TUSD's administration responsibility to ensure that their
13 programs come into full compliance within A.R.S. 15-112 within
14 60 days.

15 So I want to ask you, do you recall that Superintendent
16 Horne's findings purported to terminate the Mexican-American
17 Studies Program?

18 A. I don't recall that.

19 Q. Okay. In any event, this document contemplates that the
20 programs can come into compliance within 60 days. Is that
21 right?

22 A. Yes.

23 Q. And then on the very next line, it states: I extend to
24 TUSD's administration my full resources and commitment and
25 those of the Arizona Department of Education to help them

1 accomplish this task.

2 Do you remember what motivated that and what was going on?

3 A. Well, again, I think the motivation there was to ensure
4 that every student at TUSD and any other place across the state
5 received a quality education that was, in fact, in full
6 compliance with the statutes. All of them.

7 Q. And you wanted -- I assume, then, you wanted TUSD to have
8 an opportunity to come into compliance rather than simply
9 terminate the program? Is that accurate?

10 A. I'm not even sure if the statute did not require that, but,
11 again, I don't have that statute or the memory enough to say
12 for sure. But, yes, that's the bottom line.

13 Q. And then at the bottom of the page, he makes this
14 statement, starting here where I am indicating: Schools
15 serving these students are among the worst performing schools
16 in Arizona. Their minority students' academic growth year
17 after year substantially lags behind other TUSD schools and
18 Arizona peers. This is unacceptable. Every child needs access
19 to a quality public education, and these children are being
20 underserved.

21 In a world in which quality education holds the keys to
22 opportunity and success, these minority students are being
23 consigned to a lesser future. They deserve better.

24 And he ends the statement by saying: I won't rest until
25 every child, regardless of race, ethnic background, or

1 socioeconomic status receives the excellent education he or she
2 deserves.

3 Have I read that correctly?

4 A. Yes.

5 Q. Based on your knowledge and familiarity with John
6 Huppenthal in that time period, was that a sincere statement?

7 A. Absolutely.

8 Q. Do you have any reason to doubt that he meant what he said
9 at that time?

10 A. None.

11 Q. Did the Department of Education begin the process of
12 investigating whether TUSD's Mexican-American Studies Program
13 was actually violating the statute?

14 A. Well, clearly, as a result of Mr. Horne's findings, we
15 needed to take action. So we talked about a process by which
16 we would gather information by later on through which we could
17 make some decisions about whether there was a violation or not.

18 Q. Who was participating in those discussions?

19 A. Well, I don't recall necessarily everybody, but I would
20 think Kathy Hrabluk, John....

21 Q. Let me risk leading and suggest that the answer is John
22 Stollar?

23 A. John Stollar. There are two many Johns in my mind right
24 now. John Stollar. Stacey Morley certainly would have had
25 some role in that as well.

1 Q. Would you say the four of you then were the primary people
2 responsible for that task?

3 A. Yes.

4 Q. And what was John Huppenthal's role in that?

5 A. Basically John kind of assigned me the responsibility of
6 guiding the process by which we would gather factual
7 information, and we just kept him up to date on what we were
8 doing and how we were doing it.

9 Q. Are you the one who decided how the process would be
10 undertaken?

11 A. I think it was kind of a joint decision, but I would
12 certainly say I played a major role in that.

13 Q. Did John Huppenthal tell you how to conduct your
14 investigation? I'm calling it an investigation. You called it
15 a process.

16 A. No. Again, we had discussions, and we decided what was the
17 best tact, but this was the one that I had recommended.

18 Q. Did he state or suggest or imply what conclusions or
19 findings should result from your work?

20 A. No.

21 Q. And, just to be clear, you had a file of some kind, right,
22 from Tom Horne's administration?

23 A. I didn't personally have it. I think Stacey Morley or
24 Kathy or somebody else may have had it, but I did not have it.

25 But there was information from Tom Horne.

1 Q. So in that sense you weren't starting from scratch, at
2 least you had something to work with.

3 A. Okay.

4 Q. Were you sensitive to the fact that this could be a
5 controversial undertaking?

6 A. Oh, definitely.

7 Q. So what did you do in response to that consideration?

8 A. Well, what I always did, which is try to gather the facts
9 and let the facts speak for themselves on whether or not
10 violations may have occurred. And so again we started a
11 process by which we could gather facts and later on make a
12 decision.

13 Q. Would you characterize what you did as non-partisan?

14 A. Well, from my perspective, absolutely non-partisan, and I
15 couldn't think of anybody else that I dealt with in the
16 department that had a partisan perspective on it.

17 Q. You mentioned earlier that you were working under a
18 deadline based on the statute. Do you remember that?

19 A. Yes.

20 Q. Do you recall what that statutory period was?

21 A. If I recall, what was in that letter, there was something
22 about 60 days. But, again, I thought there was something that
23 we had -- and I can't remember what it was -- to rely on where
24 we could, in fact, extend that time.

25 Q. And did that happen?

1 A. Yes.

2 Q. I'm going to show you what we've marked as Exhibit 527. I
3 believe it's in evidence already. As you can see, this is a
4 letter from Superintendent Huppenthal's office dated
5 February 4th, addressed to John Pedicone.

6 You were familiar with Dr. Pedicone already, correct?

7 A. Yes.

8 Q. And the letter states that Superintendent Huppenthal
9 decided to extend the period within which TUSD is allowed to
10 come into compliance, and he's extending it by 45 days.

11 So without requiring you to do much math, does that take
12 the deadline from roughly the end of February to the middle of
13 April?

14 A. Yes.

15 Q. And this refers to TUSD being allowed to come into
16 compliance. Do you see that?

17 A. Yes.

18 Q. Were you and the other people in leadership at the
19 Department of Education contemplating that that is what TUSD
20 would be doing at that time?

21 A. No.

22 Q. What did you think they would do?

23 A. Well, in my discussions with John Pedicone, a conversation
24 was that they were basically beginning the semester as this
25 came out, and to go in and be so totally disruptive to the

1 classroom schedule and where students were enrolled and all
2 this at this point in time would not be helpful to education of
3 students in any way, which is why one of the reasons -- one of
4 the reasons that we extended it.

5 Q. What other decisions did you make in that time frame about
6 how to gather information?

7 A. We were fairly short-staffed at the department. There
8 are -- coming into office at that time, there were countless
9 issues that needed to be addressed. A couple of real big ones
10 was the implementation of the Common Core standards, which is
11 what Kathy and her group were responsible for, and she would
12 also, along with her team, be the ones responsible mainly for
13 looking into a subject like this.

14 Plus, we had some technology issues, in terms of the
15 delivery of our support services to schools through technology
16 that needed very fast and rapid attention. And so one of the
17 things that we talked about and I thought would be a very good
18 strategy to proceed would be to go and get outside assistance
19 in conducting an investigation and gathering materials so that
20 a decision could be made.

21 Q. How did you go about doing that?

22 A. You're required by law to go through the procurement
23 process, so we drafted a scope of work and had our state -- not
24 state -- but the department procurement office put out a
25 solicitation to potential vendors to respond to be able to

1 select somebody to actually perform what was needed.

2 Q. Did you approach any vendors who you thought would be well
3 qualified?

4 A. No.

5 Q. How many vendors responded?

6 A. My recollection is only one responded.

7 Q. Which one was that?

8 A. That was Cambium.

9 Q. And would that have been in the February 2011 time frame,
10 approximately?

11 A. Yes.

12 Q. I am going to show you Exhibit 528 right now. You see at
13 the bottom an e-mail from Doug Peeples to Erin Ramsey. Who was
14 Doug Peeples?

15 A. Doug was the chief procurement officer for the Department
16 of Education.

17 Q. When you go down to the bottom of this document -- you
18 referred to a scope of work a few minutes ago, does this appear
19 to be the scope of work you were talking about?

20 A. It's part of it, yes.

21 Q. Okay. And it continues on the next page. Does that look
22 like it to you?

23 A. Yes.

24 Q. In fact, do you recognize this as the scope of work that
25 you drafted or helped draft?

1 A. I don't know that I crafted it, but I certainly reviewed
2 it. Yes, it looks like it.

3 Q. And I just want to draw your attention to the highlighted
4 portion. It requires the auditor to conduct unannounced
5 classroom observations and to cite evidence of violations of
6 A.R.S. Section 15-112A. Correct?

7 A. Yes.

8 Q. In fact, Cambium was retained to perform that audit,
9 correct?

10 A. Yes.

11 Q. At around the time that Cambium was retained, there was an
12 e-mail from you to Stacey Morley dated March 3rd, 2011. I am
13 going to put that up on the screen. This is either Exhibit 63
14 or 66, and I am going to ask for some help clarifying that.
15 This is an e-mail dated March 3, 2011. I apologize. I had two
16 different exhibit numbers.

17 MR. REISS: 63.

18 MR. ELLMAN: Number 63, we'll confirm for the record.

19 BY MR. ELLMAN:

20 Q. Mr. Hibbs, do you recognize this e-mail or at least
21 remember the subject matter you were addressing?

22 A. Yes.

23 Q. Can you tell us what was going on and why you expressed
24 this -- and why you wrote this e-mail?

25 A. Well, I wrote it because the superintendent had indicated

1 to me that there would be people on both sides of the
2 Republican/Democrat that would be certainly curious and wanting
3 to know what was happening with this, and that we needed to let
4 them know how we were proceeding and that Cambium had been
5 selected.

6 Q. Did you select Cambium based on whether it was liberal or
7 conservative in its reputation or approach?

8 A. No.

9 Q. Did you select them because they were the only vendor and
10 you felt they met qualifications?

11 A. They were selected because they met qualifications, but,
12 yes, they were the only vendor.

13 Q. In this same time frame, this is dated -- what I am going
14 to show you is dated March 9th, 2011. This is Exhibit 531.
15 It's a cover e-mail from Donna Singler to John Pedicone
16 attaching a letter.

17 If you turn to the second page, you'll see it's from the
18 Department of Education to John Pedicone dated March 9th, and
19 if you look at the second page, it appears to be from you. Do
20 you remember writing a letter to John Pedicone in that time
21 frame?

22 A. I certainly would have done that.

23 Q. Okay. So you don't necessarily specifically remember this
24 letter, but this appears to be a letter you wrote, correct?

25 A. Six years takes a bit out of the memory, so yes.

1 Q. I understand, and I appreciate that.

2 I'd like to draw your attention to the highlighted part of
3 the letter. It says: Once you receive the investigative
4 results, you will review the report and draw conclusions
5 concerning the district's compliance with A.R.S. 15-112.

6 What were you talking about when you said "investigative
7 results"?

8 A. Well, I am sure it's the report that Cambium would provide,
9 plus any other information we might receive that would be
10 relevant to make any determination of whether there was a
11 violation of 15-112 or not.

12 Q. Okay. When you get to the bottom of that same paragraph,
13 it says: In such event, we plan to ask the district to make
14 modifications if it desires to do so and then respond in
15 writing detailing the modifications made to comply with A.R.S.
16 15-112. And that is in the event of a finding that there's a
17 violation, correct?

18 A. Yeah, I think the sentence before that talks about an
19 amended notice of violation. And that would suggest if we
20 found something, would signal the start of another 60-day
21 period in that case, and at that point they would have time to
22 do what's stated in that sentence.

23 Q. Okay. So if there was a violation, it would not
24 necessarily terminate the Mexican-American Studies Program,
25 correct?

1 A. Correct. Correct.

2 Q. Okay. And then if you get further down on the page, it
3 says: If the district is in compliance, no further action is
4 necessary. Do you see that?

5 A. Yes.

6 Q. As of that time, March 9th, 2011, had you or any other
7 member of the executive team working on this issue decided yet
8 whether the Tucson Unified School District was in violation of
9 A.R.S. 15-112?

10 A. No.

11 Q. Did any problems develop while Cambium was doing its audit
12 work?

13 A. I'm not sure exactly what you might be referring to in
14 that. There were --

15 Q. And I am referring to problems with the audit itself.

16 A. With the audit?

17 Q. Did concerns arise about the ability of Cambium to do
18 competent work in that time frame?

19 A. Well, there -- we received information from external
20 sources -- I couldn't tell you what they were at the time --
21 questioning whether Cambium was in fact going to be an
22 objective investigator, and people suggesting that they had a
23 bias one way or another. And I had discussions, along with the
24 chief procurement officer, with people from Cambium, asking
25 them about the statements that we had received and whether or

1 not there was any validity to them.

2 Q. And what did you determine?

3 A. My determination was Cambium was still qualified to conduct
4 the work and we needed to have it done and so they should
5 proceed with the best of their ability to do what was in the
6 scope of work and give us feedback.

7 Q. Did Cambium attempt to withdraw from the contract?

8 A. There were some discussions with leadership of Cambium on
9 whether or not they could withdraw, and we would not allow them
10 to do that.

11 Q. Did Cambium itself do the work?

12 A. My recollection is that they subcontracted some of the
13 work, although I can't remember who -- to whom they
14 subcontracted.

15 Q. Did that raise any concerns?

16 A. Not to me.

17 Q. Okay. How would you describe the level of cooperation from
18 Mexican-American Studies teachers during the audit period, if
19 you know?

20 A. I was going to say I did not have any direct contact with
21 the teachers, but from what I recall in discussions with Kathy
22 Hrabluk, John Stollar, and maybe even some of the Cambium
23 people conducting the review, that there was not a lot -- an
24 easy way of gathering information, that there was not a lot of
25 test work, lesson plans, a variety of materials that one

1 ordinarily would have expected that were available to be able
2 to evaluate what was being done in the classroom.

3 Q. Did the audit include classroom visits?

4 A. Yes.

5 Q. Do you recall that the scope of work required unannounced
6 classroom visits?

7 A. Yes.

8 Q. Do you know whether the classroom visits that were done by
9 the audit team were unannounced?

10 A. My recollection of -- in quick review of the report and in
11 discussions with John Stollar and Kathy, was that there did not
12 appear to be any unannounced visits as part of the work that
13 Cambium did.

14 Q. Was there a concern related to curriculum?

15 A. Yes.

16 Q. What was that?

17 A. I have to tell you, I don't feel necessarily qualified to
18 evaluate curriculum, but I could only recall, again, from
19 particularly Kathy Hrabluk and her way of describing things, is
20 that there really was not a curriculum that one could evaluate
21 clearly. There should certainly have been a lot more that just
22 was not available.

23 Q. I want to show you Exhibit 72. This is another e-mail
24 dated March 30th, so we're a little further into the process at
25 this point. And this is from Kathy to someone named Jeffrey

1 Hernandez, but it's copied to you, John Stollar, and two other
2 people.

3 As you scroll down the page, you see that Kathy has a
4 number of questions and comments, and I want to draw your
5 attention to the highlighted one, and it states: Unannounced
6 classroom observations will provide the most useful data for us
7 concerning common teaching practice in the classrooms, so I am
8 anticipating that only the broadest of dates will be provided
9 to teaching staff. I am concerned that identifying a specific
10 week may unduly influence the focus of intended learning
11 outcomes.

12 Have I read that correctly?

13 A. Yes.

14 Q. Do you remember that -- does that accurately describe the
15 concern?

16 A. Yes.

17 MR. REISS: Excuse me, Your Honor. I don't think that
18 was 72.

19 THE COURT: I'm sorry, I can't hear you.

20 MR. REISS: I don't believe that was Exhibit 72. If
21 it was, it's a different 72 than I have.

22 (Pause while exhibit is discussed out of the hearing of the
23 reporter.)

24 THE COURT: It's either straightened out or it's going
25 to be pursued further, is that right?

1 MR. REISS: I'm sorry, Your Honor. I just wanted to
2 follow-up in detail.

3 BY MR. ELLMAN:

4 Q. Was the Department of Education receiving information about
5 the Mexican-American Studies Program or its materials from
6 other people in that time period?

7 A. Yes.

8 Q. Do you remember who -- what those sources were?

9 A. Mainly some individuals up in the community in Tucson.
10 There was a Laura Leighton, John and Lori Hunnicutt, Gloria --
11 and I can't think of her last name -- were three who sort of
12 come to mind that I received phone calls or materials through
13 e-mails.

14 Q. Do you know where Laura Leighton got her materials or how
15 she got them?

16 A. She'd indicated to me many times that she had asked the
17 school district for materials and had complained a number of
18 times about her inability to get some materials. But I don't
19 know what her other sources were.

20 Q. Did you have any information that she had done a public
21 records request?

22 A. Yes. When I said, asked the district, it would be through
23 a formal public records request.

24 Q. I see. To be clear, did the Department of Education enlist
25 Laura Leighton to find materials for them?

1 A. No.

2 Q. Other than the fact that she supplied some Mexican-American
3 Studies materials to the Department of Education, did Laura
4 Leighton have any role in the investigation?

5 A. No.

6 Q. Did she participate at all in the Department's
7 determination that TUSD was violating the statute?

8 A. No. I mean, she had no role in the discussions about once
9 the materials and -- were received, our evaluation of those
10 materials, both audit and other, and making a determination of
11 and the findings.

12 Q. I want to show you what I hope is Exhibit 533.

13 MR. ELLMAN: I am going to wait this time for Mr. Reiss
14 to confirm that I am correct. It was my error last time.

15 MR. REISS: Yeah.

16 MR. ELLMAN: That's confirmed.

17 BY MR. ELLMAN:

18 Q. This appears to be a letter that you wrote to John Pedicone
19 on April 5. Would you agree that that's what this is?

20 A. Yes.

21 Q. Okay. And in the first paragraph, it states: The team of
22 investigators will finish their work in Tucson in two to three
23 weeks, after which an investigative report will be generated.
24 The Department will then evaluate the report to determine
25 compliance with A.R.S. Section 15-112.

1 What report are you referring to there?

2 A. That would be the required report from Cambium.

3 Q. Okay. And does this indicate that the report you received
4 from Cambium will control the superintendent's decision in this
5 case?

6 A. No. No. That's part of what we would use to evaluate
7 ourselves whether or not compliance was present or not.

8 Q. So that was --

9 A. Just one aspect.

10 Q. And then the letter also says in the second paragraph that
11 if the Department determines TUSD remains out of compliance,
12 then an amended notice of violation would be issued. Is that
13 right?

14 A. Yes.

15 Q. So at that point, it sounds like you still don't know
16 whether TUSD is or is not in compliance, is that correct?

17 A. Yes.

18 Q. This is Plaintiffs' Exhibit 72. This is a string of
19 e-mails, Mr. Hibbs, and the first one is referenced at the
20 bottom, and this appears to be an e-mail from Laura to you. So
21 my first question is, is that Laura Leighton?

22 A. I believe so.

23 Q. Okay. And the body of that e-mail refers to two textbooks
24 that she received: Occupied America and Mexican-American
25 Heritage. Do I have that correct?

1 A. Yes.

2 Q. Okay. Then if you look at the next e-mail, it's from you
3 to Kathy Hrabluk forwarding the information from Laura
4 Leighton, and it says: Kathy, this is for your information.
5 You may want to forward it to the investigation team.

6 Do you see that?

7 A. Yes.

8 Q. Okay. And then if you look at the next e-mail, from Kathy
9 Hrabluk to Luanne Nelson, it looks like that's what she did,
10 right?

11 A. Yes.

12 Q. Okay. And so she writes to Luanne. Luanne was part of the
13 Cambium team, right?

14 A. Yes.

15 Q. Okay. And so she writes: Would you please review the
16 materials she has forwarded and also include her in the
17 interview process?

18 And then it gives Laura Leighton's phone number, is that
19 correct?

20 A. Yes.

21 Q. And then finally, at the top, an e-mail dated April 6th,
22 Luanne acknowledges receipt and thanks Kathy for providing the
23 documents, correct?

24 A. Yes.

25 Q. Is that basically how information from Laura Leighton was

1 handled during this time?

2 A. Yes.

3 Q. So you didn't automatically throw away what she sent you,
4 right? You --

5 A. Oh, definitely not.

6 Q. Okay. Now I'm going to show you Exhibit 535. This appears
7 to show an e-mail from Ryan Ducharme to you, John Stollar,
8 Stacey Morley and Merle Bianchi and John Huppenthal, and
9 actually Kathy Hrabluk is copied on this. And the only text is
10 "FYI." And the body of the e-mail appears to be a reproduction
11 of an editorial the Arizona Republic, of April 28, 2011, having
12 to do -- well, under the header: Who's in Charge At Tucson
13 Unified.

14 Do you remember what was going on at that time or what
15 generated that editorial?

16 A. I don't specifically remember it. I remember there was
17 quite a bit of activity in Tucson over this at some of the
18 board meetings. I don't know if this was as a result of that
19 or what.

20 Q. This refers, in the first paragraph, to what the article
21 calls: An explosive, albeit exceedingly well organized,
22 demonstration that shut down a TUSD district governing board
23 meeting.

24 Do you remember when that happened?

25 A. Not specifically the date, but I do remember it happened.

1 Q. Okay. And after Mr. Ducharme forwards this e-mail to the
2 recipients, you wrote to Kathy Hrabluk. This is April 29
3 still. So we're still in the audit period, correct?

4 A. Yes.

5 Q. Okay. And you say: Kathy, please share this with our
6 Cambium team. This is why their report must be balanced in how
7 it portrays the Mexican-American Studies Program currently and
8 for prior years.

9 What did you mean when you wrote that?

10 A. Again, I think to ensure that the report did not be biased
11 in one way or another, that it demonstrates or shows exactly
12 what it is today, or in that -- "today" being in 2011, during
13 the semester.

14 Q. Other witnesses have testified that the first draft of the
15 Cambium report was received on May 2nd, 2011. Do you have any
16 reason to disagree with that?

17 A. No.

18 Q. Okay. And I'm going to start with some general questions
19 before we talk about the substance of the audit. And the first
20 one is: Did the executive team review it and discuss it?

21 A. Yes.

22 Q. Who participated in that?

23 A. I don't necessarily remember everybody. But I know for
24 sure Kathy Hrabluk, John Stollar, Stacey Morley would have had
25 input. And myself. Ryan Ducharme may have as well.

1 Q. Okay. Can you describe the level of intensity with which
2 the team reviewed the Cambium draft report? In other words,
3 I'm asking if you felt that you were under a deadline and, you
4 know, you were trying to crunch this out? And, you know, you
5 tell me. What's the best description of what was going on?

6 A. Again, this being an extremely important issue, we did a
7 very concentrated review -- and I say "we." It's mostly Kathy
8 and John Stollar, as the education experts, along with Stacey
9 Morley, whose familiarity with the statute would have been so
10 strong. A very intensive review. And I think as a result of
11 that, there were, on my recollection, questions that got raised
12 as to whether or not the report was complete enough and
13 accurate in what it was portraying.

14 Q. Okay. Did those discussions occur over the next 10 days or
15 so after you received the report?

16 A. I don't remember the time frame, but certainly very shortly
17 after the draft report was received.

18 Q. Okay. Was the executive team satisfied with the
19 completeness of the work?

20 A. No.

21 Q. Did the Cambium draft audit report conclude -- reach a
22 conclusion about whether the Tucson Unified School District was
23 violating A.R.S. 15-112?

24 A. I believe that it did. But I don't -- I mean, again, it's
25 been a long time since I looked at it, but I believe that it

1 did.

2 Q. Okay. Do you remember what their conclusion was?

3 A. I believe their conclusion was that there was no violation.

4 Q. Okay. Did those concern -- did those -- did that

5 conclusion raise concerns among the people who were reviewing

6 this at the Department of Education?

7 A. Yes.

8 Q. I am going to address four categories and ask you if they

9 were concerns and then show you some passages in the documents.

10 The first is curriculum, was that a concern based on what you

11 were seeing in the Cambium report?

12 A. Yes, that was one of the big concerns, especially for Kathy

13 Hrabluk, because of the important -- well, there are statutory

14 requirements, as I understood it, for development and approval

15 of curriculum that were not followed by the district, and so

16 there was a great concern over curriculum.

17 Q. I'm going to show you part of Exhibit 79. This is page 59.

18 You can barely see the watermark, but it does say "draft"

19 across this document. Can you make that out?

20 A. Yes.

21 Q. Does this appear to be the draft Cambium audit that the

22 department received on March 2nd -- excuse me -- May 2nd of

23 2011?

24 A. Yes.

25 Q. I want to take you to the highlighted portion at the bottom

1 of this page. Recommendation 1: Create board policies and
2 procedures for effective curriculum management within the
3 Mexican-American Studies Department. It is the recommendation
4 of the audit team that the governing board create policies and
5 procedures for effective curriculum management and seek a third
6 party for assistance.

7 Have I read that correctly?

8 A. Yes.

9 Q. Is that one of the reasons that the draft report raised
10 concerns about curriculum?

11 A. Yes.

12 Q. Then I am showing you the next page, page 60, the
13 highlighted portion again. It says: The curriculum audit team
14 found many board policies did not meet audit criteria and are
15 considered inadequate to provide a basis for sound local
16 control of the curriculum. There are minimal TUSD governing
17 board policies in place regarding curriculum.

18 Did I read that correctly?

19 A. Yes.

20 Q. Is that also the kind of concern that the draft report
21 generated?

22 A. Yes.

23 Q. And then, finally, in the same paragraph toward the bottom,
24 it says that: Under the board policy, the board will approve
25 and adopt all new text and supplementary materials.

1 Consequently, all curriculum materials created inclusive of
2 those by the Mexican-American Studies Department should have
3 been held to said examination prior to release and
4 distribution.

5 Does that indicate to you that curriculum materials used in
6 the Mexican-American Studies Program were not being examined by
7 the board?

8 A. That's correct.

9 Q. And was that also a concern that the department had?

10 A. Yes.

11 Q. Did the Cambium draft audit report raise any concerns that
12 had to do with the content of materials being used in
13 Mexican-American Studies classes?

14 A. Yes. Again, I don't remember specifics, but, yes.

15 Q. I'm going to try and refresh your recollection, actually
16 get you to identify what some of those concerns were. Same
17 exhibit, page 32.

18 So this is the same report, and there's a finding, number
19 1.4, where I'm indicating: Evidence indicates MASD curriculum
20 units contain questionable commentary and inappropriate student
21 text.

22 Did I read that correctly?

23 A. Yes.

24 Q. Was that another concern raised by the draft audit report?

25 A. Yes.

1 Q. Then as we go down the page a little further, there's
2 another highlight: Evidence indicates three of the nine MASD
3 curriculum units analyzed by the auditors contain an
4 overabundance of controversial commentary, inclusive of
5 political tones, of personal activism and bias evidenced in the
6 introductory section of a unit. Furthermore, if said course
7 units underwent an approval process, words used to dehumanize
8 or belittle any elected official or community leader would have
9 been eliminated out of respect.

10 Does that reflect another concern regarding materials that
11 was raised by the draft audit report?

12 A. Yes.

13 Q. Then, finally, at the bottom of the page, there's an
14 example of questionable material, and this has to do with a
15 curriculum unit identified by the auditors called:
16 Chicana/Chicano Educational Crisis and the Persistent Use of
17 Deficit Model. Do you see that?

18 A. Yes.

19 Q. Then at the bottom of the box, on page 32, it states: This
20 unit will allow students to demonstrate to the faculty at their
21 schools why the deficit-thinking model is inherently
22 dehumanizing, racist, and ineffective, yet many, if not most,
23 of their faculty operate from that level of understanding.

24 Have I read that correctly?

25 A. Yes.

1 Q. Would that also have raised a concern in the minds of the
2 Department of Education team reviewing this audit?

3 A. It did.

4 Q. Then on the next page, 33, same document. There is a
5 description of another curriculum unit entitled: The Struggle
6 for Ethnic Studies in Tucson, Protection Under the 1st and 14th
7 Amendments. Do you see that?

8 A. Yes.

9 Q. And then in that same box, if you'll look at the
10 highlighted portion, it says: The commitment to combat the
11 aggressive dehumanization of our community culminates this
12 unit. Students will take action to promote and defend ethnic
13 studies courses and curriculum. Have I read that correctly?

14 A. Yes.

15 Q. Would that raise a concern also?

16 A. Yes.

17 Q. Is that because the course teaches a particular political
18 view to the students rather than teaching them how to evaluate
19 and reach their own conclusions?

20 A. Yes.

21 Q. And then on the following page, page 34, in a class called
22 Foundations of the Chicano Movement, it identifies books that
23 it states that are of questionable content. Among them,
24 Occupied America, the Mexican-American Heritage, and 500 years
25 of Chicano History in Pictures. I think that's mis -- I think

1 it's "Chicana." Have I read that correctly, first?

2 A. Yes.

3 Q. Do you recall that those were also identified in Tom
4 Horne's finding as inappropriate material?

5 A. Yes.

6 Q. Then, finally, if you go to the next page, page 35, it
7 identifies additional texts that are of questionable content
8 and age appropriateness for an American government and social
9 justice class. These include, among others, a book called
10 Critical Race Theory and another book called Pedagogy of the
11 Oppressed. Have I read that correctly?

12 A. Yes.

13 Q. Do you recall whether those were also materials that were
14 deemed inappropriate in Tom Horne's finding?

15 A. Yes.

16 Q. Then if you just look a little further on the same page,
17 the American History From Chicano Perspectives course also
18 includes texts of questionable content and age appropriateness,
19 and, again, the three they specify are Occupied America, the
20 Mexican-American Heritage, and 500 Years of Chicano History in
21 Pictures, correct?

22 A. Yes.

23 Q. So the Cambium auditors are identifying texts that Tom
24 Horne found inappropriate in his finding, correct?

25 A. Yes.

1 Q. Was there a concern -- well, strike that.

2 Did the Department of Education team working on this issue
3 expect the auditors to independently research and determine
4 whether the Mexican-American Studies Program at TUSD was
5 improving academic performance among the students who took the
6 courses?

7 A. You know, I don't recall if that was in the scope of work
8 or not. I don't believe it specifically was.

9 Q. Do you remember looking into that?

10 A. I remember part of the report containing information, I
11 believe, that was given to them by the Mexican-American Studies
12 Program about student achievement.

13 Q. And was that what the draft audit report actually
14 contained?

15 A. Yes, that's my recollection.

16 Q. I want to show you an exhibit marked as Defendants' 538.
17 This is not in evidence, there are objections pending. First,
18 ask if this appears to be a string of e-mails between you and
19 Robert Franciosi in the time period of May 11, 2011 and then
20 May 17, 2011. Is that what this appears to be?

21 A. Yes.

22 Q. And in the first e-mail there's a reference to -- it's to
23 you from Robert, stating that he reviewed the tables from the
24 Cambium learning report and reporting -- and I'm quoting here:
25 The analysis was originally done by the TUSD research

1 department. Is that what you were referring to a minute ago?

2 A. Yes.

3 MR. ELLMAN: I am going to move this into evidence at
4 this time.

5 THE COURT: Any objection?

6 MR. REISS: If I may have a second, Your Honor.

7 THE COURT: What is the number of that, Mr. Ellman?

8 MR. ELLMAN: That was Defendants' 538.

9 THE COURT: Thank you.

10 MR. REISS: No objection.

11 THE COURT: All right. Without objection, Exhibit 538
12 is admitted..

13 BY MR. ELLMAN:

14 Q. Were you aware of an earlier study that Dr. Franciosi had
15 performed?

16 A. Not prior to the discussion there. I don't recall the
17 reasons it came out, and it might have been because of what was
18 in the Cambium report and then a question of whether there was
19 any other data that ought to be looked at as to whether the
20 program was effective or not.

21 Q. Then was there also a concern about the amount of
22 information and classroom time that the auditors were able to
23 observe?

24 A. I don't know about the time. There was concern that it did
25 not appear that there were unannounced observations of

1 classrooms. A lot of the report, my recollection talked about
2 observed classrooms but none that were unannounced.

3 Q. Let me show you Exhibit 79 again. This is page 49 from the
4 document. You see there's a summary here, and it reports:

5 During the curriculum audit period, no observable evidence was
6 present to suggest that any classroom within TUSD is in direct
7 violation of A.R.S. 15-112(A). Do you see that?

8 A. Yes.

9 Q. Is that the sort of thing you're talking about?

10 A. Yes.

11 Q. Then if you look at page 59, there's another summary, and
12 it says: No evidence as seen by the auditors exists to
13 indicate that instruction within the MAS program classes
14 advocates ethnic solidarity. Again, is that the kind of
15 concern that you were referring to?

16 A. Yes.

17 Q. Then actually the very next paragraph also again refers to
18 no observable evidence.

19 Do you see that?

20 A. Yes.

21 Q. Again, that's another manifestation of this concern.

22 A. Correct.

23 Q. And what was concerning about that?

24 A. Well, again, I am not the expert, but in talking with Kathy
25 and John, if an auditor is coming to your classroom and you

1 know it ahead of time, you can create an environment in that
2 classroom that may not be reflective of what happens other days
3 in that classroom. And that was the importance we thought
4 about having unannounced visits, to be able to go in and ensure
5 that students were getting a quality education.

6 Q. Are you familiar with the term "Potemkin Village"?

7 A. Nope.

8 Q. Now, in this same time frame, there was an e-mail you wrote
9 to Kathy Hrabluk, and that's Exhibit -- I think it's 82. It's
10 dated May 9, 2011.

11 MR. ELLMAN: Can we confirm that? 82. Because I've got
12 another indication on the bottom that says 87.

13 (Pause while exhibit is discussed out of the hearing of the
14 reporter.)

15 MR. ELLMAN: I beg your indulgence, Your Honor. I was
16 confirming the exhibit number.

17 This is Exhibit 82, in evidence.

18 BY MR. ELLMAN:

19 Q. This is dated May 9th, 2011. So to frame this properly,
20 Mr. Hibbs, at that time, you've had the Cambium draft audit
21 report for a week. Right?

22 A. I believe so.

23 Q. And you, John Stollar, Kathy Hrabluk, Stacey Morley,
24 perhaps among others, are reviewing the report. Are they also
25 reviewing the other materials you've been receiving in this

1 time frame?

2 A. Yes.

3 Q. Now, you state: Kathy, please forward the link at the
4 bottom to Luanne and company to get a better understanding of
5 how they missed the boat. Do you see that?

6 A. Yes.

7 Q. And then below is an e-mail from Andrew LeFevre --

8 A. Yes.

9 Q. -- to you, dated May 6th, and it's a link to a video, and
10 Andrew is urging you to forward that to the TUSD audit team in
11 order -- and these are his words -- "to put the historical
12 context of the program into perspective," end quote. Do you
13 see that?

14 A. Yes.

15 Q. Do you remember what that video was about?

16 A. No, I don't.

17 Q. Okay. When you referred -- first of all, Luanne, again,
18 that's Luanne from the Cambium audit team, correct?

19 A. Yes.

20 Q. So you want to get a better understanding of how they
21 missed the boat. What are you talking about when you say
22 "missed the boat"?

23 A. This was after we had received the draft report. Kathy and
24 John and I imagine others had reviewed it thoroughly and came
25 back with a lot of what you've presented here today with how

1 can these statements be in here and yet come to a conclusion
2 that there is no problem in this program at TUSD. And so this,
3 I think, was just indicating what had transpired as a result of
4 those discussions.

5 Q. I am going to show you an e-mail from the same date that I
6 believe is Exhibit 84, and I'm asking our paralegal to confirm
7 that right now.

8 In the middle of this page where I am indicating, you see
9 an e-mail from Kathy Hrabluk to Luanne. Again, I assume that's
10 the Luanne from the Cambium audit team, correct?

11 A. Yes.

12 Q. And she's asking Luanne to take a look at the video link,
13 and she says in the highlighted portion: We do have some
14 serious concerns about the draft report, and Elliott, John
15 Stollar and I will be meeting later this afternoon. I know how
16 much time and effort has been invested in the work to date, but
17 there are serious -- excuse me -- there are some
18 inconsistencies that we will need to discuss.

19 Is that a reference to the inconsistencies that you were
20 just talking about between the content of the report and the
21 conclusions?

22 A. Yes.

23 Q. Now, at that point in time, May 9th, 2011, had the team
24 reached a final decision about whether TUSD was in violation of
25 the statute?

1 A. Well, yeah, I would say that the team had, based on the
2 information provided, reached a conclusion that there was a
3 violation of the statute.

4 Q. Was the process still ongoing though?

5 A. Yes. I think there was again going to be a further
6 discussion with the Cambium people to see why they may have
7 come to the conclusions that they did or if there was something
8 that we had missed in the draft report that we should pay
9 attention to. But the team itself, based on what they had seen
10 in the draft report, felt that there was a violation of the
11 statute.

12 Q. Would it be fair to say that the content of the report
13 appeared to establish a violation, but the conclusions stated
14 that there was no violation?

15 A. That's correct.

16 Q. I want to show you what I believe is Exhibit 87. This is
17 an e-mail from you to Kathy Hrabluk and John Stollar. Now,
18 this is just a couple days later, May 13th, and it's entitled:
19 Cambium Report Outline of Comments.

20 This is not the first discussion of this comment that's
21 attached apparently because it says: John and Kathy, this is
22 an excellent start.

23 Although you go on to say: What this is to be used for is
24 a little unclear to me.

25 Do you see those statements?

1 A. Yes.

2 Q. Okay. And then attached to that is something called:
3 Cambium Report Outline of Comments. Do you remember this
4 document?

5 A. Vaguely, yes.

6 Q. Okay. Do you remember why it was being drafted?

7 A. Well, it -- what appears to me was there was going to be
8 some discussions with Cambium as a result of the draft report,
9 and these were notes that would enhance the quality of those
10 discussions.

11 Q. So this is related then to the e-mail Kathy sent to Luanne
12 a few days earlier saying that there were some inconsistencies
13 that they needed to discuss?

14 A. Yes.

15 Q. Okay. Now, if you turn to the final page of that
16 attachment, and, again, there's draft language going back and
17 forth, but it says: Conclusion: The existing TUSD's MASD
18 program of study must be terminated/suspended immediately and
19 will not be permitted to operate until the Tucson Unified
20 School District's Governing Board complies with the required
21 and necessary action of establishing a process outline provided
22 earlier for appropriate curriculum development.

23 And then there are some other requirements after that.

24 Do you see that?

25 A. Yes.

1 Q. Now, the conclusion identified in this comment document
2 says that the -- that TUSD's MASD program must be terminated.
3 So my first question is, was that a final determination or was
4 it still tentative as of May 13, 2011?

5 A. Well, I think it's tentative because the staff doesn't
6 actually make the final decision. The final decision is made
7 by the superintendent. But based on the review of the
8 materials in the draft report, the staff had come to the
9 conclusion that there was enough information there to validate
10 a termination or suspension of the program.

11 Q. And, again, in this time frame, you're still reviewing
12 materials, correct?

13 A. Yes.

14 Q. Still doing additional investigation of some kind?

15 A. Yes, and I think that was -- this was still before the
16 final report of Cambium. And so based on discussions with
17 Cambium, there may have been additional information that came
18 out.

19 Q. Before the executive team gave draft findings to
20 Superintendent Huppenthal, was there a consensus among them
21 about whether a violation had occurred?

22 A. Yes.

23 Q. And, again, we're talking about you, Kathy Hrabluk, Stacey
24 Morley, John Stollar, correct?

25 A. Yes.

1 Q. Okay. Are you aware of any racial or ethnic prejudice that
2 manifested itself in the course of performing these tasks?

3 A. No.

4 Q. Would you characterize the consensus as strong, weak,
5 moderate?

6 A. I think Kathy and John, who were the education experts,
7 felt very strongly, and I agreed with them.

8 Q. Do you recall when the finding of a violation was actually
9 made?

10 A. Sometime in early, mid-June, I believe.

11 MR. ELLMAN: I am going to show the witness now a
12 document that I know is in evidence. I'm finding the exhibit
13 number now. Entitled: Official Statement of Superintendent of
14 Public Instruction John Huppenthal, and it's dated June 15th,
15 2011.

16 BY MR. ELLMAN:

17 Q. This is related to the findings that he reached, correct?

18 A. Yes.

19 MR. ELLMAN: And just for the record, this is
20 Exhibit 541 I am referring to.

21 BY MR. ELLMAN:

22 Q. And at the bottom of this page, it says that he had several
23 concerns with the audit. Some of the audit was beyond the
24 scope. And then there are concerns that TUSD knew which week
25 the on-site classroom reviews and interviews would be taking

1 place.

2 Is that the concern you were referring to earlier about
3 unannounced visits?

4 A. Yes.

5 Q. And it also says only 37 percent of the classrooms were
6 observed. Do you remember that also being a concern of the
7 executive team that worked on this?

8 A. In reading this, yes.

9 Q. Then on the next page, it talks about a lack of materials
10 provided to the auditors. Do you see that?

11 A. Yes.

12 Q. And then there's a reference to key leadership of the
13 Mexican-American Studies Department refusing to cooperate. Do
14 you see that?

15 A. Yes.

16 Q. And those were both concerns of the executive team,
17 correct?

18 A. Yes.

19 Q. And it says: Despite these limitations, we were able to
20 accumulate substantial information from many sources. Do you
21 see that?

22 A. Yes.

23 Q. Do you agree with that statement?

24 A. Yes.

25 Q. Do you feel that the recommendations that the executive

1 team made to Superintendent Huppenthal were well supported?

2 A. I thought so.

3 Q. Again, where I'm indicating, it states that: The materials
4 gathered by and submitted to the Department of Education, as
5 well as the materials the auditors reviewed, contained content
6 promoting resentment towards a race or class of people. Do you
7 see that?

8 A. Yes.

9 Q. And, again, that was a concern that the executive team
10 working on this issue had when they read the Cambium audit
11 report, correct?

12 A. Yes.

13 Q. And that was also a finding of the prior superintendent,
14 correct?

15 A. Yes.

16 Q. And then there are some examples of evidence that supports
17 the finding, and then the highlighted portion refers to white
18 people being characterized as oppressors and oppressing the
19 Latino people. And do you remember seeing comments of that
20 type in the materials when you were doing your review?

21 A. Yes.

22 Q. Then at the bottom, it says that: The reviewed materials
23 present only one perspective of historical events.

24 Do you remember getting that impression and reaching that
25 conclusion also?

1 A. You know, I don't -- I wouldn't say I reached that
2 conclusion. But in discussion with Kathy and John, who were
3 the ones reviewing the materials, yes.

4 Q. Okay. All right. Then at the end of page 3, near the
5 bottom, it says: The Tucson Unified School District governing
6 board has 60 days to bring the Mexican-American Studies Program
7 into compliance with A.R.S. 15-112. Do you see that?

8 A. Yes.

9 Q. Okay. And this is dated June 15th. So school is not in
10 session, correct?

11 A. Correct.

12 Q. And at that time, was the Department of Education
13 contemplating that TUSD would bring the program into
14 compliance?

15 A. Yes.

16 Q. And you did not attempt to simply terminate it, correct?

17 A. That's correct.

18 Q. Do you understand that the statute gives authority to the
19 superintendent, upon finding a violation, to withhold up to 10
20 percent of the district's funding?

21 A. Yes.

22 Q. I want to show you Exhibit 548 here. It's two e-mails, in
23 particular, dated January 25, 2012. Do you see that?

24 A. Yes.

25 Q. And this is about TUSD funding, correct?

1 A. Yes.

2 Q. And does this indicate that funding was not withheld?

3 A. That's correct.

4 Q. After the finding of violation, do you recall that there
5 was an administrative proceeding?

6 A. Yes.

7 Q. And do you recall what the outcome of that proceeding was?

8 A. The finding of the hearing officer supported the
9 superintendent's findings.

10 Q. And did the superintendent adopt the administrative law
11 judge's findings?

12 A. Yes.

13 Q. Was that in January of 2012?

14 A. I believe it was, early January 2012.

15 Q. Okay. Remembering that the e-mail I just showed you about
16 funding was January 25th, 2012.

17 A. Okay.

18 Q. Okay. And finally, I want to show you Exhibit 549, in
19 evidence. And this appears to be a letter from the Department
20 of Education, actually from John Huppenthal specifically, to
21 John Pedicone. Do you see that?

22 A. Yes.

23 Q. January 30, 2012, correct?

24 A. Yes.

25 Q. And it states in the middle of the first paragraph that the

1 superintendent had ordered that no funds be withheld. Do you
2 see that?

3 A. Yes.

4 Q. And that was correct, wasn't it?

5 A. Yes.

6 Q. And then the bottom of the letter, it says: ADE staff and
7 I look forward to working with you, the governing board, and
8 community residents to develop core curriculum that provides a
9 balanced and appropriate view of Mexican-American history that
10 honors the diversity and culture of all parties. Do you see
11 that?

12 A. Yes.

13 Q. Have I read that accurately?

14 A. Absolutely.

15 Q. As far as you know, was that John Huppenthal's sincere and
16 true belief at that time?

17 A. Yes.

18 Q. When the executive team reached its unanimous conclusion
19 that TUSD had violated A.R.S. Section 15-112, did John
20 Huppenthal accept that recommendation without changing it, as
21 far as you know?

22 A. Yes.

23 Q. Okay. He seemed to accept your conclusions, correct?

24 A. Yes.

25 Q. Did race, ethnicity, or partisan politics have any role

1 whatsoever in your actions regarding the investigation of the
2 Mexican-American Studies Program at TUSD?

3 A. No.

4 Q. Do you have any reason to believe that Kathy Hrabluk, John
5 Stollar, or Stacey Morley were influenced in their actions by
6 considerations of race, ethnicity, or partisan politics?

7 A. No.

8 Q. Did the racial or ethnic background of the students taking
9 Mexican-American Studies classes in TUSD have anything to do
10 with the Department's review, analysis, or conclusions in this
11 matter?

12 A. No.

13 Q. Do you have any reason to believe that Superintendent
14 Huppenthal's concurrence with the recommended findings
15 developed by you, Kathy Hrabluk, John Stollar, and Stacey
16 Morley was motivated by racial animus?

17 A. No.

18 Q. Was the committee -- excuse me. Was the executive team
19 working on this issue attempting to impose a political or
20 partisan viewpoint on to the Mexican-American Studies Program?

21 A. No.

22 Q. Finally, do you have any reason to believe that John
23 Huppenthal was attempting to impose his own political or
24 partisan views on to the Mexican-American Studies Program at
25 TUSD?

1 A. No.

2 MR. ELLMAN: I have nothing further, Your Honor.

3 THE COURT: All right. Thank you, Mr. Ellman.

4 We will take our afternoon recess before we start with
5 the cross-examination. All right? You may step down. It will
6 be about 15 or 20 minutes before we resume. All right. We are
7 now in recess.

8 (A recess was taken from 3:20 p.m. to 3:51 p.m.)

9 THE COURT: Okay. Let's be seated. So we're on to
10 the cross-examination, correct?

11 MR. REISS: Yes, Your Honor. Thank you.

12 CROSS-EXAMINATION

13 BY MR. REISS:

14 Q. Good afternoon, Mr. Hibbs. My name is Steve Reiss. I
15 represent the plaintiffs in the case. We haven't met before,
16 have we?

17 A. No.

18 Q. You testified in your direct examination that you never
19 heard John Huppenthal say anything with racist views, is that
20 correct?

21 A. Correct.

22 Q. But you also said you were aware of Mr. Huppenthal's
23 blogging.

24 A. Yes.

25 Q. Are you aware that those blogs expressed racist views?

1 A. I am aware that John wrote blogs, and some of the excerpts
2 that were taken out of those suggested that he had racist
3 views. However, in talking with John, I don't believe that
4 that was his intent whatsoever, and that there was a lot more
5 to the blogs than what came out publicly, and I never heard him
6 say any of those things.

7 Q. But the blogs themselves suggested that Mr. Huppenthal had
8 racist views, right?

9 A. No. I did not get a chance to read the entire blog, so I
10 can't say that they were or were not necessarily racist; but
11 based on his explanation, I did not think they were.

12 Q. Let's take a look at some of them. December 14th, 2010.
13 Did you know Mr. Huppenthal at that point?

14 A. Yes.

15 Q. Okay. So when he blogs "No Spanish radio stations, no
16 Spanish billboards, no Spanish TV stations, no Spanish
17 newspapers, this is America, speak English," you don't view
18 that as expressing any animus against Mexican-Americans?

19 A. I don't know what the context of all this is, so it's hard
20 for me to make a conclusion. What I do know of him, and have
21 had discussions with him, don't suggest that.

22 Q. But a reasonable person reading that could conclude that
23 that expresses anti-Mexican-American animus, right?

24 A. Perhaps, if they didn't know the rest of it and had not --
25 do not know John Huppenthal.

1 Q. Let's take a look at the next one: The rejection of
2 American values and embracement of the values of Mexico in La
3 Raza classrooms is the rejection of success and embracement of
4 failure. Were you aware of that blog?

5 A. No.

6 Q. And you could see how a reasonable person would read that
7 as expressing anti-Mexican-American animus, right?

8 MR. ELLMAN: Objection to what a reasonable person
9 would believe. I don't think that's relevant.

10 THE COURT: Well, the objection's overruled.

11 MR. REISS: Thank you.

12 A. Well, as I look at that one, and I know that John had spent
13 some time in one of the classrooms or more classrooms down at
14 TUSD, you know, I think it's more an expression there of his
15 concern about the quality of the education in the classroom and
16 whether it's teaching appropriate American values.

17 BY MR. REISS:

18 Q. And you don't view it as denigrating the values of Mexico?

19 A. No.

20 Q. But you can see how someone might view it that way, right?

21 A. I can't judge how other people would interpret those
22 things.

23 Q. How about the next one: I don't mind them selling Mexican
24 food as long as the menus are mostly in English. Were you
25 aware of that blog?

1 A. No.

2 Q. I won't ask you much more, because there are a number of
3 them and I don't want to waste the Court's time. But let's
4 just look at the March 8th, 2012 blog: Yes, MAS equals KKK in
5 a different color. Were you aware of that blog?

6 A. No.

7 Q. Were you aware that Mr. Huppenthal ran for superintendent
8 of education on a platform to stop La Raza?

9 A. No, I was not involved.

10 MR. ELLMAN: Objection. Mischaracterizes the
11 evidence.

12 THE COURT: Objection's overruled. You may finish
13 your answer.

14 A. I was not involved in his campaign, and I don't know what
15 was involved, what he ran on.

16 BY MR. REISS:

17 Q. So you were not aware of that?

18 A. No.

19 Q. By the way, you never saw the open letter that Mr. Horne
20 wrote to the citizens of Tucson in 2007, did you?

21 A. No.

22 Q. Is it Mr. Hibbs or Dr. Hibbs?

23 A. Mister.

24 Q. Mister.

25 A. Definitely not doctor.

1 Q. So, Mr. Hibbs, you started working for Mr. Huppenthal when?

2 A. Official day was, I think, January 3rd, 2011.

3 Q. And that was a Monday, right?

4 A. Correct.

5 Q. And that was actually a holiday, right, because January 1st
6 had fallen on a Saturday, right?

7 A. You know, I don't remember that. In fact, I don't think
8 that was the case because everybody was at the department when
9 we went in to work.

10 Q. Well, then the state --

11 A. But I could be wrong about that.

12 Q. You are wrong. I will represent to you that January 4th
13 was a Tuesday, January 3rd was a Monday, January 1st was a
14 Saturday.

15 A. Okay. So whatever first Monday that I -- that he took
16 office was the first day I worked.

17 Q. All right. So you were giving the state a good deal and
18 working on a holiday.

19 A. I must have.

20 Q. And you were asked about a press release -- I have it as
21 Plaintiffs' Exhibit 60 -- that was issued at the very beginning
22 of Mr. Huppenthal's tenure as superintendent, right?

23 A. Yes.

24 Q. And I believe you said that Mr. Huppenthal consulted with
25 you prior to the issuance of this release?

1 A. You know, I don't remember the first couple days. What I
2 remember is that the letter was there and that we had to
3 develop a response to it. I don't remember how all that
4 transpired.

5 Q. And you would have expected, would you not, Mr. Huppenthal
6 to have reviewed this release, right?

7 A. Whatever the part that's below what is shown to me is
8 supposedly John's statement, so, yes, I would have assumed that
9 he would have reviewed that.

10 Q. You would have assumed that?

11 A. It says John Huppenthal's official statement.

12 Q. That would be an expected practice for a statement by the
13 superintendent, right?

14 A. It would be my practice always before anything was released
15 under my name.

16 Q. Now, if you look at the e-mail from Mr. -- is it Ducharme
17 or Ducharme?

18 A. Ducharme.

19 Q. Ducharme. If you look at that e-mail from Mr. Ducharme --
20 interesting, it's from him to him -- conveying the statement.
21 Right? Do you see that?

22 MR. REISS: I'm on the second page. I'm sorry. If we
23 can call that up. No, no, it's the page before that, Jorge.
24 Right there. A little further down. A little further down.
25 That, right there. Right.

1 BY MR. REISS:

2 Q. Mr. Ducharme is sending out this press release on Tuesday,
3 January 4th, 2011, at 12:47 a.m. A.M. So at 12:47 in the
4 morning, the wee hours of Mr. Huppenthal's first full day in
5 office, this is what he's sending out. Right?

6 A. I don't know if a.m. is correct or not, but that's what it
7 says, yes.

8 Q. That's what it says, right?

9 A. Yes.

10 Q. In this press release, Mr. Huppenthal says -- let's go to
11 the next page, first paragraph, we can look at that.

12 Given the evidence that I have reviewed as of today, I
13 support former superintendent Tom Horne's decision that a
14 violation of one or more provisions of A.R.S. Section 15-112,
15 the statute created by the passage of HB2281, has occurred by
16 the Tucson Unified School District.

17 Do you see that? Right?

18 A. Yes.

19 Q. So, literally, on the early, early morning of
20 Mr. Huppenthal's first day in office, he is accepting Tom
21 Horne's finding that there is a violation of 15-112, right?

22 A. He is affirming that the evidence that Tom Horne was using
23 to suggest a violation would have suggested a violation.
24 You've got to go down and look the rest of it though to
25 indicate that the statute didn't go into effect yet, so we have

1 to do more.

2 Q. Did Mr. Huppenthal ever retract this statement, to your
3 knowledge?

4 A. I think by his actions. And I don't know that I would use
5 the word "retraction." I don't know that he needed to retract
6 it, but by the actions that were taken, clearly there was
7 efforts to gather facts and determine that after the statute
8 went into effect the violations did or did not occur.

9 Q. In fact, Mr. Hibbs, you have a long history in state
10 government, right?

11 A. Yes.

12 Q. Okay. You're a sophisticated senior executive in state
13 government, right?

14 A. I appreciate the word "sophisticated," but I had been there
15 a long time, yes, I had.

16 Q. Very knowledgeable, right? And you knew, did you not, as
17 any senior official in the Arizona state government would know,
18 that a statute can't have any effect until it goes into effect.
19 Right?

20 A. I already stated that when -- during the direct
21 examination.

22 Q. So Mr. Horne's finding that the Tucson Unified School
23 District was in violation of 15-112, a finding he made on
24 December 30th, 2010, was blatantly unlawful, right?

25 A. Well, I'm not a lawyer, I am not a judge, and it's for them

1 to determine.

2 Q. But you --

3 A. From my perspective, where I am, I would have done it a
4 little differently.

5 Q. Is it just a little differently, or is it a fundamental
6 principle that a law can't be violated until it goes into
7 effect?

8 A. That is the principle that I have always followed.

9 Q. And you would have expected a man who became the Attorney
10 General of Arizona and who's been a lawyer for some 40-some-odd
11 years to know that, right?

12 MR. ELLMAN: Argumentative.

13 THE COURT: Sustained.

14 BY MR. REISS:

15 Q. So you told Mr. Huppenthal that Mr. Horne's finding had a
16 real problem, right?

17 A. I don't know that I'd use the word "problem." I more
18 recall talking to the superintendent about the fact that the
19 semester had just started, or was just starting at TUSD, and if
20 we were going to issue and uphold any finding, we would have to
21 gather factual information on what's going on during this
22 semester.

23 Q. Okay. And as of 12:47 a.m. on January 4th, there had been
24 absolutely no activity in the Tucson Unified School District
25 while the statute was in effect, right?

1 A. Well, I wasn't at the district so I can't say what was
2 done, but I would not have expected at 12:47 a.m. in most
3 organizations that there was much being done.

4 Q. It's a little worse than that. January 1st is a Saturday,
5 the law goes into effect. January 2nd is a Sunday. School is
6 not in session on Sunday, is it?

7 A. Not where I grow (phonetic) up.

8 Q. And Monday, January 3rd, which is the day they were
9 celebrating the New Year's Eve holiday, in any event, at 12 --
10 is a holiday, school's are not in effect. Right? They're not
11 operating on that holiday?

12 A. I would not imagine they were.

13 Q. Right. So at 12:47 a.m. on Tuesday, January 4th, there had
14 been absolutely no activity in the Tucson Unified School
15 District that could have come under 15-112, right?

16 A. I would agree with that.

17 Q. Okay. Now, I want to talk a little bit about your role in
18 the ultimate decision to terminate the MAS program. You're not
19 an educator, right, Mr. Hibbs?

20 A. Correct.

21 Q. You've never worked as a teacher, right?

22 A. Correct.

23 Q. And you're certainly not an expert in education?

24 A. Correct.

25 Q. And you don't really have any knowledge about ethnic

1 studies programs, right?

2 A. Correct.

3 Q. And we've already learned you're not a lawyer, happily for
4 you.

5 And you really have no background in public education,
6 right?

7 A. That's right. Other than the one education that I got.

8 Q. And so you, in examining the Tucson Unified District
9 Mexican-American Studies Program, you relied on knowledgeable
10 colleagues like Ms. Hrabluk. Right?

11 A. Correct.

12 Q. And you were concerned that there was not an adequate
13 basis, or any basis, to support Mr. Horne's finding of
14 violation, right?

15 A. To me, it was the timing of his. I mean, I don't know. He
16 had information in there that if the statute had benefit or
17 effect, maybe he could have reached that conclusion. But the
18 timing for me was you can't use that past information. We have
19 to look at what's going on now.

20 Q. Exactly. And as of January 4th, when -- at 12:47 a.m.,
21 when that press release was issued, you had absolutely no
22 information concerning whether the Tucson Unified School
23 District Mexican-American Studies Program was in violation.
24 Right?

25 A. Correct. I did not.

1 Q. Now, it wasn't your -- because you weren't an educator and
2 you weren't a lawyer, it wasn't your position to know or not
3 know what would promote resentment toward a race or class of
4 people, in violation of 15-112. Right?

5 A. Correct.

6 Q. And the legal question of whether there is sufficient
7 evidence or not of a violation of 15-112 wasn't your decision
8 to make, right?

9 A. Right.

10 Q. Okay.

11 A. I participated in it, but I didn't make it.

12 Q. So your role was not to determine whether the MAS program
13 at TUSD violated the statute, right?

14 A. I'm going to characterize it this way. Based on my history
15 of dealing with a whole variety of different subjects of state
16 government, my role, I learned to be involved, to ask
17 questions, to ensure that whoever was providing recommendations
18 had done their work thoroughly and completely, had factual
19 information to back up whatever recommendation that they were
20 going to make.

21 MR. REISS: Why don't we play clip 2.

22 BY MR. REISS:

23 Q. And I'm sorry. Mr. Hibbs, you recall being deposed in this
24 case, right?

25 A. Yes.

1 Q. I wasn't the lawyer. It was Mr. Martinez, right? Just to
2 refresh your memory.

3 A. Yes.

4 MR. REISS: It doesn't matter. Okay. Why don't we
5 play --

6 BY MR. REISS:

7 Q. Do you remember being asked the following question and
8 giving the following answer?

9 (Video playing.)

10 Q. That was your sworn testimony, right?

11 A. It's right there, right there.

12 Q. Okay. And you never concluded that the MAS program at TUSD
13 violated 15-112, did you?

14 A. I think I did. And I -- here's what I would say again.
15 What I always looked at when I was dealt with an issue, whether
16 it happened to be personnel reform or having to do with things
17 like welfare reform at DES, I came in not with knowledge, but I
18 came in asking questions and I worked it until I got to the
19 point that I agreed with whatever the findings happened to be
20 or the recommendation happened to be.

21 So I think Kathy -- what I would say is Kathy and John and
22 Stacey brought me to the point that I would -- that I fully
23 agreed with them that a violation had occurred.

24 MR. REISS: Why don't we play clip 3.

25 (Video playing.)

1 MR. ELLMAN: Excuse me. Can we see what preceded
2 that? There is no context or foundation for that question and
3 answer.

4 MR. REISS: I will give you the cite and you can look
5 at it. We're on page 49 of the deposition, lines 5 through 8.

6 BY MR. REISS:

7 Q. Now, by the way, did you know, Mr. Hibbs, who, if anyone,
8 at the Department of Education knew about Chicano history?

9 A. No.

10 Q. Okay. And did you know who, if anyone, at the Department
11 of Education knew about Mexican-American literature?

12 A. We had staff people, but I don't know who they are and what
13 they may have known.

14 Q. You never talked to them, did you?

15 A. No. Well, when you say, "never talked to them," yes, I may
16 have talked to them, but not about this specific subject.

17 Q. Fair enough. You're more accurate than my question. Thank
18 you.

19 Now, I think we've established that you believe that you
20 couldn't accept Mr. Horne's finding at face value, right?

21 A. Right.

22 Q. And that's what led to the retention of Cambium, right?

23 A. Yes, that was one of the things that we did, yes.

24 Q. Okay. And you had a role in that retention, right?

25 A. Yes.

1 Q. And when they were being retained, you had an RFP or an RFQ
2 that set out the scope of work, right?

3 A. Yes.

4 Q. You were satisfied with the scope of work that was sent
5 out, right?

6 A. Well, again, I am relying on the experts, the educational
7 experts --

8 Q. Okay.

9 A. -- as to what should be done. But if they're satisfied and
10 my review couldn't find any other questions that I had, I would
11 have been okay with it.

12 Q. Right. And if Ms. Hrabluk was satisfied with it, you would
13 have been satisfied with it?

14 A. Well, you would have to ask her if she was satisfied, but I
15 think she was, yes.

16 Q. I did and she was.

17 A. Okay.

18 Q. Now, before you retained Cambium, you wanted to notify the
19 legislature of your choice, right?

20 A. I don't know if it was before or not. But I know at some
21 point of time, the superintendent suggested that we make sure
22 that the members of the legislature know what we're doing.

23 Q. Okay. So let's look at -- I think you were asked about it,
24 but let's look at it again, Plaintiffs' Exhibit 63. This is on
25 March 3rd. Do you recall whether that's before you retained

1 Cambium?

2 A. I don't.

3 Q. And this is an e-mail from you to Stacey Morley, copies to
4 Ms. Hrabluk. And you write: Stacey, John -- that's John
5 Huppenthal?

6 A. Yes.

7 Q. John expressed concern to me that we inform the legislature
8 about the select of Cambium Group to conduct our TUSD
9 investigation rather than have -- rather than have then (in
10 document) hear it from others. He also mentioned that some
11 people would research Cambium to determine whether they were
12 conservative enough or too liberal in their thinking.

13 So there was a concern by Mr. Huppenthal that Cambium be,
14 quote, conservative enough, right?

15 MR. ELLMAN: Objection, that mischaracterizes what
16 this states.

17 THE COURT: Well, objection's overruled. I am sure
18 the witness understands the question and will answer it the way
19 he sees as accurate.

20 A. Well, I think it goes both ways, that it's whether they
21 were sufficiently conservative or too liberal, and it's wanting
22 to get, again, somebody that would be perceived as objective
23 and unbiased in what we were asking them to do.

24 BY MR. REISS:

25 Q. And ultimately, Cambium was retained, right?

1 A. Well, in fact, this, if I'm reading this correctly, it
2 would appear that about the select of Cambium, so it would
3 appear here to me that we had selected Cambium at that point.

4 Q. Right. And they were ultimately retained to do the audit,
5 right?

6 A. Well, it says here "about the select," so I would think at
7 this point that this went out that we had selected them.

8 Q. Okay. So they were selected to do the audit, right?

9 A. Yes.

10 Q. And during the Cambium audit, they were modified -- they
11 were monitored by the staff, by the senior staff at the
12 Department of Education, right?

13 A. Not on a day-to-day basis, but, yes, there were -- sorry --
14 occasional updates and meetings to talk about how things were
15 going and whether it was progressing the way that we had hoped.

16 Q. And Ms. Hrabluk was basically the point person in
17 overseeing the audit?

18 A. Yes.

19 Q. But you were involved as well in that?

20 A. Maybe one meeting or so. I don't recall meeting with the
21 Cambium people much at all.

22 Q. And you were copied on the e-mails between Ms. Hrabluk and
23 the Cambium auditors?

24 A. If the e-mails say I was, I was.

25 Q. Okay. They do.

1 So you were kept in the loop about the audit?

2 A. Yeah.

3 Q. And you were generally satisfied with their work, right?

4 A. I did not reach a conclusion about satisfaction --

5 Q. During --

6 A. -- until later on when the draft report was issued and
7 meeting with John and Kathy and having discussions about what
8 was in it.

9 Q. Right. But during the course of the audit, you never saw
10 anything about the audit that you thought was problematic,
11 right?

12 A. Again, I wasn't overseeing the audit on a daily basis. I
13 had extremely broad responsibilities at the department, and
14 there were many other issues of primary concern. So I -- when
15 you say I didn't have a problem, I don't know. I didn't look
16 at it in depth at that point.

17 Q. Right. But you never -- all right, fine.

18 But you never complained, you never noticed any problems
19 with the audit, right?

20 A. And I wouldn't have because I wasn't involved.

21 Q. Do you recall during the course of the audit, prior to
22 receiving the draft Cambium report on May 2nd, do you remember
23 Ms. Hrabluk ever telling you there were any issues with the
24 audit?

25 A. You know, I don't recall it. Again, we're talking over six

1 years ago, so I don't recall it.

2 Q. By the way, do you remember how much you paid Cambium for
3 the audit?

4 A. Not the specific dollars. I could make a pretty good
5 guess, but...

6 Q. Hundred ten thousand dollars ring a bell?

7 A. A hundred what?

8 Q. Hundred ten thousand.

9 A. Okay. That seems reasonable.

10 Q. And you paid them the full price that you had agreed to in
11 the contract, right?

12 A. Yes.

13 Q. All right. Didn't dock them anything?

14 A. No.

15 Q. Now, ultimately, Cambium sent a draft report on May 2nd,
16 2011. Do you recall that?

17 A. Yes.

18 Q. And I think you mentioned on your direct testimony that
19 there was a very tight deadline for Cambium to do its audit and
20 issue its report. Right?

21 A. I think we had a time frame in the contract, yes.

22 Q. Right. And that time frame was when that was imposed by
23 the Department of Education, right?

24 A. Correct.

25 Q. It could have been changed, right?

1 A. Sure. It could have been extended if necessary.

2 Q. Okay. Now, when you received the Cambium audit, you were
3 asked a number of questions on your direct examination. I
4 think you noted that there were four concerns, at least you
5 were asked about four concerns, and I'm going to ask you about
6 those. Okay?

7 A. Okay.

8 Q. Okay. The first one was concerns expressed in the Cambium
9 draft audit about curriculum, right?

10 A. Yes.

11 Q. Okay. And you were read a number of passages in the
12 Cambium audit that identified potential issues with the
13 curriculum, right?

14 A. Yes.

15 Q. And the identification of those curriculum issues -- by the
16 way, you wanted the Cambium report to be fair and balanced,
17 right?

18 A. Yes.

19 Q. That was important to you, right?

20 A. Yes.

21 Q. And the identification of those curriculum issues in the
22 Cambium report did just that. They identified curriculum
23 issues. They didn't hide them, did they?

24 A. No.

25 Q. And that would be an indication that they were issuing a

1 fair and balanced report, right?

2 A. On that issue, yes.

3 Q. On that issue.

4 By the way, problems with the curriculum don't violate
5 15-112, do they?

6 A. Not according to Kathy Hrabluk, I believe.

7 Q. And you said you also had some issues with the content of
8 the materials, right?

9 A. Yes.

10 Q. Okay.

11 A. May I say, John and Kathy had issues and convinced me that
12 there were issues with the report.

13 Q. Fine. So you relied on John and Kathy, right?

14 A. Yes.

15 Q. Now, you certainly had never visited and didn't ever visit
16 an MAS class, right?

17 A. Not during that time frame. Later in my time with the
18 department, I did go to TUSD and visit some classrooms.

19 Q. But not during this period?

20 A. Not during this period.

21 Q. And not prior to reaching the decision on May 9th that the
22 MAS program was in violation of the statute, right?

23 A. Not before the group arrived at a conclusion that there was
24 a violation.

25 Q. Right. And prior that to that time, Ms. Hrabluk never

1 visited an MAS class, right?

2 A. I don't know if she did or not.

3 Q. And did you know whether Mr. Huppenthal had?

4 A. I believe John had at a future -- excuse me -- at a prior
5 point in time, but I don't think he did during this time.

6 Q. So the problems that Ms. Hrabluk and Mr. Huppenthal had
7 with the materials were based on the materials themselves,
8 right?

9 A. You're asking me to say how they made their conclusions?

10 Q. You know. That's fair enough. Did you have an
11 understanding, since they hadn't gone to the classroom, that
12 their views on the materials were simply based on reading the
13 materials?

14 A. And the report, and I don't know what all information.
15 There may have been other information that they had, and they
16 would have to provide testimony as to that.

17 Q. Okay. In fact, Mr. Huppenthal, he characterized the
18 materials as Marxist, right?

19 A. I don't know. I mean, I don't recall a specific
20 conversation on that.

21 Q. Well, we'll try to refresh your memory.

22 Mr. Huppenthal characterized the Mexican-American Studies
23 as a Marxist-based curriculum, right?

24 A. Are you reading from something?

25 Q. I'm just asking you.

1 A. You're asking me to remember from tons and tons of
2 conversation with him if he ever used those words, and I
3 honestly don't really that.

4 MR. REISS: Let's play clip 20.

5 (Video playing.)

6 BY MR. REISS:

7 Q. And Mr. Huppenthal also told you that Pedagogy of the
8 Oppressed was the work of a Marxist author, right?

9 A. Again, same response. I had lots of conversations. I
10 don't remember specifically whether he said that to me or not.

11 MR. REISS: Clip 21.

12 (Video playing.)

13 BY MR. REISS:

14 Q. Now, beyond the curriculum and the materials, I think a
15 third area that was mentioned as an issue was student
16 achievement and the fact that the Cambium report addressed
17 student achievement. Is that right?

18 A. Yes.

19 Q. And that was because there was a belief that student
20 achievement was outside the scope of the Cambium audit, right?

21 A. That there was concern about it? I'm not sure what your
22 question is.

23 Q. What was the concern with the Cambium report's addressing
24 student achievement?

25 A. My recollection is that that was not a focus of the scope

1 of work.

2 Q. Oh, it wasn't. Okay.

3 A. I believe so.

4 Q. Well, let's look at the Cambium report.

5 A. Okay.

6 Q. Let's look at the draft Cambium report. It's --

7 A. I'm not arguing that it isn't. It is in there.

8 Q. The draft Cambium report is Exhibit 79, and on the third
9 page of that report, Mr. Hibbs, if you look at the audit
10 purpose towards the bottom, the audit purpose, which is taken
11 from the scope of work. And if you don't take my word for it,
12 I'll show you that.

13 The purpose of the Tucson Unified School District
14 Mexican-American Studies Department curriculum audit is to
15 determine, one, how or if the Tucson Unified School District
16 Mexican-American Studies Department programs are designed to
17 improve student achievement; two, if statistically valid
18 measures indicated student achievement occurred.

19 A. Okay.

20 Q. So you would accept that as being included within the scope
21 of the audit, right?

22 A. Yes.

23 Q. And, by the way, the draft Cambium report, and the final
24 Cambium report, found that there was a significant positive
25 effect on student achievement of the Mexican-American Studies

1 Program, right?

2 A. I think the report included the district's statistical
3 analysis, and I don't believe that Cambium conducted any
4 separate independent analysis of its own.

5 Q. Well, let's look at Exhibit 94. This is important
6 information regarding Tucson Unified School District's
7 violation of A.R.S. Section 15-112, which was released on
8 June -- I'm sorry -- January 16, 2011. Right? Were you
9 familiar with this?

10 A. June 16th?

11 Q. January. Oh, June 16th. I'm sorry. June. My mistake.
12 Were you familiar with this?

13 A. Yep, I'm looking at it.

14 MR. REISS: Actually, we can take that one off. Let
15 me just go back to the Cambium report itself, Exhibit 93.
16 Let's look at page 43 of that exhibit. I think this is the
17 draft. The final, Jorge.

18 BY MR. REISS:

19 Q. Under Outcome Measure 2: Determine if statistically valid
20 measures indicated student achievement occurred.

21 And this was a finding of the Cambium report: This section
22 is an overview of the findings that follow in the area of
23 Outcome Measure 2. Tucson Unified School District
24 Mexican-American Studies Program claimed not to only improve
25 student achievement but to surpass and outperform similarly

1 situated peers. The findings of the auditors agree student
2 achievement has occurred and is closing the achievement gap
3 based on the re-analysis and findings of TUSD's department of
4 accountability and research data charts below.

5 So the Cambium report itself said there was a re-analysis,
6 right?

7 A. That's the word that's used there. I don't know to what
8 extent that was done.

9 Q. And you recall that the findings with respect to student
10 achievement were quite positive, right?

11 A. From the TUSD report, yes.

12 MR. ELLMAN: Steve, can you identify the page number
13 of that Cambium with the highlights?

14 MR. REISS: Sure. 43.

15 MR. ELLMAN: Thank you.

16 BY MR. REISS:

17 Q. And, Mr. Hibbs, the draft Cambium report which you received
18 on May 2nd found that there was no violation of 15-112, right?

19 A. That was Cambium's perspective, yes.

20 MR. REISS: Right. Why don't we look at 84. It's a
21 more complete e-mail chain. It's the third page of that
22 exhibit, Jorge, the very bottom.

23 BY MR. REISS:

24 Q. You were asked about this on your direct testimony. This
25 is from you to Ms. Hrabluk, Monday, May 9th: Kathy, please

1 forward the link at the bottom to Luanne and company to get a
2 better understanding of how they missed the boat. Right?

3 A. Yes.

4 Q. And the boat they missed is the SS Violation, right? That
5 is that there was a violation of 15-112.

6 A. I'm going to say yes because there was material in there
7 based again on the discussions with Kathy and John that on
8 their own they would have said they should have reached a
9 conclusion that there was a violation.

10 Q. So, on May 9th, before even receiving the final Cambium
11 report, you reached a conclusion totally contrary to that in
12 the Cambium report, the independent Cambium report, that there
13 was, in fact, a violation of 15-112, right?

14 A. Yes, based on the discussions, yes.

15 Q. And you reached that conclusion despite the fact that no
16 one at the Department of Education had visited a single
17 Mexican-American Studies class, right?

18 A. I don't know if anybody else had visited a class or not.

19 Q. You don't know that anyone else did, right?

20 A. I don't.

21 Q. And let's talk a little bit about the classroom visits.
22 That was the fourth thing I think you said you were concerned
23 about, that -- and I think it was specifically that the --
24 there was advance notice of the classroom visits. That was a
25 concern to you, right?

1 A. That was a concern of Kathy's, yes.

2 Q. Okay. Let's look at Exhibit 68. I think you were asked
3 about this a little bit. Let's look at the Bates number page
4 ending in 570.

5 By the way, let me just -- if it would be helpful,
6 Mr. Hibbs, this is the audit plan for Cambium's audit of the
7 TUSD MAS program. Right?

8 A. I have no way of knowing that right now.

9 Q. Well, let's look at the --

10 A. This is what was submitted by them in response to the RFP?

11 Q. Yes.

12 A. Okay.

13 Q. In fact, if you just have any -- there it is. If you have
14 any doubt, you can look at the second page, the e-mail which
15 conveys this.

16 MR. REISS: Why don't we go to the second page of the
17 exhibit, Jorge. Next page. The very, very top.

18 A. Yep.

19 BY MR. REISS:

20 Q. Jeffrey: Thank you for forwarding the work plan outline.
21 It appears to cover our scope of work, although I do have a few
22 questions/comments.

23 This is from Ms. Hrabluk to Mr. Hernandez, right, at
24 Cambium? You accept this was the work plan?

25 A. Yes.

1 Q. So let's look at page -- Bates page ending in 570. There
2 it is. Part of the audit plan was unannounced classroom
3 visits, right?

4 A. Yes.

5 Q. But it says: Instructors will be notified -- instructors
6 will be notified of the week, however, not the specific day,
7 course, class period, et cetera. Right?

8 A. Yes.

9 Q. In fact, the MAS teachers were not notified of the specific
10 day, course, or class, were they?

11 A. I don't know.

12 Q. And if they were notified of the week, that was
13 specifically contemplated in the audit plan, right?

14 A. It says they will be notified of the week.

15 Q. And that was the audit plan that Ms. Hrabluk approved,
16 right?

17 A. If she accepted it, yes.

18 Q. Now, let's look at the official statement of Superintendent
19 of Public Instruction John Huppenthal, which is Exhibit 541.
20 If you look down towards the bottom of the last two
21 paragraphs --

22 MR. REISS: Let's go one paragraph above that, Jorge.
23 Let's take the last three paragraphs. Thank you.

24 BY MR. REISS:

25 Q. This is dated June 15th, 2011: I want to first address the

1 foundation for my decision and the independent curriculum
2 audit. The audit was a limited part of the overall
3 investigation that the department had conducted. I
4 specifically had several concerns with the audit. The first
5 two-thirds of the final audit report was beyond the scope of
6 the legal determination I am making.

7 Do you see that?

8 A. Yes.

9 Q. But the two-thirds that were beyond the scope of the legal
10 determination were specifically part of the audit plan, right?

11 A. I don't know. This is getting into the technical aspects
12 of it that were a little bit more than my involvement in it.

13 Q. Let's look at the second: The Tucson Unified School
14 District administration knew which week on-site classroom views
15 and interviews would be taking place. They knew which week.
16 That was a criticism by Mr. Huppenthal, right?

17 A. Yes.

18 Q. But that was part of the audit plan that Ms. Hrabluk
19 approved?

20 MR. ELLMAN: Argumentative.

21 THE COURT: Overruled. You can answer.

22 A. It appears to be the case.

23 BY MR. REISS:

24 Q. Another problem is that only 37 percent of the
25 Mexican-American Studies Program classrooms were observed,

1 right?

2 A. Yes.

3 Q. But when you made -- but when the decision was made on
4 May 9th 2011 that, in fact, MAS program was in violation of the
5 statute, you had observed no classrooms of MAS teachers, right?

6 A. I had not.

7 Q. And you were not aware that anyone else in the Department
8 of Education had, right?

9 A. I had not -- any information whether anybody else had.

10 Q. By the way, in this press release, Mr. Huppenthal nowhere
11 says what the results of the Cambium audit were, does he?

12 A. I don't believe that there's any statement of -- when you
13 say, "the results," there was a lot of information used from
14 the Cambium audit in his findings and stuff, but he doesn't
15 indicate in there what Cambium thought the result was.

16 Q. Right. Now, you were asked a number of questions about
17 Ms. Leighton, right? Laura Leighton.

18 A. Yes.

19 Q. You knew she was an extremist, right?

20 A. Yes.

21 Q. All right. And you didn't find her credible, right?

22 A. I didn't find her not credible or credible. I just
23 accepted the information that she provided to us, and I passed
24 it on to those who could evaluate it.

25 Q. All right. And, in fact, even after the June 15th finding

1 of violation, 2011 violation by Mr. Huppenthal, you continued
2 to correspond with Ms. Leighton and continued to pass materials
3 from Ms. Leighton on to the State in connection with the
4 administrative law judge hearing. Right?

5 A. Yes.

6 Q. Now, let's look at Plaintiffs' Exhibit 108. This is
7 Mr. Huppenthal's order accepting the administrative law judge's
8 decision. Were you familiar with this?

9 A. Yes.

10 Q. And if you turn the -- by the way, do you know what the
11 administrative law judge's finding was with respect to whether
12 the Mexican-American Studies Program violated 15-112?

13 A. Well, as far as my recollection, he upheld the decision
14 that was made in June.

15 Q. Do you remember that the finding said that at least one
16 class or course was in violation? That was the finding?

17 A. I don't remember the specifics at this point.

18 Q. You were still on Mr. Huppenthal's staff when that finding
19 was made, right?

20 A. Yes.

21 Q. Was there any discussion among the Superintendent
22 Huppenthal staff that the finding was limited to at least one
23 class or course and wasn't broad?

24 A. I think the issue is whether or not it violated the
25 statute. Regardless of numbers or whatever, if there's a

1 violation of the statute, that's what it is.

2 Q. So the only concern was whether a single class or course
3 violated the statute, is that it?

4 A. No. The -- to me, the only concern was whether or not
5 students at TUSD were in fact getting a quality education.

6 Q. In fact --

7 A. And if there was one course or a dozen courses, there would
8 be indications that things needed to change.

9 Q. So if only one class violated 15- -- sorry, 12-115 -- or
10 15-112 --

11 MR. REISS: I'm sorry, Your Honor. My math skills are
12 not great.

13 BY MR. REISS:

14 Q. So if only one class or course violated the statute,
15 Mr. Huppenthal and the senior staff of the Department of
16 Education were nevertheless willing to terminate the entire
17 Mexican-American Studies Program, right?

18 A. No. What they wanted was for the district to modify its
19 program so that it would be in -- what's the right word I'm
20 looking for? -- it's in compliance with the statute in
21 providing a culturally diverse education for students.

22 Q. Let's look at the second page, and the last paragraph of
23 that page: Accordingly, pursuant to Section 15-112(B), the
24 superintendent hereby instructs the Arizona Department of
25 Education to withhold ten percent of the monthly apportionment

1 of state aid that would otherwise be due to the district
2 effective from August 15, 2011 through the present, and until
3 such time as this violation of A.R.S. 15-112 is corrected. The
4 Department shall adjust the district's apportionment
5 accordingly. Right?

6 A. Yes.

7 Q. Did you consult with Superintendent Huppenthal about the
8 penalty to be imposed on TUSD?

9 A. I think the statute was clear as to what the penalty was --

10 Q. You're right.

11 A. -- as far as I can remember.

12 Q. You're exactly right.

13 And the statute says "up to ten percent." Was there any
14 discussion about whether the penalty should be less than ten
15 percent?

16 A. I don't recall any discussions regarding the penalty.

17 Q. None?

18 A. I don't recall any.

19 Q. And you --

20 A. That doesn't mean they didn't happen --

21 Q. You were aware, were you not --

22 MR. ELLMAN: Will you let him finish his answer,
23 please?

24 MR. REISS: I'll certainly do that. I am perfectly
25 happy. Mr. Hibbs, if I interrupted you, please finish your

1 answer.

2 THE WITNESS: I think I did, if she got it.

3 MR. REISS: Thank you. I thought you did as well.

4 And could you read back the last question and answer,
5 please.

6 THE REPORTER: Well, the last question was: None?

7 And the last answer was: I don't recall any. That doesn't
8 mean they didn't happen. Question: You were aware, were you
9 not -- And that's when Mr. Ellman said: Will you let him
10 finish his answer.

11 BY MR. REISS:

12 Q. You were aware, were you not, that the imposition of the
13 ten percent penalty on TUSD was completely beyond the pale,
14 they -- they could not function with a ten percent reduction in
15 their revenue from the state. Right?

16 A. I have no information regarding their budgets and how they
17 might handle a ten percent reduction, that it would be
18 significant. I can't imagine that it wouldn't.

19 THE REPORTER: "I can't imagine that it"?

20 THE WITNESS: That it would not be significant.

21 MR. REISS: I'm sorry, I didn't hear that.

22 THE REPORTER: "I have no information regarding their
23 budgets and how they might handle a ten percent reduction, that
24 it would be significant.

25 THE WITNESS: That it would be significant.

1 BY MR. REISS:

2 Q. Would be -- okay. Very significant, right?

3 A. It's significant. I don't know to what extent.

4 Q. Well, in fact, after the ALJ decision, TUS board took
5 action to shut the program down in order not to suffer the
6 economic loss, right?

7 A. If that was the basis of their decision.

8 MR. REISS: Why don't we play clip 22.

9 (Video playing.)

10 MR. REISS: Your Honor, if I could have a minute, I
11 might --

12 THE COURT: Certainly.

13 MR. REISS: Thank you.

14 Your Honor, that's it for me.

15 THE COURT: All right. Thank you. I assume there
16 will be some redirect, right?

17 MR. ELLMAN: Yes, Your Honor.

18 THE COURT: Now, you know, it's 5:00 o'clock, but I'd
19 like to finish with this witness today.

20 MR. ELLMAN: I think we can.

21 THE COURT: Can we do that?

22 MR. ELLMAN: Yes.

23 THE COURT: Even if there's more recross?

24 MR. REISS: Your Honor, I'll do my very -- I think
25 I've been pretty on the mark with my predictions of exams.

1 THE COURT: Let's see where we go.

2 MR. ELLMAN: I will try to be very efficient, Your
3 Honor.

4 REDIRECT EXAMINATION

5 BY MR. ELLMAN:

6 Q. Mr. Hibbs, do you know whether John Huppenthal reviewed the
7 evidence that Tom Horne used before his January 4th press
8 release?

9 A. No, I don't.

10 Q. But we looked at Tom Horne's finding. It was 10 pages and
11 contained specific information about what he had found,
12 correct?

13 A. Yes.

14 Q. Okay. And if John Huppenthal had read that, then he would
15 have had an evidentiary foundation for his statement, wouldn't
16 he?

17 A. Yes.

18 Q. I want to show you Exhibit 525. This is a finding by Tom
19 Horne that TUSD is in violation, and it's dated January 1,
20 2011. Do you see that?

21 A. Yes.

22 Q. That is after the effective date of the statute, correct?

23 A. I don't know what date the statute went into effect,
24 honestly.

25 Q. All right. You were asked about the press release which is

1 Exhibit 60. I want to draw your attention to this paragraph on
2 the second page. It states: It should be noted that A.R.S.
3 Section 15-112 and its provisions went into effect as of
4 midnight on December 31, 2010. The day before, on December 30,
5 2010, the TUSD governing board held a meeting and issued a
6 resolution, the third of its kind, in support of the
7 Mexican-American Studies Program as it is currently structured.

8 Have I read that correctly?

9 A. Yes.

10 Q. So does that indicate to you that the classes that were
11 going to be conducted in January of 2011 would be the same as
12 the classes conducted in January of 2010 or perhaps January
13 2009?

14 A. Yes.

15 Q. I'll show you Exhibit 63. This is the e-mail that refers
16 to whether Cambium was conservative enough or too liberal in
17 their thinking. Superintendent Huppenthal's concern was about
18 the legislature's reaction to the selection, correct?

19 A. Yes.

20 Q. Is he here expressing concern that some people would
21 consider Cambium too liberal?

22 A. Yes.

23 Q. As opposed to his own view that Cambium was too liberal?

24 A. Yes.

25 Q. You testified that funding was not -- excuse me -- that

1 contract money was not withheld from Cambium, correct?

2 A. Yes.

3 Q. Were there discussions about withholding part of that?

4 A. Yes.

5 Q. But you ultimately decided to pay the entire amount,
6 correct?

7 A. Yes.

8 Q. You also said that the department could have extended the
9 deadline for the audit process, correct?

10 A. Yes.

11 Q. But any significant extension would have taken it beyond
12 the end of the semester, wouldn't it?

13 A. Yes. I don't think that was the consideration though, as
14 much as based on the discussions with John and Kathy that there
15 was sufficient information at that point to be able to make a
16 decision and move forward.

17 Q. I see. I want to show you Plaintiffs' Exhibit 92. This is
18 the official statement from June 15th, 2011. You were asked
19 about the statement I'm indicating here that: Two-thirds of
20 the final audit report was beyond the scope of the legal
21 determination that Superintendent Huppenthal was making that
22 day. Do you see that?

23 A. Yes.

24 Q. And I think we established that curriculum violations were
25 not necessarily a violation, correct?

1 A. Correct. And I think that's what that is at least in part
2 referring to.

3 Q. There were questions and answers about the date that you
4 actually reached your conclusion that TUSD was in violation.
5 Do you remember that?

6 A. Yes.

7 Q. Does the timing at which you actually reached your
8 conclusion have anything to do with the race or ethnicity of
9 the children in the Tucson Unified School District attending
10 MAS classes?

11 A. No.

12 Q. I am going to show you Exhibit 68. We've discussed this
13 already. This is Kathy Hrabluk's e-mail to Jeffrey Hernandez,
14 copied to you and others. This is dated March 30th, 2011, and
15 she is expressing her concern here that identifying a specific
16 week may unduly influence the focus of intended learning
17 outcomes, correct?

18 A. Yes.

19 Q. And you said that the scope of the work permitted Cambium
20 to announce the week, correct, if you recall?

21 A. My recollection of what we looked at was what Cambium came
22 back as their work plan. I don't remember that it was in the
23 scope of work.

24 Q. All right. But the contract didn't require Cambium to
25 announce the week in which was doing its classroom visits, did

1 it?

2 A. Not to my recollection.

3 Q. Then let's look at Exhibit 108. This is the order
4 accepting recommended decision. You discussed that ten percent
5 of funding being withheld would be effective from August 15th,
6 2011, correct?

7 A. Yes.

8 Q. And the finding was dated June 15th, correct?

9 A. Yes.

10 Q. And under the statute, you have 60 days to cure, correct?

11 A. Yes.

12 Q. And that would take you to August 15th, 2011, correct?

13 A. Yes.

14 Q. And no funding was withheld, correct?

15 A. Yes, that's correct.

16 Q. All right. Let's look finally at Exhibit 544. This is
17 page 34 of the administrative law judge's findings. I want to
18 direct your attention to -- well, first, paragraph 4 says that
19 the judge concludes that the statute only requires a finding of
20 at least one class or course to be in violation. Correct?

21 A. Correct.

22 Q. But the actual finding on this point, at paragraph 8, says
23 that the: The department's evidence showed that the MAS
24 program has at least one class or course in violation.

25 Correct?

1 A. Correct.

2 Q. And does not say how many classes or courses are in
3 violation, does it?

4 A. No.

5 MR. ELLMAN: That's all I have, Your Honor.

6 THE COURT: Okay.

7 MR. REISS: I've literally got --

8 THE COURT: Mr. Reiss?

9 MR. REISS: Thank you, Your Honor.

10 Let's go back to Plaintiffs' Exhibit 108. I'm sorry.
11 Yeah, it's Plaintiffs. That paragraph, the last full
12 paragraph.

13 RECROSS-EXAMINATION

14 BY MR. REISS:

15 Q. Mr. Ellman pointed out: Accordingly pursuant to 15-112, et
16 cetera, et cetera, the order is to withhold ten percent of the
17 monthly apportionment of state aid that would otherwise be due
18 the district effective from August 15th, 2011, through the
19 present. Right?

20 A. Yes.

21 Q. Okay. Now, during the time between August 15th and the
22 time this order was issued in January of 2012, that was the
23 period during this which the administrative law judge
24 proceedings were taking place. Right?

25 A. Yes.

1 Q. So in making the ten percent maximum penalty retroactive
2 back to August 15th, the superintendent was penalizing the
3 Tucson Unified School District for using its statutory right to
4 appeal the superintendent's finding. Right?

5 A. No, I would not interpret it that way. The department --
6 and under the statute, they had the 60 days to correct, and any
7 penalty that would have applied after that 60 days, we kept it
8 on hold until such time as the decision of the superintendent
9 was affirmed.

10 Q. The superintendent could have made the penalty effective as
11 of the date of the order, right?

12 A. Of his order?

13 Q. Of the administrative law judge's order.

14 A. I don't know if he had that authority because the statute,
15 my recollection, said 60 days after his decision.

16 MR. REISS: I have no further questions.

17 THE COURT: Mr. Ellman, anything further?

18 MR. ELLMAN: Yeah, at this time I'd like to renew our
19 motion for judgment on partial findings under Rule 52(c).

20 THE COURT: All right. But nothing further of this
21 witness, right?

22 MR. ELLMAN: No, Your Honor. I am sorry.

23 THE COURT: That's fine. All right, Mr. Hibbs, you
24 are excused. Thank you very much, sir.

25 MR. HIBBS: Thank you, Your Honor.

1 THE COURT: Okay. I am going to rule on that motion
2 now. Not that it requires -- wait a minute now. Hibbs is your
3 witness, right?

4 MR. ELLMAN: I'm sorry?

5 THE COURT: Hibbs is the defendants' witness.

6 MR. ELLMAN: Yes.

7 THE COURT: And you rested a while ago.

8 And that's when you made your motion, when he rested.

9 MR. ELLMAN: Correct.

10 THE COURT: It doesn't matter who rested when, but --
11 the motion says any time it appears that the record is
12 sufficient to make a ruling.

13 I am going to deny the motion. I just don't think
14 this is -- I don't want to make a broad statement now. You
15 know, it's not the kind of case where it would be fruitful to
16 seriously entertain this kind of motion, but the motion comes
17 anyway so close to the end of the case that I think it's better
18 to decide this case on a full record. So I deny the motion.

19 Now, I think that's it for today.

20 Now, tomorrow, Mr. Reiss, has somebody on your team
21 contacted your witnesses?

22 MR. REISS: Yes, Your Honor. In all candor, we will
23 have one, possibly two, and in all candor, I can't tell you
24 whether we're going to call the second witness.

25 THE COURT: All right. Can you get your witness here

1 by 8:30?

2 MR. REISS: Sure.

3 THE COURT: The reason I say I want to start a little
4 early is this: If we don't finish by 1:30, I am going to stay
5 and finish, but I am going to miss my plane, so I'm going to
6 have to stay over another night, which I don't want to do. If
7 I'm going to stay over another night, I might as well stay
8 until Monday, right? Because I might get home for Saturday
9 night to Sunday morning and then come back.

10 So, unless we finish by 1:30, it's going to make a lot
11 of problems. So that's what I meant before, if we can start at
12 8:30, whether he has one or two, I think we can finish. Right?
13 Tomorrow.

14 MR. ELLMAN: I think --

15 THE COURT: By 1:30.

16 MR. ELLMAN: I think that's realistic, Your Honor,
17 yes.

18 THE COURT: 8:00, 9:00, 10:00. I'm trying to count --

19 MR. REISS: Totally. So, Your Honor, that would put
20 the closings back until Monday, I assume.

21 THE COURT: No. No. No. No.

22 MR. REISS: I'm sorry.

23 THE COURT: The idea is to do it on Friday so people
24 like you and me can go home. But that means if we have
25 reserved two hours for closing argument -- right?

1 MR. REISS: Right.

2 MR. ELLMAN: Yes.

3 THE COURT: -- that would be -- well, 11:00 or 11:30,
4 including a recess, say 11:00. So if we finish the testimony
5 by 11:00, I think we're pretty good if we start at 8:30. Gives
6 us two and a half hours for your rebuttal witnesses. All
7 right?

8 MR. REISS: Okay, Your Honor.

9 THE COURT: Now, obviously, if you only have one
10 witness, we can finish earlier, we can just get the closing
11 argument. We're still only going to one hour per side?

12 MR. REISS: Yes, Your Honor.

13 THE COURT: I don't know if you plan to renew your
14 motion at the close of all the evidence or not, but you'll
15 probably get the same ruling, because otherwise I'll take it
16 under submission and we'll be at the same place.

17 All right. Anything else to take care of today?

18 MR. REISS: No, Your Honor.

19 MR. ELLMAN: Yes, Your Honor. I'd like to know if the
20 defense is entitled to know the identity of the rebuttal
21 witnesses.

22 THE COURT: I think you should let him know today.

23 MR. REISS: We will.

24 THE COURT: It's less than -- it's less than -- it's
25 about, what, 12, 15 hours away.

1 MR. REISS: We will tell them the one we know about.
2 The second one we're not sure about. So probably the one we
3 know about and we'll let you know if there's a second.

4 THE COURT: No, wait a minute now. The second one,
5 you know, we have to treat her as being on your list, because
6 you have the right to call that second witness. So I think you
7 should let the defense know. It's less than a day.

8 MR. REISS: I will tell them, Your Honor. I'll tell
9 them who we definitely and who we may.

10 THE COURT: That's fine. Then we stand at recess.
11 Thank you very much, Counsel. We're at recess.

12 (Proceedings were adjourned at [!JOB END TIME])

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, A. TRACY JAMIESON, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true and accurate transcript of the proceedings contained herein, held in the above-entitled cause on the date specified therein, and that said transcript was prepared by me.

Signed in Tucson, Arizona, on the 21st day of July, 2017.

s/A. Tracy Jamieson
A. Tracy Jamieson, RDR, CRR