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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The ASSOCIATION OF MEXICAN-AMERICAN EDUCATORS ("AMAE") et al., Plaintiff-Appellants, vs. The CALIFORNIA COMMISSION ON TEACHER CREDENTIALING, Defendant-Appellees.	)	U.S Court of Appeals Docket Nos. 96-17131 & 96-17133 District Court Docket No CV-92-3874-WHO BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Plaintiffs allege two federal statutory claims under Title VI and Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000d et seq. and § 2000e et seq.. Jurisdiction of the subject matter of this action was established in the district court pursuant to 28 U.S.C. § 1331 and § 1343 and 42 U.S.C. § 2000e-5(f)(3). First Amended Complaint, Docket No. ("DKT#") 13.[1]

Plaintiffs appeal from a final judgment of the district court, pursuant to FRCP 58, finding for Defendants on both counts and entering judgment in favor of Defendants. Opinion and Order, DKT# 417 ("Op. & Ord."); Judgment, DKT # 418. This Court has jurisdiction over Plaintiffs' appeal pursuant to 28 U.S.C. § 1291.

A timely appeal was taken by Plaintiffs within the thirty days permitted by Federal Rule of Appellate Procedure ("FRAP") 4(a)(1). Judgment was entered on September 23, 1996, Judgment, DKT# 418; the appeal was filed on October 16, 1996. Notice of Appeal, DKT# 432.

STATEMENT OF ISSUES PRESENTED

I. Whether the initial attempt to "validate" the CBEST--which utterly failed to undertake a job analysis that identified any elements of work behavior and which was therefore unable to determine that the CBEST is "predictive of

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[1] Documents from the record are cited by their district court Docket Number and tabbed in the Excerpts of Record accordingly. Trial Exhibits are cited herein and tabbed in the Excerpts by their trial exhibit number.

or significantly correlated" with elements of work behavior--was a professionally acceptable method for employment test validation.

II. Whether the Defendants' decision to attempt validation of the CBEST for one "generic" position complies with the requirement under Title VI and Title VII that a test which disproportionately impacts minorities be job-related for *each* position the test selects for.

III. Whether the CBEST test items have ever been shown by professionally acceptable methods for employment test validation to actually measure the basic skills they purport to when Defendants have never offered *any* evidence of such a relationship as required by law and when the only study undertaken by Defendants in this regard demonstrated a failure of CBEST items to measure the skills they purport to.

IV. Whether the revised CBEST satisfies the requirements of Title VI and Title VII that the specific skills tested be limited to the "important or critical" reading, writing, and math skills needed by educators when Defendants retained many skills on the CBEST which were determined to be less than important.

V. Whether the passing standard for the CBEST writing sub-test is job-related when the only passing score study ever performed on the writing sub-test demonstrated that 9 or 10--not 12--out of 16 distinguishes between educators who do and do not "write well enough to teach".

VI. Whether the district court complied with the requirements of FRE 706 mandating an expert report and cross-examination for court-appointed experts when it appointed and used an apparently biased court-appointed expert without requiring any report or permitting cross-examination.

STATEMENT OF THE CASE

This action is a civil rights class action challenge to the California Basic Educational Skills Test ("CBEST"), one of the exams required for obtaining a credential to teach, counsel, or administer in the public schools of California. Plaintiffs include eight individual educators and the largest Latino and Asian-dedicated educator organizations in California and one of the largest such African American organizations, the Association of Mexican American Educators, the California Association for Asian-Pacific Bilingual Education, and the Oakland Alliance of Black Educators (collectively, "Plaintiffs" or "Educators"). The district court certified the case as a class action on behalf of all Latino, African American, and Asian educators adversely affected by the CBEST, Op. and Ord. at 6, DKT# 417, a class now conservatively estimated to number over 50,000 educators of color. See Class Cert. Order, DKT# 132 at 10:20-23. Defendants are the State of California and the California Commission on Teacher Credentialing (collectively, "Defendants" or "CTC").

Plaintiffs claim that the CBEST has a disproportionate adverse impact on Plaintiff class members seeking jobs in the public schools without being properly "job-related" to those positions as required by Titles VI and VII. Following trial, the district court ruled for Defendants on both counts. The court ruled that, although the CBEST does adversely impact each of the three ethnic groups in the Plaintiff class, Defendants had met their burden of establishing the test's job-relatedness through a series of validation studies, all of which the court found to be professionally acceptable. The court also ruled that Plaintiffs had failed to prove the existence of less discriminatory, substantially equivalent alternatives. See Op. and Ord., DKT# 417.

Plaintiffs, in pursuing this appeal, contend the district court committed several legal errors in its validity determinations. Instead of requiring that Defendants meet the demanding showing necessary to establish the job-relatedness of the CBEST, the district court based its decision on what it took to be the "self evident" facial validity of the test. Justifying a test which adversely impacts so many on the basis of its appearance as "easy" or "relevant" are the types of simplistic notions that Title VII prohibits. The requirement that tests with adverse impact like the CBEST be validated as job-related is especially appropriate where, as here, a single test is used to limit employment opportunities for not just one, but for a broad array of jobs.

Plaintiffs challenge the court's validity determinations with respect to both the original CBEST, first implemented in 1983, and to the "revised" CBEST which Defendants implemented in 1995, on the eve of trial and after post-litigation studies pointed to infirmities in the test. Even should this Court uphold the "revised" CBEST, the lack of validity for the original exam nonetheless warrants a finding that it was unlawful and a remand for a determination of appropriate relief. Plaintiffs contend, however, that many of the problems with the CBEST's validity--the lack of validation for each position at issue, the lack of validity as to the items, the failure to test for only critical or important skills, and the invalid passing standard on the writing test--have carried over to the revised CBEST. Accordingly, both tests are unlawful.

STANDARD OF REVIEW

This Court reviews the five validity issues raised by Plaintiffs *de novo*. All five issues involve mixed questions of law and fact. The Supreme Court has defined mixed questions as those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). In U.S. v. McConney, 728 F.2d 1195 (9th Cir. 1984), this Court determined, *en banc*, the process for determining the standard of review involving such mixed questions. "If application of the rule of law to the facts requires an inquiry that is 'essentially factual,'...the district court's determination should be classified as one of fact reviewable under the clearly erroneous standard." Id. at 1202. Yet:

> If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about

> the values that animate legal principles, then...the question should be classified as one of law and reviewed de novo.

Id. Most mixed questions will be reviewed *de novo* the Court acknowledged, "because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles." Id.

The Pullman-Standard case was a Title VII disparate treatment case. There, the Supreme Court found that the state-of-mind determination required to discern the intent to discriminate is "essentially factual" in nature, indeed, that it "appears...to be a pure question of fact". Pullman-Standard v. Swint, 456 U.S. at 288, 289. The instant disparate impact case involves, however, a "legal concept" of discrimination, see id.. That is, whether Defendants can justify their use of the adversely impacting CBEST exam through a sufficient showing of "business necessity" and "job-related[ness]". 42 U.S.C. § 2000e-2(k)(1)(A). By definition, the resolution of this question will involve "the consideration of legal concepts and...the exercise of judgment about the values underlying legal principles." McConney, 728 F.2d at 1202. See also Bratt v. County of Los Angeles, 912 F.2d 1066, 1072 (9th Cir. 1990).[2]

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[2] Plaintiffs do not claim, and this Court need not determine, that all issues arising from a Title VII or Title VI disparate impact claim require *de novo* review. The issues raised herein, however, all concern matters in which the facts have been established below and where all that remains is for this Court to exercise its independent legal judgment in applying the law to these facts.

FACTS

I. THE CBEST HAS HAD A "RECURRING...SIGNIFICANT AND SYSTEMATIC" ADVERSE IMPACT ON MINORITY TEACHERS & THE CALIFORNIA STUDENT POPULATION.

Since February 1983, the California Basic Educational Skills Test ("CBEST") has been required for almost all of California's certificated teaching and non-teaching positions in the public schools. *Cal. Educ. Code* § 44252(b) (West's 1993 & Supp. 1997); id. § 44830(b).[3] Teaching positions for which the State has required the CBEST include that of elementary school (or "multiple subjects") teachers, §§ 44259, 44256, and secondary school (or "single subjects") teachers in the areas of Agriculture, Art, Business, English, foreign languages, Health Science, Home Economics, Industrial and Technology Education, Mathematics, Music, Physical Education, Science, and Social Sciences. §§ 44259, 44256, 44257. Non-teaching positions for which the State has required the CBEST include administrators, § 44270, school counselors (or "pupil personnel services"), § 44266, librarians, § 44269, school nurses, § 44267.5, clinical or rehabilitative service personnel §44268, and child center (*e.g.*, pre-school) supervisors, § 8360.1.

Since its inception, the CBEST has adversely impacted minority educations in a "recurring, large, significant and systematic" manner. Exh. 573 at 12; Op. and Ord., DKT# 417 at 26-7. Whites pass the CBEST at a rate of

[3] Unless otherwise noted, all subsequent code references are to the *California Education Code*).

80%, while African Americans, Latinos, and Asians pass at rates of 38%, 49%, and 53%, respectively. Exh. 573 at 12; Op. and Ord., DKT# 417 at 26-7.[4] Throughout the CBEST's history, the CTC has repeatedly acknowledged the adverse impact of the test upon the Plaintiff class. See e.g. Exh. 106 at 5, 107 at 5, 111 at 4, 117 at 4, 122 at 77. So have contractors and committees sponsored by the CTC. Exh. 206 p. 6.9, 2.41, 4.20; Exh. 1855 at p. ii.

The adverse impact observed with respect to the CBEST is not a mirror of the impact typically observed on standardized educational and employment tests. The degree of the CBEST's adverse impact on the math and reading subtests is substantially greater than that observed on most such tests, at least as concerns African Americans and Mexican Americans. Lefkowitz Direct at p. 12-16, Exh. 576A; Exh. 582; T.1878-1880.

Though the CBEST is offered six times each year, Op. and Ord., DKT# 417 at 5, many educators of color who suffer a CBEST failure quickly elect to pursue career options other than public education. According to a CTC study, among minorities who fail the CBEST a single time, 25% of Latinos, 41% of Asians, and 48% of African Americans do not return for further humiliation. Exh. 116 at 6-7, 9. See, e.g., Plaintiff Sam Genis (left public

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[4] The district court's order contains a drafting error. At 26:9, the court reports the White pass rate as 73.4%. This is the pass rate for "All examinees" reported on the line directly below the White pass rate in Dr. Poggio's Direct Testimony. Plaintiffs' and Defendants' experts both agree, the White pass rate is 80%. Exh. 573 at 12:17; Op. and Ord., DKT# 417 at 26:22.

school employment to teach in private schools); Plaintiff Diana Kwan (pursued career in airline industry). Op. and Ord., DKT# 417 at 5-6.

With respect to test-takers of all races, the CBEST fails 45% of incumbent teachers who take it, 25% of California college graduates, 25% of those holding Master's degrees, and 10% of the graduates of Stanford's prestigious School of Education. Poggio Supp. Dir., Exh. 576 at 45-46; Haertel Direct, Exh. 578 at 40:14-41:18; Exh. 122 at 17-22. Defendants have offered no empirical evidence that a widespread basic skills deficiency has ever existed among California public school teachers and/or graduates of California education programs on the order of magnitude suggested by CBEST failure rates. T. 2569:5-2571:19, 2563:1-13; Wright Depo. 12/5/95 at 126:9-127:3; Haertel Dir., Exh. 578 at 40:24-45:12; Poggio Supp. Dir., Exh. 576 at 45; see generally Exhs. 1850, 1973, 1641, 1970.

During the years that the CBEST has been in place, the minority teaching force has largely remained static, with the percentage of African American teachers declining. Exh. 570 at 1, 3. At the same time, the public school student body has moved from a majority white, to a "majority minority" composition. Exh. 50 at 13. Now nearly 60% of the student population consists of ethnic minorities. Id. at 2, 13. See also Exhs. 48, 49, 51.

Nationally, according to the U.S. Department of Education, California has more than 42% of the country's Limited-English-Proficient ("LEP") students. In California's public classrooms, nearly one out of three students come from a home where English is not the primary language. Jew Direct, Exh. 579 at 24:3-7. Currently, there is approximately 1 Spanish bilingual teacher for every 92 Spanish-speaking LEP students; 1 bilingual teacher for every 116 Cantonese LEP students; 1 bilingual teacher for every 690 Vietnamese LEP students, and only 9 bilingual Hmong teachers to serve nearly 30,000 Hmong LEP students. Exh. 51 at 6, 16.

A 1991 report published by the State Department of Education cited the CBEST as one of the primary causes of the severe shortage of bilingual teachers (then estimated at 14,000). Exh. 559 at 13, 19, 27. A CTC-commissioned study found the CBEST is "[t]he greatest barrier to increasing the number of underrepresented groups in teaching". Exh. 206 at 6.9.

II. THE CBEST READING AND WRITING TESTS ARE COLLEGE-LEVEL, THE REVISED MATH TEST IS PRECOLLEGIATE.

The district court, referring only to math items on the recently revised CBEST, concluded that the CBEST tests "at most secondary-level, precollege skills." Op. and Ord. at 11, DKT# 417. The only evidence concerning the other two sub-tests suggests otherwise.

Defendants' expert performed a readability analysis which demonstrated that the mean readability of the reading questions was at grade levels 13.92 and 12.82 respectively, with some passages as high as the 20 to 23rd grade level. T. 1167:17-1170:17; Exh. 637 at A20415-A20416.

The writing test is set at a level substantially higher than required for a college graduate who "writes well enough to teach". Exh. 120 at 20, and Table 20; see *infra* Facts at § IX. The fact that the math test should test only rudimentary math skills was found unremarkable and consistent with other job analyses for teacher jobs by Defendants' expert, Dr. Lundquist. Exh. 1541 at 312; T. 1081, 1095.[5]

Defendants and their contractors consistently have described the CBEST as "college-level". See, e.g., Exhs. 73 at 1; 125 at 12; 206 at 4.3.[6]

III. A SHORT HISTORY OF THE CBEST AND ITS VALIDATION

The CBEST was developed in 1982 by Educational Testing Service ("ETS"), pursuant to a contract with the State of California. The first test was administered in December 1982. The statutory requirement that credentials not be issued and that school districts not hire credential holders absent proof of CBEST passage took effect on February 1, 1983. AMAE v. State of California, 836 F.Supp. 1534, 1538-39 (N.D.Cal. 1993) at DKT# 51.

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[5] In one of the studies Defendants used as a model for their post-litigation job analysis, so few math skills were considered relevant across the educator jobs reviewed that math was dropped entirely from that state's basic skills test. T. 1889:2-25, 978:22-980:4; see also Exh. 13 at 2 (Senator Hart did not think math should be at as high a level as reading and writing).

[6] When the CTC's CBEST program director took the CBEST himself, he did not find the test "too easy", but rather "reasonable and appropriate in terms of its level of difficulty." T. 2604:19-24; Wright Depo. 4/10/95 at 20:21-21:1.

Prior to this litigation, Defendants undertook three validity studies, only two of which were advanced by the CTC as evidence of job-relatedness. The first effort was the 1982 validity study by Dr. Wheeler and Dr. Elias. Op. and Ord. at 32, DKT# 417, Exh. 120. The second was a 1985 study by Dr. Watkins. Op. and Ord. at 33, DKT# 417; Exh. 118.

Though the data was all gathered for a third CBEST validity study in 1991 by CTC employee, Dr. Patricia Brinlee, the Commission never reported the results of this study and never published it in a complete and final report. See Exh. 131; T. 576:24-582:9.[7]

After this litigation was initiated in 1992, Defendants retained Dr. Lundquist who performed the first job analysis *vis-à-vis* the CBEST in 1994 and 1995 (Exh. 1541). She later followed this study with a content validation report in May of 1995 (Exh. 1543). Op. and Ord. at 33, DKT# 417.

The results of Dr. Lundquist's work caused Defendants to significantly revise the CBEST for the first time. Beginning with the August 1995 test, algebra and geometry and similar "higher order" math questions were dropped. Id. at 5; Exh. 1543 at 7-2. In all, 60% of the old CBEST math items were found inappropriate "because they related to nonjob-related skills".

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[7] Six "validity study sessions" at six separate sites were intended to be convened for this study, Exh. 131 at A2539, and the study documents reveal that data were gathered from 112 individuals at six locations: San Diego, Los Angeles, Riverside, Sacramento, Fresno, and the San Francisco Bay Area. Id. at A2522-2524 (see "Study Loc").

Op. and Ord. at 44. These items were supposedly removed from the revised CBEST. Id. at 44-45.[8]

In fact, Dr. Lundquist's job analysis, which had gathered data from over 1,100 teachers, found that approximately 80% of the CBEST math test was not job-related.[9] Dr. Lundquist determined that these results were consistent with other job analyses performed on teacher jobs in other states. Exh. 1541 at 312; T. 1081:3-22; 1094:12-1095:5. After meeting with the CTC, however, she decided to do additional work on the content of the math sub-test alone. T. 1083:17-1084:13; 1086:8-1087:2. This work, which was not part of her original validation proposal to the CTC, is reflected in her content validation report. T. 1087:3-1089:20; 1091:12-1092:11; Exh. 1543; Exh. 187. Nineteen math skills were endorsed by small, unrepresentative "focus groups", as part of this study. Defendants retained these math skills on the CBEST, overriding the judgment of the 1,100 teachers whose data from the job analysis endorsed only 10 math skills. Exh. 1543 at i-iv; T. 1096:1-1098:23; 1105:18-1108:25; 1109:4-1110:2; Exh. 631; T.1117:23-1118:10.

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[8] But see Poggio Sup. Dir., Exh 576 p.29-32 (uncontradicted testimony that 35% of the items on the revised test do not match the revised specifications using Dr. Lundquist's system for matching CBEST items to the revised specifications).

[9] Dr. Lundquist admitted that less than 14 of 40 items on CBEST test forms she had examined would match her Job Analysis specifications and that she had never specifically determined the exact number. T. 1156:9-25. Dr. Poggio's unrebutted analysis, using ETS's item classification, showed that only 6-7 out of 40 math items can be classified as job-related under the Job Analysis. Poggio Dir., Exh. 575 at 22:16-23:7.

Though Dr. Lundquist also substantially revised the CBEST test specifications for reading and writing, compare Exh. 138 (original specifications) with Exh. 1543 at 4-9 to 4-20 (revised specifications), Defendants did not change the content of the reading and writing tests in any way. The same reading items and the same writing prompts written for the prior test specifications are being used on the revised CBEST. Id. at v, 4-23; see also Op. and Ord., DKT# 417 at 44:5-7.

Although all test-takers--including minorities--performed better on the revised math test, Defendants increased the standard required to pass the revised math sub-test from 26 to 29 out of 40. Raising the math passing score to 29 resulted in essentially the same pass rates for all ethnic groups as were observed with the original CBEST. Employing the original passing score of 26 on the revised test would have decreased the CBEST's adverse impact on the Plaintiff class. Poggio Supp. Direct (on Adverse Impact) at 1, 3, Exh. 574; Poggio Sup. Dir., Exh. 576 at n.32, Exh. 541.

IV. THE STATE REJECTED MAKING THE CBEST JOB-RELATED AT THE OUTSET.

The original CBEST test specifications were not developed from job analyses of teaching and non-teaching positions but were written by a politically-appointed "Advisory Board" as mandated by the CBEST legislation. Exh. 32 at 5-8; see specifications at Exh. 138. At the very first Advisory

Board meeting, the State official primarily responsible for implementing the CBEST legislation, instructed the Board in drafting the specifications that:

> The purpose of the test is to ensure a reasonable 'foundation' of basic skills for <u>all</u> teachers; the skills will not necessarily be job-related <u>per</u> <u>se</u>.

Exh. 13 at 3. (emphasis in the original).

In fact, the State considered and explicitly *rejected* performing a job analysis and making the CBEST job-related in 1982. T. 254:13-259:2, 267:10-16; Exhs. 20 at 2; 19 at 1, 2, 4; 13 at 3; 24 at 9953 (T. 270-71); 25 at 1 (T. 271-72); 26 (T. 272-73); 31 at 10016-18 (T. 267-70); 23 at 12-13, 15 (T. 273); 27 (T. 273-80); 36 at 1 (T. 286-90); 35 at 2; 179 at 4; 14 at 4. This decision was at least in part motivated by an awareness of the impending adverse impact of the CBEST and the desire of ETS and the State to insulate themselves from Title VII liability under the mantle of "licensing". T. 254:13-259:2; 267:10-16; Exh. 19 at 1, 2, 4; T. 278:4-6. Defendants elected to live with the "licensing" rationale despite being told by ETS, by a private education attorney, and by their own staff that the CBEST was likely subject to job-relatedness standards. Watkins Depo. 4/17/95 at 92:13-96:16; Exh. 19 at 1, 3; Exh. 14 at 4.[10]

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[10] Moreover, one of the significant reasons for the selection of ETS as CBEST contractor was its ability to meet the "extremely short timeline for the first administration" of the CBEST. Exh. 22 at 3; Exh. 32 at 9. Use of ETS's pre-existing PPST exam, without the requisite *a priori* job analysis, was the only option identified by the State for meeting the statutory deadline. <u>Id</u>.; T. 282:3-285:25. When first runner-up NES informed the State that a job analysis was required, Exh. 31 at 10016-18, its bid was penalized as being "not realistic", as "[t]rying to do too much", and as not "fit[ting] in [the] time line." Exh 27 at 9993-4, T.273:17-280:18.

V. DEFENDANTS FAILED TO VALIDATE THE CBEST AS JOB-RELATED PRIOR TO LITIGATION.

Dr. Wheeler and Dr. Elias were not qualified to undertake the necessary job analyses, nor to investigate the job-relatedness of any employment test such as the CBEST. They did not have the requisite educational or professional training, nor were they familiar with principles of employment testing. T. 96:5-98:4; 106:6-13; 368:13-369:22; 377:13-378:18.

Dr. Wheeler and Dr. Elias, as well as the CTC, admitted that they failed to undertake the necessary job analyses to content validate the CBEST for any job. T. 106:14-25; 376:25-385:5; Wright Depo. 4/11/95 at 19:8-20:11.[11] Because they did not carry out job analyses, they did not identify a single important work behavior for any job. T. 106:18-21; 381:4-11; 382:4-9.

Dr. Wheeler conceded at trial that their study did not comply with the professionally accepted content validation standards in place at the time and that she and Dr. Elias "did not represent the CBEST test as a content valid instrument for the State of California, as part of this study." T. 376:25-385:5.

In carrying out the 1985 study, Dr. Watkins also failed to undertake any job analyses. Dr. Watkins was not qualified--indeed, he admitted he did not know how--to do a job analysis. Watkins Depo. 4/17/95 at 89:4-16, 90:21-

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[11] Dr. Wright is the FRCP 30(b)(6) representative for the CTC. His deposition testimony was submitted at trial pursuant to FRCP 32(a)(2), key portions of which are included in the excerpts at Tabs A, B, and D. The cited portions of Dr. Wheeler's and Dr. Elias's testimony are also included in the Excerpts.

91:17; 21:7-22:5, 42:25-46:22.[12] Having failed to do any job analyses, Dr. Watkins conceded he too failed to identify any important work behaviors for any job. Id. at 89:14-16; see also Wright Depo. 4/11/95 at 43.[13]

Evidence questioning the CBEST's validity surfaced in the CTC's unpublished 1991 study. Some of this evidence corresponded to the same concerns over the validity of the math test reflected in both Dr. Watkins earlier work and Dr. Lundquist's later work. Dr. Brinlee testified that the results of the study suggested the following "global recommendations":

> "(1) that additional time should be given to examinees to take the CBEST; (2) that the appropriateness of some of the skills tested should be reconsidered (*e.g.*, algebra and geometry); and (3) that the second-language/bias-related issues be further investigated by experts in linguistics, testing, and related fields."

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[12] Key portions of Dr. Watkins' deposition testimony was received by the trial court pursuant to Fed.R.Civ.Proc. 32(a)(3)(B) and are included in the Excerpts of Record at Tab C.

[13] Though the lack of job analyses prevented the 1985 Study from confirming the job-relatedness of the CBEST for any position, it did produce significant evidence disconfirming the content validity of the CBEST. Namely: (i) a majority of panelists felt math skills were improperly weighted, over-emphasizing algebra and geometry and a near majority felt reading skills over-emphasized logical as opposed to literal comprehension, Exh. 118 at 14, 27; and (ii) significant differences surfaced with respect to judgments about the relevance of CBEST skills for different job categories; Poggio Dir., Exh. 575 at 18, Lefk. Dir., Exh. 576A at 60-64.

Exh. 571 at 12th page.[14] Though he denied all knowledge, Dr. Brinlee testified these results were conveyed to Dr. Wright, her supervisor. They were also conveyed to the Executive Director of the CTC, and to other staff, id., though not to the public. T. 576:24-582:9. The district court completely ignored this significant disconfirming validity evidence in its review of the CBEST. See generally Op. and Ord.

VI. DEFENDANTS FAILED TO VALIDATE THE CBEST FOR EACH POSITION FOR WHICH IT IS USED.

Dr. Wheeler and Dr. Elias, failed to gather information about the relevance of the CBEST by grade level or subject matter taught. T. 99:9-19; Op. and Ord. at 34, DKT# 417, Exh. 120 at 6. They also failed to gather any information regarding non-teaching positions. T. 104:22-105:25, 379:10-380:12. Dr. Wheeler testified that the importance ratings gathered were all about the generic "job of teaching in California", and that none of these ratings concerned the relevance of the CBEST to nonteaching jobs. As a result, Dr. Wheeler testified, their study did not represent that the CBEST was content valid for nonteaching positions. T. 379:3-380:12.

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[14] Dr. Brinlee, who is currently under a doctor's care, was allowed by the district court to testify by interrogatory. DKT# 366, Court Hearing, 5/15/96 at 11-12; Dr. Brinlee testified that all of the data and documentation in Exh. 131 are accurate and authentic. Exh. 571 at 3rd-11th page; see also Exh. 572.

Dr. Watkins' 1985 study similarly asked all raters to judge the relevance of CBEST questions to a generic "applicant for initial certification". Exh. 118 at 55, 58.[15]

Dr. Lundquist did not perform a literature review of job analyses for nonteaching jobs. Nor did she do separate job analyses for non-teaching positions. Exh. 1541.[16] Instead, she asked a general group of nonteachers to rate skills generated by her job analysis of the generic teacher job. Id. at Appendix F (survey form for "administrators" listing teacher job skills).[17]

Dr. Lundquist did not (and because of small sample size, could not) do any subgroup analysis of job analysis data from "administrators" (*i.e.*, nonteachers). As such, Dr. Lundquist did not examine the validity of the CBEST by job position for nonteachers (*e.g.*, counselor, nurse, librarian, child center supervisors, principals, etc.). T. 1073:7-1074:18.

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[15] Where Dr. Watkins asked judges to rate the relevance of broad CBEST skill categories to different types of positions, though flawed in many respects, significant differences surfaced as to how different job categories view such skills. Exh. 575 at 17-18; see also Exh. 576A at 60-64.

[16] Although Dr. Lundquist did not report it, the ETS Potter Study she reviewed found that differences existed between teacher jobs, warranting separate job analyses. T. 970:6-971:23, 974:9-976:19, Exh. 1583 at 70, 79-80.

[17] Nor were nonteaching positions analyzed as part of the additional validity investigations Dr. Lundquist undertook in her content validation report. Exh. 1543 at ii-vii; T. 1095:22-25.

Dr. Lundquist did not examine proper passing scores for nonteachers, though there is some indication that a lower score for them might have been set. T. 1173:14-1174:15; 1176:6-1177:9; Exh. 1968, Table 14.

To examine whether reading, writing, and math skills differ for separate teaching positions, Dr. Lundquist compared importance ratings for the various skills in her revised specifications by "credential categories". Yet, Dr. Lundquist's "credential category" analysis did not examine all the credential positions at issue, separately, but lumped several together. Exh. 1541 at 131. (Her "single subject" category, for example, contains over 13 separate credential positions. §§44259, 44256, 44257.)

VII. DEFENDANTS NEVER DEMONSTRATED THAT CBEST ITEMS ARE VALID.

According to even Defendants' expert, Dr. Mehrens, the items on a test (*i.e.*, the actual questions) must be "validated" by independent content experts. This means that there must be independent confirmation that the items measure what the test specifications call for. Without this essential step a test cannot be said to be content valid. T. 1475:14-1480:24; Exh. 1640 attached article at 204, 208; Exh. 1632 at 43; Exh. 208 at 26 (Std 3.3).[18] This is

[18] The item writers--*i.e.*, Educational Testing Service ("ETS") or National Evaluation Systems ("NES"), the original and current CBEST contractors--should not be the judge of the match. T. 1477:11-23.

required by professional standards. T. 1479. See APA Standard 3.3, Exh 208; Uniform Guidelines §§ 1607.14(C)(4), 1607.15C(5), Exh. 210.

Defendants' expert, Dr. Mehrens, could not determine if CBEST items had ever been "item validated" in the 1982 ETS study, the 1985 study, or in Dr. Lundquist's 1995 Job Analysis (Exh. 1541) and her 1995 Content Validation Report (Exh. 1543). T. 1480:25-1482:17. A review of these studies reviews no such process has ever occurred *vis-à-vis* CBEST items. See generally Exhs. 120, 118, 1541, 1543; Lefk. Dir., Exh. 576A at 41:11-42:4.

In fact, although not disclosed in any of her reports, Dr. Lundquist's 1995 validation work did have content experts attempt to match items to revised specifications--an attempt that failed, as did an attempt by her own staff. T. 1146:21-1152:13.

Thus, although Dr. Lundquist originally proposed to have content experts compare items on CBEST forms to the revised specifications, Exh. 187 at 33; Exh. 1541 at xvi, she never ultimately did so in either her job analysis or content validation report. See generally Exh. 1541; Exh. 1543. Whenever assigning CBEST items to her revised specifications, Dr. Lundquist took ETS' item categorizations as a given and did not have content experts independently evaluate items either as to their fit with ETS's specifications or with her revised specifications. T. 1143:17-1146:20.

There is no evidence as to how ETS made their characterizations or of the qualifications of the characterizers.[19] The one item an ETS "item expert" was asked to categorize at trial was said to belong in one of two specification categories (II.F. or I.B.), neither of which corresponded to ETS's official categorization of that item (I.D.1). T. 914:18-915:15; Exh. 131 at A2422, A2399 (#19); T. 933:2-12.

VIII. DEFENDANTS FAILED TO RETAIN ONLY IMPORTANT OR CRITICAL SKILLS ON THE REVISED CBEST

Central to the content validation process is the determination of which skills among the array of skills job incumbents are surveyed about shall be retained for inclusion in the final test specifications. The Uniform Guidelines and prevailing professional standards require that only "important" or "critical" skills be part of employment tests. Op. and Ord. at 47, n.35.

Dr. Lundquist used a standard which selected for testing reading, writing, and math skills that were rated as less than important by the educators she surveyed. Dr. Lundquist's importance scale rated skills as "Minor" (a value of 1), "Important" (2), or "Critical" (3). She retained skills which had a mean or average importance rating of 1.5. In her scale, 1.5 corresponds to the mid-point between minor and important. Exh. 624, T. 1032:8-11.

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[19] There is also no documentation regarding the process of item categorization under the new contractor, NES, or information about who is making such item classifications or their qualifications. Dr. Lundquist's input was limited to a single phone call. T. 1266:19-1267:14.

Dr. Lundquist originally intended to use a mean 2.0 importance retention criteria when she proposed to content validate the CBEST. Exh. 187 at 32, T. 1029:23-1032:7.

Dr. Lundquist's "less than important" threshold is lower than that deemed professionally acceptable by ETS in the Rosenfeld and Tannebaum study, a model teacher basic skills study cited by Dr. Lundquist, (Exh. 216 at iii-iv, T. 1032:12-1033:2; 1065:16-1066:18) or by the CTC itself in its content validation of the MSAT, the subject matter certification exam for California elementary school teachers. Exh. 126 at p. 15. Had a 2.0 retention criteria been used, only 6 math (not 10) and 28 reading (not 37), and 22 writing (instead of 27) skills would have been retained based on the Job Analysis data. T. 1058:3-24; Exh. 1541 at Appendix O.

IX. THE ONLY EVIDENCE OF A VALID PASSING SCORE FOR THE WRITING SUB-TEST SUPPORTS A PASSING STANDARD OF 9 OR 10, NOT 12, OUT OF 16.

The CBEST writing sub-test consists of two essays, each of which are scored by two graders. Each grader gives the essay a score ranging from zero to four points. See Op. and Ord. at 56, DKT# 417; DKT# 228, Wright Declaration (7/25/95) at 3. Thus, the maximum points allowable on the writing sub-test is 16. Since the CBEST's inception, Defendants have required 12 out of 16 to pass. Id.

The only evidence advanced by Defendants to justify a 12 on the writing test is Appendix F to Exh. 120 (the "Burbank letter"), which briefly reports a recommendation from "44 carefully-selected" readers. The "vote" of the readers based on scale definitions is not a professionally acceptable passing score study. See generally, Exh. 211 (ETS publication listing professionally acceptable passing score methodologies); T. 1488:4-15.

The only passing score study ever performed on the writing test was done by Dr. Wheeler in 1982 with the same 44 readers. (Dr. Lundquist did not study the writing passing standard.) Poggio Dir., Exh. 576 at 4-5 & n.3; see also T. 1171:6-1172:15; 1521:8-11. These individuals made judgments about essays without knowing what score they had been assigned. T. 361:12-19; Exh. 120 at 14-15, 20-21. As with reading and math, the study was intended to establish a borderline performance standard. T. 387:4-6; 113:13-114:5.

The data gathered by Dr. Wheeler shows that borderline performance between "writes well enough to teach" and "does not write well enough to teach" is at a score of 9. Exh. 120 at 20, Table 20 (A544). Her data can be analyzed two ways. Under a Borderline-Groups methodology, her "Not Certain" category represents a group of scores for borderline test-takers. Their median or mean performance is a 9. Exh. 211 at 34; Exh. 120 at Table 20, see also T. 397:2-11; and T. at 493:2-11 (CTC rounds cutscores down).[20] Under

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[20] Dr. Poggio has used this exact same methodology to set passing scores on writing tests in Kansas. Exh. 219 at 30-31.

a Contrasting-Groups methodology, "the score at which there are just as many 'qualified' test-takers [*i.e.*, "Passers"] as 'unqualified' test-takers ["Not Passers"] is between 8 and 9. Exh. 211 at 35.

Reducing the Writing cutscore to 9 or 10 would reduce the CBEST's adverse impact. Exh. 1387 at Attachment B1-3 (all Plaintiff groups suffer adverse impact on writing exam); Exh. 116 at 5 and Table 1 (writing has lowest pass rate of 3 subtests and largest number of people bunched around cut score range of 37-41); see also Poggio Direct, Exh. 575 at 38:7-12.

X. THE COURT APPOINTED AN APPARENTLY BIASED EXPERT, THEN DENIED PLAINTIFFS THE OPPORTUNITY TO DISCERN HIS OPINIONS AND BIASES.

As trial commenced, the district judge announced that the desire to appoint a "court-appointed expert" to assist the court with the technical issues in the case. See T. 388:3-11. In order to procure an expert first, the court delayed the "expert" phase of the trial until June 1996.

The district judge ultimately announced he intended to appoint Dr. Stephen Klein of the Rand Corporation. Id. The court permitted the parties to propound interrogatories to Dr. Klein but struck and/or refused to require Dr. Klein to respond to certain interrogatories seeking to ascertain potential bias.[21]

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[21] Among the interrogatories stricken were questions as to the nature of Dr. Klein's personal and professional relationships with individuals employed by Defendant CTC, and the approximate time spent and remuneration received by Dr. Klein each year pursuing his substantial private consulting practice for state licensing and certification boards (15% of which is for California boards

The court forbade all objections to the completeness of Dr. Klein's response. 5/8/96 Hearing Tr. at 6:22-24, DKT# 362.[22]

Plaintiffs objected to the appointment of Dr. Klein.[23]

The court denied these objections and appointed Dr. Klein "as the court's expert", informing Plaintiffs that "you will have an opportunity to examine him *fully* with respect to any views that he may have." 5/15/96 Hearing Tr. at 3:24-4:7, DKT# 366 (emphasis added). The court added:

> I expect to do it the way I've done it in the past. At some point, probably toward the end of the trial, I'll put on Dr. Klein and ask him his views with respect to certain matters that have come up during the trial, and he will expound them, and then he will be vigorously cross-examined by [Plaintiffs' counsel] and [Defendants' counsel] and that will be the extent of what he does.

Id. at 21:16-22:4. On the first day of trial, the court issued an order formally setting forth Dr. Klein's duties and informing the parties that "[i]f the Court calls him as a witness, he will be available to the parties for such examination

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and agencies including Defendant CTC). Id.; see Plaintiffs Interrogatories, DKT# 356 at Nos. 3 and 10; compare with Dr. Klein's Response at 5-7.

[22] Upon compiling the Excerpts of Record Plaintiffs learned for the first time that the district court did not make Dr. Klein's Response to Interrogatories part of the record. Accordingly, Plaintiffs have filed a motion with their brief seeking to supplement the record.

[23] Plaintiffs objected to Dr. Klein because: (1) he has worked closely in the recent past with the Defendant CTC, including Dr. Wright, (2) he has developed a substantial private consulting practice in support of certification exams with several state licensing boards including many in California, (3) he has already taken positions on issues raised in the case and in support of certification exams like the CBEST, and (4) he has worked closely and extensively with one of Defendants' key experts, Dr. Mehrens. Plaintiffs' Objections to Proposed Court-Appointed Expert, DKT# 364.

as is proper." Order Appointing Technical Advisor at 3, DKT# 375. The court required that the parties split Dr. Klein's hourly fee. Id.

The district judge never required Dr. Klein to provide the parties with a report detailing either Dr. Klein's opinions or the substance of his *ex parte* discussions with the court. At the end of trial, the court reversed his earlier pronouncements and informed the parties for the first time that they would not be allowed to cross-examine Dr. Klein to discover the substance of his opinions or his potential biases or for any other purpose. T. 2062:14-22.

SUMMARY OF THE ARGUMENT

Plaintiffs include California's major minority educator organizations. These Educators and the class they represent are dedicated to improving the quality of teachers who will effectively educate minority and non-minority children alike. Plaintiffs abhor the notion of teachers in the classroom committing spelling and grammatical errors and any suggestion to the contrary is both demeaning and insulting. This case turns, though, not on whether one values a quality public education, but on the value of the CBEST itself. As presently constituted, the CBEST does not tell us which teacher candidates are truly likely to commit errors in basic skills that will undermine our schools. This is so because the test continues to suffer from a lack of validity and job-relatedness for all the diverse positions for which it screens.

While the effectiveness of the CBEST is undoubtedly a critical issue for our schools, there is a related, and equally critical public policy at stake here. This policy--which Congress recognized in 1964 and 1991 in passing and amending the Civil Rights Act--seeks to ensure that arbitrary barriers are not erected which disproportionately interfere with minority access to employment opportunities. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Given the widely-acknowledged and crucial need to integrate California's public school teaching force, the CBEST is appropriately scrutinized and scrutinized closely. Where the test fails to comport with professional and legal standards, it must not be allowed to continue to operate without appropriate modification.

It is by now well-established that, where an employment or educational practice causes an adverse impact, Plaintiffs prevail under Title VII or Title VI unless Defendants can justify the disparate effect by proving the practice is job-related and consistent with business or educational necessity. Griggs v. Duke Power Co, 401 U.S. 424, 432 (1971); 42 U.S.C. § 2000e-2(k)(1)(A)(i); Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582 (1983) (approving of disparate impact standard under Title VI and its regulations in a Title VI employment setting); Larry P. By Lucille P. v. Riles, 793 F.2d 969, 982 n.9 (9th Cir. 1984), amended, (9th Cir. 1986).[24] In determining whether

[24] As this Court acknowledged in Larry P. and as the Supreme Court implied in Guardians, the standards and burdens of proof under Title VI and Title VII for purposes of this case are the same. See also Groves v. Alabama State Bd. of Educ., 776 F.Supp. 1518, 1530 (M.D. Ala. 1991).

the CBEST complies with professional and legal standards for establishing job-relatedness, one cannot rely on "face validity" as the district court did so often below. ("The CBEST is self-evidently..."; "...the skills...appear to be central to teacher competence."; "The very nature of the CBEST makes evident its applicability..."). Op. and Ord. at 12, 47, 48. Reliance on an "'obvious', but unmeasured" belief in job relatedness does not establish job-relatedness or business necessity. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977); Craig v. County of Los Angeles, 626 F.2d 659, 667 n. 8 (9th Cir. 1980), cert. denied, 450 U.S. 919 (1981). Instead, it is essential that selection devices be 'validated' by professionally acceptable methods. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Blake v. City of Los Angeles, 595 F.2d 1367, 1378 (9th Cir. 1978).

With references to Plato, Henry Adams, the Tax Court, and a dissenting Washington state appellate opinion, Op. and Ord. at 9-11, the district court below evinces the extent to which it was lured by the CBEST's appealing "face" validity.[25] Though well-intentioned, many of the determinations the district court made in seeking to uphold the CBEST past, present, and future, will seriously undermine well-established employment testing precedent should this Court allow them to stand and will not ultimately serve our schools well.

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[25] As a result, the court effectively placed an inappropriate Ward's Cove burden on Plaintiffs, requiring merely that Defendants produce an explanation for a given validity rationale and placing on Plaintiffs the burden to persuade otherwise. See Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); see 42 U.S.C. § 2000e-2(k)(1)(A) (overturning Ward's Cove).

The professionally acceptable and legally required steps for content validating a teacher test that has an adverse impact are well-established and were not in serious dispute below. They are:

(1) Develop an original list of "competencies" or "work behaviors"--that is, specific job skills considered necessary for successful job performance--by studying the job; this can involve a literature review, job observations and interviews, and work with a committee of experts;

(2) Conduct a job analysis survey to determine the appropriate final list of work behaviors; typically this involves asking a representative sample of current job incumbents about the skills they consider necessary to successfully perform their job;

(3) Determine the test domain or specifications, that is, the blueprint for the test, based on the work behaviors identified and endorsed through the job analysis;[26]

(4) Have item-writers who are content experts (*e.g.*, in reading, writing, or math) write test questions which will measure the skills called for by the test specifications;

(5) "Validate" the items that have been written, that is, confirm that they actually measure the skills they purport to by having independent content experts review the items to determine what they assess; and finally

(6) Determine by professionally acceptable methods the appropriate passing score(s) for the test which will be "reasonable and consistent" with normal expectations for a minimally competent educator.

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[26] A "Job Analysis" in the global sense is typically understood to include all of the first three steps. See e.g., Exh. 1541 (Defendants' Job Analysis); SIOP Principles, Exh. 207 at 21 ¶C. Though a test, like the CBEST, need not include everything that is done on the job, "the investigator should describe the whole job as part of the job analysis, indicate what is included in the [test] domain and explain why certain parts were or were not included." Id. at 20.

See Uniform Guidelines, §§ 1607.14(C)(1)-(4), 1607.6(H), Exh. 210 (attached in Addendum pursuant to Circuit Rule 28-2.7); Exh. 1640 attached article by Defendants' expert at 197, 204-209.

Plaintiffs focus here on five issues with respect to the district court's rulings which conflict with these requirements. This Court reviews the trial court's determinations on these issues *de novo*. See Standard of Review, *supra*.

Plaintiffs first challenge the pre-litigation validity studies. These studies did not follow the steps outlined above at all. Rather, they merely asked panels of teachers whether CBEST test questions appeared relevant to their jobs. Importantly, neither the test questions nor the test specifications were developed pursuant to the requisite job analysis, which requires, *inter alia*, an identification of critical or important work behaviors. The failure to follow the required procedures resulted in a non-job-related CBEST, as best reflected from Defendants own evidence. When they finally carried out a job analysis as a result of this litigation, at a minimum, 60-80% of the CBEST math test was determined to be invalid and not-job-related. As such, even if this Court goes no further, the original CBEST must be declared unlawful and this cause remanded for the appropriate relief.

Secondly, Plaintiffs argue it was legal error for the court below to approve the use of a single test across an unprecedented array of different jobs when that test had not been validated as job-related for each "position in question" as required by Title VII. The CTC is entitled to use a single test such as the CBEST for twenty different job positions as it currently does only if it analyzes each job separately and separately demonstrates job-relatedness. Defendants lumped as many as thirteen different teaching jobs into a single category for analyzing the CBEST's job-relatedness. Defendants have never adequately studied the CBEST's job-relatedness for nonteaching positions.

Thirdly, in fourteen years of CBEST operation, Defendants have never carried out the crucial "item validation" step (No. 5, above). The district court completely ignored all evidence on this point. Defendants never offered *any* evidence that CBEST items actually measure the skills they purport to as required by law. The only work undertaken by Defendants in this area demonstrated that the CBEST lacks item validity.

Fourthly, Plaintiffs argue that Dr. Lundquist's standard for including skills on the revised CBEST was unlawfully low. According to the Uniform Guidelines and professional testing standards, only skills that are deemed important or critical to successful job performance are to be retained for testing. Dr. Lundquist kept many skills which were rated as less than important.

Fifthly, Plaintiffs challenge the job-relatedness of the passing score on the CBEST writing test. This issue and the evidence around it was ignored by the district court. The only professionally acceptable study ever carried out on the CBEST writing sub-test evidences the appropriate passing standard as 9 or 10, not 12 out of 16.

The Educators raise one final issue for the Court. During trial, the district judge appointed a court expert to assist him with the technical issues in deciding the case. The expert was, in Plaintiffs' view, seriously biased in favor of Defendants. The court committed legal error, in direct violation of Federal Rule of Evidence 706(a), by not requiring that its expert submit a report of his determinations and in not permitting Plaintiffs to cross-examine the expert to determine the substance of, basis for, and any possible bias in his opinions. The procedural taint from this legal error warrants a remand should this Court not otherwise rule for Plaintiffs on the validity issues raised.

ARGUMENT

I. IT WAS LEGAL ERROR FOR THE DISTRICT COURT TO UPHOLD THE ORIGINAL CBEST WHERE NO JOB ANALYSIS WAS PERFORMED; ABSENT IDENTIFICATION OF WORK BEHAVIORS, THE CTC COULD NOT VERIFY THAT THE ORIGINAL CBEST "CORRELATED WITH" *ANY*, MUCH LESS *ONLY* "IMPORTANT" WORK BEHAVIORS.

The record reflects that the State chose not to undertake a job analysis of any educator job when the CBEST was implemented. See Facts § IV., *supra*. All three psychometricians responsible for the 1982 and 1985 studies testified that they did not undertake job analyses, and as such, that they could not and did not identify any work behaviors or job duties for any job. See Facts § V., *supra*. Dr. Wheeler ultimately conceded that the 1982 study could not and did not represent that the CBEST was content valid. Id.

In determining whether the original or revised CBEST meets the legal requirements of Titles VI and VII for job-relatedness, this Court looks to industry standards as embodied in the Federal Uniform Guidelines on Employee Selection Procedure ("Uniform Guidelines"), 29 C.F.R. § 1607 et seq., Exh. 210;[27] the 1987 SIOP Principles, Exh. 207, and the 1985 APA Standards, Exh. 208.[28] Washington v. Davis, 426 U.S. at 247 n.13; Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (employment tests to be validated by "professionally acceptable methods"); Contreras v. City of Los Angeles, 656 F.2d 1267, 1280-81 (9th Cir. 1981), cert. denied, 451 U.S. 1021 (1982).

The standards in effect at the time of the pre-litigation studies all make abundantly clear that those studies did not comply with professionally acceptable methods for establishing job-relatedness through content validation. The Uniform Guidelines (implemented in 1978) state that:

> There should be a *job analysis* which includes an analysis of the *important work behavior(s)* required for successful performance. . ."

and further, that

> *Any* job analysis should focus on the *work behavior(s)* and the *tasks* associated with them.

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[27] Though the Guidelines are not binding and do not have the force of law, Clady v. County of Los Angeles, 770 F.2d 1421, 1428 (9th Cir. 1985), cert. denied, 475 U.S. 1109 (1986), they are "entitled to great deference" by the courts. Contreras v. City of Los Angeles, 656 F.2d 1267, 1281 (9th Cir. 1981), cert. denied, 451 U.S. 1021 (1982), citing, Griggs, 401 U.S. at 434.

[28] See also, Exh. 650 (1980 "Principles", precursor to SIOP Principles), and 1974 APA Standards, Exh. 209.

29 C.F.R. § 1607.14(C)(2), Exh. 210 (emphasis added). The 1974 APA Standards provide that:

> When a test is represented as having content validity for a job or class of jobs, the evidence of validity should include a *complete description of job duties*, including relative frequency, importance, and skill level of such duties. Essential.

Exh. 209 at Standard E12.4 (emphasis added). The 1980 Principles state that:

> *Job analysis* is *essential* to the development of a content oriented procedure....[that this envisions] A systematic examination of the job....[resulting in] *task or activity statement[s]*....[or in the case of] work behavior analysis...*behavior statement[s]*....

Exh. 650 at 4-5 (emphasis added). All three sets of standards envision a systematic analysis of the job, producing a set of work behaviors, job duties or tasks specific to the job being analyzed. By the authors own admissions, however, neither the 1982 nor the 1985 CBEST studies complied with these essential job analytic requirements.

Similarly, the courts at the time of the pre-litigation studies required (and require still today) a thorough analysis of the job, including an identification of important work behaviors specific to the job.[29]

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[29] Officers for Justice v. Civil Service Com'n, City and County of San Francisco, 371 F.Supp. 1328, 1336 (N.D. Cal 1973) ("Content validation requires a detailed analysis of the requirements of the job and the translation of that analysis into carefully formulated test questions."); Guardians Ass'n of New York City v. Civil Serv., 630 F.2d 79, 95 (2nd Cir. 1980), cert. denied 452 U.S. 940 (1981) ("the test-makers must have conducted a suitable job analysis" which involves "an analysis of the important work behavior(s) required for successful performance and their relative importance."); Contreras v. City of Los Angeles, 656 F.2d 1267, 1281 (9th Cir. 1981) (employer must determine that particular trait or characteristic, skill or ability being measured "is an important element of work behavior;" approving use of job analysis to do

It was clear legal error for the court to conclude that the '82 and '85 validation studies each constituted "an appropriate form of a job analysis under the professional standards of the time". Op. and Ord. at 49, DKT# 417, citing 1980 Principles.[30] First of all, as to the requirement of a job analysis and identification of specific job tasks, there has been no substantive change in the professional standards since the early 1980's as the court implies. As set forth above, the law and the professional standards required these steps for content validation in 1982, and the law and the standards require them today.[31]

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so); Firefighters Institute, Etc. v. City of St. Louis, 549 F.2d 506 511 (8th Cir. 1977), cert. denied, 452 U.S. 938 (1981) ("Constructing a content valid exam and proof of its validity requires as a first step a thorough analysis of the job to be performed."); see also Legault v. Russo, 842 F.Supp. 1479, 1488 (D.N.H. 1994) (demonstration of content validity "necessarily begins with a thorough job analysis. . ."); Fickling v. New York State Dept. of Civil Service, 909 F.Supp. 185, 190 (S.D.N.Y. 1995).

[30] Not only is the court's selective reading of the 1980 Principles in error, see citations *supra*, but it bears noting that for this radical rewriting of employment testing standards, the court relied on testimony from Dr. Mehrens, see Mehrens Direct, Exh. 1969 at 23, 19-20. Dr. Mehrens is not an expert in industrial organizational psychology (employment testing) or the standards that pertain to that field, such as the 1980 Principles. Moreover, he has limited employment-related validation experience. T. 1432:2-1432:15. Dr. Mehrens is Defendants' expert in educational testing. Defendants' employment testing expert, Dr. Lundquist, offered no such interpretation of the 1980 Principles.

[31] The same Uniform Guidelines were in effect in the early 1980's that are in effect today. The revised APA Standards and the SIOP Principles have not substantively changed the requirements at issue. SIOP Principles, Exh. 207 at 21 ¶C. ("Job Content Domains Should be Defined on the Basis of Accurate and Thorough Information About the Job.....Definition of a job content domain should be based on analysis of tasks, activities, or responsibilities of job incumbents....[This d]etermination...requires a job analysis..."); 1985 APA Standards, Exh. 208 at 60 ("Content validation should be based on a thorough

Moreover, the very authority the court relied on actually undermines its position. The court cited the Ninth Circuit's explanation of the validation process in Craig v. County of Los Angeles, 626 F.2d 659, 662 (9th Cir. 1980), cert. denied, 450 U.S. 919 (1981). As applied here, Craig requires:

> The [CTC] must first specify the particular [reading, writing, and math skills] which the [CBEST] is being used to identify or measure. The [CTC] must then determine that [those] particular [reading, writing, and math skills are] [] important element[s] of work behavior. Finally, the [CTC] must demonstrate by "professionally acceptable methods" that the selection device is "predictive of or significantly correlated" with the element[s] of work behavior identified in the second step.

Id. (quoting Albemarle v. Moody Paper Co., 422 U.S. 405, 431 (1975). In fact, the CTC's pre-litigation validation work accomplished the first step (in designing CBEST test specifications and questions), *skipped the second*, and, with the two validation studies, attempted the third. Because Defendants never actually studied any educator jobs, however, they never identified any tasks, job duties, or work behaviors for any educator jobs as required by the second step.[32] And because they had failed to identify key work behaviors for any jobs, Defendants could not demonstrate that any particular CBEST skill "correlated with" any work behavior as required by the third step.

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and explicit definition of the content domain of interest. For job selection, classification and promotion, the characterization of the domain should be based on job analysis.").

[32] Note that the Craig formulation explicitly requires that specific work behaviors be "identified in the second step." Id.

The fallacy of the court's ruling that the early studies established the CBEST's job-relatedness is best demonstrated by the Defendants' own evidence. When Defendants finally undertook a job analysis after the litigation was commenced, it found that a significant portion of the math exam tested "non-job-related skills". Op. and Ord. at 44, DKT# 417[33]

All the pre-litigation studies attempted was to ask panels of educators whether particular CBEST questions seemed relevant to the generic "job of teaching". Op. and Ord. at 34, 36, DKT# 417; Exhs. 118, 120.[34] Absent the correlation of the test content with specific elements of work behaviors required for specific teaching and non-teaching jobs, the State's pre-litigation validity studies do no more than demonstrate that in the *opinion* of numerous California educators the skills and abilities measured by the CBEST are moderately relevant (not necessarily "critical" or "important" as required by the Guidelines) to some abstract notion of "teaching" as a whole. This general opinion evidence, like the notion "facial validity" is insufficient to meet Defendants' burden of establishing job-relatedness. Dothard v. Rawlinson, 433 U.S. 321,

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[33] The district court's recent denial of all costs to Defendants appears to recognize the fact that Plaintiffs established a violation of the Civil Rights Act *vis-à-vis* the pre-litigation validation of the CBEST. The court held that "plaintiffs' case did have merit. In 1995...defendants modified the CBEST examination...." Order 2/12/97, DKT# 444 at 3 (emphasis in original).

[34] Dr. Watkins also asked whether the generic CBEST skills--like "writing" or "logical comprehension" related to the job of teaching. Op. and Ord. at 35. This extra step did not cure the fundamental flaw flowing from a lack of a job analysis. The CTC was still unable to establish that such generic skills correlated with any specifically identified work behavior for any job.

331, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); Blake v. City of Los Angeles, 595 F.2d 1367, 1378 (9th Cir. 1979). "[O]pinion evidence that [certain skills or characteristics] are useful in [the job], does not prove job relatedness, but rather only a good faith belief of job relatedness." Craig, 626 F.2d at 667 n.8 (citations omitted).

II. IT WAS LEGAL ERROR FOR THE DISTRICT COURT TO NOT REQUIRE DEFENDANTS TO DEMONSTRATE JOB-RELATEDNESS FOR EACH TEACHING AND NON-TEACHING POSITION FOR WHICH THE CBEST IS USED.

Since its inception, Defendants have rested their claim for the CBEST's use as a screen for some twenty different job positions on evidence addressing the test's validity as a screen for a single generic teaching job. See Facts § VI., *supra*.

The problem with this approach is that "teaching" is not a single job. Unlike a bar exam which authorizes practice in any area of law, a credential authorizes practice in a narrow specialization. See Facts § I, *supra*. A holder of a Single Subject Math credential cannot teach English; an English credential holder cannot teach multiple subjects in an elementary classroom; a holder of a Pupil Personnel Services Credential (school counselor) cannot serve as a vice-principal, etc. Each credential is a separate "position" with separate job duties within the meaning of Title VII. See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

Plaintiffs do not assert that "basic skills" *in the abstract* are not job-related for some or even all of the jobs at issue. Instead, the question raised here concerns whether *all* the specific reading, writing and math subskills the CBEST seeks to measure are related to specific reading, writing, and math tasks in *all* the different jobs. It simply does not follow (and Dr. Lundquist's job analysis did not allow sufficient examination of this) that the same skills are required (or even relevant) for all teaching or all non-teaching positions (counselors, librarians, school nurses, child center supervisors, administrators, etc.). See e.g., notes 13 and 15, *supra* (teachers and nonteachers appear to have different views of the relevance of certain broad CBEST skills).

A job analysis and evidence of job-relatedness is required for *each job* for which a test, such as the CBEST, selects candidates. Title VII explicitly requires a demonstration of job-relatedness "for the position in question". 42 U.S.C. § 2000e-2(k)(1)(A)(i). It would subvert the plain meaning of the Act to permit employers to avoid this requirement when using the same test for more than one position. To the contrary, the Uniform Guidelines and the professional standards consistently make clear that for *each* use of a test as a screen for a job, the user must demonstrate the test's validity as to that job. Uniform Guidelines, 29 C.F.R. §§ 1607.14(A) ("*Any* validity study should be based upon a review of information *about the job* for which the [test] is to be used. The review should include a job analysis...") (emphasis added), 1607.14(C)(2), 1607.15(C)(3), Exh. 210; SIOP Principles, Exh. 207 at 20, 21; APA Standards, Exh. 208 at 14 (1.6), 60-61, 61. In particular, Standard 10.7 of the 1985 APA Standards makes clear that:

> If the validity of a test for selection into a particular job is based on content-related evidence, a similar inference should be made about the test in a new situation *only if* the critical job factors are substantially the same (*as is determined by a job analysis*)...

Id. (emphasis added); see also id. at 64, Std. 11.1 Comment ("Job analyses provide the primary basis for defining the content domain. If a single examination is used in the licensure or certification of people employed in a variety of settings and specializations, a number of jobs may need to be analyzed.") The Defendants are entitled to use one test to select for so many different job positions. However, Title VII and professional testing standards require that they first study each job separately via separate job analyses.[35]

The district court did not address the fact that Defendants' validation studies, including Dr. Lundquist's, have never analyzed the CBEST *vis-à-vis* separate teaching positions. See Facts § VI., *supra*.[36] The district court's conclusion that one or more separate job analyses were not in order for nonteaching jobs is a legal conclusion supported only by untested "face" validity: "The very nature of the CBEST makes evident its applicability to

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[35] Indeed, when Plaintiffs' expert Dr. Lefkowitz developed a battery of tests for different clerical jobs at Banker's Trust, he independently analyzed 35 separate job positions. Similarly, separate job analyses were warranted here. T. 1608:20-1609:10, 1866:16-1867:16.

[36] Dr. Lundquist did not do subgroup analysis by subject taught; rather she lumped all single subject teachers together, although she had sufficient sample sizes to look at some subjects. T. 1058:25-1059:19; 1060:16-18; Exh. 626. (Nor did she do subgroup analysis by grade level taught, by geographic region, or rural versus urban, T. 1062:16-1063:9, although these factors were analyzed in ETS' Rosenfeld and Tannebaum Job Analysis which Dr. Lundquist referred to and relied. T. 978:2-21; Exh. 216 at v.)

nonteachers..." Op. and Ord. at 48, DKT# 417.[37] The district court claims to rely on "evidence that nonteachers generally rated the items on the CBEST to be as relevant to their jobs as did teachers." Op. and Ord. at 49, DKT# 417. As set forth above, the legal and professional standards require more than this simple opinion evidence when seeking to determine the comparability of a single test across different job positions. Only after separate job analyses have been carried out enabling a psychometric confirmation of "the critical job content" of both jobs, can a user seek to employ a test for selection in a second job position. Exh. 208, 1985 APA Standards at 10.7. As set forth above, no job analysis was carried out for "teachers" until 1995; no job analysis has ever been carried out for any non-teaching position.[38]

III. IT WAS LEGAL ERROR FOR THE DISTRICT COURT TO ASSUME THAT THE CBEST MEASURES WHAT IT PURPORTS TO WHEN DEFENDANTS HAVE NEVER MET THIS CRITICAL CONTENT VALIDATION BURDEN.

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[37] The court, in support, cites Dr. Elias' testimony that she believed CBEST skills were generally applicable to nonteaching jobs. Op. and Ord. at 49, DKT# 417. Dr. Elias conceded this was a wholly untested assumption. T. 105:24-25.

[38] In addition to the legal error, the district court's findings here are also clearly erroneous. Wheeler and Elias admitted that nonteachers were not making judgments "relevant to their jobs" as the court claims. Instead, nonteachers in 1982 were only making judgments about the relevance of CBEST items to the generic teacher job. T. 104:22-105:25, 379:10-380:12. Similarly, in Dr. Watkins' 1985 study, nonteachers were not rating the relevance of CBEST items to their jobs, but to a generic "applicant for initial certification". Exh. 118 at 55, 58.

In fourteen years of operation, Defendants have never demonstrated the validity of CBEST items in terms of their ability to actually measure the specific reading, writing, and math skills called for by the test specifications. See Facts § VII., *supra*; Post-Trial Proposed Findings of Fact, DKT# 410 at Findings ¶¶P49(b), 95, 97; Plaintiffs' Brief in Response to Court's Questions, DKT# 411 at 6.

Even Defendant's expert, Dr. Mehrens, agrees that this is one of the key steps called for in content validation. Id.; see also Summary of the Argument Section, *supra*, Step (5). The Uniform Guidelines require, for example, that "[f]or any [test] measuring a [] skill, or ability the user should show that...the [test] measures and is a representative sample of that [] skill or ability" Uniform Guidelines § 1607.14(C)(4); see also § 1607.15C(5), Exh. 210. The 1985 Standards state that test specifications and test items should be sufficiently in sync "so that knowledgeable experts can judge the relations of items to the domains they represent." Exh. 208 at 26, Std. 3.3.

In Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), cert. denied, 451 U.S. 1021 (1982), this Court approved a content validation procedure only where defendants had had "experts individually review[] each question and decide[] if it tested one of the critical elements identified in the [job analysis] phase." Id. at 1282. The Court determined that this "examination review phase" constituted the third part of the Craig test, *i.e.*, that "the exam be significantly correlated with those elements of work behavior identified in the job-analysis phase." Id.

Here, the court again merely accepted the face validity of the CBEST when, without any evidence in support, it concluded that "the CBEST has been shown to be a valid measure of [the] basic skills [tested]." Op. and Ord. at 51, DKT# 417; see also id. at 29. To the contrary, the record demonstrates Defendants have *never* made this showing. Dr. Lundquist attempted it twice, once with committees of content experts, once with her own staff. Each time her efforts to validate CBEST items to actual CBEST skills failed, as did the effort of one of ETS's item experts at trial. See Facts § VII, *supra*.[39]

Even if the old or the revised CBEST test *specifications* are acceptably job-related, Defendants must still show that *the test itself* is job-related. Fourteen years after the test's substantial adverse impact began, there is only disconfirming evidence of the CBEST's ability to actually measure the skills called for. It is significant to recall here that, other than the math test, Dr. Lundquist's work did not "change" the actual CBEST test content. She

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[39] The item "accuracy" review performed by panels of practicing educators in the 1982 study, Exh. 120 at 6, Op. and Ord. at 33, DKT# 417, was not "item validation" by content experts. "Accuracy" concerns whether the question has the correct (and only one correct) answer. It is not a review of whether an item actually measures one of the sub-skills called for in the CBEST's specifications. Moreover, as the Standards and Dr. Mehrens well recognize, the psychometric judgments involved in item validation are to be performed by "content specialists", *e.g.*, university math and english professors, not job incumbents. Exh. 1640, attached article at 208; Exh. 208 at Std. 3.3.

retained all CBEST reading items and writing prompts and filled in the eliminated portion of the math test with other pre-existing CBEST math items. Exh. 1543 at v, 4-23; see also Op. and Ord., DKT# 417 at 44:5-7. To the extent the present CBEST items continue to be "bad" items, *i.e.*, are vague, abstract, and not measuring concrete, specific job-related skills (written as they were to non-job-analytic test specifications), then all of Dr. Lundquist's efforts to validate the test by altering its surface specifications counts for little.

IV. IT WAS LEGAL ERROR FOR THE COURT TO PERMIT DEFENDANTS TO RETAIN CBEST SKILLS WHICH ARE NOT "IMPORTANT...FOR SUCCESSFUL [JOB] PERFORMANCE."

The district court endorsed Dr. Lundquist's retention of several skills for testing on the CBEST that were judged by job incumbents in the job analysis to be "less than important" (*i.e.*, halfway between minor and important). See Facts § VIII., *supra*; Op. and Ord. at 47, n.35, DKT# 417. The court found that Dr. Lundquist's 1.5 Mean Importance Rating/80% Applicable decision rules to be "manifestly reasonable professional judgments" Id. The applicable standard is not whether Dr. Lundquist is being "reasonable", *i.e.*, providing a rational basis for her decision-making. Instead, the burden is on her to make professional judgments that will demonstrate the CBEST is manifestly job-related. Griggs v. Duke Power Co., 401 U.S. at 432. Dr. Lundquist's decision rules fail to meet this challenge.

Dr. Lundquist's use of a 1.5 mean importance rating is inconsistent with the Uniform Guidelines' requirement that only critical or important skills be selected for measurement. 29 C.F.R. § 1607.14(C)(2). See also SIOP Principles, Exh. 207 at 19 (A [test] may sample a given job performance domain, but if that domain is not an important part of the job, the value of the procedure for employment purposes in negligible."); 1985 APA Standards, Exh. 208 at 61, 64. The skills must be "required" for competent performance, not merely relevant to a job. Id. at 64.

In fact, where as here, the test in question does not measure the *whole* job, but only a few *critical* or "necessary prerequisite" skills, then the content validity evidence must demonstrate that job incumbents actually consider those skills *critical* and not just "relevant" or even just somewhat "important". See Uniform Guidelines, 29 C.F.R. § 1607.14(C)(2), Exh. 210 (where test does not seek to measure work behaviors "constituting most of the job", "[t]he work behaviors selected for measurement should be critical work behavior(s)"). See T. 1854:25-1857:2. Indeed, the APA Standards also note the need to establish "criticality" under content validity when one is not attempting to represent the whole job. Exh. 208 at 1.6; see also Exh. 207 at 22 ("A Job Content Domain May be Restricted to Critical...or to Prerequisite...Skills...). Even Dr. Mehrens' writings concede that tests like the CBEST seek to measure the domain of "*critical* knowledge and skills", Exh.

1640, attached article at 206, that is, those which are not merely important, but without which harm would be done to children. Id.

The district court's rationale that "1.5 rounds up to 2.0", Op. and Ord. at 47, n.35, DKT# 417, is hardly sufficient to rise to the level required by these professional standards.

Indeed, the primary study Dr. Lundquist relied upon in fashioning her job analysis, the ETS Rosenfeld and Tannebaum Job Analysis, used a higher retention criterion (halfway between "moderately important" and "very important"). Exh. 216 at iii-iv. Likewise, when the CTC validated one of its other primary teacher tests, the MSAT, it used essentially the same criterion as the ETS study. Exh. 125 at 15-16. Yet, the best evidence that Dr. Lundquist herself considered a 2.0 Mean Importance standard the professionally appropriate standard for retaining CBEST skills is that she proposed using this very standard in her original validation proposal, Exh. 187 at 32, and she used it for her content validation report.[40] Exh. 1543 at iv.[41]

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[40] Even though Dr. Lundquist used a 2.0 standard in her content validation report on the way to retaining 19 math skills (instead of the 10 endorsed in the job analysis), the 2.0 issue still matters for the math skills as well. Dr. Lundquist's overriding the results of the job analysis based on data from over 1,100 educators with feedback from 20-odd member, unrepresentative focus groups should not be deemed lawful by this Court. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 n.32 (1975) (studies conducted "at a time when the litigation was about to come to trial" and which are "so closely controlled by an interested party in litigation must be examined with great care."). Dr. Lundquist testified that she undertook not to *investigate* the CBEST's validity, but--like an advocate--to "establish" it with her studies. T. 939:9-940:18. The district court's approval of Dr. Lundquist's last minute "second bite at the apple", was rooted entirely in the face validity of the math

The court also erred to the extent it considered the "80% Applicable" endorsement criterion "stringent". Applicable includes the category "Minor" as well as "Important" or "Critical". Exh. 624 at 2. This contrasts with other studies that Dr. Lundquist looked at where not only was the importance rating higher, but the initial 80% "applicable" screen did not include minor categories. See Rosenfeld and Tannebaum, Exh. 216 at iii-iv; T. 1065:16-1066:18. Directly contrary to the district court's finding, see Op. and Ord. at 47:6-8, DKT# 417, under Dr. Lundquist's weak standards, an item could be retained that was approved by less than 50% of the judges as critical or important.[42]

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skill descriptors (not even the particular items at issue): "this result seemed absurd..."; "some of the skills...appear central to teacher competence". Op. and Ord. at 40, 47, DKT# 417. In fact, the court improperly substituted its own opinion as to what should be on the CBEST in place of the 1,100 job incumbents, finding the job analysis results "questionable", id. at 46, even though Dr. Lundquist herself reported them to be "consistent with results of other recent teacher job analyses." Exh. 1541 at 312. Even using the weak 1.5 retention standard from the job analysis would result in a very different math test than that currently in place. Exh. 1541 at xv. In fact, the 2.0 retention standard should be used to ensure that only those math skills which are actually critical to all jobs at issue are on the CBEST.

[41] The Court, without any citation to the record, errs in stating that Plaintiffs' experts agree that a standard as low as 50% important is acceptable. Dr. Poggio's standard is more stringent than Dr. Lundquist's: he rates only entry or pre-requisite skills, and requires that a "strong majority" of the rating be in the top two levels (crucial and important) of the ratings. T. 2196:24-2198:5; 2218:22-2219:25.

[42] See, e.g., items rated as follows: 25% critical (3), 20% important (2), 35% minor (1), and 20% not applicable (0).

V. THE DISTRICT COURT IGNORED THE RESULTS OF THE ONLY PROFESSIONALLY ACCEPTABLE STUDY EVER CARRIED OUT ON THE CBEST WRITING SUB-TEST WHICH EVIDENCES THE JOB-RELATED PASSING STANDARD IS 9 OR 10, NOT 12 OUT OF 16.

Since its inception, the passing standard on the CBEST writing sub-test has been 12 out of 16. This standard was derived from a "vote" of 44 essay readers in 1982 based on the four scale definitions (not pass, marginal not pass, marginal pass, pass), which is not a professionally acceptable method for setting passing scores. The only professionally acceptable passing score study on the writing test--using the same 44 readers and a blind scoring system--empirically demonstrates that the proper, job-related passing score on the CBEST writing sub-test is 9 or 10. There are large numbers of minority educators bunched around the writing cut score. Altering that score downward would reduce the CBEST's adverse impact. See Facts § IX., *supra*.[43]

As the district court recognized, even if the CBEST is a valid measure of writing skills, the test is unjustified under Titles VI and VII if the particular cut score "is not itself a valid measure of the minimal ability necessary to become a competent teacher." Op. and Ord. at 52, DKT# 417, quoting Groves v. Alabama State Bd. of Educ., 776 F.Supp. 1518, 1530 (M.D. Ala. 1991). Indeed, in Groves, an arbitrary, politically established teacher test

[43] The district court ignored this evidence and this issue despite the fact that it was presented below. See Post-Trial Proposed Findings of Fact and Conclusions of Law, DKT# 410 at Findings ¶P45(b); Plaintiffs' Brief in Response to Court's Questions, DKT# 411 at 24.

cut score was struck down as failing to meet the standard of being "educationally justified" under Title VI. See also Richardson v. Lamar Cty. Bd. of Ed., 729 F.Supp. 806, 819 (M.D. Ala. 1989), aff'd 935 F.2d 1240 (11th Cir. 1991); Rogers v. Int'l Paper Co., 510 F.2d 1340 (8th Cir. 1975). Similarly, in the Guardians case, the Second Circuit noted:

> No matter how valid the exam, it is the cutoff score that ultimately determines whether a person passes or fails. A cutoff score unrelated to job performance may well lead to the rejection of applicants who were fully capable of performing the job. When a cutoff score unrelated to job performance produces disparate racial results, Title VII is violated.

Guardians Ass'n of New York City v. Civil Serv., 630 F.2d 79, 105 (2nd Cir. 1980), cert. denied 452 U.S. 940 (1981).

Table 20 to the 1982 Elias and Wheeler report is shocking in its clarity: the line between "writes well enough to teach" and "does not write well enough to teach" is 9 or 10. This is the line that demarcates "minimal ability to become a competent teacher", see Groves, *supra*, and the line which "relate[s] to job performance", see Guardians, *supra*. Regardless of what passing standard the Burbank readers may have desired to vote for or Superintendent Honig may have decided *appeared* reasonable to him, any line above 9 or 10 is not job-related, increases the test's adverse impact, and violates Titles VI and VII. Id.; see also Uniform Guidelines, 29 C.F.R. § 1607.14(C)(4) ("If a test purports to sample a work behavior...the manner and setting of the selection procedure and *its level and complexity* should closely approximate the work situation.") (emphasis added).[44]

VI. THE DISTRICT COURT FAILED TO COMPLY WITH FRE 706'S REQUIREMENT OF AN EXPERT REPORT AND CROSS-EXAMINATION.

Even if this Court is inclined to uphold the trial court's rulings, those determinations were procedurally tainted and must be remanded for a new trial. Plaintiffs believe a possible explanation for the district court's repeated reliance on the CBEST's face validity in contravention of well-established Title VII jurisprudence may be the result of the unreported influence of Dr. Klein. We do not know the extent of Dr. Klein's *ex parte* communications with the court, nor the influence these communications had with the court, nor the extent to which extreme views and unfamiliarity with employment testing standards could have been tempered by the heat of cross-examination. We know none of this because the district court did not require any report of the "advice" he received from Dr. Klein and, most importantly, denied Plaintiffs their right to cross-examine the court's expert. See Facts § X., *supra*.

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[44] Though the district court believed that the use of "Dale", an example of a borderline teacher candidate, tended to depress the judges estimated performance scores on reading and math as part of the 1982 Wheeler and Elias study, Op. and Ord., DKT# 417, at 56, Defendants were unable to establish that Dale played any role in the writing passing score study (which took place at a separate time and place and with different judges than the reading/math study). T. 361:3-8; see Exh. 120.

The Federal Rules of Evidence ("FRE") make clear that, with respect to court-appointed experts:

> A witness so appointed *shall* advise the parties of the witness' findings, if any. . . . The witness *shall* be subject to cross-examination by each party, including a party calling the witness.

FRE 706(a) (emphasis added). In requiring no report from Dr. Klein, nor allowing him to be cross-examined, the court committed legal error, tainting the entire ruling.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) adjudge the original CBEST unlawful and remand for appropriate retroactive relief; and (2) adjudge the revised CBEST unlawful and remand for appropriate relief; or, in the alternative, (3) if the Court is not inclined to rule in Plaintiffs' favor on the validity issues presented, then remand for a new trial based on the procedural taint underlying the court's rulings below.

ATTORNEYS FEES & RELATED CASES

Should Plaintiffs prevail on this appeal and the underlying action in any respect, Plaintiffs intend to seek costs and attorneys fees pursuant to 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1988. Plaintiffs know of no other related cases pending before this Court.

//

Dated in San Francisco, California, on the 7th day of March 1997.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, John Affeldt, hereby state that attached brief is double-spaced (with the exception of headings, footnotes and quotations more than two lines), and that the brief is proportionately spaced, together with a 14 point typeface. The text style is in times roman and the total word count is 13,182.

Dated: March 7, 1997

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Attorneys for Plaintiffs-Appellants

Testing and Selecting Employees Guidelines

[¶ 4010]

The following Uniform Guidelines on Employee Selection Procedure were adopted on August 25, 1978, by the Equal Employment Opportunity Commission, the Civil Service Commission, Department of Justice, and the Department of Labor's Office of Federal Contract Compliance Programs. The rules, becoming effective on September 25, 1978, are designated as U G.E.S.P. (1978), Sections 1 through 18, and are made part of the official regulations of the EEOC, 29 CFR 1607; OFCCP, 41 CFR 60-3; Department of Justice, 28 CFR 50.14; and the former Civil Service Commission, 5 CFR 300.103(c).

AUTHORITY Secs. 201, 202, 203, 203(a), 205, 206(a), 301, 303(b), and 403(b) of E O 11246; as amended by sec 715 of Civil Rights Act of 1964, as amended (42 U S C 2000(e)-14)

General Principles

[¶ 4010.01]

Sec. 1 Statement of purpose.

A *Need for uniformity—Issuing agencies* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers

B *Purpose of guidelines* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin They are designed to provide a framework for determining the proper use of tests and other selection procedures These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles

C. *Relation to prior guidelines* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession These guidelines are intended to be consistent with existing law

[¶ 4010.02]

Sec. 2 Scope.

A *Application of guidelines* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"), by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"), by the Civil Service Commission and other Federal agencies subject to section 717 of Title VII, by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act, by the Department of Justice in exercising its responsibilities under Federal law, by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended, and by any other Federal agency which adopts them

B *Employment decisions* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above

C *Selection procedures* These guidelines apply only to selection procedures which are used as a basis for making employment decisions For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program, but recruitment practices are not considered by these guidelines to be selection procedures Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D *Limitations* These guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap

E *Indian preference not affected* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation

[¶ 4010 03]

Sec. 3 Discrimination defined Relationship between use of selection procedures and discrimination

A *Procedure having adverse impact constitutes discrimination unless justified* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied

B *Consideration of suitable alternative selection procedures* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines

[¶ 4010.04]

Sec. 4 Information on impact.

A *Records concerning impact* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B below in order to determine compliance with these guidelines Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size

B *Applicable race, sex, and ethnic groups for recordkeeping* The records called for by this section are to be maintained by sex, and the following races and ethnic groups Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO–1 series of reports The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly See sections 4E and 17(4), below

C *Evaluation of selection rates. The "bottom line"* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component

D *Adverse impact and the "four-fifths rule"* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force

E *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work

[¶ 4010.05]

Sec 5 General standards for validity studies.

A *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B *Criterion-related, content, and construct validity* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance See 14B below Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated See section 14D below.

C *Guidelines are consistent with professional standards* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D C., 1974) (hereinafter "A.P A Standards") and standard textbooks and journals in the field of personnel selection

D *Need for documentation of validity* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below

E *Accuracy and standardization* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report Selection procedures should be administered and scored under standardized conditions.

F *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact

G *Method of use of selection procedures* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis See sections 3B, 14B (5) and (6), and 14C (8) and (9)

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered

I *Use of selection procedures for higher level jobs* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years Use of selection procedures to evaluate applicants for a higher level job would not be appropriate

(1) If the majority of those remaining employed do not progress to the higher level job,

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period, or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job

J *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time If such a study is not technically feasible, see section 6B If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law

K *Review of validity studies for currency* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above There are no absolutes in the area of determining the currency of a validity study All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated

[¶ 4010.06]

Sec. 6 Use of selection procedures which have not been validated.

A *Use of alternate selection procedures to eliminate adverse impact* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program See section 13 below Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible

B *Where validity studies cannot or need not be performed* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below

(1) *Where informal or unscored procedures are used* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law

(2) *Where formal and scored procedures are used* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to elimi-

nate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

[¶ 4010.07]

Sec. 7 Use of other validity studies.

A. *Validity studies not conducted by the user* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met

(1) *Validity evidence* Evidence from the available studies meeting the standards of section 14B below clearly demonstrates that the selection procedure is valid,

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used, and

(3) *Fairness evidence* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (2) above but do not contain an investigation of test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness

C. *Validity evidence from multiunit study* if validity evidence from a study covering more than one unit within an organization statisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly

D. *Other significant variables* If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above

[¶ 4010.08]

Sec. 8 Cooperative studies.

A *Encouragement of cooperative studies* The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines

B *Standards for use of cooperative studies* If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly

[¶ 4010 09]

Sec. 9 No assumption of validity.

A. *Unacceptable substitutes for evidence of validity* Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity Specifically ruled out are. assumptions of validity based on a procedure's name or descriptive labels, all forms of promotional literature, data bearing on the frequency of a procedure's usage, testimonial statements and credentials of sellers, users, or consultants, and other nonempirical or anecdotal accounts of selection practices or selection outcomes

B. *Encouragement of professional supervision* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job

[¶ 4010 10]

Sec. 10 Employment agencies and employment services.

A *Where selection procedures are devised by agency* An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to device and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact If adverse impact exists the agency should comply with these guidelines An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines

B *Where selection procedures are devised elsewhere* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers If adverse impact results the agency or service should comply with these guidelines If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information

[¶ 4010 11]

Sec 11 Disparate treatment

The principles of disparate or unequal treatment must be distinguished from the concepts of validation A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines, nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines

[¶ 4010.12]

Sec 12 Retesting of applicants.

Users should provide a reasonable opportunity for retesting and reconsideration Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting The user may however take reasonable steps to preserve the security of its procedures

[¶ 4010.13]

Sec 13 Affirmative action.

A *Affirmative action obligations* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives

B *Encouragement of voluntary affirmative action programs* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them, but are not intended to impose any new obligations in that regard The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976) That policy statement is attached hereto as appendix, section 17

Technical Standards

[¶ 4010 14]

Sec. 14 Technical standards for validity studies.

The following minimum standards, as applicable should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines See sections 6 and 7 above

A *Validity studies should be based on review of information about the job* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity Any method of job analysis may be used if it provides the information required for the specific validation strategy used

B *Technical standards for criterion-related validity studies*—(1) *Technical feasibility* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information The possibility of bias should be considered both in selection of the criterion measures and their application In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups

(3) *Criterion measures* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures Whatever criteria are used should represent important or critical work behavior(s) or work outcomes Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparsion of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences, or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0 05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure

(6) *Operational use of selection procedures* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering Generally, if other factors reman the same, the greater the magnitude of the relationship (e g , coorelation coefficent) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity

(7) *Overstatement of validity findings* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard. cross-validation is another

(8) *Fairness* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job class, or test developers, and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations* Users conducting a study of fairness should review the A.P A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results

(d) *When unfairness is shown* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected

(e) *Technical feasibility of fairness studies* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below) an investigation of fairness requires the following

(i) An adequate sample of persons in each group available for the study to achieve findings of statistical significance Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness, but the user has the obligation otherwise to comply with these guidelines

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences, or such factors should be included in the design of the study and their effects identified

(f) *Continued use of selection procedures when fairness studies not feasible* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness

C. *Technical standards for content validity studies* —(1) *Appropriateness of content validity studies* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job

(2) *Job analysis for content validity* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s) Any job analysis should focus on the work behavior(s) and the tasks associated with them If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job

(3) *Development of selection procedures* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representa-

tive sample of the work product of the job In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability, and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity

(5) *Reliability* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure

(6) *Prior training or experience* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole

(7) *Content validity of training success* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job

(8) *Operational use* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i e , a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job

(9) *Ranking based on content validity studies* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance

D *Technical standards for construct validity studies*—(1) *Appropriateness of construct validity studies* Construct validity is a more complex strategy than either criterion-related or content validity Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below

(2) *Job analysis for construct validity studies* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in

question Each construct should be named and defined, so as to distinguish it from other constructs If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity

(3) *Relationship to the job* A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) above The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s) The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above

(4) *Use of construct validity study without new criterion-related evidence* —(a) *Standards for use* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7 However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of subparagraphs section 14B (2) and (3) above for the additional jobs or groups of jobs

(b) *Determination of common work behaviors* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same

Documentation of Impact and Validity Evidence

[¶ 4010.15]

Sec. 15 Documentation of impact and validity evidence.

A *Required information* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below

(1) *Simplified recordkeeping for users with less than 100 employees* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO–1, et seq , reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin,

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin, and

(c) The selection procedures utilized (either standardized or not standardized)

These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area However, it is not necessary to maintain records by race and/or national origin (see § 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8)

(2) *Information on impact* —(a) *Collection of information on impact* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are

called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below If the determination of adverse impact is made using a procedure other than the "four-fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available

(b) *When adverse impact has been eliminated in the total selection process* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated

(c) *When data insufficient to determine impact* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially

(3) *Documentation of validity evidence*—(a) *Types of evidence* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below)

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below)

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below)

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines

(c) *Completeness* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below Evidence denoted by use of the word "(Essential)" is considered critical If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete The user should maintain and have available the information called for under the heading "Source Data" in sections 15B(11) and 15D(11) While it is a necessary part of the study, it need not be submitted with the report All statistical results should be organized and presented in tabular or graphic form to the extent feasible

B *Criterion-related validity studies* Reports of criterion-related validity for a selection procedure should include the following information

(1) *User(s), location(s), and date(s) of study* Dates and location(s) of the job analysis or review of job information, the date(s) and loca-

tion(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential) If the study was conducted at several locations, the address of each location, including city and State, should be shown

(2) *Problem and setting* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided A description of existing selection procedures and cutoff scores, if any, should be provided

(3) *Job analysis or review of job information* A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential) Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential) Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential) The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential) Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential)

(4) *Job titles and codes* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U S Employment Service's Dictionary of Occupational Titles

(5) *Criterion measures* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential) A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential) If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential) All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential)

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential) A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable Descriptions of educational levels, length of service, and age are also desirable

(7) *Description of selection procedures* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential) If commercially available selection procedures are studied, they should be described by title, form, and publisher (essential) Reports of reliability estimates and how they were established are desirable

(8) *Techniques and results* Methods used in analyzing data should be described (essential) Measures of central tendency (e g , means) and measures of dispersion (e g , standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential) Where groups are too small to obtain reliable evidence of the magnitude of the relationship need not be reported separately Statements regarding the statistical significance of results should be made (essential) Any statistical adjustments, such as for less then perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained, and uncorrected correlation coefficients should also be shown (essential) Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential) Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential) These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question Where test fairness or unfairness has been demonstrated on the basis of other studies a bibliography of the relevant

studies should be included (essential) If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential) Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential) All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential)

(9) *Alternative procedures investigated* The selection procedures investigated and available evidence of their impact should be identified (essential) The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential)

(10) *Uses and applications* The methods considered for use of the selection procedure (e g , as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential) This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential) The purpose for which the procedure is to be used (e g , hiring, transfer, promotion) should be described (essential) If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential) If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential)

(11) *Source data* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures These records should be made available upon request of a compliance agency In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers Records should be maintained which show the ratings given to each sample member by each rater

(12) *Contact person* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential)

(13) *Accuracy and completeness* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results

C *Content validity studies* Reports of content validity for a selection procedure should include the following information

(1) *User(s), location(s) and date(s) of study* Dates and location(s) of the job analysis should be shown (essential)

(2) *Problem and setting* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided A description of existing selection procedures and cutoff scores, if any, should be provided

(3) *Job analysis—Content of the job* A description of the method used to analyze the job should be provided (essential) The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential) Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential) Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential) The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s)

(4) *Selection procedure and its content* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential) If commercially available selection procedures are used, they should be described by title, form, and publisher (essential) The behaviors measured or sampled by the selection procedure should be explicitly described (essential) Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a

representative sample of the knowledge, skill, or ability should be provided (essential)

(5) *Relationship between the selection procedure and the job* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential) The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential) Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential) If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained Measures of central tendency (e g , means) and measures of dispersion (e g , standard deviations) and estimates of reliability should be reported for all selection procedures if available Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis

(6) *Alternative procedures investigated* The alternative selection procedures investigated and available evidence of their impact should be identified (essential) The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential)

(7) *Uses and applications* The methods considered for use of the selection procedure (e g , as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential) This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential) The purpose for which the procedure is to be used (e g , hiring, transfer, promotion) should be described (essential) If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential) In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance

(8) *Contact person* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential)

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results

D *Construct validity studies* Reports of construct validity for a selection procedure should include the following information

(1) *User(s), location(s), and date(s) of study* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential)

(2) *Problem and setting* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided A description of existing selection procedures and cutoff scores, if any, should be provided

(3) *Construct definition* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential) This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential) There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential) Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential)

(4) *Job analysis* A description of the method used to analyze the job should be provided (essential) A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential) The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential) Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable

work behaviors or work products should be made (essential)

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential) The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential) Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group

(7) *Relationship to job performance* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential) Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential) Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential) Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential)

(8) *Alternative procedures investigated* The alternative selection procedures investigated and available evidence of their impact should be identified (essential) The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential)

(9) *Uses and applications* The methods considered for use of the selection procedure (e g , as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential) This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential) The purpose for which the procedure is to be used (e.g , hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential) If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results

(11) *Source data* Each user should maintain records showing all pertinent information relating to its study of construct validity

(12) *Contact person* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential)

E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above In addition, the following evidence should be supplied

(1) *Evidence from criterion-related validity studies*—a *Job information* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential) A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential)

b *Relevance of criteria* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential)

c *Other variables* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential) A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential)

d *Use of the selection procedure* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential)

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential) Copies of reports published in journals that are not commonly available should be described in detail or attached (essential) Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential) If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential)

(2) *Evidence from content validity studies* See section 14C(3) and section 15C above

(3) *Evidence from construct validity studies* See sections 14D(2) and 15D above

F *Evidence of validity from cooperative studies* Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential)

G *Selection for higher level job* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide (1) a description of the job progression structure, formal or informal, (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression, and (3) an identification of any anticipated changes in the higher level job In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H *Interim use of selection procedures* If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential)

Definitions

[¶ 4010.16]

Sec. 16 Definitions.

The following definitions shall apply throughout these guidelines

A *Ability* A present competence to perform an observable behavior or a behavior which results in an observable product

B *Adverse impact* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group See section 4 of these guidelines

C *Compliance with these guidelines* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law See section 6B, above.

D *Content validity.* Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job See section 5B and section 14C

E *Construct validity* Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance See section 5B and section 14D

F *Criterion-related validity* Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior See sections 5B and 14B

G *Employer* Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontactor covered by Executive Order 11246, as amended

H. *Employment agency* Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended

I *Enforcement action* For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds, but not a finding of reasonable cause or a concil- ation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J *Enforcement agency* Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K *Job analysis* A detailed statement of work behaviors and other information relevant to the job

L *Job description* A general statement of job duties and responsibilities

M *Knowledge* A body of information applied directly to the performance of a function

N *Labor organization* Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O *Observable*, Able to be seen, heard, or otherwise perceived by a person other than the person performing the action

P *Race, sex, or ethnic group* Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin

Q *Selection procedure* Any measure, combination of measures, or procedure used as a basis for any employment decision Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms

R. *Selection rate* The proportion of applicants or candidates who are hired, promoted, or otherwise selected

S *Should* The term "should" as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users

T *Skill* A present, observable competence to perform a learned psychomoter act

U *Technical feasibility* The existence of conditions permitting the conduct of meaningful criterion-related validity studies These conditions include (1) An adequate sample of persons available for the study to achieve findings of statistical significance, (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized, and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy See section 14B(2) With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8)

V *Unfairness of selection procedure* A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance See section 14B(7)

W *User* Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user

X *Validated in accord with these guidelines or properly validated* A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines

Y *Work behavior* An activity performed to achieve the objectives of the job Work behaviors involve observable (physical) components and unobservable (mental) components A work behavior consists of the performance of one or more tasks Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors

Appendix

[¶ 4010.17]

Sec. 17 Policy statement on affirmative action (see section 13B).

The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well '

(1) Equal employment opportunity is the law of the land In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics The remedy for such past and present discrimination is twofold

On the one hand, vigorous enforcement of the laws against discrimination is essential But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics Without such efforts equal employment opportunity is no more than a wish The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether precentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the precentages of those groups available in the relevant job market who possess the basic job-related qualifications

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market,

(b) A recruitment program designed to attract qualified members of the group in question,

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field,

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications,

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection,

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs, and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons Selection under such plans should be based upon the ability of the applicant(s) to do the work Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity

Respectfully submitted,

Harold R Tyler, Jr ,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council

Michael H Moskow,
Under Secretary of Labor

Ethel Bent Walsh,
Acting Chairman, Equal Employment Opportunity Commission

Robert E Hampton,
Chairman, (former) Civil Service Commission

Arthur E Flemming,
Chairman, Commission on Civil Rights

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement, and it concurs and joins in the adoption of this policy statement

Done this 26th day of August 1976

Richard Albrecht,
General Counsel,
Department of the Treasury

[¶ 4010.18]

Sec. 18 Citations.

The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)" The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission

The official citation is

"Section ——, Uniform Guidelines on Employee Selection Procedure (1978), 43 FR —— (August 25, 1978) "

The short form citation is

"Section ——, U G E S P (1978), 43 FR —— (August 25, 1978) "

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation The specific additional citations are as follows

Equal Employment Opportunity Commission
29 CFR Part 1607

Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60-3

Department of Justice
28 CFR 50 14

Civil Service Commission
5 CFR 300 103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1–18 If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation For example, section 6A of these guidelines could be cited for EEOC as follows "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR ——, (August 25, 1978), 29 CFR Part 1607, section 6A "

[The next page is 4083]

CERTIFICATE OF SERVICE

I, Daisy Muhammad, state I am a citizen of the United States, over eighteen years of age and am not a party to the within action. My business address is 1535 Mission Street, San Francisco, California, 94103.

On March 7, 1997, I caused a copy of the attached **BRIEF OF APPELLANT** and **EXCERPTS OF RECORD, VOLUME ONE** and **EXCEPRTS OF RECORD, VOLUME TWO**, to be served at the below addresses:

Via First Class Mail
Stephanie Wald
Supervising Deputy Attorney General
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50 Fremont Street, #300
San Francisco, CA 94105-2239

Via Overnight Mail
Nancy Rafuse
R. Lawrence Ashe
Paul, Hastings, Janofsky & Walker
600 Peachtree Street, NE, #2400
Atlanta, GA 30308

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 7, 1997

D. Muhammad

Daisy Muhammad