

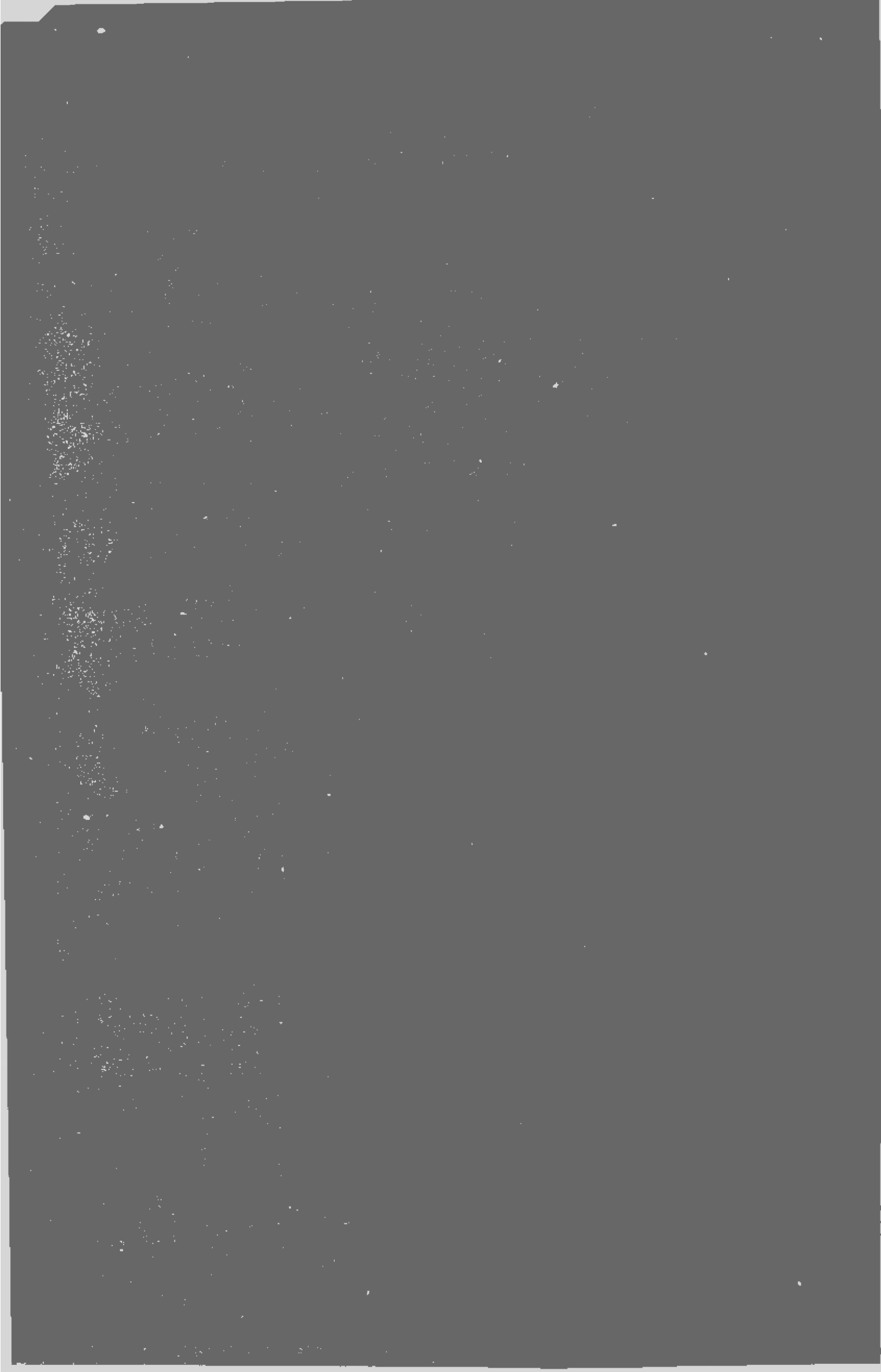


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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
NORTH CAROLINA ASSOCIATION	)	
OF EDUCATORS, et al.,	)	Civil Action
	)	No. 4476
Plaintiff-Intervenors,	)	
	)	
v.	)	
	)	
STATE OF NORTH CAROLINA,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

INTRODUCTION TO SUBMISSION OF
PLAINTIFF-INTERVENORS

The case at bar comes before the Court on the basis of the record established by the parties in the course of deposition and discovery proceedings over the past 17 months.

Pursuant to the Court's pre-trial order of January 21, 1975, plaintiff-intervenors submit herewith their proposed findings of fact and legal argument. In addition, plaintiff-intervenors attach hereto as Appendix No. 1 a listing of the witnesses, exhibits and other documents constituting the evidence before the Court.

1/ Paragraph 3 of the pre-trial order provides that the evidence "shall be admitted subject to any written objections served by any of the parties on or before March 1, 1975." Plaintiff and plaintiff-intervenors moved on February 24, 1975, for an order striking from the record certain exhibits to defendants' answers to plaintiff's request for admission and declaring that any explanatory or qualifying statements of defendants' counsel submitted as part of defendants' answers are not evidence. Defendants responded urging the Court to deny the motion or to amend the pre-trial order to permit reopening of the record to receive the disputed materials. Plaintiff and plaintiff-intervenors have replied to defendants' response. To date, the Court has not ruled on the plaintiff and plaintiff-intervenors' motion to strike.

-INTERVIEW

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PROPOSED FINDINGS OF FACT

A. Nature of the Action.

1. Plaintiff is the United States of America which instituted this action on October 16, 1973.

2. Plaintiff-intervenors, granted leave to intervene herein on February 12, 1974 (Order of Judge F. T. Dupree, Jr.),^{2/} are:

a. The National Education Association of the United States ("NEA"):

The NEA is a corporation chartered by Congress in 1906, whose purposes and objectives are "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States" (ID-NEA No. 1).^{3/}

b. The North Carolina Association of Educators, Inc. ("NCAE"):

The NCAE is a corporation organized July 1, 1970, under the laws of North Carolina, whose objectives are the professional improvement of its members, the promotion and the protection of the welfare of its members, and the advancement of the cause of education in North Carolina. Approximately 92 percent of the teachers employed in North Carolina are members of the NCAE. (ID-NCAE Nos. 1, 2).

^{2/} The individual plaintiff-intervenors have intervened on behalf of themselves and classes or subclasses they seek to represent (Complaint of Plaintiff-Intervenors ¶3(d)). Pursuant to the Pre-Trial Order entered January 21, 1975, all issues relating to monetary relief and the propriety of plaintiff-intervenors' class action have been severed for hearing at a later date (Pre-Trial Order, ¶10).

^{3/} Citation is to the answer of NEA to defendants' Interrogatory No. 1 mailed to NEA August 8, 1974. The meaning of the abbreviated form of the citation is explained in Stipulation No. 4 which establishes a uniform system of citations for all depositions and documentary evidence in the record of this case. All citations hereinafter will follow that uniform system.

c. Annie M. Brown, et al.:

Twenty-four black individuals who applied for and were denied a basic or advanced teaching certificate because they failed to attain a minimum score on the NTE prescribed by defendants as a prerequisite to such certificate, all of whom were employed by public schools in North Carolina but at pay levels reduced because they had not attained the minimum NTE score required for the basic or advanced certificate (Plaintiff-Intervenors' Complaint ¶3(c); Defendants' Answer to Plaintiff-Intervenors' Complaint ¶3; Answers to Defendants' Interrogatories on March 8, 1974, to individual plaintiffs; Taylor Dep. II, pp.222-67; NCAE 2).

3. Defendants are the State of North Carolina, the North Carolina State Board of Education ("State Board" or "Board"), and the members of the State Board of Education: Dr. Dallas Herring, Honorable James B. Hunt, Edwin Gill, John A. Pritchett, R. R. Manz, Douglas Aitken, Barton Hayes, John M. Reynolds, Prezell Robinson, E. H. Oxendine, Mrs. W. B. Strickland, Mrs. Evelyn Tyler and Richard C. Erwin.

4. Plaintiff alleges that defendants have pursued and continue to pursue a pattern and practice of discrimination by failing to grant otherwise qualified black, American Indian and Oriental persons certification for public school faculty and staff positions pursuant to a racially discriminatory minimum test score requirement on the NTE required by Section 115-153 of the General Statutes of North Carolina;^{4/} and that such failure hinders or prevents

^{4/} Section 115-153 provides in pertinent part:

"Certifying and regulating the grade and salary of teachers
... The State Board of Education shall have entire control of certifying all applicants for teaching, supervisory and professional positions in all public elementary and high schools of North Carolina; and it shall prescribe the rules and regulations for the renewal and extension of all certificates, and shall determine and fix the salary for each grade

(footnote continued on following page)

such persons from obtaining employment as public school faculty and staff members in North Carolina (Plaintiff's Complaint, ¶¶8, 9). Plaintiff-intervenors also complain of these practices and allege that they have denied and continue to deny equal employment opportunities to black educators in the State because of their race and are arbitrary and capricious (Plaintiff-Intervenors' Complaint ¶¶7-16). Both complaints ask this Court to declare the minimum NTE score requirements prescribed for certification by §§115-153 and the regulations issued pursuant thereto unlawful; to enjoin defendants from continuing to require prescribed minimum scores on the NTE or other standardized examinations as a condition for employment, reemployment, determination of pay level and advancement until such requirements have been validated for such uses; and to award other monetary relief to be considered in a subsequent proceeding (*id.*, pp. 9-10; Plaintiff's Complaint, pp. 4-5).

5. This action arises under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983; Section 1977 of the Revised Statutes of the United States, 42 U.S.C. §1981; Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1)^{5/}; the Supremacy Clause (Article VI) of the United States Constitution; and the Due Process and Equal Pro-

(footnote continued from preceding page):

and type of certificate which it authorizes; provided, that the State Board of Education shall require each applicant for an initial certificate or graduate certificate to demonstrate his or her academic and professional preparation by achieving a prescribed minimum score at least equivalent to that required by the Board on November 30, 1972, on a standard examination appropriate and adequate for that purpose; provided, further, that in the event the Board shall specify the National Teachers Examination for this purpose, the required minimum score shall not be lower than that which the Board required on November 30, 1972.

" "

The General Statutes of North Carolina are cited hereinafter as "N.C.G.S." followed by the pertinent section number.

^{5/} Pursuant to 42 U.S.C. §2000e-5, plaintiff-intervenors on November 6, 1973, filed a charge of discrimination with the Equal Employment Opportunity Commission. On September 24, 1974, the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, issued a "right to sue" letter to plaintiff-intervenors (Amendment to Complaint of Plaintiff-Intervenors filed December 23, 1974).

tection Clauses of the Fourteenth Amendment to the United States Constitution (Plaintiff-Intervenors' Complaint ¶1; Answer to Complaint of Plaintiff-Intervenors ¶1).

6. The jurisdiction of this Court is founded upon 28 U.S.C. §1331(a), 1343(3) and (4), 2281 and 2284; and 42 U.S.C. §2000e. The matter in controversy exceeds \$10,000, exclusive of interests and costs.

7. Attorney General Elliot Richardson, acting pursuant to 42 U.S.C. §2000e-6(b), filed with the complaint of the United States a certificate of the Attorney General advising the Court that "this case involved matters of general public importance" and requesting that a court of three judges be convened to hear and determine the case pursuant to 42 U.S.C. §2000e-6(b) and 28 U.S.C. §2281. A Court of three judges was convened.

B. Certificates, Permits and Ratings Granted by Defendants Since July 1, 1964.

8. Pursuant to N.C.G.S. §115-152 of the North Carolina General Statutes, "All teachers, supervisors and other professional personnel employed in the public schools of the State, or in schools receiving public funds, shall be required to hold certificates in accordance with the law"

9. Section 115-153 of the General Statutes vests control of teacher certification in the State Board of Education and directs the State Board to "require each applicant for an initial or graduate certificate to demonstrate his or her academic and professional preparation by achieving a prescribed minimum score at least equivalent to that required by the Board on November 30, 1972 on a standard examination appropriate and adequate for that purpose" This section also directs the State Board to "determine and fix the salary for each grade and type of certificate which it authorizes."

10. Commencing on or before July 1, 1964, the State Board has issued teaching certificates according to the candidate's level of academic preparation. The basic certificates issued since that time are as follows:

- (a) Class A Certificate: For candidates who hold a bachelor's degree and have attained the minimum score on the NTE required for issuance of that certificate;
- (b) Class G Certificate: For candidates who hold a master's degree and have attained the minimum score on the NTE required until July 1, 1972, as a precondition to issuance of that certificate;
- (c) Advanced (Six-Year) Certificate: For candidates who have completed one year of study beyond the master's degree and have attained the minimum score on the NTE required until July 1, 1972, as a precondition to issuance of that certificate; and
- (d) Probationary A Certificate: For candidates who hold a bachelor's degree but have missed by no less than 50 points the minimum score on the NTE required for issuance of the Class A Certificate. Certificates issued between July 1, 1964, and June 30, 1967, were good for two years. Certificates issued between July 1, 1967, and June 30, 1969, when the Probationary A Certificate was abolished, were good for one year.

(NCAE 1; NEAX 29, 30; Taylor Dep. I, pp.126, 127; id. III, 193-94; I.U.S. No. 16, "Teaching in North Carolina," pp.12-13; RA Nos. 15, 36 and 47).

11. In addition to the foregoing teacher certificates, the State Board has granted temporary permits to persons who have not attained the minimum NTE score required for certification.

- (a) Commencing July 1, 1964, and continuing through June 30, 1967, the State Board granted a temporary, non-renewable one-year permit to otherwise qualified persons who had not taken the NTE (Page 4, ¶IV C of PX 24, 25 and 26; NCAE 1; RA No. 15).
- (b) Beginning July 1, 1967, and continuing through June 30, 1969, the State Board granted a permit to otherwise qualified persons employed as teachers who had not attained the minimum NTE score required for certification. This permit was valid only until the results of the next administration of the NTE became available. (Page 5, ¶IV C of PX 27 and 28; Taylor Dep. III, p.80).

(c) Commencing July 1, 1969, and continuing through the present, the Board has granted a one-year permit to candidates who hold a bachelor's degree but have not attained the minimum score on the NTE required for issuance of a Class A Certificate. Such candidates are permitted to teach for one year on the same terms and conditions and at the same pay level as persons holding a Class A Certificate (Taylor Dep. I, p.144), but they must attain the required minimum NTE score in order to be certified (PX 33, pp.4-5; NEAX 29, 30; RA No. 49). Such permits are good for one year and are nonrenewable (PX 33, pp. 4-5; I.U.S. No. 14).

12. In addition to the certificates and permits granted by the State Board and described in Proposed Findings Nos. 10-11, the State Board has since at least July 1, 1969, issued a "Nonstandard Rating" to permit holders who after one year have not attained the minimum NTE score required for the Class A certificate (RA No. 49).

13. The minimum NTE score requirements fixed by the State Board commencing July 1, 1964, and all such requirements thereafter have been applied prospectively to candidates seeking initial certification. Once a teacher has received a certificate, he has been able to retain and renew that certificate without having to meet any NTE score requirements established after the issuance of his original certificate (Taylor Dep. III, pp.109, 116).

C. The Relationship Between Certification And Employment.

14. Commencing at least as early as 1960, local school districts in North Carolina have been required by statute and by accreditation regulations of the State Board to hire only persons holding a certificate issued by the State if such persons are available (Taylor Dep. II, 140-41). N.C.G.S. §115-155 declares that "it shall be unlawful for any board of education or school committee to employ or to keep in service any teacher, supervisor or other professional school personnel who does not hold a certificate in compliance with the provisions of law or in accordance with the regulations of the State Board of Education governing emergency substitute personnel."

15. Commencing at least as early as July 1, 1964, local school districts in North Carolina have been authorized to employ persons holding temporary permits (e.g., PX 24, page 4; ¶IV C; NCAE 1). The record is silent as to whether such districts were required to prefer certified teachers over those holding temporary permits.

16. Commencing at least as early as 1969, local school districts have been authorized to employ "nonstandard" teachers, but only upon filing with the State Department of Public Instruction a statement that no better qualified person is available for the job (Taylor Dep. II, pp.149-50; IUS No. 16, p.5).

17. During the period July 1, 1964 to date, defendants' requirement of a minimum score on the NTE as a precondition to certification has reduced and eliminated employment opportunities for persons otherwise qualified for certification as teachers in North Carolina (Taylor Dep. III, pp.156-58).

D. The Relationship Between Certification and Salary Levels.

18. Pursuant to N.C.G.S. §115-153, the State Board each year establishes a salary schedule for "State-allotted professional employees." This schedule fixes the employee's "state-allotted pay." The following two tables, drawn from the salary schedules issued by the State Board for the academic years 1964-65 and 1973-74 (PX 24, p.13; PX 33, p.11), are typical of the increments provided since at least July 1, 1964, to classroom teachers on the basis of their certification level and years of experience (see PX 24 through 34).

TABLE I

STATE-ALLOTTED PAY PER MONTH
1964-65

Type of Certi- ficate	Experience In Years													
	0	1	2	3	4	5	6	7	8	9	10	11	12	13
Graduate	\$---	\$---	\$466	\$479	\$492	\$505	\$519	\$533	\$549	\$565	\$581	\$597	\$614	\$631
Class A	\$415	\$427	\$439	\$451	\$464	\$477	\$490	\$503	\$516	\$530	\$544	\$559	\$574	\$---
Non- Standard	\$200													

TABLE II

STATE-ALLOTTED PAY PER ANNUM

1973-74

Salary	Types of Certificates and Salary Levels		
Annual 10 Months	* / "G"	* / "A"	Nonstandard Salary Rating Only
\$11,680	14		
11,430	13		
11,190	12		
10,950	11		
10,710	10	13	
10,460	9	12	
10,210	8	11	
9,980	7	10	
9,730	6	9	
9,480	5	8	
9,250	4	7	
9,010	3	6	
8,770	2	5	
8,530	1	4	
8,280	0	3	
8,040		2	
7,800		1	
7,560		0	
4,170			[Sole salary level]

* / Numbers in these columns represent years of teaching experience.

19. Under the state salary schedules in effect for the academic years 1964-65 through 1973-74 (PX 24 through PX 34), all teachers except those rated as nonstandard received increments in pay based on their years of teaching experience. Nonstandard teachers did not receive any increments in pay reflecting their years of teaching experience.

20. In 1973-74, teachers with no experience who held a Class A certificate were paid \$3,390 more per annum from the State Public School Fund than teachers rated as nonstandard (PX 33).

21. Since July 1, 1964, teachers who were otherwise qualified for a Class A Certificate but who were granted a temporary permit because they failed to meet the prescribed minimum NTE score requirement have been compensated at or below the pay level provided by the State Board for teachers holding a Class A Certificate. For example, during the period July 1, 1964 through July 1, 1967, such permit teachers were docked \$20 per month by the State Board as compared to the salary allotted to teachers with a Class A Certificate. (NCAE 1; p.4, WVC of PX 24 through PX 26; Taylor Dep. II, pp. 92-104).

22. The Director of the Division of Certification of the North Carolina Department of Public Instruction testified that "[a] number of [local] units" "supplement" the salaries of teachers paid from state funds with monies derived from local tax funds (Taylor Dep. II, p.85; see PX 38). These supplements are paid pursuant to salary schedules established by the local units. The amount of the supplement is generally based upon the teacher's level of certification and teaching experience. Thus, for the school year 1969-70, 32,259 of the State's approximately 46,250 classroom teachers received local supplements. At that time when the average salary for classroom teachers was \$7,444, the average supplement was \$593 (experienced teachers in the Charlotte-Mecklenburg system received a maximum of \$1,660) and a total of \$19,124,550 was paid in local supplements. No more than four local units (Burke County, Currituck County, Gaston County and Richmond County) paid supplements to teachers holding nonstandard

ratings, and it is uncertain whether any of these four counties paid such supplements to teachers holding nonstandard ratings (PX 38).

23. Thus, persons who have been successful in securing employment as teachers in the public schools of North Carolina despite their failure to attain the prescribed minimum scores on the NTE have received salaries which are substantially lower than those paid to persons having the same academic background and years of teaching experience and performing similar duties (Taylor Dep. I, pp. 87, 102, 116).

E. The Institution and Development of NTE Score Requirements.

24. On June 20, 1959, the North Carolina General Assembly in Resolution 73 directed the State Board to study teacher evaluation, rating and certification (RA Ex. No. 1; NEAX 33). The Legislature further directed the Board to "administer the National Teacher Examination or its nationally recognized equivalent" to every applicant for certification and every certified employee who volunteers to take the examination (RA Ex. No. 1; NEAX 33).

25. The NTE are published and administered by Educational Testing Service ("ETS") (Majetic Dep. I, pp.8-10). The NTE consist of "Common Examinations ("CE") and "Teaching Area Examinations" ("TAE") (DM 3, p.5).

26. The Common Examinations consist of a test of professional education and a battery of tests for general education--i.e., written English expression, social studies, literature, fine arts, science and mathematics (DM 3, pp.5-6).^{6 /}

27. The Teaching Area Examinations test areas of study in which candidates have concentrated. Today there are 28 Teaching Area Examinations, including examinations for industrial arts, mathematics, early childhood development and Texas government (see brochures for each Teaching Area Examination, DM 4A through 4BB).^{7 /}

^{6 /} Copies of the Common Examinations and five Teaching Area Examinations have been filed with the Court under seal and are included in the evidentiary record as DM 9, DM 10, NEADX 2, NEADX 3, NEADX 4 and NEADX 5. For an explanation of the background to the sealing of these exhibits, see first footnote to Appendix No. 1 attached hereto.

^{7 /} See preceding footnote.

28. Pursuant to Resolution 73, the State Board in October 1959 established a "Committee to Study Teacher Evaluation, Rating and Certification" ("Study Committee") (PX 21). Commencing April 9, 1960, the State Board required every applicant seeking initial certification as a teacher, principal, superintendent, or other professional and every applicant seeking a higher class of certificate or a different class of certificate to take the Common Examinations of the NTE (NEAX 33; RA No. 8).

29. On January 19, 1961, the Study Committee presented its report to the State Board of Education (PX 21). This report advised, inter alia, that

- (a) "[I]n general, these standardized tests (among them the National Teacher Examinations) contain a culture bias" (id. at 18);
- (b) The mean score of black college seniors taking the NTE Common Examinations in North Carolina was 140 points below the mean score of white college seniors ^{8 /} (id. at 4);
- (c) "The tests presently in use are admittedly inadequate in themselves as measures of any portion of the total complex of the teaching-learning process" (id. at 18);
- (d) "Teacher evaluation needs to be related to a variety of measurement devices. The results of the evaluation of student teaching, personality and attitude testing, and behavioral observation need to be examined for their relation to National Teacher Examination scores" (id. at 20); and
- (e) "The Committee, recognizing the need for further research, has no firm opinion at this point concerning

^{8 /} The total possible score on the NTE Common Examinations was and is 900 (DM 1, p.10). A mean score is the average score reported for a group of examinees and is derived by totalling the scores of all examinees in the group and dividing that total by the number of examinees in the group.

a method by which scores may be used effectively as one of the factors in initial certification" (id. at 14).

The committee report recommended to the State Board a "research study based on the testing program" required by Resolution 73 (id., letter of transmittal).

30. Contrary to the recommendation of the Study Committee, no further study of the NTE and of the method by which scores could be used for certification was undertaken (Taylor Dep. II, pp.64-65).

31. On January 9, 1964, the State Board adopted a resolution requiring candidates for certification, effective July 1, 1964, to obtain minimum scores on the Common Examinations as a precondition for receiving the various certificates granted by the State (NCAE 1, p.1; Taylor Dep. I, pp.159-60; NEAX 33). Defendants set the following minimum score requirements (id.):

TABLE III

Score Requirements For Teachers' Certificates
Effective July 1, 1964

<u>Type of Certification</u>	<u>Required Minimum Score on Common Examination</u>
Probationary A	400
Class A	450
Class G	500
Advanced	500

* * * * *

32. Prior to the time these cutoff scores were established, defendants obtained from ETS statistical summaries reporting, inter alia, NTE scores by race for each administration of the NTE to North Carolina candidates for certification since April 1960 (PX 12, 13; NEAX 40; Taylor Dep. II, pp. 42-43; id. III, pp. 332-33). The statistical summaries revealed that the racial impact of the cutoff scores established by defendants would have been the following (PX 12, 13; NEAX 40):

TABLE IV

Percentage of North Carolina Candidates
By Race Tested 1960-63 Falling Below Minimum Scores
Established January 9, 1964

<u>Date of Testing</u>	<u>400 Score or Below</u>		<u>450 Score or Below</u>		<u>500 Score or Below</u>	
	Black	White	Black	White	Black	White
April & October 1960	24%	0.5%	56%	4%	84%	14%
1961-62	20%	0.2%	52%	2%	79%	12%
1962-63	22%	0.4%	53%	3%	80%	13%

* * * * *

33. On June 2, 1966, the State Board revised all minimum NTE score requirements for certification. At this time the Board added to the certification regulations, effective July 1, 1967, a requirement that candidates take a Teaching Area Examination and meet minimum score requirements fixed by the Board for such examinations. In addition, the Board increased the minimum score requirements on the Common Examinations effective July 1, 1967, and provided for a further increase in the minimum scores on the Common Examinations and the TAE, effective July 1, 1968. (NEAX 33; Taylor Dep. III, 197-99). The minimum score requirements promulgated on June 2, 1966, for each certificate were as follows (NEAX 33; RA No. 36):

TABLE V

Minimum Score Requirements
To Be Effective Commencing July 1, 1967

<u>Type of Certificate</u>	<u>Minimum CE Score</u>	<u>Minimum TAE Score</u>
Probationary A	425	425
Class A	475	475
Class G	550	550
Advanced	625	625

* * * * *

TABLE VI

Minimum Score Requirements
To Be Effective Commencing July 1, 1968

<u>Type of Certificate</u>	<u>Minimum CE Score</u>	<u>Minimum TAE Score</u>
Probationary A	450	450
Class A	500	500
Class G	600	600
Advanced	650	650

* * * * *

34. Prior to the Board's action on June 2, 1966, it had obtained from ETS statistical summaries for two additional years, 1963-64 and 1964-65, reporting, inter alia, NTE scores by race for each administration of the NTE to North Carolina candidates for certification during that period (NEAX 19, 40; Taylor Dep. III, pp.292, 332-33). These statistical summaries revealed that the percentages of blacks meeting the then existing cutoff scores for Probationary A and Class A Certificates remained substantially below the comparable percentages of whites, but were increasing. Those statistical summaries further revealed that the increased cutoff scores scheduled to be effective in 1968 would increase the percentages of blacks barred from Probationary A and Class A certificates (see Tables III and IV, supra; NEAX 19, 40):

TABLE VII

Percentages of North Carolina Candidates By Race
Tested In 1963-64 and 1964-65 Falling Below Minimum NTE Scores

<u>Date of Testing</u>	<u>Cutoff Score For Probationary A Certificate in 1964 (400)</u>		<u>Cutoff Score For Class A Certificate in 1964 and Probationary A Certifi- cate in 1968 (450)</u>		<u>Cutoff Score For Class G Certificate in 1964 and Class A Certificate in 1968 (500)</u>	
	Black	White	Black	White	Black	White
1963-64	17%	0.3%	45%	3%	73%	11%
1964-65	11%	0.1%	38%	2%	71%	10%

* * * * *

35. Between January 9, 1964, and June 2, 1966, when the State Board acted to increase the minimum NTE cutoff scores, defendants did not make any study "concerning the use of the NTE as a requirement for professional faculty and/or staff certification in North Carolina" (IUS Nos. 24, 25). Defendants have not introduced evidence setting forth the grounds for the Board's action on June 2, 1966.

36. On September 25, 1967, the State Department of Public Instruction received from Dr. Jim Lewis of Sul Ross State College, Texas, a study of the relationship between NTE scores of 45 students in Texas and their student teaching performance as evaluated by the students' college coordinators (NEAX 12; Taylor Dep. III, pp.203-06). This study showed a correlation coefficient of .18, or a "slight positive relationship" which did not rise to the level of being statistically significant.^{9 /} From these results, Dr. Lewis reported that "one must conclude that there is not a significant relationship between the National Teacher Exam and success in student teaching" and that an "arbitrarily designated score on the common exam portion of the NTE as a necessary prerequisite for successful teaching is not warranted" (*id.*).

37. The revisions slated for July 1, 1967, were placed into effect on that date but those scheduled for July 1, 1968, were not (NEAX 33). Prior to the latter date, the State Board's Advisory Council reviewed the NTE score requirements in conjunction with officials from ETS (Taylor Dep. I, pp. 168-69). The Director of Teacher Certification testified that at this time ETS advised "that the use of an absolute cut-off score, while the decision of the particular user of the test [,] should be viewed with some concern, and it [*i.e.*, use of a cutoff score] was not the specific recommendation of the type of use that they would make" (*id.* II, pp.3-4).

^{9 /} "Statistical significance" is a mathematical concept based on the theory of probability that enables a researcher to determine whether a given finding or correlation is a dependable result or the product of chance (Kirkpatrick Dep. 73-74). In the field of testing, experts generally conclude that a correlation is statistically significant if the correlation will, as a matter of probability, be wrong no more than one time in twenty (*i.e.*, five percent of the time) (*id.* at 75). The EEOC Guidelines incorporate this standard, stating "The relationship between the test and at least one relevant criterion must be statistically significant" and "this ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance" (29 C.F.R. §1607.5(c)(1); GKX4).

38. The Board's Advisory Council recommended to the Board that cutoff score requirements be frozen at 1967 levels because there was a teacher shortage and because "the elimination rate for the higher cutoff score[s] . . . would be excessively high" (id. I, p.192). In this connection, the Advisory Council also recommended that the Board abandon the requirements for separate cutoff scores on the Common and Teaching Area Examinations and replace them with composite score requirements (id. at 191-92). (A composite score on the NTE is the sum of the candidate's CE and TAE scores).

39. On March 7, 1968, the Board promulgated further revisions (NEAX 33). Retroactive to July 1, 1967, the Board established the following minimum score requirements on the NTE (NEAX 33; NCAE 1; RA No. 47):

TABLE VIII

Minimum Score Requirements Promulgated March 7, 1968,
Retroactive to July 1, 1967

<u>Type of Certificate</u>	<u>Minimum CE Score</u>	<u>Minimum TAE Score</u>	<u>Composite ^{10/} Minimum Score</u>
Probationary A			875
Class A			950
Class G	550	550	
Advanced	625	625	

* * * * *

The requirements set forth in Table VIII had the effect of repealing the score requirements set forth in Table VI before the latter requirements became effective (Taylor Dep. III, p.199).

40. Effective July 1, 1969, the State Board abolished the Probationary A Certificate (see Proposed Finding No. 10(d), supra). In its stead, the Board provided that applicants for certification would be granted a one-year permit irrespective of whether they had submitted a satisfactory composite score on the NTE (Taylor Dep. I, p.172). Teachers receiving the one-year permit were

^{10/} In those fields for which there is no available TAE, the candidate's score on the weighted Common Examinations is sufficient if it amounts to one-half of the required composite score (Taylor Dep. I, pp.148, 170).

to be paid and otherwise treated the same as holders of a Class A Certificate during the one-year period (Taylor Dep. I, p.172; id. II, pp.103-04). However, at the end of the one-year period the teacher was to be rated as "nonstandard" unless he or she submitted a composite score of 950 or more on the NTE (NEAX 30, pp.3-4; RA No. 49).

41. Defendants continued to receive annually from ETS statistical summaries of scores registered on the statewide administrations of the NTE in North Carolina (PX 12-19)^{11/}. For the period 1960 through the end of the school year 1964-65, the annual summaries expressly set forth the scoring patterns for candidates by race (see Tables III and IV, supra). Thereafter, through 1971 when the State Board terminated its contract with ETS for preparation of the statistical summaries (Taylor Dep. I, pp. 40-41), the summaries discontinued reporting scores by race. However, racial data could still be readily extracted from the ETS summaries because the scoring pattern of each teacher-training institution in the State was reported and these institutions were racially segregated through 1970 (Cashwell Dep., pp.163-67, 199-201; Taylor Dep. II, pp. 43, 48-50, 207-08). As the following table of mean scores by institution shows, the annual statistical summaries of scores reported by candidates attending North Carolina institutions showed that defendants' NTE cutoff score requirements barred substantially greater percentages of black than white candidates from all levels of certification. (An institution's mean score is the average score for all of its students taking the examination during the indicated year.)

42. Sometime between 1968 and 1970, the Advisory Council to the State Board appointed an Ad Hoc Subcommittee to Study the NTE Question, composed of educators and top officials of the State Department of Public

^{11/} The record, by inadvertence, does not contain the ETS statistical summary for 1965-66.

TABLE IX

RANGE OF MEAN SCORES ON COMMON AND SELECTED TEACHING AREA
EXAMINATIONS REPORTED FOR PREDOMINANTLY BLACK AND PREDOMINANTLY
WHITE TEACHER TRAINING INSTITUTIONS (1966-67 through 1970-71)^{12/}

Year	Common Examination		Area	^{13/} Teaching Area Examination		Cutoff Scores	
	Range of Mean Scores For Black Institutions	White Institutions		Range of Mean Scores For Black Institutions	White Institutions	For Class "A" Certificate Common	Composite Score
1966-67	449-528	552-735	Elementary Education Eng. Lang. & Literature Social Studies	475-577 449-536 473-528	589-723 571-729 576-751	450	
1967-68	440-506	546-736	Elementary Education Eng. Lang. & Literature Social Studies	466-549 495-522 494-540	589-729 560-671 584-739		950
1968-69	443-548	557-726	Elementary Education Eng. Lang. & Literature Social Studies	471-578 474-540 484-551	592-686 559-717 582-748		950
1969-70	437-538	556-729	Elementary Education Eng. Lang. & Literature Social Studies	482-509 451-545 469-535	597-721 548-695 571-724		950
1970-71	412-516	542-714	Elementary Education Eng. Lang. & Literature Social Studies	421-589 456-524 467-521	581-709 557-683 550-721		950

^{12/} The annual mean scores reported for students attending each institution are found at PX 15, pp.36-39; PX 16, pp.32-35; PX 17, pp.32-37; PX 18, pp.28-33; PX 19, pp.31-34. The institutions are identified by code number in PX 15 through 19. Their names may be determined from the key (PX 20). The racial composition of the student body at each institution is given at Taylor Dep. II, pp.48-52 and RA No. 3. Mean scores reported by ETS for persons attending Pembroke State University are not included because Pembroke "historically" was predominantly Indian and "presently" is predominantly white with a "heavy" Indian enrollment (Taylor Dep. II, p.49).

^{13/} We have selected for inclusion in this chart the three Teaching Area Examinations having the largest number of scores reported each year for candidates in North Carolina (PX 15, Table 16; PX 16 and 17, Table 14; PX 18 and 19, Table 12). The ETS statistical summaries contain similar score data for many of the other TAEs.

Instruction and under the chairmanship of the Dean of Winston-Salem State University (Taylor Dep. III, p. 95; id., II, pp.182, 253; NEAX 21-22; PX 8). The appointment grew out of the earlier recommendation of the Advisory Council for elimination of the cutoff score requirement for graduate level certificates and the rejection of that recommendation by the State Board in a resolution of April 7, 1968, "call[ing] for additional study prior to any deletion of scores at the graduate level" (Taylor Dep. III, p. 95). According to the Director of Teacher Certification who served as a member, the Committee held its initial meeting commencing the study of the NTE question on June 8, 1971 (id. at 297; NEAX 22).

43. Commencing in 1969, defendants came under mounting pressure to alter, if not abolish, their NTE minimum score requirements for certification.

44. On January 7, 1969, the ETS Senior Program Director for the NTE, Dr. Arthur L. Benson, advised North Carolina's Director of Professional Services that officials of ETS "have a continuing concern for the minimum NTE score standards which the State Board of Education established last spring, both with respect to initial certification and certification at the graduate level" (DX 20).

45. In June 1969, Dr. Jerry A. Hall, Professor of Education at Wake Forest University and a former consultant to, and employee of, the Division of Professional Services of the North Carolina Department of Public Instruction (IUS No. 24; RA No. 98), published a study titled "National Teacher Examinations and Selected Criteria of Teacher Effectiveness," which attempted in part to correlate the NTE scores of 169 active teachers with their principals' evaluation of their teaching effectiveness (IUS No. 25, Hall study attachment). Dr. Hall reported that the correlations found in his study indicate that "there are no significant relationships between the selected criteria of teaching effectiveness and scores achieved on the Common Examination of the National Teacher Examinations." (Id. at p.4; RA No. 96). A

copy of this study was received by the State Department of Public Instruction in 1969 (IUS No. 24; RA No. 96).

46. In April 1970, officials of ETS and the State Department of Public Instruction completed a report of a joint study entitled "Outstanding Teachers In North Carolina: Principals' Ratings and NTE Scores" (NEAX 46). The study report, marked "Confidential," was circulated to officials of the Department of Public Instruction on April 26, 1970, by Assistant State Superintendent James T. Burch, one of the authors of the study (NEAX 46; IUS No. 5). The study documents then existing criticisms of North Carolina's use of the NTE standard for certification, including, inter alia,

- (a) "Efforts to validate teacher-training against teacher-performance have been few, and such data are not reported for the NTE."
- (b) "Tests of this sort contain a white middle-class bias, and are thus inappropriate for black applicants. It is a matter of record that graduates of traditionally Negro colleges attain lower scores on the NTE than do the graduates of traditionally white schools." (NEAX 46, pp.1-2).

The report states that such criticisms "seem sufficiently reasonable and have been so frequently voiced that several questions appear to be indicated. The foremost of these concerns the validity of the NTE for the selection and certification uses to which it is now put. What evidence can be marshalled as to its validity?" In light of such concerns, "a small scale study (involving NTE scores, principals ratings, and a gross attempt at defining 'good teaching') has just been completed, and is reported here" (id. at 3).

47. The joint study compared the NTE scores of 76 elementary school teachers who were evaluated as "outstanding" by their principals, and the NTE scores of 101 teachers selected at random. The report stated that the 76 "outstanding" teachers had a mean score of 580 on the NTE Commons, whereas the 101 teachers selected at random had a mean score of 558; that the mean score of the white teachers in the random group surpassed the mean score of the "outstanding" white teachers by 9 points; and that the mean score of the randomly selected black teachers was only 10 points lower than

the mean score of the "outstanding" black teachers (id. at 5). The joint study report concluded that "there is no clear evidence that NTE scores are associated with nomination as outstanding teachers" (id. at 6), and that "the outcomes of this study - even with its limitations - strongly suggest the need for further study of the whole area of certification standards, teacher performance and appropriate measurement techniques" (id. at 7).

48. In May and June 1970, following circulation of the joint study report, ETS urged the State Department of Public Instruction to make a "rather large-scale validation study of NTE and other predictive criteria for teacher certification" (Deneen Dep. I, p. 128; NEADX 22; RA No. 110). Top ETS officials responsible for the NTE, Dr. James R. Deneen and Dr. Richard M. Majetic, traveled twice to Raleigh to meet with Dr. H. T. Conner, Assistant State Superintendent for Research, to discuss the study (Deneen Dep. I, p.128; see also NEADX 22). The study, however, was never undertaken (id. at 128-29).

49. On January 11, 1971, Drs. Deneen and Majetic of ETS advised Assistant State Superintendent Burch that the "need" for an "examination of NTE's usefulness is urgent. Some sort of short-term study should begin very soon" (NEADX 27). They further advised that "The NTE does not predict teaching performance" (id.)^{14/}.

50. On July 23, 1971, Drs. Deneen and Majetic forwarded to the State Superintendent a preliminary copy of the newly-prepared ETS "Guidelines for Using the National Teacher Examinations" and in their cover letter

^{14/} In this letter, the ETS officials also said:

"The fact that NTE alone does not predict teaching performance is certainly a limitation on its value, analogous to the inability of a clinical thermometer to assess total health. This simply means the instruments in question are restricted in value and ought to be used in conjunction with other measures. But it does not seem unreasonable to weigh a potential teachers' achievement in general education, professional education, and especially, knowledge of his teaching specialization as partial bases of judging his fitness to teach. The array of other predictors might include an oral interview, letters of recommendation, background and experience questionnaire, observations of actual or practice teaching, etc. These would help to get at other than the cognitive knowledge being assayed by the NTE." (NEADX 27).

advised him that "As you know, we do not consider the NTE to be appropriate measures of teaching performance." They requested to meet with the State Superintendent "for a discussion of possible implications of the Guidelines for North Carolina" (NEADX 32).

51. In August 1971, the NTE was discussed at a meeting of the State Board. The staff was asked to study the matter further and report the following month. (NEADX 40, "Sequence of Events: Ad Hoc Committee").

52. On August 31 and September 1, 1971, Drs. Deneen and Majetic met in Raleigh with Assistant State Superintendent Burch and the Ad Hoc Committee for the purpose of shaping a proposal to the State Board that would modify North Carolina's teacher certification requirements (NEADX 34).

53. The State Board met to discuss the NTE again in September 1971. It heard a presentation from the staff who were assisted by Dr. Deneen and Dr. Majetic. Following the presentation, the Board directed the staff "to continue its study and report its findings to the Board at a later date" (NEADX 40, "Sequence of Events: Ad Hoc Committee"). Dr. Majetic subsequently described these events as follows: "While in North Carolina in 1971 we discussed the use of multiple criteria in the certification process and the deletion of a minimum score requirement on the NTE. When we met with the State Board of Education, the proposal was rejected primarily because the president of the Board insisted on retaining the minimum score on the NTE" (NEADX 37; see Taylor Dep. III, pp. 120-22).

54. On September 3, 1971, Dr. Deneen wrote to Assistant State Superintendent Burch stating that he and Dr. Majetic "share your disappointment at some Board members preliminary reactions to the recommendations . . . [and] that all Board members should clearly understand the most recent court decisions and ETS' attitudes concerning misuse of tests. If the Board fails to eliminate at least the use of an NTE cutoff score for experienced teachers it will be in the legally and logically untenable position of insisting a test can do what the test's makers say it cannot" (NEADX 33). Dr. Deneen's letter indicated that the Chairman of the State Board was blocking proposals to alter the State's NTE requirements (id.).

55. On September 16 and 17, 1971, Drs. Deneen and Majetic met with members of the State Board's Advisory Council and staff of the State Department of Public Instruction. Dr. Majetic later reported that these meetings were devoted to discussion of "those aspects of the North Carolina policies which were in noncompliance with our NTE Guidelines and . . . alternative certification strategies which would include the NTE but reduce some of the current tension created by the lower achievement of Blacks in North Carolina." "We pointed out that the test should not be required beyond the initial entry level and that the present policy could in fact lead to a court action that was indefensible. We got immediate agreement from all concerned that changing the policy would prove no problem" (NEADX 37).

56. The staff did not promptly return to the Board with its findings. Dr. Majetic, in a memorandum of September 28, 1972, states: "the staff dropped the ball and it was not until this past summer, when a court action was instituted by a White teacher who had received a Master's Degree in Driver Training and was required to 'pass' a Teaching Area Examination in Social Studies, that the issue was brought forward again. The result of pending court action was" the NTE revisions adopted by the State Board on August 10, 1972 (NEADX 37).

57. On August 10, 1972 the State Board retroactively revised the NTE score requirements for certification, effective July 1, 1972. These revisions consisted of abandoning the minimum score requirements for all certificates except the Class A certificate (NEAX 5; Taylor Dep. II, pp.173, 181; RA No. 60).^{15/}

^{15/} This action by the Board promptly followed the Fifth Circuit's decision in Baker v. Columbus Municipal Separate School District, 462 F.2d 1112 (June 30, 1972), affirming a district court order enjoining the school district's minimum score requirement of 1,000 on the NTE. The Court of Appeals ruled that the requirement produces such racial distortions "as to require the district to show an overriding purpose for the requirement independent of its racial effects." Defendants had been aware of the district court's action since at least September 1971 (NEAX 48 and Taylor Dep. III, p.345).

As a result of the Board's action between 500 and 1,000 professional educators in North Carolina qualified for graduate or advanced certificates, and a "couple of hundred" educators received principal certificates (Taylor Dep. III, pp.208, 210).

new regulations a candidate's NTE score would constitute no less than 10 points and no more than 25 points on a total point scale of 150. The candidate's class ranking would be given equal weight to the NTE scores, and professional performance and personal social characteristics of the candidate would account for two-thirds of the total possible points (PX 7; Taylor Dep. I, pp.101-03).

64. On December 21, 1972, the State Superintendent issued a statement in support of the "Exit Criteria": "The adoption of these requirements comes as close to assuring quality and fitness to teach as does any method now in use today throughout the fifty states. This combination of factors--the approval of the college or university program of study by the State Board of Education; scholarship as determined by class rank and NTE scores; and measure of performance and personal quality-- is a much better method of determining all-around teaching qualifications than is being used today" (NEADX 40, p.2).

65. Following the Board's action on December 7, 1972, the North Carolina General Assembly considered proposed legislation that would roll back the State Board's new plan for certification and reinstate cutoff score requirements on the NTE or an equivalent examination (Taylor Dep. I, pp.114-16).

66. Dr. Richard Majetic, from ETS, appeared before the House Education Committee and advised the legislators that the "Exit Criteria" recommended by the Board were preferable to the use of NTE cutoff scores for certification (Taylor Dep. I, pp.112, 121-22; IUS No. 25, ¶C). He also "indicated the test does not specifically predict teaching success" (Taylor Dep. I, p.121).

67. Dr. Phillips, on behalf of the State Department of Public Instruction, advised the General Assembly, inter alia, that "for the individual who makes 949 or below on the National Teacher Examinations, the score becomes everything since it cancels out all other considerations relative to this individual candidate. We do not believe that any test used by itself, excluding all other means of evaluation, should carry this much weight in the evaluation process. The new procedures recognize the importance of standardized testing, but they also recognize the limitations of standardized testing

58. On August 10, 1972, the State Board further resolved that the Ad Hoc Committee "is hereby instructed to complete with due dispatch its study of an instrument of evaluation to be used for initial entry into the teaching profession" and to submit its recommendations to members of the Board twenty days prior to the Board's meeting in December 1972 (NEAX 5).

59. After the Board's action on August 10, 1972, Drs. Deneen and Majetic met twice with members of the Ad Hoc Committee to assist them in preparing recommendations to be made to the State Board at its December meeting (Taylor Dep. III, pp.122-23).

60. The Ad Hoc Committee unanimously recommended to the State Board a certification program that would eliminate the use of NTE cutoff scores for certification in North Carolina. The recommendation was the product of at least 25 meetings of the Committee working as a whole or through subcommittees (Taylor Dep. II, pp.186-87). The Director of Teacher Certification testified that "the Committee concluded that no single factor should in and of itself veto or cancel consideration of all other factors" in certifying professional educators (Taylor Dep. I, p.113). One of the reasons for the Committee's recommendations was the racially disparate results produced by the NTE cutoff score requirements. (Taylor Dep. II, pp.208-09, 204-05; NEAX 9).

61. On November 12, 1972, the State Superintendent presented the Ad Hoc Committee's report and recommendations to the State Board, stating "I hope we can make this important and positive step" (NEADX 40, Phillips memorandum of November 17, 1972, and attachments).

62. At its meeting on December 7, 1972, the State Board resolved, over the opposition of its chairman and two other members, that "certificates for teaching from and after July 1, 1973, shall be issued pursuant to" the "Exit Criteria" prepared and recommended by the Ad Hoc Committee (NEADX 40 "Sequence of Events: Ad Hoc Committee Work").

63. The "Exit Criteria" so adopted abandoned the use of NTE cutoff scores and provided instead weighted criteria for certification. Under the

and assign to the test a part of the total evaluation but not all of the evaluation." Dr. Phillips concluded his statement, saying "It seems only logical to conclude that, viewed in its total perspective, the new certification procedures give greater, not less, assurance to the public of high quality in those individuals granted a certificate by the State to serve public school age children. Therefore, we urge everyone to lay aside the fears which have been voiced and give the new procedures a chance before condemning them." (PX 6, pp.1-2, 5; Taylor Dep. I, p.97). This statement was presented to the House Education Committee, the Senate Education Committee and the 1973 North Carolina General Assembly (Taylor Dep. I, p.102).

68. Dr. Taylor, the Director of Teacher Certification, testified before the House Education Committee that an NTE cutoff score requirement for certification was not "defensible," and that "the score requirement should be either deleted entirely, or the approach to the use of the score should be modified" (Taylor Dep. II, p.155).

69. At the time the bill to reinstate the NTE cutoff score requirements was pending before the General Assembly, the State Department of Public Instruction provided the Chairmen of the House and Senate Committees and the press with computer analyses showing the adverse impact that defendants' cutoff score requirements had had on black candidates for certification (PX 10; Taylor Dep. II, pp.28-29; id. III, pp. 140-41). That study showed that 31.08% of the black candidates for certification scored below the 950 cutoff on the NTE, while only 1.36% of the white candidates fell below that score (PX 10; Taylor Dep. II, p.29).

70. On April 19, 1973, the State Legislature, notwithstanding the action of the State Board and the advice of the State Superintendent of Public Instruction, the Director of Certification and Educational Testing Service, enacted N.C.G.S. §153-115, which directed the State Board to establish a required minimum score on a standard examination that is equivalent to or the same as the NTE score requirements that were in effect on November 30, 1972 (Taylor Dep. II, pp.29-30); see note 4, supra., for the test of §153-115).^{16/}

^{16/} At several places (e.g., IUS No. 17) the record incorrectly states that N.C.G.S. §115-153 was enacted on March 19, 1973. In his testimony, Dr. Taylor corrected this error and confirmed that N.C.G.S. §115-153 was enacted on April 19, 1973 (Taylor Dep. II, pp.29-30).

71. In light of N.C.G.S. §115-153, the State Board rescinded its certification regulations promulgated on December 7, 1972 (IUS No. 17). This action had the effect of leaving intact the Board's prior regulations which

- (1) grant to every otherwise qualified candidate a one-year permit, irrespective of his NTE score;
- (2) require every candidate for a Class A certificate to tender a composite score of 950 on the NTE on or before the expiration of his one-year permit; and
- (3) downgrade any candidate to a "nonstandard" rating, irrespective of his classroom performance or undergraduate record, if he fails to tender a composite score of 950 on the NTE on or before the expiration of his one-year permit (see PF 67).

72. The State Department of Public Instruction, while bound by N.C.G.S. §115-153, continues to oppose the use of a minimum NTE score for certification (IUS No. 25, ¶U).

F. Impact of Defendants' Minimum NTE Score Requirements Upon Black Candidates for Certification and Black Teachers in Service.

73. Statistics prepared by the State Department of Public Instruction on March 17, 1973, show that the minimum 950 NTE score requirement established for the Class A Certificate bars 31 percent of the black candidates while more than 98 percent of the white candidates meet the minimum score requirement (PX 10).

74. Statistics kept by the State Board of Education also show that, commencing with the implementation of the minimum NTE score requirement in mid-1964, there has been a sharp decline in the percentage of teachers employed in the public schools of North Carolina who are black (IUS No. 33). These statistics show that between the 1951-52 and 1973-74 academic years, the total number of teachers employed in the North Carolina elementary and secondary schools has grown from 32,149 to 61,009. ^{17/}(id.). In each of the

^{17/} The statistics shown on the last page of defendants' response to Interrogatory No. 33 were initially prepared on March 5, 1974. They were revised by defendants on June 18, 1974, and we have used the later-prepared data in the text above.

13 years prior to the time that defendants' minimum cutoff scores became effective, black teachers constituted between 26.8 and 28.1 percent of the total number of teachers employed in North Carolina. In the last school year before the minimum NTE score was required (1963-64), black teachers comprised 28.1 percent of the total number of teachers. By 1973-74, black teachers constituted only 21.5 percent of the total number of teachers employed, a decline of 23.5 percent (id.).

75. In 1963-64, North Carolina employed 12,835 black teachers. By 1973-74, the figure had risen to 13,151, a gain of 316 or 2.5 percent. During this same period the number of white teachers employed in North Carolina schools rose from 32,865 (1964-65) to 47,273 (1973-74), a gain of 13,311, or 43 percent (id.).

76. The fact that the minimum NTE cutoff score bars 31 percent of the black applicants from certification has contributed to the decline in the percentage of black teachers employed in the public schools of North Carolina after the academic year 1963-64 (Taylor Dep. III, pp.156-57). One computer analysis prepared by defendants shows, for example, that over a three-year period (January 1, 1971, and December 31, 1973), there were 881 black as compared to 191 white applicants for certification who failed to meet the NTE minimum score requirements (Stipulation No. 5, Exhibit S.5-1, p.17).

77. As to persons who have obtained employment in the public schools, the evidence shows that defendants' minimum NTE score requirements have barred a significantly greater percentage and number of black than white teachers from higher levels of pay. Since July 1, 1964, the state salary schedules have placed "nonstandard" teachers at the lowest salary level and have not provided any increment for years of teaching experience. Pursuant to the 1973-74 state salary schedule, a teacher who was rated "nonstandard" was paid \$4,170 irrespective of his or her experience, whereas teachers who held a Class A Certificate were paid between \$7,560 and \$10,710 per annum depending upon their years of teaching experience (see Table II, supra; PX 33).

78. Between the academic years 1964-65 and 1971-72, defendants required candidates for a Class G Certificate to attain even higher scores on the NTE than were required for a Class A Certificate. The State Board's salary schedules provided higher increments of pay for holders of a Class G Certificate than for holders of the Class A Certificate. Thus, in 1971-72 the State Board's salary schedules provided that holders of the G Certificate were to be paid \$610.50 more per annum than holders of the A Certificate (PX 31, p.11). The evidence shows that the cutoff scores required for the Class G Certificate during this period barred a greater percentage of black than white teachers from those higher pay levels (see Tables IV, VII, ^{18/}supra).

79. Defendants supplied to plaintiff computerized data from which plaintiff was able to determine that there were 15 school districts in North Carolina that employed seven or more teachers between January 1, 1971, and December 1, 1973, who had failed to attain the minimum 950 composite NTE score required for certification (Stip. No. 5, ¶¶1-3). Plaintiff and plaintiff-intervenors then obtained the performance ratings of all teachers employed in 14 of these 15 districts who were listed by defendants as having failed to meet the minimum NTE score between January 1, 1971, and December 1, 1973 (id., ¶¶4, 6). With respect to six of the school districts, the parties deposed the superintendents of the districts or their appropriate assistants to obtain the performance ratings of teachers in those districts who failed to attain the 950 score on the NTE (id., ¶7). With respect to eight school districts, the parties stipulated to the facts found in the personnel files kept by the school districts relating to the performance of such teachers (id., ¶¶12-19).

80. Overall, Table X shows that 158 out of 165 teachers who reported a score lower than 950 on the NTE on one or more occasions (i.e., almost 96 percent) were rated as satisfactory or better by their principals or supervisors. Of this group of teachers, 120 were either terminated or paid at

^{18/} Defendants do not pay Advanced Certificate holders more than Class G Certificate holders (Taylor Dep. I, p.140).

TABLE X

19/

Performance Record For 165 Teachers In 14 North Carolina School Districts
Who Reported A Score Lower Than 950 On The NTE On One Or More Occasions
(January 1, 1971, Through December 31, 1973)

	Black	Other	Total Number
A. Persons holding temporary permits who performed satisfactorily in the classroom but were not rehired because of their failure to meet the NTE minimum score requirement	52	13	65
B. Persons holding temporary permits who were offered reemployment on the basis of satisfactory performance in the classroom but were downgraded to lower pay ratings because of their failure to meet the NTE minimum score requirement. ^{20/}	29	9	38
C. Persons holding emergency, nonstandard or provisional ratings who performed satisfactorily in the classroom but were not rehired because of their failure to meet NTE minimum score requirement . .	7	0	7
D. Persons holding emergency, nonstandard or provisional ratings who were offered reemployment on the basis of satisfactory performance in the classroom at their same status or an even lower status. ^{21/}	9	1	10
E. Persons holding temporary permits or emergency or provisional ratings who performed satisfactorily in the classroom but were not reemployed and may not have been offered reemployment for reasons other than the NTE minimum score requirement or unsatisfactory performance ratings (e.g., moved away, changed careers, continued schooling).	9	1	10
F. Persons holding temporary permits or emergency or provisional ratings who were listed as failing the NTE but who met the NTE minimum score and qualified for a certificate in time to avoid being downgraded	16	12	28
G. Persons holding temporary permits or emergency, nonstandard or provisional ratings who performed unsatisfactorily and were not rehired because of their unsatisfactory performance	4	3	7
Totals	126	39	165

SUMMARY

Persons Who Performed Satisfactorily (Categories A through F)	122	36	158
Persons Who Performed Satisfactorily and Were Terminated or Paid at Lower Rates Because of Their Failure to Meet the NTE Score Requirement (Categories A through D)	97	23	120
Persons Who Performed Unsatisfactorily (Category G)	4	3	7

^{19/} Stipulation No. 5 and the depositions of the superintendents or their assistants review the performance of 180 teachers. Fifteen of these persons have been eliminated from this chart because data concerning their status were incomplete or they were not properly members of the class surveyed.

^{20/} Of this number, nine were not reemployed after one or more years as nonstandard teachers because of the State policy requiring that preference be given to teachers with certificates (see Proposed Finding No. 16, *supra*). They would have been rehired but for the NTE requirement. Nine others subsequently passed the NTE cutoff, after incurring salary cuts.

^{21/} Of this number, three were not reemployed after one or more years as nonstandard because of State policy (see Proposed Finding No. 16, *supra*). They would have been rehired but for the NTE requirement. One other subsequently passed the NTE cutoff, after incurring a salary cut.

lower rates because they failed to attain the minimum NTE score requirement. Ninety-seven (81 percent) of the 120 teachers who were terminated or downgraded because of their below-950 NTE scores were black.

81. The evidence with regard to the 24 individual plaintiff-intervenors offers further examples of the effects of North Carolina's NTE requirements. All are black. Eight lost pay at the G level certification until 1972-73 because of the NTE requirement. The other sixteen have suffered loss of pay or job because of insufficient NTE scores for Class A certification (Taylor Dep. II, pp.222-67; NACE 2). From the most recent information in the record it appears that of the latter sixteen teachers, four are out of the teaching field entirely, four are teaching as nonstandard, three are working as teacher's aides, one is working as a school teacher in North Carolina, one is teaching out of state, one is retired, and two have met requirements and are teaching with a Class A Certificate. (Id.).

G. Undisputed Testimony and Documentary Evidence Elicited
from Officials of Educational Testing Service Relating
to the NTE and North Carolina's Use of Cutoff Scores.

82. Defendants called Dr. Majetic and Dr. Deneen of ETS as witnesses. They testified for a total of seven days (see Appendix No. 1 hereto). Their testimony and the many documents identified by them deal with a range of subjects including the construction of the NTE, its purpose, and its use. Only limited and most pertinent portions of their testimony and the exhibits from the files of ETS are selected here for summarization.

83. ETS does not claim that the NTE have "predictive validity"--i.e., no claim is made by ETS that the NTE predict who will be effective classroom teachers and who will not be effective classroom teachers (Majetic Dep. IV, p.369; Deneen Dep., p.428; DM 1, p.12).

84. At least two publications of ETS state that the NTE are not "intended to be a measure of classroom teaching performance." "A Critical Review of Research Related to the National Teacher Examinations" (DM 6, p.3; emphasis by ETS); "Manual For Designing and Conducting Validity Studies Based on the National Teacher Examinations" (GM 16, p.1).

85. Dr. Majetic testified that there are a number of qualities which are important to effective teaching but which are not measured by the NTE (Majetic Dep. I, pp.156-57). Among those qualities not measured by the NTE are the prospective teacher's ability to motivate students, the teacher's manual skills (i.e., typing, woodworking, sewing, and athletic prowess), his or her ability to communicate with students, to function effectively with other teachers, to function effectively with parents of schoolchildren, and to maintain discipline in the classroom, and the prospective teacher's willingness to work hard (Majetic Dep. I, pp.153-56; see also Deneen Dep. II, p.240). ETS publications state that "The National Teacher Examinations are not designed to measure aptitude, interests, attitudes, motivation, maturity or other personal or social characteristics" (GM 16, p.1; DM 6, p.2).^{22/}

86. Because the NTE does not measure many skills and traits which are necessary to effective teaching, ETS has consistently opposed the use of cut-off score requirements for certification (see Proposed Finding No. 87, infra).^{23/}

^{22/} The North Carolina General Assembly requires classroom teachers to perform many duties which are not tested by the NTE N.C.G.S. §115-146 states:

"It shall be the duty of all teachers . . . to maintain good order and discipline in their respective schools; to encourage temperance, morality, industry and neatness; to promote the health of all pupils, especially of children in the first three grades by providing frequent periods of recreation, to supervise the play activities during recess, and to encourage wholesome exercises for all children; to teach as thoroughly as they are able all branches which they are required to teach; to provide for singing in the school, and so far as possible to give instruction in the public school music; and to enter actively into the plans of the superintendent for the professional growth of the teachers. Teachers shall cooperate with the principal in ascertaining the cause of non-attendance of pupils"

^{23/} The North Carolina Director of Teacher Certification testified that ETS has "never" recommended a fixed cutoff score as a requirement for teacher certification in North Carolina - "quite to the contrary" (Taylor Dep. II, p.163. See DM 6, p.2; GM 16, p.1).

87. The ETS manual for test validation states:

"Sometimes a single NTE score is set as a cutoff, and all candidates who score below this level are automatically rejected for a teaching position. We strongly oppose the use of an inflexible cutoff score on the NTE. The tests are a less-than-perfect measure of a candidate's knowledge in general education and subject-matter competency. Moreover, test scores should be considered along with a wide variety of other information such as attitudes, personality, maturity, academic record, personal and social skills, recommendations for qualified personnel, teaching experience, out-of-school activities, and potential as a teacher" (GM 16, p.2; emphasis supplied by ETS).

This manual also states that ETS "does not set any passing or failing standard for any of the [NTE]. Only local institutions can make this type of decision based on their own validity studies of the NTE" (*id.* at 1). The same caveat appears in the ETS publication "A Critical Review of Research Related to the National Teacher Examinations" (DM 6, p.2).

88. With respect to North Carolina's cutoff score requirements, Dr. Majetic testified that "our general feeling is that the use of the cutoff score should be discontinued" (Majetic Dep. III, p.227)^{24/}.

89. Defendants' certification requirements, according to ETS officials and documents, are also infirm because the decision to reemploy a permit teacher turns on the cutoff score when in fact school officials have had the opportunity to observe and evaluate the teacher's actual teaching performance.

90. The ETS manual for test validation states that NTE scores "should never be used in decisions about retention or tenure, and only with caution in hiring, experienced teachers." (GM 16, p.2; emphasis by ETS). So too,

^{24/} Dr. Majetic reserved the position that a cutoff score might be permissibly used if North Carolina officials can validate the single criteria" (*i.e.*, the particular score requirement), but he further testified that "I know that they [North Carolina officials] have not" "conducted such a study" (Majetic Dep. II, pp.227-28). Dr. Deneen, when asked if it is unreasonable to set a cutoff score for certification without validation of that score, responded "Generally, yes, I would perceive that as an arbitrary decision" (Deneen Dep., pp. 285, 299-302). Dr. Deneen testified that it may be permissible to use an NTE cutoff score if that score were validated, "but it requires very strict conditions in the sense that the user who wants to use the score in this manner must do certain things to be sure that he is applying the cut-off score fairly and that it is needed, that is, there is some reason for having the cut-off score in the first place" (*id.* at 67-68).

the 1974 edition of "Guidelines For Using The National Teacher Examinations" states:

"Using the NTE in determining a teacher's retention, tenure, or salary level is a misuse of the examinations.

If an adequate and reliable record of a teacher's in-service performance is available, there is no need to measure his or her preparation for teaching. The critical criterion in evaluating an in-service teacher is not potential but actual teaching performance. The NTE are not an adequate measure of teaching performance--nor is any other single process or instrument" (DM 3, p.10).

91. Dr. Deneen was asked whether it was contrary to ETS policy for North Carolina to withhold certification from and reduce the pay of teachers who had been rated well in the classroom but had failed to meet the 950 score requirement. The witness said, "Even leaving out the question of reducing their salary, if you once have an adequate employment record you should not use the NTE any longer to make any judgment, whether it is salary or certification or anything else." (Deneen Dep., p.75).

92. Dr. Majetic testified that "once a candidate has taught and actual observations and evaluations of his teaching in practice is available, it would appear to us that that is much more relevant to make the judgment by ability than the test score" (Majetic Dep. III, p.220; see id. at 454-55).

93. Drs. Deneen and Majetic of ETS confirmed that a teacher with one year of experience was an "experienced" teacher as to whom the requirement of an NTE score for certification would be contrary to the ETS Guidelines (NEADX 42; Deneen Dep., pp.165-66; Majetic Dep. III, pp.220, 239). Dr. Deneen testified that it would be a "misuse" of the NTE to condition a North Carolina teacher's continued employment upon meeting a minimum score on the NTE if there is "an evaluation by a principal on a typical evaluation form" (Deneen Dep., pp.336-37).

94. The North Carolina Director of Teacher Certification testified that a "basic assumption" of ETS "is that you do not take a vicarious experience which the test is and substitute it for the real thing" (Taylor Dep. I, pp.180-81).

95. Defendants' practice of reducing the pay of inservice teachers who fail to meet the 950 minimum score on the NTE is also a violation of ETS' "Guidelines" (DM 3, p.10, quoted in Proposed Finding No. 90, supra) and recommendations. Dr. Majetic testified that in his judgment this practice is a "misuse" of the examination; that ETS has requested that the practice be changed; and "in the absence of that change, then we are in a position where we are going to have to indeed do something else which would probably bring about sanctions or court actions or whatever else may be appropriate."^{25/} (Majetic Dep. III, pp.237-38; id. II, p.87; id. IV, p.454; see NEADX 42).

96. Dr. Deneen also testified that using an unvalidated NTE cutoff score for the purpose of downgrading the certification and pay of in-service teachers violates the ETS' guidelines for using the NTE and constitutes a misuse of the test (Deneen Dep. III, pp.343-47).

97. In sum, ETS has warned users that it constitutes a misuse of the NTE (1) to use the examinations as a factor for determining whether to retain an in-service teacher; (2) to use the examinations as a factor for determining pay levels of in-service teachers; and (3) to use an unvalidated cutoff score on the examinations as a precondition to certification or initial employment.

^{25/} Following the adverse decision of the Court in Baker v. Columbus Municipal Separate School District, 329 F. Supp. 706 (N.D. Miss. June 23, 1971), ETS published "Guidelines for Using the National Teacher Examinations" (GM 1) which provided that "ETS will inquire into any allegation of misuse of the National Teacher Examinations." The Guidelines provided a four-step procedure leading to the imposition of "sanctions" for misuse. Pursuant to these sanction procedures ETS will [1] "inquire into any allegation of misuse"; [2] "discuss test usage with officials . . . and . . . endeavor to obtain appropriate changes." "Should school officials decline to reconsider an NTE misuse," ETS will [3] inform the appropriate professional organizations of the situation . . . [and] offer to cooperate with the organization in seeking a remedy" "If these steps fail to bring about change within a reasonable period, ETS [4] will notify school officials . . . and . . . teacher training institutions . . . that NTE scores will not be reported to the system." (Id. at 9). The sanction procedures remained the same when ETS published revised "Guidelines" in 1974 (DM 3, p.4). ETS has invoked these procedures against the State of South Carolina for its use of the NTE in connection with teacher certification and pay levels and currently is not reporting scores to that State (Majetic Dep. I, p.118). Drs. Deneen and Majetic testified that ETS had commenced sanction procedures against defendants but had suspended them when this litigation was initiated (Deneen Dep., pp.60-61; Majetic Dep. IV, pp.465-67; id., III, pp.238-39).

The review and compilation of research related to the NTE--"A Critical Review of Research Related to the National Teacher Examinations" (DM 6)--prepared and published by ETS in 1972, requires and confirms these conclusions (id. at pp. 37-38; PX 22; Taylor Dep. II, p.66).^{26/} Relevant excerpts from the "Critical Review of Research" are quoted at Proposed Findings Nos. 106-107.

H. Standards and Evidence Concerning Validation of the NTE as an Instrument for Certifying, Terminating or Fixing Pay Levels of Teachers in North Carolina.

98. The "Technical Handbook" published by ETS (DM 1) defines and explains "validity" as follows:

"A measuring device is useless unless it does, in fact, measure what it is designed to measure. The degree to which a measuring device does measure what it is designed to measure is called its 'validity'" (id. at 11; see Majetic Dep. IV, p.350).

99. An examination may be valid for one use and not for another. The ETS validation manual (GM 16) states that "Since there are many different ways of using a test with different candidates, there is no such thing as the validity of a test. How well a test carries out the purpose for which it is used determines whether it has any validity for that purpose" (id. at 3; emphasis by ETS). The same point is made by the American Psychological Association in its 1974 publication, "Standards for Educational & Psychological Tests" (GM 19, p.31).

100. From the testimony in this record it appears that two methods of test validation are relevant: criterion related validation and content validation. Criterion related validation involves "comparing test scores with one or more external variables [e.g., teacher rating evaluations] considered to provide a direct measure of the characteristic or behavior in question." This comparison most commonly takes the form "of a correlation relating the test score to a criterion measure." (GM 18, p.13). Content validation involves demonstrating

^{26/} ETS sent a copy of this study to the North Carolina Director of Teacher Certification on December 18, 1972 (NEADX 38; Taylor Dep. II, p.67).

"how well the content of the test samples the class of situations or subject matter [e.g., job requirements] about which conclusions are to be drawn" (id. ^{27/} at 12).

101. ETS takes the position that "a major responsibility for determining validity falls to the user . . . ," "including a user for certification" (Majetic Dep. IV, pp.348- 353). It has published in May 1972 and distributed a manual (GM 16) to assist users in designing validation studies and will process data collected by users for such studies at low or no cost (Majetic Dep. IV, pp.352-54, 356).

102. Defendants concede that they have not validated their use of the NTE (IUS No. 25, WH and passim; Taylor Dep. III, pp.132-33). Defendants claim that they have relied on ETS for the validity of the NTE (id.; IUS No. 25).

(i) Criterion-Related Validation of the NTE and on-the-Job Performance.

103. In their answers to interrogatories defendants state that they do not contend (1) that the Common or Teaching Area Examinations are criterion-related valid, or (2) that the NTE has a high degree of utility as defined in the Equal Employment Opportunity Commission's "Guidelines on Employee Selection ^{28/} Procedures," 29 CFR Part 1607 (IUS No. 25, WS, T).

27/ The foregoing definitions appear in the 1966 edition of "Standards for Educational & Psychological Tests and Manuals" published by the American Psychological Association. Guidelines published by the Equal Employment Opportunity Commission, 29 CFR §1607.4 (GK 4) rely upon this pamphlet as a proper statement of generally accepted validation procedures.

28/ Section 1607.3 of the EEOC Guidelines provides:

"The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII [of the Civil Rights Act of 1964] constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility"

Section 1607.5(c) of the guidelines provides that in assessing the utility of a test, the relationship between the test and at least one relevant criterion must be "statistically significant," defined as having a probability of no more than 1 to 20 of having occurred by chance, and in addition the relationship should have "practical significance." Professor Kirkpatrick defines the terms statistical and practical significance respectively at pages 73-80 and 103-05 of his deposition. See also note 9 to Proposed Finding No. 36, supra. The full text of 29 CFR 1607 is included in the record as GK 4.

104. Defendants have not taken the opportunity available to them to compare the performance of teachers with and teachers without the required minimum NTE scores. There are and have been since July 1, 1964, educators teaching in the public schools of North Carolina who have not attained the minimum NTE scores required for certification--i.e., those persons certified prior to July 1, 1964, and those persons employed on permits (see Proposed Findings Nos. 11, 13, supra). Defendants have not evaluated the classroom performance of such persons or made other studies to determine whether they have been unsatisfactory teachers or whether they have been in some way less effective than teachers who have met the NTE score requirements (Taylor Dep. III, pp.37-39; IUS No. 25, ¶¶I, K, M).

105. The only study that defendants have made of the NTE in North Carolina is the joint study completed in April 1970 by officials of the State Department of Public Instruction and ETS (NEAX 46). That study indicated that NTE scores do not differentiate between teachers evaluated as "outstanding" by their principals and teachers who are chosen at random (see Proposed Findings Nos. 46, 47, supra).

106. The record shows that other researchers have also made criterion related studies of NTE scores and job performance. This research has been compiled and reviewed by Educational Testing Service in its publication "A Critical Review of Research Related To The National Teacher Examinations" (DM 6).
29/
ETS' evaluation of these criterion related studies is as follows:

"We located only two correlations between WCET scores and grades in practice teaching and both were practically zero (-.01 and -.04)

"The correlations between WCET scores and ratings by college supervisors or principals during the student-teaching period are not very encouraging. We discovered six such correlations; they ranged from -.03 to .18 with a median value of .05. Obviously, the WCET scores do not predict these ratings very accurately.

"The WCET scores do not correlate highly with ratings given by principals or supervisors during the first year of teaching either. We found seven such correlations, with a range of -.15 to .45 and a median value of .11. The one correlation we found between WCET scores and principals' ratings at the end of the third year was only .10." (DM 6, pp.33-34; emphasis by ETS).

29/ "WCET" is an abbreviation sometimes used for the NTE Common Examinations.

107. ETS' review of the criterion related studies dealing with on-the-job performance concludes:

"Given the low correlations between the National Teacher Examinations and ratings of on-the-job performance by principals and supervisors, it is difficult to justify the use of fixed cutoff WCET scores in considering salary raises of teachers as advocated by Eckelberry (27), for the contract assignment by school districts as described by Carson (11), for provisional teaching certificates as described by Starcher (78) and Boozer (8), and for differential rating on teaching certificates, as described by Crow (18), even if we allow for the unreliability of these ratings. Since we were unable to locate a single study that used scores earned on any of the Teaching Area Examinations after 1964, when these scores were first equated to each other, the use of fixed cutoff scores across TAE (Crow and Starcher) is especially arbitrary, blind, and inappropriate. ^{30/}

(ii) Content Validation of the NTE and Job Requirements of Teaching.

108. Content validation entails, at the very least, a systematic comparison of the questions on an examination and the job requirements, skill, knowledge, or other factors sought to be measured (see Proposed Finding No. 100, supra; Kirkpatrick Dep., pp.219-20).

109. In response to an interrogatory asking defendants to state whether they contend that the Common Examinations and/or the Teaching Area Examinations of the NTE are content validated and, if they so contend, to describe the evidence supporting that contention (IUS No. 25, ¶r), defendants stated that they "accept the NTE as the most valid test for teachers." They said further: "We have no evidence available other than the reputation of ETS for the construction of standardized tests." ^{31/} (Id., ¶r).

110. The evidence shows that no official of the State Board of the Department of Public Instruction has examined the Common Examinations or 27 of the 28 Teaching Area Examinations to determine if the examinations are appro-

^{30/} Numbers in parentheses following authors' names were used to refer the reader to particular reference works described in the bibliography.

^{31/} Section 1607.8(a) of the EEOC Guidelines, 29 CFR §1607.8(a), provides: "Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity."

priate to the curricula taught in the North Carolina teacher training institutions (Taylor Dep. III, pp.130-34; Deneen Dep., p.133)^{32/}.

111. The Director of Teacher Certification testified that defendants have not made job analyses of the various teaching jobs performed in the public schools of North Carolina (Taylor Dep. II, pp.158-59; IUS No. 25, ¶¶F, G).

112. ETS recognizes that "the prime requisite in any licensing examination today . . . [is] job-relatedness"; that in determining the job-relatedness of a test, an empirical examination must be made of the desired in-service teaching behavior; and that the behavior of a teacher which may be desirable in one situation may not be desirable in another, depending on the nature of the pupils, the type of instruction you are trying to give, and other variables. (See NEADX 19, p.21). Dr. Deneen testified, "One must always keep in mind, doing job analyses and labeling behaviors, that desirable and undesirable are partly situation conditioned. It is, however, conceivable that one can find desirable teaching behaviors which do cut across all variables. So I don't rule that possibility out. I think the caution is simply made that we shouldn't assume that is true, it has to be demonstrated." (Deneen Dep., p.124; see Kirkpatrick Dep., pp.140-43). He testified further that it "is certainly correct" that no such breakdown has been made by ETS of the teaching jobs found in the North Carolina public schools (Deneen Dep., p.124).

113. The evidence shows that neither defendants nor ETS have compared the NTE with job analyses of the various teaching jobs for which candidates are certified by the State Board (IUS No. 25, ¶¶F, G; Deneen Dep., pp.123-24, 241, 245-58). Thus, the NTE has not been shown by content validation to be related to the requirements of teaching jobs in North Carolina.

^{32/} ETS loaned a copy of the "Media Specialist" examination to defendants for 38 days in 1970. Dr. Deneen was not aware of any other NTE tests having been sent to the State Department of Public Instruction. (Deneen Dep. pp. 126-27, 133; NEADX 21; Taylor Dep. III, p. 133).

114. The evidence also shows that steps have not been taken to determine whether the NTE adequately measure the academic performance of persons trained in the colleges and universities of North Carolina. ETS does not warrant that the NTE in fact adequately measure the academic achievement of students graduating from specified colleges. The 1972 edition of "Guidelines For Using the National Teacher Examinations" states:

- (1) "Although the NTE reflect curriculum areas and content common to most teacher education programs in the United States, state and college officials should review the tests to judge whether their institutions' curriculums are adequately represented," and
- (2) "before a college compares the performances of its students on the NTE with the performance of students from other institutions throughout the nation, 'each college must be certain that the tests' content is related to the college's preparation program.'" (DM 3, p.7).

115. Dr. Majetic testified that defendants were responsible for making certain that the content of the NTE relates to the preparation programs of its teacher training institutions insofar as the test is used for certification (Majetic Dep. IV, pp.360-61). He further testified that no one from ETS has traveled to North Carolina to review the teacher training institutions (Majetic Dep. IV, pp.358-59).

116. The North Carolina Director of Teacher Certification testified that ETS has not been "involved in the evaluation of the Academic Achievement within North Carolina institutions to my knowledge" and he believed he would be aware of such an evaluation if one had been made (Taylor Dep. III, p.22). The Director further testified that no agency of the State has ever conducted a study to compare the contents of teacher education programs approved by the State Board with the contents of the subjects tested by the NTE (Taylor Dep. I, pp.87-88).

(iii) Validation of the NTE Cutoff Scores Set by Defendants.

117. In addition to validation of the use of the NTE as an instrument for certifying, terminating or fixing pay levels of teachers in North Carolina,

defendants were responsible for validating any particular cutoff scores set for these purposes (Deneen Dep., p.68; Majetic Dep. IV, p.457). The ETS "Manual for Designing and Conducting Validity Studies Based on the National Teacher Examinations," published May 1972 (GM 16, p.1), states: "Educational Testing Service does not set any passing or failing standards for any of the National Teacher Examinations. Only local institutions can make this type of decision based on their own validity studies of the NTE." To the same effect, see Quirk, Witten and Weinberg, "A Critical Review of Research Related to the NTE" (ETS April 1972) at p.3 (DM 6).

118. Neither defendants nor ETS has validated the particular cutoff score requirements set on the NTE as measures of job performance or academic achievement (Deneen Dep., p.285; Majetic Dep. IV, p.463; IUS No. 25 ¶P).

I. Standards and Procedures Utilized by State and Local Officials To Insure That North Carolina Teachers and Teacher Candidates Are Qualified To Teach.

119. Beginning in 1962 the State Board of Education has used its certification authority to regulate the nature and quality of teacher training programs offered by colleges and universities in North Carolina (PX 39A, p.vii).

120. The record contains a substantial amount of evidence concerning the State Board's supervision and regulation of teacher training institutions. In this connection, the record includes the testimony of the Director of Teacher Certification (Taylor Dep.), the Assistant Director of the Division of Teacher Education (Cashwell Dep.), and the State Board's publication "Standards & Guidelines for Approval of Institutions & Programs for Teacher Education" (PX 39A).

121. North Carolina's certification procedures and requirements relating to teacher training institutions are summarized in a document entitled "Current Process Leading To Certification" (NEADX 40), which was prepared for and submitted to the State Board of Education in December 1972 by State Superintendent Phillips as part of the materials supporting his recommendation and that of the Ad Hoc Committee for elimination of the NTE cutoff score requirement for certification (Deneen Dep., p.163). This document states:

"Beginning in 1962 the process leading to certification has been through an Approved Program Approach which focuses on programs as developed and implemented by the Colleges and Universities. On the basis of State standards and guidelines each institution develops its teacher education programs and submits them to the State Board of Education for approval. The institutions and programs that meet the approved program test of the State Board are granted approval and the graduates are certificated upon a recommendation from the College or University involved. The State Standards and Guidelines (1) demand a total college or university involvement and commitment to the program for the preparation of teachers; (2) emphasize high admission standards for the teacher education programs; (3) call for a relevant curriculum with the objective of giving the teacher a broad, well-rounded education including depth in some academic specialization and suggests that for the average student up to 80 or 85 percent of his degree program should be directed to this phase of his preparation, with the remainder of his program devoted to the art of teaching; (4) require cooperation between colleges and public schools with the aim of providing meaningful student teaching experiences; and (5) require adequate faculties, facilities, equipment and supplies for the programs offered.

"On September 7, 1972 the State Board of Education adopted a program that introduces new elements and emphases for the approved program process. The major thrust of the new emphases calls for Colleges and Universities to (1) put more emphasis on assessment of students to determine needs in order that preparation programs might be more individual oriented; (2) place a special focus on a study of curriculum content with the objective of making preparation programs more relevant to the competencies (knowledge, skills, behaviors) needed by the teacher; (3) develop and execute exit policies that predict (competency to teach) on the part of the prospective teacher; and (4) carry out a systematic and comprehensive follow-up of graduates and use results in further development and improvement of programs.

"The approval process of the State Board of Education includes the following steps:

1. Colleges and Universities present programs, including a full description and justification to the State Board for approval.
2. Teams made up of College and University educators (professional and academic) public school personnel and state department personnel visit campuses for the purpose of observing teacher education programs in action. Programs are described and analyzed by the teams and reports are submitted to the State Board. [33/]

33/ The Visiting Committees inspect each institution for compliance with Standard 2.6, which provides:

"The institution shall have evaluation procedures to assess the quality of its graduates when they complete their pre-service programs. The exit evaluation should be an assessment of their ability and promise as performing teachers" (PX 39A, p.3; Cashwell Dep., pp.185-87).

3. The reports of the Visiting Committees are referred to the State Evaluation Committee on Teacher Education. (A standing committee appointed by the State Superintendent and the State Board of Education and members come from public and private colleges, from public schools and from the public at large.) The responsibility of this committee is to appraise institutions and programs in terms of compliance with the State Standards and Guidelines, as such compliance is reflected in the reports of the Visitation Committees.

4. Recommendations of the State Evaluation Committee on Teacher Education are made to the State Board of Education.

5. The State Board of Education makes the final decision as to the status of programs. The State Board makes one of four possible decisions as listed below:

a. Regular Approval: This means that the institution and programs are in approval form and the approval is for five years. The decision usually carries with it many recommendations for further improvement.

b. Provisional Approval: This means that the institution has some serious problems but can be corrected with adequate time. The approval is from one to three years.

c. Disapproval or Denial: Decision of this type means that the program is not in approvable form.

d. Deferred Action: A deferred action decision means that information is inadequate for making a decision, the institution's situation changes radically between the time it is visited and the time it is evaluated, or the results of another study being conducted by an institution would be significant in the decision.

"Once an institution has an approval decision regarding its teacher education programs, the graduates are issued teaching certificates upon the recommendation of proper authorities of the college or university, provided the State minimum N.T.E. composite score of 950 has been met. The recommendation must indicate that the candidate for a certificate has achieved the level of competency required for entry into the profession." (NEADX 40, "Current Process Leading to Certification").

122. Mr. Joseph Leon Cashwell, Jr., Assistant Director of the Division of Teacher Education and defendants' witness on the approved program, testified that the objective of these procedures is to assure that persons graduating from an approved program are at least minimally competent to teach in North Carolina (Cashwell Dep., pp.8, 123, 214).

123. The parties have stipulated that the testimony of six superintendents and assistant superintendents who were deposed provides an adequate

sampling of the criteria and procedures for initial hiring and for contract renewal utilized by administrative personnel in North Carolina school districts (Stip. No. 5, ¶8).

124. All of the superintendents and assistant superintendents testified that their respective school districts require candidates for initial employment to submit a transcript of their grades, to provide references, and to appear for interviews (Anderson Dep., pp.5-6; Gann Dep., pp.4-7; Hair Dep., pp.6-7; Hicks Dep., p.11; Newbold Dep., pp.4-5, 8-9; Robinson Dep., p.8).

125. All of the superintendents and assistant superintendents testified that they solicit and consider evaluations of the candidates from persons who have observed the candidates' practice teaching (Anderson Dep., pp.8-10; Gann Dep., pp.7-8; Hair Dep., pp.8-9; Hicks Dep., pp.12-13; Newbold Dep., pp.7-8; Robinson Dep., p.8).

126. Four of the six superintendents and assistant superintendents testified that they place no weight on the candidate's NTE score, except insofar as a low score indicates that the teacher may not be certified by the State at the end of his or her first year of teaching. (Anderson Dep., p.10; Gann Dep., pp.8-9; Hicks Dep., p.14; Robinson Dep., p.10). One superintendent testified that he looks more closely at the transcripts of candidates who have "inadequate" NTE scores (Hair Dep., p.9). Another testified that the NTE score "gives me . . . a rough estimate of the academic performance of a potential candidate," but also that "we simply make sure that the teacher has made a satisfactory score of 950 . . . and that's about it" (Newbold Dep., pp.8-9).

127. Further assurance of the maintenance of quality education in North Carolina is given by the career teacher procedures enacted in 1973. N.C.G.S. §115-142. These procedures provide that a teacher must serve three full years in probationary status and be rehired for a fourth year before acquiring career status. N.C.G.S. §115-142(c)(2). Thus, after making the initial decision to hire a teacher, the need for annual contract renewal affords a local school system at least three additional occasions for evaluation of his or her on-the-job performance before career status attaches.

128. The testimony of the local superintendents and assistant superintendents shows that each school district sampled by the parties has prepared teacher evaluation forms and has adopted procedures requiring that probationary teachers be evaluated in writing between one and three times each year (Anderson Dep., pp.11-13 (once per year); Gann Dep., pp.10-11 (twice per year); Hair Dep., pp.10-11 (twice per year); Hicks Dep., p.15 (twice per year); Newbold Dep., pp.11-16 (three times per year); Robinson Dep., pp.10-11 (twice per year)).

J. Certification Requirements in Other States.

129. A survey made in 1970 shows that every State requires teachers in its public elementary and secondary schools to hold teaching certificates (NEADX 40, last page).

130. Thirty-six States, including North Carolina, follow the approved program approach to certification (id.). The remaining 14 States "use other approaches similar to North Carolina's old course and hour concept"--i.e., the candidate is required to earn a specified number of credit hours in certain academic courses (id.; Taylor Dep. II, p.78; id. I, p.90).

131. In the past, Florida, Texas and West Virginia have required candidates for teacher certification to submit an NTE score as a precondition for certification. These States have abandoned their NTE requirements for certification (Deneen Dep., pp.370, 373-75, 378).

132. Mississippi currently requires all candidates for certification to submit an NTE score but the State makes no use of the scores other than for study purposes (Deneen Dep. III, pp.368-69). California permits candidates for certification in some teaching areas to submit NTE scores as an alternative to passing through the approved program of education for those teaching areas (Deneen Dep. IV, p.505).

133. Presently, only North Carolina and South Carolina require that candidates attain a minimum NTE cutoff score as a precondition to obtaining

a teacher certificate (Taylor Dep. II, p.77; Deneen Dep., pp.370, 381).^{34/}

134. In July 1974, ETS notified the State of South Carolina it would no longer report NTE scores to the State because the use of the examinations for classification of teachers for salary purposes was a misuse of the NTE (Majetic Dep. I, p.118; see note 25 to Proposed Finding No. 95, supra).

^{34/} Georgia requires all graduates of teacher training institutions to take the examination for the purpose of collecting data on graduates of Georgia institutions, but the State makes no decision about individual candidates for initial certification on the basis of NTE scores (Deneen Dep., pp.368-69).

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II

LEGAL ARGUMENT

Introduction.

Plaintiff-intervenors ask the Court to treat their proposed findings (supra, pp.2-49) as the statement of the case that would ordinarily precede a legal brief such as this one. As appears more fully in plaintiff-intervenors' proposed findings of fact, the State of North Carolina requires candidates for teacher certification to attain a score of 950 or more on the NTE (PF 71).^{35/} Persons who fail to meet that score are either denied employment opportunities altogether (PF 14-17) or are employed at a pay level that is approximately one-half that of teachers holding a certificate (PF 18-23).

There are five reported cases in the federal courts wherein school officials have required teachers or applicants for teaching positions to meet fixed cutoff scores on the NTE as a precondition to employment: Walston v. County School Board of Nansemond City, Va., 492 F.2d 919 (4th Cir. 1974), reversing 351 F. Supp. 196 (E.D. Va. 1972); United States v. Chesterfield County School District, 484 F.2d 70 (4th Cir. 1973); reversing 6 FEP Cas. 433 (D.S.C. 1972); Baker v. Columbus Municipal Separate School District, 462 F.2d 1112 (5th Cir. 1972), affirming 329 F. Supp. 706 (N.D. Miss. 1971); Morgan v. Hennigan, 379 F. Supp. 410, 464 (D. Mass. 1974); and Pickens v. Okaloosa Municipal Separate School District, 3 Race Relations Law Survey 180 (N.D. Miss. Aug. 11, 1971).^{36/} In each of these cases, the courts

^{35/} Citation is to Proposed Finding No. 71. The abbreviation "PF" followed by the pertinent finding number will be used hereinafter.

^{36/} See also Armstead v. Starkville Municipal Separate School District, 461, F.2d 276 (5th Cir. 1972), affirming in pertinent part, 325 F. Supp. 560 (N.D. Miss. 1971). The Armstead case differs from the above-cited cases because the school district, coincident with faculty desegregation, required in-service teachers to meet a minimum score requirement on the Graduate Record Examinations rather than the NTE.

have held that the use of a fixed cutoff score on the NTE as a selection criterion for employment or reemployment of teachers is racially discriminatory and/or arbitrary. In all but the Boston case (Morgan v. Hennigan), the evidence showed that the NTE cutoff score requirement was adopted and enforced by the school district during the time that the school district was being required to desegregate its schools and that the NTE cutoff score barred from employment or reemployment substantially greater percentages of black teachers than white teachers.

The instant case arises in the same setting. Defendants adopted and enforced their NTE cutoff score requirements for certification coincident with court-ordered desegregation. The cutoff scores required by them have barred from certification and higher pay substantially greater percentages of black than white teachers (PF 73-81). Defendants' most recent cutoff score, as the evidence shows, bars 31 percent of the black candidates for certification while more than 98 percent of the white candidates meet that cutoff score requirement (PF 73).

Unlike the NTE cases heretofore, this case presents two unusual features. In this case, the developer of the NTE has for the past five years repeatedly advised defendants not to use the NTE with a cutoff score for determining teacher certification or pay levels (PF 44, 48-50, 53-55, 66). In addition, here the school officials (the State Board, the State Superintendent and the State Department of Public Instruction), have determined, albeit belatedly, against using the NTE with a cutoff score for certification (PF 57, 60, 62-64). Thus, the State Board, the State Superintendent, the State Department of Public Instruction and Educational Testing Service have prepared and attempted to implement a certification plan that would end the use of cutoff scores on the NTE as a precondition for certification (PF 59-64), but the State Legislature has intervened and by statute, N.C.G.S. §115-153, has required the State Board to continue using cutoff scores on the NTE or an equivalent standardized examination as a precondition for teacher certification (PF 65-70).

We show below that the facts and law compel the conclusion that defendants' use of the NTE with a fixed cutoff score as an instrument for certifying, terminating and fixing pay levels of teachers is unlawful and should be enjoined. Specifically, we show that defendants have adopted, enforced and by statute perpetuated the NTE cutoff score requirements for the purpose of discriminating against black candidates; that defendants' cutoff score requirements violate Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment because the requirements are repugnant to the Griggs standard; and that defendants' requirement of a 950 cutoff score on the NTE violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the requirement is arbitrary.

A. The Evidence Shows that Defendants Have Adopted, Enforced, and by Statute Perpetuated NTE Cutoff Score Requirements for the Purpose of Discriminating Against Black Candidates.

In this section of our brief, we show that the State has adopted, enforced and by statute perpetuated the NTE cutoff score requirements for the purpose of discriminating against black candidates for certification. We show first that prior to the adoption of the NTE cutoff score requirements, defendants had definite proof that such cutoff scores would decimate the ranks of black teachers, and that, since their adoption, the cutoff scores have in fact decimated the ranks of black teachers. Next we show that where, as here, the State adopts and enforces cutoff score requirements that, coincident with desegregation, decimate the ranks of black teachers, the State must prove that discriminatory intent was not among the factors that motivated their actions. Keyes v. School District No. 1, Denver, 413 U.S. 189, 209-10 (1973). Defendants have not and cannot make such a showing. They have persisted to this day in enforcing the cutoff score requirements, notwithstanding the utter lack of evidence showing that the NTE with the 950 cutoff score is a valid instrument for certifying, terminating and setting pay levels of teachers and in spite of repeated advice from the developer of the NTE that their cutoff score requirements should be eliminated. Accordingly, this Court should

rule that defendants have unlawfully adopted, enforced and by statute perpetuated NTE cutoff score requirements for the purpose of discriminating against black candidates.

1. The State Adopted and Continues to Enforce the NTE Cutoff Score Requirements with Full Knowledge that those Requirements Bar Significantly Greater Percentages of Black Candidates than White Candidates from Certification, Employment, and Preferred Pay Levels.

Prior to adopting cutoff scores on January 9, 1964, the State Board was advised by its own Study Committee that the test contained a "culture bias," that the tests "are admittedly inadequate in themselves as measures of any portion of the total complex of the teaching-learning process" and that further "research" was necessary to determine how "scores may be used effectively as one of the factors in initial certification" (PF 29). When the State Board promulgated its NTE cutoff score requirements, it had proof positive that its cutoff scores would discriminate against black teachers (PF 32). The score reports received by defendants prior to January 9, 1974, forecast that a 450 cutoff score for the Class A certificate would phase out 53 percent of the black candidates for certification in a two-year period (PF 32). Twenty-two percent of the black candidates would immediately be denied the two-year probationary certificate and another 31 percent would be barred from Class A certification two years later when their Probationary A Certificates expired (PF 32). At the same time, only 3 percent of the white candidates would be similarly affected by the 450 cutoff score.

So too in selecting 500 as the cutoff score for the Class G Certificate, the Board knew that it would bar 80 percent of the black candidates from the higher pay levels and promotion opportunities it afforded as compared to 13 percent of the white candidates (id.).

The score reports received after the adoption and implementation of the cutoff score requirement confirmed that a decimation of black candidates for certification was taking place (PF 34). Yet the Board, without further study (PF 30, 35), increased the cutoff scores effective July 1, 1967, and scheduled further increases for July 1, 1968 (PF 33).

Defendants' cutoff score requirements, which even now bar 31 percent of the black candidates for certification as compared to less than two percent of the white candidates, have contributed to a significant decline in the percentage of black teachers employed in the public schools of North Carolina (PF 76). Defendants' statistics show that from 1951-52 through 1963-64, the last year before initiation of the cutoff score requirement, black teachers constituted approximately 27 percent of all teachers employed in the public schools of North Carolina. During that period, the absolute number of black teachers had steadily increased from 8,755 to 12,835. In the next ten years, with the minimum score requirement in effect, the absolute number of black teachers rose by 316, or 2.5 percent, while the number of white teachers increased by 13,311, or 43 percent. As a result, the overall percentage of black faculty in the North Carolina schools declined 23.5 percent (PF 74, 75). In the three-year period 1971 through 1973, 881 black as compared to 191 white applicants for certification failed to meet the NTE score requirement (PF 76).

Defendants adopted and increased their cutoff score requirement while the public schools of North Carolina were undergoing desegregation. In 1962, the Fourth Circuit, sitting en banc, held that the North Carolina Pupil Enrollment Act was being discriminatorily applied by school districts so as to perpetuate the dual system. The Court relieved black school children of the duty of exhausting administrative procedures under the Act and ordered the district courts to admit them to the schools of their choice. Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962); Wheeler v. Durham City Board of Education, 309 F.2d 630 (4th Cir. 1962). On June 3, 1963, the Supreme Court held that "no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." Goss v. Board of Education, 373 U.S. 683, 689 (1963). The promulgation of NTE cutoff scores followed (PF 31). On May 25, 1964, the Supreme Court announced that "the time for mere deliberate speed has run out," Griffin v. Prince Edward County, 377 U.S. 218, 234, and in November 1965, it held that school districts

may not delay desegregation of their faculties until student desegregation is completed. Bradley v. Richmond, 382 U.S. 103. Meanwhile, Congress enacted the Civil Rights Act of 1964, 42 U.S.C. §2000a et seq., with its authorization to the Attorney General in Title IV to initiate school desegregation actions, id., §2000c-6, and its direction in Title VI that federal funding be terminated to any district engaging in discrimination on account of race. Id., §2000d-1. Increases in the required cutoff scores followed (PF 33).

Finally, the Legislature's reinstatement of the NTE requirement--contrary to the recommendations of the State Board, State Superintendent, State Department of Public Instruction and ETS (PF 67-70)^{37/}--is part of a pattern wherein efforts to end racial discrimination in the public schools of North Carolina have been met with legislation that would perpetuate the racial discrimination. The Legislature passed its "anti-busing" statute shortly after the Charlotte-Mecklenburg School District was ordered to submit a desegregation plan for 1969-70. See Swann v. Charlotte-Mecklenburg Board of Education, 318, 312 F. Supp. 503, 506 (W.D. N.C. 1970). That statute was struck down by the Court in Swann v. Charlotte-Mecklenburg Board of Education, supra, 312 F. Supp. 503, aff'd, 402 U.S. 43 (1971). Similarly, in the wake of federal action to dismantle the dual school system, the State Legislature, on March 3, 1969, enacted statutes that would permit school districts undergoing desegregation to divide and preserve the white identity of one part. See United States v. Scotland Neck City Bd. of Educ., 442 F.2d 575 (4th Cir. 1971) (en banc); Turner v. Littleton-Lake Gaston School District, 442 F.2d 584 (4th Cir. 1971). This legislation was set aside by the Supreme Court in United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972).

^{37/} At the time the bill was pending, the State Department of Public Instruction provided the Chairmen of the House and Senate Committees and the press with computer analyses showing the adverse impact of the cutoff score requirements on black candidates for certification (PF 69).

2. The Evidence Relating To the Adoption and Enforcement of NTE Cutoff Score Requirements for Certification Establishes a Prima Facie Case of Purposeful Discrimination Which Defendants Have Not Rebutted.

It is well settled that when, coincident with school desegregation, the ranks of black educators are decimated by action of state agencies having a longstanding history of racial discrimination, the action is prima facie purposely discriminatory. This rule was established by the Fourth Circuit in Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 193 (1966) (en banc), endorsed by the Supreme Court in Keyes v. District No. 1, Denver, 413 U.S. 189, 209-10 (1973); and applied to cases involving the use of NTE cutoff scores in Walston v. Nansemond County School Board, 492 F.2d 919, 924 (4th Cir. 1974); United States v. Chesterfield County School District, 484 F.2d 70, 72-73 (4th Cir. 1973); and Baker v. Columbus Municipal Separate School District, 329 F. Supp. 706, 720 (N.D. Miss. 1971), aff'd, 462 F.2d 1112 (5th Cir. 1972).

Under the rulings of Chambers, Keyes, Nansemond, Chesterfield and Baker, plaintiffs have established, prima facie, that the NTE cutoff score requirements for certification were adopted by the State Board and perpetuated by the State Legislature for the purpose of discriminating against black candidates for certification. Thus, defendants have the burden of overcoming plaintiff's prima facie case. In Keyes, the Supreme Court held that:

"In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." Keyes v. School District No. 1, Denver, supra, 413 U.S. at 210.

Defendants have not and cannot discharge that burden.

The State Board initially adopted the cutoff score requirements despite their Study Committee's advice that further study of the NTE was necessary (PF 29-30). It maintained those requirements in the face of successive

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studies that failed to correlate the NTE with teaching performance and advice from ETS that (1) the State was misusing the NTE (PF 44, 49 n.14, 50, 54, 55, 66, 86, 88, 94-97), and (2) at the very least a full scale study of the NTE's use in North Carolina was urgently needed (PF 47-49). Finally, the State Legislature perpetuated the requirement in the face of the unanimous position of its State Superintendent, the Department of Public Instruction, the State Board and ETS that the NTE cutoff scores should be eliminated (PF 60, 64, 66, 68) and advice of the State Superintendent that adoption of an alternative requirement for certification "comes as close to assuring quality and fitness to teach as does any method now in use today throughout the fifty states . . . [and] is a much better method of determining all-around teaching qualifications than is being used today" (PF 64).

In sum, defendants have not and cannot show that discriminatory intent was not among the factors that have motivated them in adopting, enforcing and by statute perpetuating the NTE cutoff score requirements for certification.

B. The Evidence Shows that Defendants' NTE Cutoff Score Requirements Violate Title VII and the Fourteenth Amendment Because they are Repugnant to the Griggs Standard.

In the first section of our brief we demonstrated that defendants have adopted, enforced and by statute perpetuated their NTE cutoff score requirements for the purpose of discriminating against black candidates for certification. It is clear, however, that even where defendants have not acted with racial purpose, their use of a standardized examination may be barred by

38/ The only studies the defendants ever received were adverse to the use they were making of the NTE. In 1967, there was the study of Dr. Lewis finding that an "arbitrarily designated score on the common exam portion of the NTE . . . is not warranted" (PF 36). In 1969, Professor Hall's study concluded that "there are no significant relationships between selected criteria of teaching effectiveness and scores achieved" on the NTE Common Examinations (PF 45). Then in 1970, the joint study by ETS and the State Department of Public Instruction advised defendants that "there is no clear evidence that NTE scores are associated with nomination as outstanding teachers" and concluded that "the outcomes of this study--even with its limitations--strongly suggest the need for further study of the whole area of certification standards, teacher performance and appropriate measurement techniques" (PF 47).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, and the Fourteenth Amendment. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court said that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" (id. at 432). "What Congress has forbidden [in Title VII] is giving these devices and mechanisms controlling force unless they are demonstrably a ^{39/} reasonable measure of job performance" (id. at 436).

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973), the Court distilled its ruling in Griggs:

"Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be 'shown to bear a demonstrable relationship to successful performance of the jobs' for which they were used." ^{40/}

As we view this case, it is unnecessary for this Court to venture deeply into the issue of whether there is a demonstrable relationship between the NTE and successful performance of jobs. Any claim that defendants might make regarding the merits of the NTE in the abstract still cannot overcome three central facts which render defendants' use of the NTE invalid. As we show below (1) defendants have used the NTE with a cutoff score in derogation

^{39/} The standard announced in Griggs for determining whether an employment practice is discriminatory within the meaning of Title VII is also the standard which must be used to determine whether an employment practice is discriminatory and thus prohibited by the Fourteenth Amendment. As the Court of Appeals said in United States v. Chesterfield County School District, 484 F.2d 70, 73 (4th Cir. 1973), "it has been held, and we think correctly, that the test of validity under Title VII is not different from the test of validity under the fourteenth amendment." See also cases cited therein at page 73, and Walston v. Nansemond County, 492 F.2d 919, 924 (5th Cir. 1974). Accordingly, we do not make separate arguments showing that defendants' NTE certification requirements violate Title VII and the Fourteenth Amendment.

^{40/} In Walston v. County School Board of Nansemond County, 492 F.2d 919, 924 (1974), the Fourth Circuit held that the district court applied the wrong standard in determining that the board's NTE cutoff score requirements were lawful. The district court ruled "that for the NTE to pass muster, it was necessary that there be a 'reasonably necessary' connection between the qualities tested . . . and the actual requirements of the job to be performed." The Court of Appeals held the Griggs standard--a "'demonstrable relationship to successful performance of the jobs'"--"is much more rigorous in its burden than the standard actually utilized by the District Court here." Id. (emphasis and ellipses by the Court).

of ETS guidelines and admonitions; (2) there are acceptable alternative certification policies which would better accomplish the business purpose or accomplish it equally well with a lesser racial impact; and (3) defendants have not validated their cutoff score requirements or made analyses of the jobs for which teachers are certified. Under the Fourth Circuit's decisions in Nansemond and Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), any one of these facts concludes the case against defendants.

1. Defendants' Cutoff Score Requirements Violate the ETS Admonitions and the Guidelines for Using the NTE.

In Nansemond, the Fourth Circuit ruled that the NTE

"cannot be used as a tool of discrimination; it cannot be used without proper validation studies and job analyses under the rule in Moody, supra. Nor can it be administered capriciously in derogation of the guidelines promulgated by the ETS." 492 F.2d at 927.

In the first section of our brief (pp.52-57, supra), we demonstrated that the NTE has been used by defendants as a "tool of discrimination." In a later section of the brief we will show that defendants have adopted and enforced their cutoff score requirements without proper validation studies and job analyses. Here we take up the third point--that defendants have adopted and enforced the NTE cutoff score requirements capriciously in derogation of ETS guidelines and admonitions.

Unlike defendants in all other NTE discrimination cases reported to date, the defendants at bar, since 1969, have had a continuing dialogue with officials at Educational Testing Service who are responsible for the NTE (PF 44, 46, 48-50, 54, 55, 59, 66). During May or June 1970, ETS proposed that defendants, with assistance from ETS, make a "rather large-scale validation study of NTE" (PF 48), and on January 11, 1971, Dr. Deneen and Dr. Majetic advised defendants that the "need" for an "examination of NTE's usefulness is urgent. Some sort of short-term study should begin very soon" (PF 49). They further advised that "The NTE does not predict teaching performance The fact that NTE alone does not predict teaching performance is certainly a limitation on its value, analogous to the inability of a clinical thermometer to assess total health. This simply means the instruments in question are

restricted in value and ought to be used in conjunction with other measures" (PF 49, n.14).

On July 23, 1971, Dr. Deneen and Dr. Majetic sent to the State Superintendent a preliminary draft of the ETS "Guidelines For Using The National Teacher Examinations" and requested a meeting for the purpose of discussing "the possible implications of the Guidelines for North Carolina" and advised him that "we do not consider the NTE to be appropriate measures of teaching performance" (PF 50). . On September 3, 1971, Dr. Deneen advised the Assistant Superintendent for Special Services that "if the Board fails to eliminate at least the use of an NTE cutoff score for experienced teachers it will be in the legally and logically untenable position of insisting a test can do what the test's makers say it cannot" (PF 54).

In 1972 ETS sent to defendants a study entitled "A Critical Review Of Research Related To The National Teacher Examinations" (PF 97 & n.26; PF 107). This report stated, inter alia, that "Given the low correlations between the National Teacher Examinations and ratings of on-the-job performance by principals and supervisors, it is difficult to justify the use of fixed WCET [i.e., Common Examinations] scores in considering salary raises of teachers . . . , for provisional teaching certificates . . . , and for differential rating on teaching certificates . . . even if we allow for the unreliability of these [on-the-job] ratings" (PF 107). The Study also stated that "Since we are unable to locate a single study that used scores earned on any of the Teaching Area Examinations after 1964, when these scores were first equated to each other, the use of fixed cutoff scores across TAE . . . is especially arbitrary, blind and inappropriate" (id.).

Above all else, ETS has warned that the NTE should not be used as an instrument for evaluating in-service teachers. The "Guidelines For Using The National Teacher Examinations" state that "Using the NTE in determining a teacher's retention, tenure, or salary level is a misuse of the examinations"

^{41/}
(PF 90).

The evidence shows that defendants have failed to comply with the ETS Guidelines and the admonitions directly conveyed by ETS officials to the State Department of Public Instruction. Defendants have never undertaken a study of the NTE's usefulness (PF 30, 35, 102, 104, 109-10), though ETS deemed such a study "urgent." As to many in-service teachers, defendants' rules make the NTE cutoff score the sole factor in determining their reemployment irrespective of their actual classroom performance (PF 11(c), 16, 71(3)). Defendants use NTE cutoff scores to reduce by almost half the pay level of teachers after their first full year of teaching irrespective of their performance (PF 71(3); PF 18, Table II). Defendants use cutoff score requirements for every TAE, though that is "especially arbitrary, blind and inappropriate" (PF 107). In short, defendants have used NTE cutoff scores in capricious derogation of the test makers' advice and guidelines and, as Nansemond makes clear, such misuse of the NTE cannot meet the standards of Griggs.

2. The Evidence Shows that there Is No Business
Necessity that Justifies Defendants' Use of
Cutoff Score Requirements.

In Griggs, the Supreme Court pointed out that "What is required by Congress [in Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment" when they exclude minority groups. Griggs v. Duke Power Co., supra, 401 U.S. at 431. "The touchstone is business necessity." Id. The Equal Employment Opportunity Commission and the Fourth Circuit in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), have also emphasized that Title VII requires that one relying upon a test that yields racially disparate results must demonstrate that there is a business necessity for using the test rather than some other selection procedure or device.

^{41/} This statement appears in the 1974 edition of the Guidelines (DM 3, p.10). In the prior edition of the Guidelines (1971), ETS said "When a teacher has a record of classroom performance, he should be judged on the basis of that performance; test scores contribute little or nothing to the evaluation of an in-service teacher" (GM 3, p.5).

Section 1607.3 of the EEOC Guidelines provides:

"The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless:

(a) . . .

(b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use."
29 CFR §1607.3.

In Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), the Fourth Circuit held that:

"the business purpose [for using a particular employment criterion] must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must also be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." See also Moody v. Albemarle Paper Company, 474 F.2d 134, 138 n.2 (4th Cir. 1973), cert. granted, 43 L.W. 3349 (December 17, 1974).

The evidence in this record requires this Court to conclude that there are "acceptable alternative policies [relating to certification]. . . which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

The evidence shows that of the 50 States, only North Carolina and South Carolina use minimum NTE cutoff scores as a precondition for certification (PF 133). The remaining 48 States have certification requirements, but none require minimum NTE scores as a precondition for certification (PF 130, 133). At least 35 of these States use the "approved program approach" to certification, as does North Carolina, but without the use of minimum NTE scores (PF 130). Moreover, three of the States have used NTE scores for certification and abandoned them (PF 131). This demonstrates that there is nothing inhering in the process of teacher certification that requires use of minimum cutoff scores on the NTE or other standardized tests.

Beyond that, the evidence shows that the State Department of Education, the State Superintendent, the State Board of Education, and ETS developed new certification requirements for North Carolina (the so-called "Exit Criteria") which they deemed superior to the certification requirements now in force (PF 60-62, 64, 66-68, 72). The "Exit Criteria" would have eliminated the minimum NTE cutoff score requirement and thus would have eliminated the factor causing the substantial racial disparity in the certification process.

Finally, defendants' current procedures demonstrate that there is no need to use NTE cutoff scores as a precondition for certification in North Carolina. Defendants do not require candidates to submit NTE cutoff scores before they can enter the classroom. On the contrary, defendants permit all candidates to teach for one year and only at that point require them to meet the minimum score requirement (PF 11(c))^{42/}. Under defendants' certification procedures, it is possible for defendants to evaluate candidates on the basis of actual classroom performance (PF 71, 79-80, 89-93). It defies common sense and the advice of ETS to "take a vicarious experience which the test is and substitute it for the real thing" (PF 94). And it is clear from the study of persons who have failed to meet defendants' minimum score requirements in the three year period following January 1, 1971, that if evaluations of actual classroom performance were given weight in teacher certification, the racial impact of certification would be greatly reduced (PF 79-81 & Table X).

In short, the evidence requires the conclusion that there are acceptable alternative policies for certification which would better accomplish the business purpose of defendants or accomplish it equally well with a lesser racial impact. Thus, defendants' minimum NTE score requirements must be declared unlawful. Robinson v. Lorillard Corp., supra; 29 CFR §1607.3.

^{42/} Even then, the candidates may continue teaching as "nonstandard" teachers at half-pay, provided the employing district certifies that no better qualified person is available (PF 16, 18-23).

3. The NTE Have not Been Validated for the Uses
Defendants Make of Them.

Griggs places upon defendants the burden of proving that there is a demonstrable relationship between the NTE and successful teaching performance (see p.58, supra). Nansemond makes clear that such a showing requires "proper validation studies and job analyses under the rule in Moody, supra." 492 F.2d 919. The EEOC Guidelines impose the same requirement. 29 CFR §§1607.3(a), 1607.5(a).

The record in this case is bereft of any study validating the use of the NTE as an instrument for certifying, terminating or fixing pay levels of teachers in North Carolina. It is also bereft of any analysis of the requirements of the various types of teaching jobs for which teachers are certified in North Carolina. (PF 30, 35, 104, 109-111, 113, 115, 116).

Defendants concede that they have not validated their uses of the NTE (PF 102, 109). Instead, they claim that they relied upon ETS for such matters (PF 102, 109)^{43/}. The record, on the other hand, does not contain any document or testimony demonstrating that defendants in fact requested ETS to make job analyses or to provide proof of validation. On the contrary, the evidence shows that ETS made no analyses of the various teaching jobs in North Carolina (PF 112), conducted no studies validating North Carolina's uses of the NTE (PF 101, 105, 106-07, 113, 115, 118), and in fact on separate occasions explicitly advised defendants to make a "rather large-scale validation study of NTE" (PF 48), and that the "need" for an "examination of the NTE's usefulness is urgent" (PF 49).

In short, the NTE have not been validated for the uses that defendants make of them.

^{43/} Defendants asserted that "We have no evidence [of content validation] available other than the reputation of ETS for the construction of standardized tests" (PF 109). The EEOC Guidelines, 29 CFR §1607.8(a), provide that "Under no circumstances will the general reputation of the test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity."

C. Defendants' Requirement of a 950 Cutoff Score on the NTE Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment Because the Requirement Is Arbitrary.

It is well settled that the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit State officials from denying certificates and licenses to professional candidates on the basis of arbitrary requirements. E.g., Konigsberg v. State Bar of California, 353 U.S. 252, 262 (1957); Schwartz v. Board of Examiners, 353 U.S. 232, 238-39 (1957). In this section we show that defendants' 950 cutoff score requirement for certification is arbitrary.

Defendants do not use the NTE as one of several factors for determining whether graduates from state-approved programs should be certified for teaching or whether such graduates should be downgraded for pay and reemployment purposes. Under N.C.G.S. §115-153 and defendants' regulations, a below-950 score becomes the sole factor for making these decisions (PF 17-23, 67, 71). In this regard, defendants give no weight to the graduate's actual job performance and no weight to the graduate's performance at the teacher training institution over a four-year period (PF 67, 71). Under defendants' certification requirements, nothing can redeem a graduate who has scored below 950 on the NTE.

While defendants have used the NTE as if it were a finely calibrated instrument for separating the good from the bad and the competent from the incompetent, the record shows that defendants' 950 score requirement does not accomplish that purpose. On the contrary, the evidence shows that in North Carolina the large majority of teachers scoring below the cutoff score of 950 perform satisfactorily or better in the classroom (PF 80 & Table X). The performance evaluations made by officials in fourteen school districts in the State show that 158 of 165 teachers - i.e., almost 96 percent - in those districts who scored below the NTE cutoff score performed satisfactorily or better in the classroom, yet those persons were denied certification, regular pay and in many cases reemployment by virtue of defendants' cutoff score requirement (id., Table X).

In Nansemond, the district court found that "the evidence clearly establishes that no study has shown any correlation between any score [on the WCET] and an ultimately effective in-service teacher." 351 F. Supp. 196, 203 (E.D. Va. 1972). On appeal the Fourth Circuit concluded that "If this be true, the NTE cut-off score of 500 is patently arbitrary and discriminatory." 492 F.2d 919 (4th Cir. 1974). The United States District Court for the Northern District of Mississippi applied the same principle in holding that a 1,000 cutoff score on the NTE "is an arbitrary and unreasonable qualification for reemployment and employment as a teacher in [a public school] system and therefore violates the Due Process Clause." Baker v. Columbus Municipal Separate School District, 329 F. Supp. 706, 722 (N.D. Miss. 1971), affirmed on other grounds, 462 F.2d 1112 (5th Cir. 1972). To the same effect, see Armstead v. Starkville Municipal Separate School District, 461 F.2d 276, 279 (5th Cir. 1972), affirming 325 F. Supp. 560, 570 (N.D. Miss. 1971).

In the instant case there is no study establishing any correlation between any score on the Commons, any Teaching Area Examination, or both, and an ultimately effective teacher (PF 118). Thus, this Court should conclude, as the Court of Appeals did in Nansemond, that defendants' use of a cutoff score on the NTE is "patently arbitrary."

IV

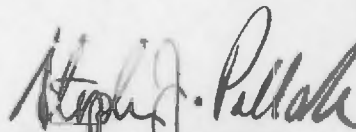
CONCLUSION

For the foregoing reasons, this Court should declare invalid and enjoin the enforcement of N.C.G.S. §115-153 and the State Board's regulations adopted thereunder insofar as they require candidates for certification to meet cutoff scores on the NTE, and should further enjoin defendants from using the NTE or any other standardized test as a criterion for certification, reemploy-

ment or fixing pay levels, unless and until defendants have validated such tests for the uses they intend to make of them.

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APPENDIX NO. 1

Listing Of Witnesses, Exhibits
And Other Documents Constituting
The Evidence Before The Court
Pursuant To The Pretrial Order

A. Depositions and Exhibits Identified by Deponents.

Dr. J. Arthur Taylor, Director of the Division of Teacher Certification, Department of Public Instruction for the State of North Carolina. Three volumes of testimony (April 10-12, and May 28-29, 1974) and Exhibits PX-1 through PX-44; NEAX-1 through NEAX-51; and NCAE-1 through NCAE-3;

Mr. Joseph L. Cashwell, Jr., Assistant Director of the Division of Teacher Education, Department of Public Instruction for the State of North Carolina. One volume of testimony (December 13, 1974) and Exhibits DC-1 through DC-60;

Dr. Richard M. Majetic, Senior Program Director for the National Teachers Examinations, Educational Testing Service, Princeton, New Jersey. Four volumes of testimony (July 10-12, 1974) and Exhibits DM-1 through DM-10; GM-1 through GM-19; NEAM-1 through NEAM-5; */

Dr. James R. Deneen, Director of Teacher Programs, Educational Testing Service. Four volumes of testimony (July 29, September 16-18, 1974) and Exhibits NEADX-1 through NEADX-45; NCAEDX-1; DDX-1 through DDX-4;

Dr. James J. Kirkpatrick, Professor of Industrial Psychology, Department of Manpower Management, California State University. Three volumes of testimony (August 23-24, September 9, 1974) and Exhibits GK-1 through GK-10; NEA-1; and DK-1;

Dr. Roy A. Sommerfeld, Professor of Education, University of North Carolina, Chapel Hill, North Carolina. One volume of testimony (August 19, 1974) and Exhibits DS-1 through DS-3; NEAS-1 through NEAS-2; and GS-1;

Dr. Karl L. Dolce, Dean, School of Education, North Carolina State University, Raleigh, North Carolina. One volume of testimony (August 19, 1974) and Exhibits DCJD-1 through DCJD-2;

*/ Pursuant to stipulation of the parties dated July 29, 1974, and at the request of the Educational Testing Service, exhibits DM9, 10; NEAM-4, 5; and NEADX2 through 6, 8 through 17 consisting of copies of various tests offered by the Educational Testing Service as part of the National Teacher Examinations and related Educational Testing Service work papers and correspondence have been filed with the Court under seal. The Educational Testing Service seeks to maintain the confidentiality of the NTE in order that no person be given an unfair advantage in taking the test. The stipulation of the parties is part of the record in the case bearing uniform citation number NEADX-1.

William L. Anderson, Jr., Assistant Superintendent for Personnel, Charlotte-Mecklenburg School System. One volume of testimony (October 29, 1974) and Exhibits GA-1 through GA-46; DA-1 through DA-3;

L. J. Gann, Administrative Assistant to the Superintendent, Union County School System, North Carolina. One volume of testimony (October 29, 1974) and Exhibits GG-1 through GG-17;

Kenneth R. Newbold, Superintendent of Schools, Scotland County School System, North Carolina. One volume of testimony (October 29, 1974) and Exhibits GN-1 through GN-13; DN-1;

Lawrence Herbert Robinson, Director of Secondary Instruction, Moore County School System, North Carolina. One volume of testimony (October 30, 1974) and Exhibits GR-1 through GR-11; DR-1 through DR-5;

John J. Hicks, Assistant Superintendent, Brunswick County School System, North Carolina. One volume of testimony (October 30, 1974) and Exhibits GJH-1 through GJH-31; and DJH-1 through DJH-4; and

William J. Hair, Superintendent, Bladen County School System, North Carolina. One volume of testimony (October 30, 1974) and Exhibits GH-1 through GH-23; DH-1 through DH-12.

B. Answers to Interrogatories and Attached Exhibits.

Defendants' answers to the interrogatories of the United States served February 13, 1974; answers of NEA to defendants' interrogatories served August 8, 1974, and Exhibits AID-NEA Ex. 1 through 14; answers of NCAE to defendants' interrogatories served August 8, 1974; answers of individual plaintiff-intervenors to defendants' interrogatories served March 8, 1974.

C. Answers to Request for Admissions.

Answers of defendants to request for admissions served by the United States on December 13, 1974. **/

D. Stipulations.

Stipulation No. 3 and attached Exhibits S.3-1 through S.3-4 consisting of census data; stipulation No. 5 and attached Exhibits S.5-1 through S.5-8 consisting of facts concerning various procedures and standards used by school systems in the State of North Carolina in hiring teachers, evaluating teachers and deciding on whether to reemploy teachers and the weight, if any, which those local school systems give to scores on the National Teacher Examinations in their decisions regarding hiring and retaining teachers.

**/ Plaintiff and plaintiff-intervenors have filed a motion for an order striking extra-record documents attached to defendants' answers and declaring that explanatory statements of defendants' counsel included in the answers are not evidence in the case. The motion is pending before the Court (see note 1, supra).

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused copies of the foregoing Plaintiff-Intervenors' Proposed Findings of Fact and Legal Argument to be served, by air mail, postage prepaid, upon counsel as follows:

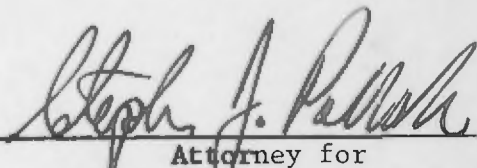
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Attorneys for the Plaintiff, United States

Dated: March 19, 1975

A handwritten signature in cursive script, reading "Stephen J. Pollak", is written over a horizontal line.

Attorney for
Plaintiff-Intervenors