

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
and	)	NO. 4476
	)	
NORTH CAROLINA ASSOCIATION	)	
OF EDUCATORS, et al.,	)	
	)	
Plaintiff-Intervenors,	)	
	)	
v.	)	
	)	
STATE OF NORTH CAROLINA, et al.,	)	
	)	
Defendants.	)	
	)	

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	i
II. The NTE Have Never Been Validated For Their Use In North Carolina	1
A. ETS Considers Defendants' NTE Requirements to be a "Per Se Misuse" of the NTE Which Cannot Be Validated for Experienced Teachers and Which Have Not Been Validated for Inexperienced Teachers	1
B. The Defendants and ETS Erroneously Assert That the Defendants Need Only Establish Content Rather Than Criterion-Related Validity for Their NTE Cut-Off Score Requirements	3
C. The Defendants Erroneously Claim That The North Carolina NTE Requirements Have Both Content and Predictive Validity	9
D. The Defendants' Contention That Their NTE Requirements Have Content Validity as a Measure of a Prospective Educator's Academic Preparation in North Carolina Is Not Supported by the Record	14
E. Evidence of Record, Unrefuted by the Defendants, Shows that Defendants' NTE Requirements Are Based Upon Examinations Plagued by Numerous Infirmities Which Evidence Would Have to Be Refuted Before Defendants' Uses of the Examination Could Be Validated	19
1. The Record Reflects that Defendants' NTE Requirements Are Based upon Examinations Which Studies Have Found to Be Culturally Biassed Against Blacks	19
2. The Record Reflects that Defendants' NTE Requirements Are Based upon Examinations Which Are Not Consistent or Precise Measures of the Areas Which They Purport to Test	24
III. The Record Does Not Justify the Claims of the Defendants that Alternatives to Defendants' NTE Requirements for Certification Are Inadequate and Unworkable.	34

IV.	The Defendants Have Failed to Demonstrate that the Adoption and Continuation of Their NTE Requirements Were Not Racially Motivated	35
V.	Defendants and ETS Err in Contending that the Standards Required by Title VII and the Equal Protection Clause of the Fourteenth Amendment Do Not Apply to Defendants' NTE Requirements	39
A.	Congress Intended Title VII to Apply to the Certification of Professional Educators in North Carolina	39
B.	The Defendants Err in Contending that Their NTE Requirements Should Not Be Judged by the Standards Required by Title VII and the Equal Protection Clause of the Fourteenth Amendment.	41
C.	The Defendants and ETS Erroneously Characterize the Standards Applied by Courts in Cases Involving Racial Discrimination in Testing	44
VI.	The Defendants Must Show a Compelling State Interest To Condition Certification and Employment upon Qualifications Which They Have Made More Difficult for Blacks To Obtain.	48
VII.	Proposed Conclusions of Law	51
VIII.	Conclusion	60

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REPLY BRIEF FOR THE UNITED STATES

I. INTRODUCTION

This brief is submitted in response to matters raised by the defendants and the Educational Testing Service (ETS) in their respective briefs. In their briefs, both the defendants and ETS make assertions concerning the alleged "validity" and technical characteristics of the National Teacher Examinations (NTE) and their use in North Carolina. These claims will be dealt with here, as in our Trial Brief, only to the extent that they relate to defendants' use of the NTE in North Carolina. In addition, while the United States agrees with the contention of ETS that North Carolina's

NTE requirements are not rationally related to a legitimate state interest, the briefs of the defendants and ETS err to the extent that they argue that the standards required by Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment do not apply to the defendants' NTE requirements for certification. Moreover, we believe that the outcome suggested by ETS would be a disservice to the defendants and to the interests of judicial economy. For, in effect, ETS asks this Court to strike down the State's present use of the NTE without articulating the legal standards by which any future use of the NTE, or other similar exam, will be measured.

II. THE NTE HAVE NEVER BEEN VALIDATED
FOR THEIR USE IN NORTH CAROLINA.

- A. ETS Considers Defendants' NTE Requirements To Be a "Per Se Misuse" of the NTE Which Cannot Be Validated for Experienced Teachers and Which Have Not Been Validated for Inexperienced Teachers.

In its brief amicus curiae, ETS emphatically and repeatedly states that it believes that North Carolina's use of the NTE is a "per se misuse" which cannot be validated as it relates to experienced teachers and which has not been validated as it relates to inexperienced teachers. 1/ ETS also states that the North Carolina cut-off score requirement for prospective teachers is a misuse of the test because it has never been validated although ETS claims that some single cut-off score could be validated. 2/ With respect to its

1/ See, e.g., ETS Brief, pp. 4, 22-26, 39-41.

2/ The Defendants' Brief p. 71, notes that such a score might eliminate even more minority applicants.

contention that North Carolina's NTE cut-off score requirements are a misuse of the NTE for experienced teachers, ETS's brief is consistent with its numerous prior notifications to the defendants that they were misusing the tests. 3/ We agree with ETS that the record shows with "utter clarity" that North Carolina's uses of the NTE are misuses even under the ETS Guidelines for Using the NTE as well as the APA Standards and EEOC Guidelines. We also agree with ETS that it is improper to use a test for a purpose for which it was not designed. 4/

However, although ETS's statements have sometimes been equivocal in this respect, the record is clear that ETS also warned the defendants against the use of any cut-off score for certification even for prospective teachers without prior experience. 5/ ETS especially advised against the use of a single composite cut-off score across TAE lines as "especially arbitrary, blind, and inappropriate." 6/

3/ U.S. Trial Brief, pp. 50-52, 72-86. Defendants' claim of surprise at the alleged "sudden turnabout" in ETS's brief is totally contradicted by the record.

4/ ETS Brief, p. 22; see also GK 2-4.

5/ Compare ETS Brief, pp. 4, 24-26, 41-47, with its statements quoted in our Trial Brief, pp. 44-45, 49, 72-73, 78, 82-83, 86. Also, as noted in our Trial Brief, p. 82, the Guidelines for Using the NTE (DM-3, p. 11) state that "NTE results should not be the sole determinant of graduation, certification, or selection decisions."

6/ U.S. Trial Brief, pp. 87-89. The ETS Brief does not specifically address the 450 WCE cut-off score required where no Teaching Area Examination (TAE) is available.

B. The Defendants and ETS Erroneously Assert That the Defendants Need Only Establish Content rather than Criterion-Related Validity for Defendants' NTE Cut-Off Score Requirements.

Both the defendants and ETS claim that the defendants can establish the validity of their NTE requirements by showing that they are "content valid."^{7/} ETS's position differs from the defendants in that ETS contends that North Carolina cannot, or in the case of inexperienced teachers, has not validated its cut-off scores.^{8/} Both ETS and the defendants contend that any effort to verify the existence of criterion-related validity for defendants' score requirements would be inappropriate, if not impossible.^{9/} However, the record shows that, under currently accepted professional standards in the field of testing and mental measurement, the defendants must establish the validity of their NTE score requirements in accordance with a criterion-related validity model for the following reasons:

First, the NTE are used in North Carolina to determine certification, a prerequisite for employment;^{10/} thus, they

^{7/} Defendants' Brief, pp. 31-32; ETS Brief, pp. 40-44.

^{8/} ETS Brief, pp. 20-28.

^{9/} ETS Brief, pp. 39, 47-50; Defendants' Brief, pp. 54-58. Criterion-related and content validity are discussed in our Trial Brief at pp. 60-67.

^{10/} RA No. 49.

are used as aptitude tests to predict ability to perform various teaching and administrative jobs rather than an achievement tests. 11/ The nature of a test, whether designed as an aptitude or achievement test, depends solely on its use. 12/

Second, because the NTE requirements are aptitude tests used for employment purposes, the EEOC Guidelines, §1607.5(a), and the 1974 APA Standards, pp. 26-27, require the defendants to produce evidence of criterion-related validity. Content validity, under the EEOC Guidelines, is appropriate only where criterion-related validity is not feasible. 13/ "Technically feasible" is described by the Guidelines, §1607.4(b) as

11/ Kirkpatrick dep., pp. 190-191.

12/ Ibid., pp. 38-40, 330-33. The attempts of defendants and ETS to divorce the NTE from the way they are used in North Carolina, see, e.g., Defendants' Brief, pp. 36, #101, and ETS Brief, p. 45, are not supported by evidence of record. The defendants stated that their Director of Certification, Mr. J. Arthur Taylor, testified that North Carolina used the NTE as achievement tests, in support of their claim that they use the NTE for this purpose. This characterization of Mr. Taylor's testimony is not accurate. Actually, Mr. Taylor testified that "I would say that it is fair to characterize the test and its design to be to a degree an achievement test in the various areas covered by the examination." Mr. Taylor said nothing to describe the manner in which the NTE are actually used in North Carolina. Taylor dep., v. 2, p. 224.

Also, ETS's claims as set forth in its brief, pp. 5, 13 and 19, appear to be contradictory. While alleging that the NTE were designed for use as achievement tests, ETS later claims that its committee of examiners attempts to measure both knowledge and "the ability to apply the knowledge to specific situations" and that "each test question fits into a carefully considered plan that weighs each subfield according to its current importance in actual teaching situations." There is no support for either of these latter claims in the record.

13/ EEOC Guidelines, §1607.5(a).

having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

The record shows that the defendants have not made such a demonstration. 14/

The defendants can make no showing of lack of feasibility merely by claiming that educators have never agreed on a definition of "effective teaching". 15/ The testimony of local North Carolina school officials demonstrates that local systems are able to determine which of their teachers are effective and which qualities are necessary for effective teaching. 16/ Thus, teaching jobs are susceptible to sufficient analysis upon which to base appropriate criterion-related and differential validity studies. 17/

14/ Kirkpatrick dep., pp. 43-48, 157-159, 176-178, 412-414.

15/ Defendants' Brief, p. 33, ¶83-85.

16/ Stipulation No. 5; Kirkpatrick dep., pp. 410-412.

17/ Kirkpatrick dep., pp. 225-226, 410-414. It is interesting to note that while the defendants (Defendants' Brief, p. 33) and ETS claim (ETS Brief, p. 39) that no agreement has been reached on a uniform definition of "effective teaching", there have been numerous efforts at classifying teaching job behavior, e.g., Ryans, Characteristics of Teachers, cited in ETS's Brief at p. 39. The record shows that it would be feasible to apply professionally acceptable research and validation techniques to teaching. Kirkpatrick dep., pp. 400-401. Moreover, the 1974 APA Standards, comment to §A1, state that a standard may not be ignored merely because it is difficult to meet or has not been usually met by a similar test. Finally, since both the defendants and ETS claim (Defendants' Brief, p. 35, ¶94; ETS Brief, p. 32) that the NTE measures the knowledge necessary for "effective teaching", certainly they must believe that they are able to define "effective teaching" in order to claim that the NTE measures it.

In their briefs, the defendants and ETS make numerous, extra-record, evidentially incompetent references to the "expertise" of the persons retained by ETS to develop the NTE. 18/ Both the defendants and ETS assert that the "expertise" of these persons and the manner in which they develop the examinations insures the "content validity" of the NTE. 19/ ETS' brief asserts that the expertise of the test developers and the procedures which they follow ensure that the NTE have some ubiquitous property described in its brief as "the underlying content validity of the examinations." 20/ At the same time, ETS acknowledges that the defendants' uses of the NTE are misuses of the NTE. 21/ Defendants, on the other hand, assert that the "expertise" of the developers and the procedures they

18/ Defendants' Brief, pp. 28-32, paragraphs 67, 68, 70(a) (b) and (c), and 78. ETS' Brief, pp. 9-20, 37-39. In addition, ETS attached four extra-record appendices containing cursory biographical sketches of the members of some test committees. ETS' Brief also refers to the Teacher Programs Advisory Board, asserting that the Advisory Board reviews "policy matters with respect to all teacher examination programs" as well as "the development and revision of the Common Examinations. ETS Brief, p. 11.

19/ Defendants' Brief, pp. 28-32, paragraphs 67-71, 77-79. ETS' Brief pp. 4, 19-20, 37-43.

20/ ETS' Brief, pp. 4, 28.

21/ Id. at pp. 20-28.

follow insure the validity of the NTE for the uses made of the examinations by the defendants.

ETS' brief further asserts:

Nowhere have the plaintiff or plaintiff-intervenors challenged the qualifications of the experts who participated in creating the test to make [judgments concerning skills, facts, and concepts included in the performance domain of the examinations.] 22 /

ETS is correct. Plaintiff neither challenges, nor concedes, the "qualifications of any 'expert' who participated in creating [the NTE]." The qualifications of these persons, whatever they may be, are not in the record of this case. No person participating in the creation of these examinations was called as a witness in this case; nor have the defendants made any effort to qualify any of these persons as expert in any field. The record of this case does not show that any of these persons have any knowledge of the curricula of the various North Carolina teacher training institutions, or any knowledge concerning the curricula taught in any of the public school systems of the State, or any knowledge of the manner in which any of the different NTE are used by the defendants.

22 / See, Defendants' Proposed Finding No. 69, ETS' Brief, p. 9; Defendants' Proposed Finding No. 68, ETS' Brief, p. 11; Defendants' Proposed Finding No. 69, ETS' Brief, pp. 11-12; Defendants' Proposed Finding No. 70(a), ETS' Brief, pp. 12-13; Defendants' Proposed Finding No. 70(b), ETS' Brief, pp. 14-15; Defendants' Proposed Finding No. 70(c), ETS' Brief, pp. 15-16; Defendants' Proposed Finding No. 70(d), ETS' Brief, p. 16; Defendants' Proposed Finding No. (e) Defendants' Proposed Finding No. 71, ETS' Brief, p. 19

Even if it is assumed that the persons employed by ETS to develop the NTE are qualified for that task, the record shows, and ETS acknowledges at pp. 20-28 of its brief, that their expertise alone would not be sufficient to validate the defendants' uses of the examinations. In that connection, the EEOC Guidelines, §1607.8, mandate that

(a) 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. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

C. The Defendants Erroneously Claim that the North Carolina NTE Requirements Have Both Content and Predictive Validity.

In their brief, pp. 31-34, 58, the defendants claim that their NTE requirements have "content validity" and that, although the NTE "cannot be expected to have predictive validity," nevertheless there is evidence of the "predictive validity" of the NTE. Neither of these claims finds any support in the record.

First, the defendants and ETS incorrectly assert that the NTE has "content validity" for granting certification in North Carolina if the test "adequately samples those things which are taught in teacher training programs." Defendants' Brief, p. 58; see also ETS Brief, pp. 37-38.^{23/} However, the EEOC Guidelines and APA Standards, reflecting currently accepted professional standards, define content validity as "suitable samples of the essential knowledge, skills or behaviors composing the job in question." GK-4, p. 68 (EEOC Guidelines, §1607.5(a)). The defendants and ETS fail to note that the same Guideline also requires evidence for content validity to be "accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) . . . "Ibid. The APA Standards (GK-3, p. 29) as noted in our Trial Brief, p. 66, warn that "an employer cannot justify an employment test on the grounds of content validity if he cannot demonstrate that the content universe [of the

^{23/} In point of fact, the record does not support any claims that the NTE is such an "adequate sample."

examination] includes all, or nearly all, important parts of the job." ^{24/} As discussed below, the NTE cut-off score requirements for certification are employment tests; no showing of content validity can be made by claiming that the NTE may have some undisclosed relationship to a teacher training program rather than to the various jobs in question.

Second, the defendants' assertion (Defendants' Brief, pp. 33-34) that their NTE requirement evidences predictive validity is controverted by the record. The testimony of local North Carolina school officials cited in our Trial Brief, pp. 90-98, conclusively demonstrates that the defendants' NTE requirements frequently result in the termination or downgrading of many minority educators who have effectively performed their jobs. The defendants offered nothing to rebut this evidence. ^{25/}

^{24/} ETS's brief, p. 47, provides no citation, record or non-record, for its assertion that a job analysis is not a required part of a validity investigation unless the investigator doing the study is unfamiliar with the job in question. It would appear presumptuous for any person conducting a validity study to assume sufficient expertise in each of the numerous teaching and administrative positions for which NTE scores are required in North Carolina. See Kirkpatrick dep. pp. 139-143, 225-228; Sommerfeld dep., pp. 83-86. In any event, the record is clear that such job analyses are required by professional standards as well as by Federal law and that no such job analyses have been conducted by the defendants. U.S. Trial Brief, pp. 68, 129-135.

^{25/} In their brief, pp. 39-47, the defendants allude to a number of examples of errors in grammar and spelling by minority teachers denied certification because of the NTE requirements. We assume that the defendants would not contend that this amounts to a study in accordance with the EEOC Guidelines and APA Standards from which any conclusions could be drawn concerning the validity of their NTE cut-off score requirements. Defendants also elicited but do not quote in their brief testimony showing that similar spelling and grammatical errors were made by a district superintendent who presumably had been required to obtain the NTE score

(footnote continued next page)

The studies cited by the defendants' brief, pp. 33-35, as evidence of the NTE's alleged predictive validity were included in an ETS Research Bulletin (DM-6). Only one of the thirteen studies cited in the Research Bulletin dealt with North Carolina and none dealt with the cut-off scores required by the defendants.^{26/} Moreover, uncontradicted expert testimony demonstrated that these studies did not establish the "predictive" validity of the NTE for any purpose, much less the validity of the particular North Carolina cut-off scores.^{27/}

Under the APA Standards, the 1951 study by Ryans cited by the defendants contained very low correlations and could not be relied upon as evidence of validity because of its age.^{28/}

The 1955 Shea study is revealed by the evidence to have statistical, but no practical significance as required by the

(footnote continued)

required for certification as a superintendent. Hicks dep., pp. 27-29. Further, the record shows that persons scoring above 950 on the NTE make similar errors. Robinson dep., p. 58; Anderson dep., pp. 105-106. Nor are the briefs of any of the parties to this action free from such errors, see, e.g., defendants' Trial Brief, pp. 27, ¶64, 34, ¶90, 35, ¶94(a), 38, ¶111.

^{26/} The other studies in this record dealing with the NTE in North Carolina found that the NTE had no predictive validity. U.S. Trial Brief, pp. 27-31, 43-50, 75.

^{27/} Kirkpatrick dep., pp. 86-129, 186-187, 202-215.

^{28/} Kirkpatrick dep., pp. 91-92, 205-206. This study apparently attempted to compare principal ratings with an NTE subtest. Here, the defendants rely upon this study for evidence of validity while later gainsaying the adequacy of principals' ratings. Compare Defendants' Brief, pp. 33-34 with pp. 74-75.

EEOC Guidelines, §1607.5(c)(2).^{29/} The correlations between supervisory ratings and North Carolina Teachers' WCE scores in the 1964 Thacker study were not statistically significant under the EEOC Guidelines, §1607.5(c)(1).^{30/} The 1969 Carson study comparing principal ratings with WCE scores produced correlations which were barely statistically significant between WCE scores and "social efficiency" and "skill in teaching."^{31/} However, neither these correlations nor those provided for the other studies noted in the ETS Research Bulletin were practically significant as required by the EEOC Guidelines.^{32/}

With respect to practical significance the EEOC Guidelines, §1607.5(c)(2), provide that

In assessing the utility of a test the following considerations will be applicable:

^{29/} Kirkpatrick dep., pp. 93, 108-113.

^{30/} Kirkpatrick dep., pp. 93-94.

^{31/} Kirkpatrick dep., pp. 95-96.

^{32/} Kirkpatrick dep., pp. 108-113. In discussing these validity coefficients, Defendants Brief, pp. 33-35, makes no mention of the practical significance requirements. In his testimony, Dr. Kirkpatrick discussed the interpretation of validity coefficients in terms of practical significance by means of the concept of "variance," statistically defined as the square of the deviation. Thus, a study comparing NTE scores with teaching effectiveness yielding a validity coefficient of .20 means, in terms of practical significance, that the NTE score would predict approximately 4 per cent of the criterion of teaching effectiveness and that 96 per cent of the criterion would not be predicted by the NTE. A rough rule of thumb followed in the profession gives .30 as the value of a validity coefficient at a minimum level of practical significance. Kirkpatrick dep., pp. 103-111.

In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high. 33/

33/ The guidelines applying to economic and human risks are meant to apply to occupations involving safety such as pilots or air traffic controllers and not to educators. Kirkpatrick dep., pp. 414-417. In any event, the risks involved in North Carolina would not be high in view of the numerous safeguards involved in the hiring and retention process for teachers. Ibid. And, of course, the testimony of North Carolina's local school officials demonstrates that the NTE requirements have no effect on any such risks. U.S. Trial Brief, pp. 90-98.

The evidence of record is that none of the studies cited by defendants meet these criteria.^{34/} Certainly, none manifest any relationship whatsoever to defendants' cut-off score requirements.^{35/} Beyond defendants' wholly unsubstantiated assertion belied by their answers to interrogatories,^{36/} the record reflects affirmatively that no efforts have been made by the defendants to establish the validity, either criterion-related or content, of the North Carolina cut-off score requirements.^{37/} In addition, since the NTE is used by the defendants to select people for jobs, the defendants must establish the criterion-related rather than the content validity of their cut-off scores. U.S. Trial Brief, p. 67.

D. Defendants' Contention That Their NTE Requirements Have Content Validity as a Measure of a Prospective Educator's Academic Preparation in North Carolina Is Not Supported by the Record.

The defendants contend that their NTE requirements have content validity as a measure of a prospective educator's academic preparation.^{38/} The record reflects no support for

^{34/} Moreover, in its Research Bulletin (DM-6, Tables 1-2), ETS includes as evidence of either the "predictive" or "concurrent" validity of the NTE summaries of purported "studies" on norm groups with as few as seven persons although ETS's Brief, p. 46, concedes that a sample size of at least 85 is normally necessary. See also, Kirkpatrick dep., pp. 96-97, 118.

^{35/} Kirkpatrick dep., pp. 214-215. The ETS Brief also supports this position, see p. 26.

^{36/} IUS No. 25(h)-(n), (p)-(r); see also RA Nos. 10-13.

^{37/} U.S. Trial Brief, pp. 67-71.

^{38/} Defendants' Brief, p. 32-33.

this contention or the analogous argument of ETS.^{39/}

First, as discussed above, since the defendants use the NTE as an aptitude test for employment purposes and not as an achievement test, it is inappropriate under the APA Standards and EEOC Guidelines to base any estimate of the validity of the NTE cut-off scores upon an estimate of the content validity of the NTE as an alleged measure of the academic preparation of prospective educators.^{40/} Second, the record is devoid of any efforts by the defendants or ETS to define and validate any minimum level or levels of academic preparation needed by educators to perform their various jobs^{41/} and to relate

^{39/} ETS erroneously argues that the NTE have an "underlying validity" as achievement tests apart from the manner in which they are used in specific circumstances although it correctly emphasizes that the defendants' specific NTE cut-off scores are "misuses" because they were not designed and/or validated for such uses. Compare ETS Brief, pp. 4, 28, with U.S. Trial Brief, p. 61. In any event, ETS misapprehends the requirements of current professional standards by its implication that it is up to the plaintiff to disprove the "validity" of the NTE. The burden of establishing validity for a specific purpose rests entirely upon the test user and/or test developer under current professional standards. Compare ETS Brief, p. 4, with EEOC Guidelines, §1607.4, 1974 APA Standards, p. 1 and §B5. In addition, the EEOC Guidelines, §1607.7, require any person relying on evidence from other validity studies as evidence of his test requirement's validity to "substantiate in detail job comparability" and to "demonstrate the absences of contextual or sample differences . . ." The record shows that the defendants have made no such undertaking with respect to defendants' score requirements.

^{40/} Of course, the defendants have provided no validity coefficients for this purpose.

^{41/} The government, of course, recognizes that the state has a legitimate interest in assuring that the academic preparation of its educators is adequate for successful job performance. In this connection, ETS's characterization of the testimony of the government's expert witness, Dr. Kirkpatrick, is inaccurate. Nowhere in his deposition did Dr. Kirkpatrick testify or imply that academic preparation was not necessary for teaching. In addition, a review of his deposition makes clear that the partial statement as quoted by ETS is misleading and out of context. Compare ETS Brief, p. 33, n. 98, with Kirkpatrick dep., pp. 216-218, see also pp. 155-156.

either the NTE or defendants' NTE cut-off scores to that minimum level or levels.^{42/}

Third, it is erroneous for the defendants and ETS to contend that the NTE act as an "alternate measure of academic preparation, that parallel the approved program" and that the defendants' cut-off score requirement is a "measure of a minimum level of achievement within the approved program that parallels the cut-off score within the approved program itself [referring to the required grade point average for graduation]." ^{43/} Again, the validity of the defendants' NTE score requirements depends upon the existence of a manifest relationship not between the NTE and North Carolina's approved program but between the required NTE scores and the knowledge required for successful performance by the various North Carolina educators who must achieve the scores.

^{42/} As reflected by the record, professional standards may not permit the use of the NTE for certification purposes under any circumstances. In its brief, ETS obfuscates the distinction between use of the NTE for certification by particular states and the use for which the NTE were designed, i.e., to measure the academic preparation of a graduate of a four-year teacher training institution. Compare ETS Brief, p. 3 with pp. 5-6, 8. The record does not show that the tests were designed for certification of teachers in any state or states and, contrary to ETS's claim, (ETS Brief, p. 5) are not widely used for this purpose. U.S. Trial Brief, p. 107. In fact, only three states (North Carolina, South Carolina and Mississippi) require graduates of teacher training institutions to take the NTE and all three are using the NTE in a manner ETS considers a misuse. See, ETS Brief, pp. 22-29, describing North Carolina's use as a misuse; Deneen dep., p. 383, stating ETS has advised Mississippi not to adopt any cut-off score requirements. Since Dr. Deneen's deposition was taken, Mississippi has adopted cut-off score requirements for certification notwithstanding ETS' recommendations to the contrary.

^{43/} ETS Brief, p. 43; see also Defendants' Brief, pp. 32-33.

The defendants and ETS argue that the NTE are valid for making certification decisions because the NTE are alleged to be related to the North Carolina approved program which, in turn, is claimed to be similar to teacher preparation programs in other states.^{44/} These claims find no support in the record^{45/} although, even if substantiated, they could not establish the validity of the defendants' cut-off score requirements for the following reasons:

(1) The record shows that the required amount of academic preparation for certification varies between states. For example, North Carolina does not require graduation from an approved program in order to obtain certification as a professional educator.^{46/}

(2) The defendants and ETS have not conducted any studies comparing the NTE or any part thereof with the approved program in North Carolina or made any other efforts to validate their score requirements.^{47/}

(3) ETS attempts to piggyback on the approved program by claiming that, as an alleged measurement of academic preparation similar to the approved program, the NTE need not be validated

^{44/} ETS Brief, pp. 42-43; Defendants' Brief, pp. 32-33.

^{45/} The defendants cite a non-record document apparently purporting to be a general study of American teacher education for the claim that North Carolina teacher programs are "essentially the same as any other state." Defendants' Brief, p. 32, ¶80. This assertion should not, of course, be considered as evidence.

^{46/} Taylor dep., v. 2, p. 146. ETS's assertion that all states require graduation from an approved program for certification is in error. See Walston v. County School Board of Nansemond County, 492 F. 2d 919 at 925 (C.A. 4, 1974), where there were apparently no state barriers to certification for teachers without even college degrees. ETS does acknowledge that the basic minimum qualifications for licensing teachers vary from state to state. ETS Brief, p. 34, n. 101.

^{47/} U.S. Trial Brief, pp. 67-68.

in accordance with Title VII since there is no requirement that the approved program be so validated.^{48/} However, the question of the validity of the approved program is not at issue in this case. Since this record contains no evidence that the approved program has a racially discriminatory effect, the EEOC Guidelines, §1607.3, do not require its validation.

^{48/} ETS Brief, pp. 42-44.

E. Evidence of Record, Unrefuted by the Defendants, Shows that Defendants' NTE Requirements Are Based Upon Examinations Plagued by Numerous Infirmities Which Evidence Would Have to be Refuted Before Defendants' Uses of the Examinations Could Be Validated.

As discussed above and in our Trial Brief, the record of this case does not contain a single study which purports to validate defendants' uses of the NTE. The uncontroverted evidence in this case also shows that the NTE are plagued by numerous infirmities which would have to be corrected, or the studies demonstrating the infirmities would have to be refuted, before defendants' uses of the examinations could be validated. The record further shows that the defendants do not have background information vital to any effort to validate their uses of the NTE.

1. The Record Reflects that Defendants' NTE Requirements Are Based Upon Examinations Which Studies Have Found to Be Culturally Biassed Against Blacks.

The briefs of the defendants and ETS both cite the "safeguards" taken in the development of the NTE to insure the NTE are free from bias in support of the conclusion that the NTE are neither culturally nor racially biassed against blacks. Whatever merit these procedural safeguards might have, the results of the studies of cultural bias in the WCE in the record of this case show that the safeguards have been inadequate. Neither the defendants nor ETS cite any study which concludes the NTE are not culturally biassed and, every study in the record of this case which addresses the

issue explicitly concludes the WCE are culturally biased.^{49/}

In 1961 the North Carolina Study Committee on Teacher Education, Rating and Certification concluded that the NTE^{50/} were culturally biased. Although no further studies of the cultural bias of the NTE were conducted by the defendants either before or after the adoption of the first cut-off score requirements, studies conducted by ETS and ETS employees have confirmed the Committee's opinion.

ETS conducted its first study of cultural bias in the NTE in 1969. In this study ETS convened a panel of minority educators to review the NTE and to "talk to [ETS] about bias as [the panel] would describe it and define it."^{51/}

^{49/} See, PX-21, pp. 18-19; NEADX12, pp. 1-6; and NEAM-2, pp. 228-233.

^{50/} PX-21, pp. 18-19.

^{51/} Majetic dep., p. 80.

CONFIDENTIAL MATERIAL SUBJECT OF JOINT MOTION
AT THE REQUEST OF ETS

ETS made some alterations in the WCE in response to
the findings of the minority panel;^{58/} however, a study conducted by Dr. Thelma Spencer after these alterations had been made found the WCE was still culturally biased against blacks.^{59/} As part of her study Dr. Spencer asked a panel of judges to review the WCE and identify questions which in its opinion contained cultural bias. The panel identified fourteen such questions and these questions were subjected to statistical analysis.^{60/} The results of this investigation and the remainder of her research led Dr. Spencer to conclude:

[T]he allegation of cultural bias in the NTE Common Examination had merit, and that evidence to support the allegation was found in the significant differences in means of the racial groups in the investigation, and in their differential response patterns for certain types of test items.^{61/}

^{58/} ETS developed a new TAE in Education in the Urban Setting; eliminated a portion of the written English expression subpart on the WCE, Majestic dep., p. 84; and, began publishing leaflets describing the various TAEs for persons about to take the exams, Majestic dep., p. 84.

^{59/} Dr. Spencer is currently Executive Associate to the Director of the Higher Education Division at ETS and was formerly the Assistant Program Director for Teacher Programs and Services, Deneen dep., p. 191-92.

^{60/} Dr. Spencer's study was done on the WCE form which was used for the January, 1971 national administration of the NTE. Dr. Spencer did not undertake any statistical analysis of questions not identified by the panel as biased and it is, of course, unknown what the results of such an analysis would have been.

^{61/} NEAM-2, p. 231. The full text of Dr. Spencer's conclusions and recommendations are set forth at pp. 228-233.

In September, 1972 ETS published a "Research Bulletin" entitled Race and Subject Matter Influences on General Education Items of the National Teacher Examinations.^{62/} For the purposes of this study, questions on the social studies, literature, and fine arts portion of the WCE were categorized as "traditional," "modern," or "black" on the basis of their content. The response patterns of black and white examinees were then analyzed to determine if the racial groups performed differently on different item types. The results of this study show that increasing the concentration of "black" questions as opposed to "traditional" questions or increasing in equal numbers the mixture of "black" and "modern" questions as opposed to "traditional" questions would increase the scores of black examinees compared to white examinees.^{63/}

In response to the findings of the 1969 panel, the Spencer study and the "Research Bulletin" ETS began identifying the race of persons taking the NTE in October, 1973. The data collected as of July, 1974 shows that white examinees score higher than black, Oriental and Chicano examinees on every test

^{62/} This study was conducted jointly by Drs. Donald Medley and Thomas Quirk of ETS.

^{63/} GM-2, pp. 20-21.

^{64/}
in the NTE battery. Although, Dr. Majetic testified that
ETS has continuing concern over cultural bias and the NTE,
there are no studies currently of this problem being under-
^{65/}
taken by ETS. Dr. Majetic was unable to testify that there
was a consensus at ETS that the NTE were not culturally
^{66/}
biased.

2. The Record Reflects that Defendants NTE Requirements Are Based upon Examinations Which Are Not Consistent or Precise Measures of the Areas Which They Purport to Test.

The defendants propose, without supporting record citations, that this Court find "[t]he NTE reliably and accurately measures the academic preparation of graduates of teacher education programs."^{67/} The record of this case cannot support this proposed finding.

The "reliability" of a test is an estimate of how consistently the test measures whatever it measures. Reliability alone tells nothing about a test's validity because it does not address the question of how well the test is fulfilling its intended purpose. However,

^{64/} NEAM-1. It is interesting to note that the median score of white examinees is higher than the median score of Chicano examinees on the Spanish TAE.

^{65/} Majetic dep., p. 83.

^{66/} Id., at pp. 88-89.

^{67/} Defendants' Proposed Finding of Fact No. 93. In support of this proposed finding, defendants cite their Proposed Findings of Fact No. 58. The only citation following Defendants' Proposed Finding of Fact No. 58 is to DM-7, p. 3. Information contained on p. 3, DM-7 does not address the reliability of the NTE; and in any event, DM-7 has been superseded by the NTE Technical Handbook (DM-1).

a test must measure consistently (i.e., have an acceptable degree of reliability) before it can be validated as the basis for certificating professional educators. Thus, the APA Standards consider an acceptable degree of reliability as a necessary but not sufficient condition for the validity of the NTE cut-off score requirements in North Carolina.^{68/} The APA Standards state:

Reliability coefficients are pertinent to validity in the negative sense that unreliable scores cannot be valid. But reliable scores are by no means ipso factor [sic] valid, since validity depends on what interpretation is proposed. Reliability is of special importance in support of, but not in replacement of, the analysis and estimation of content, criterion related, and construct validity.^{69/}

There are several professionally accepted methods of estimating the reliability of an examination. The appropriateness of these different methods depends on the characteristics of the examination and the uses made of the test results.^{70/} The defendants have not computed reliability estimates for any of the examina-

^{68/} Kirkpatrick dep., pp. 49-50; GK-3, p. 29 §D3.1 and comment.

^{69/} GK-3, p. 29, comment following §D3.1.

^{70/} GK4-D4.9; see also, GK3-pp. 25-26.

tions in the NTE battery but have at all times relied on ETS to produce reliable examinations.^{71/} ETS has reported reliability estimates for the WCE and individual TAEs on the basis of a modification of the Kuder-Richardson Formula 20 (hereafter K-R-20) reliability estimate; however, ETS has not reported reliability estimates for any of the various composite NTE test batteries.^{72/} The K-R reliability estimates, including the K-R-20 formula, are internal measures of reliability which do not indicate how consistent the test scores are over a period of time.^{73/} Because the only estimates of the reliability of the NTE are estimates based on the internal consistency of the individual examinations, the defendants have no basis for using interchangeably

^{71/} IUS No. 25(h), (r)

^{72/} DM-1. The technical information on the NTE routinely available to ETS customers is contained in DM-1; other information is sometimes available on request but there is no indication in the record that the defendants have requested or ETS has prepared reliability estimates for the composite test batteries.

^{73/} Kirkpatrick dep., p. 54; GK-3, p. 25. While recognizing the propriety of reporting determinations of reliability based on internal consistency under certain circumstances, the APA Standards note that "[m]easures of internal consistency should not be regarded as substitutes for other measures. When alternative forms [of the test] are available, alternate form reliabilities should be reported in preference to but not necessarily to the exclusion of coefficients based on internal analysis." GK-3 30; see also GK-4, p. 53.

scores obtained on different administrations of the WCE,^{74/}
the individual TAEs, or any of the composite NTE batteries.

In addition to this limitation on its use, the K-R-20 is an improper method of estimating reliability on "speeded" tests (tests in which time is a factor in the test setting) because it yields "spuriously high" reliability estimates^{75/} for such examinations. The NTE Technical Handbook states: "a test may be regarded as essentially unspeeded (a test in which speed is not a factor) if at least 80% of the candidates answer its last item and if virtually everyone answers the item which is three-fourths of the way through the test."^{76/} According to ETS's definition of a speeded test, the science and mathematics subpart of the WCE and^{77/} 11 of the 28 TAE cannot be regarded as unspeeded, and insufficient data is available to determine whether or not the

^{74/} GK-10, p. 968 (Buros, Seventh Mental Measurement Yearbook); Kirkpatrick dep., p. 54. ETS routinely refers its NTE customers to Buros for an objective appraisal of their examinations, Deneen dep., p. 434.

^{75/} GK-3, p. 30, §D5.2. and comment; GK-10, p. 968 Kirkpatrick dep., p. 55; see also, GK-4, p. 53.

^{76/} DM-1, p. 14.

^{77/} Id. at pp. 38-111. DM-1 reports less than 80% of the examinees complete the mathematics and science subpart of the WCE and less than 80% complete the Biology and General Science, Chemistry, Physics, and General Science, Elementary Education, Administration and Supervision, French, Home Economics, Mathematics, Men's Physical Education, Music, Spanish, and Woman's Physical Education TAEs.

professional education, written English expression, and the social studies literature, and fine arts parts of the WCE and an additional 6 of the 28 TAE are unspeeeded.^{78/}

The APA Standards have set a more rigorous standard for determining whether or not a particular test is speeded. The Standards, which make it "essential" to report information on the effect of speed and test scores, comment:

The most complete evidence of the effect of speed would be the comparison of scores on one form using the usual time limit, with scores on another form having unlimited time. The correlation of scores at the end of the usual time with scores obtained with extra time on the same trials is of limited meaning because the two scores are not independent. Less complete evidence would consist of data on the percentage of examinees who attempt the last item or some item very near the end of the test. If the percentage is below 90 a more penetrating study is needed to show that individual differences on the test do not reflect speed to any great extent. ^{79/}

^{78/} Id. Data are not reported for these subparts of the WCE or for the Audiology, Education of the Mentally Retarded, Urban Setting, English and Literature, German, Guidance, Introduction to Reading, Speech and Theatre, or Texas Government TAEs.

^{79/} GK-4, p. 48; see also GK-3, p. 24.

Using the APA Standard (requiring a penetrating study of the effect of speed on test scores for examinations where less than 90% of the examinees complete the examination), the science and mathematics subpart of the WCE and 15 of the 28 TAE's require study of the effects of speed on the test scores.^{80/} Additionally, insufficient data have been reported to determine whether or not the professional education, written English expression, and social studies, literature, and fine arts subparts of the WCE and 9 of the 28 TAE require this type of study.^{81/}

In all the available data show that none of the WCE subparts and only 7 of the 28 TAEs meet ETS's definition of an unspeeded test, and none of the WCE subparts^{82/} and only 4 of the 28 TAEs meet the APA Standards for tests where a penetrating study of the effect of speed is not required.^{83/} No study (except for reporting the percentage of persons completing

^{80/} GM-1, pp. 38-111.

^{81/} Id.

^{82/} Id. The data reported shows that Art, Early Childhood, Industrial Arts, Media Specialist, Reading Specialist, Social Studies; and Speech Pathology are the only TAEs where 80% of the examinees finish the test.

^{83/} Id. The data reported shows that Art, Industrial Arts, Media Specialist, and Speech Pathology are the only TAEs where 90% of the examinees finish the test.

the last item and the item three quarters of the way through the examinations for some of the NTE) of the effect of speed on NTE scores has been produced by the defendants or ETS.

The reported NTE scores are an imprecise measure of what the NTE test. The precision with which a test measures whatever it measures is estimated by a statistic called the standard error of measurement (hereafter SEM). The NTE Technical Handbook gives the following definition and explanation of the SEM:

A candidate's test score is an approximate rather than a precise measure of his level of achievement in the subject under consideration. Therefore, one should think of a score as a range that extends both above and below the candidate's actual obtained score. This range is defined by a statistic called the standard error of measurement. This statistic is an index of the probable range of discrepancy between the score the individual earned and the average score he might have earned if he had taken an infinite number of equivalent forms of the test. The mean of all those scores would be an estimate of that individual's true score-a score with no error, which is the goal of the measurement process. An interval extending one standard error of measurement above and below the candidate's true score would include approximately two-thirds of the scores that he would obtain if he were to take an infinite number of equivalent forms. 84/ [emphasis in the original]

84/ DM-1, p. 14. The Technical Handbook states that ETS rounds off the TAE scores to the nearest multiple of 10 "to discourage people from making unreliably fine differentiations." DM-1, p. 11. This process results in some persons scoring above 950 before the rounding procedure actually receiving a score below 950 after the rounding procedure, e.g. an examinee scoring 474 on the TAE and 479 on the WCE would have a composite score of 953 before ($474+479=953$) and 949 after the rounding procedure ($470+479=949$).

The defendants have not determined the SEM for the WCE, any TAE, or any of the composite NTE test batteries.^{85/} ETS has not reported the SEM for any of the composite NTE batteries, or the WCE, although ETS estimates the SEM for the WCE to be "around thirty points."^{86/} ETS has reported the SEM's for 22 of the 28 TAE ranging from 19 points (Biology and General Science TAE) to 39 points (Speech - Communication and Theatre TAE).^{87/} Although the SEM has not been computed for any of the composite score batteries, the SEM on each composite battery would be slightly less than the sum of the SEM on the WCE and TAE.^{88/} Assuming that the SEM on a composite score battery is equal to the sum of the SEM on the WCE and the TAE, the SEM's for the various composite NTE batteries would range from "around 49 points" for persons taking the Biology TAE to "around 69 points" for persons taking the Speech TAE. By way of example, this means if an examinee has a reported composite score of 950 on an NTE battery for which the SEM was 60, the examinee's true score falls within the range of 890 to 1010 two out of three times and within the range of 830 to 1070 nineteen out of twenty times.^{89/}

^{85/} IUS No. 25(h), (r).

^{86/} Majetic dep., p. 296.

^{87/} DM-1, pp. 38-111.

^{88/} Kirkpatrick dep. p. 181-82.

^{89/} Id., at p. 51.

The SEM is partly determined by the reliability estimate for an examination (the higher the reliability the lower the SEM and vice versa). Because the reliability estimates determined by the K-R 20 are overinflated for speeded tests, the reported SEM is understated for each NTE that is speeded. Dr. Kirkpatrick testified that the real SEM of the various examinations in the NTE battery could be twice what it is reported by ETS. ^{90/}

The APA Standards consider it "essential" that

Standard errors of measurement and reliability coefficients should be provided for every score, subscore or combination of scores (such as a sum, difference, or quotient) that is recommended by the test manual (either explicitly or implicitly) for other than merely tentative or pilot use. ^{91/}

In the case of the NTE, neither the defendants nor ETS, upon whom the defendants have allegedly relied for the construction of the NTE, have prepared reliability estimates or standard errors of measurement for any of the composite NTE batteries used by the defendants. Additionally, the reliability estimates provided for the

^{90/} Id., at pp. 180-83.

^{91/} GK-4, p. 50.

subparts of the NTE battery are improper because of the speeded nature of the examinations.^{92/} Finally, because the reliability estimates which are reported for the NTE subparts are spuriously high, the reported SEM's for those subparts are underestimated.^{93/} In order for a cut-off score to be properly set under currently accepted standards in the field of testing and mental measurement, the examination on which the cut-off score is established must be highly reliable and have a low standard error of measurement.^{94/} There is no evidence to show that either of these conditions is present for the NTE in North Carolina.^{95/} Defendants' "clinical thermometer" analogy is utterly inaccurate.^{96/}

^{92/}

GK-4, p. 53.

^{93/}

Kirkpatrick dep., p. 56.

^{94/}

Id., at p. 51.

^{95/}

These conditions are just necessary but not sufficient conditions for validly establishing a cut-off score so even if they were met, the issue of validity must still be confronted, Kirkpatrick dep., pp. 49-50; GK-3, p. 29 §03.1 and Comment. See also, Majetic dep, p. 296 where Dr. Majetic testified that it is necessary to know the SEM when a cut-off score is established.

^{96/}

See Defendants' Brief, p. 34, ¶ 90.

III. THE RECORD DOES NOT JUSTIFY THE CLAIMS OF THE DEFENDANTS THAT ALTERNATIVES TO DEFENDANTS' NTE REQUIREMENTS FOR CERTIFICATION ARE INADEQUATE AND UNWORKABLE.

The defendants contend that the various approaches to certification in North Carolina, including the "course and hour" approach, the "approved program" approach and the "competency based" approach implemented by the State are inadequate and unworkable. Defendants' Brief, pp. 37-39. In addition, ETS argues that while defendants' NTE score requirements are not proper bases for certification, nevertheless the approved programs approach has several limitations. ETS Brief, pp. 43-44. However, as explained in our Trial Brief, pp. 99-107, the various approaches to certification previously used in North Carolina do not appear to have a discriminatory effect and there is no evidence in the record similar to the testimony of local school officials in North Carolina concerning the inadequacy of defendants' NTE requirements to show that the "course and hour", "approved program" and "competency based" methods frequently deny certification to qualified and effective minority educators. Nor is there any evidence to demonstrate that these methods of certification would permit the certification of unqualified and ineffective educators.

The various approaches to certification are discussed in our Trial Brief at pp. 99-107. As noted at p. 107 of our Trial Brief, 47 states find the course and hour or approved program approaches to certification to be adequate and workable.

IV. THE DEFENDANTS HAVE FAILED TO DEMONSTRATE
THAT THE ADOPTION AND CONTINUATION OF THEIR
NTE REQUIREMENTS WERE NOT RACIALLY MOTIVATED.

The Defendants' Brief alludes to no evidence capable of refuting the substantial evidence of record discussed in our Trial Brief, pp. 22-55, 72-86, 113-139, reflecting racial discrimination in defendants' initial adoption of NTE cut-off scores in 1964 and their continuation through G.S. §115-153 in 1973. In fact, some of the contentions advanced by the defendants bolster the strong inference of racial motivation raised by the record.

First, the defendants, without citation, postulate the launching of the Russian satellite Sputnik as the reason for the adoption of the NTE.^{97/} Sputnik was launched in 1957, seven years before the defendants adopted the first NTE cut-off scores for North Carolina.

Second, the defendants claim that the state supported rather than opposed public school desegregation, relying on non-record documents including newspaper articles and papers purporting to be speeches given by a former governor of North Carolina.^{98/} These assertions are, of course, belied by the actual events described in our Trial Brief at pp. 113-120.

^{97/} Defendants' Brief, pp. 21, 62.

^{98/} Defendants' Brief, pp. 19-23. Defendants' claim, p. 63, n. 34, that only one member of the General Assembly, the chairman of the House Education Committee, was aware of the racial impact of the cut-off scores is contradicted by the record. U.S. Trial Brief, p. 55. The point was raised in the debate over the bill that became G.S. §115-153.

Third, the defendants conceded in their brief that they were aware of the racial impact of the NTE in North Carolina in setting minimum scores and that "part of their motive in setting minimum scores was racial" but that their intent was to "ensure that blacks and other minorities would be properly and adequately represented on the faculties of the public schools."^{99/} Thus, it appears that defendants' NTE requirements were conceived for the express purpose of limiting the number of minority teachers certified and employed in the state.

Further proof that the NTE requirements were deliberately aimed at blacks is provided by defendants' assertions that the requirements were established because of the state's fear of certifying graduates of its segregated, black institutions.^{100/}

^{99/} Defendants' Brief, pp: 23, ¶53, 29, ¶56, 63-64, 67.

^{100/} Defendants' Brief, pp. 39, ¶112-114; 41-47, Tables 1-3; p. 69, n. 40, Appendix E. Compare testimony of Superintendent Robert Wood in Walston v. County School Board of Nansemond County, 492 F.2d 919 at 925 (C.A. 4, 1974), in which he stated that he knew that black teachers were less likely to score as high as white teachers on the NTE. The court found Nansemond's adoption of the NTE cut-off score to be "arbitrary based on the fact that Nansemond School District was getting the cut-off teachers of other school districts that required the 500 cut off score on the NTE. Mr. Wood testified that it was adopted because the Board 'found that we were getting many teachers coming in from Chesapeake, Portsmouth, Norfolk, Virginia Beach' and 'many of the teachers we were getting were unable to become certified in North Carolina'; and 'we found that all of these school divisions required a minimum of 500 on the National Teachers Examination . . . So that presented a problem . . . So taking all of this into account we felt that our teachers coming into Nansemond County should at least bring a minimal amount of general knowledge into the classroom.'"

In their brief, the defendants state that the State Board plan for certification adopted on December 10, 1972, was "conceptually flawed" because it would allegedly have permitted certification of "an individual scoring less than 850 on the NTE and graduating in the lowest quarter of his class from the poorest teacher training institution in the state" In addition, the defendants argue that "the State cannot rely on all institutions within the State to produce graduates and candidates for certification all of whom possess minimal academic capabilities."^{101/}

In support of these allegations, the defendants rely exclusively upon tables reflecting lower Scholastic Aptitude Test (SAT) scores among students at North Carolina's black colleges and upon certain spelling and grammatical error by a number of graduates of such colleges.^{102/} The defendants also noted that no graduate of predominantly white North Carolina State University has ever failed to achieve the NTE cut-off scores.^{103/}

Thus, the defendants and ETS charge, in effect, that it is North Carolina's black teacher preparation colleges which do not adequately, prepare educators and that black examinees consequently score lower on the NTE.^{104/} At the same time, the defendants

^{101/} Defendants' Brief, pp. 38-39, ¶112.

^{102/} Ibid., pp. 39, ¶114, 41-47, 69.

^{103/} Ibid., p. 39, ¶116.

^{104/} Defendants' Brief, pp. 39-40; ETS Brief, pp. 29-30.

acknowledge that North Carolina's public schools and colleges were racially segregated prior to 1954; the record demonstrates that defendants' colleges remain racially segregated to this day.^{105/} In accordance with the testimony of their witness, Dr. Sommerfeld, the defendants proposed as a finding of fact that the president of one teacher training institution in North Carolina stated that he knew his college was admitting "functional illiterates" and that he knew that some of them graduated. Dr. Sommerfeld claimed that the president of a black college in North Carolina made this statement.^{106/}

As the record exists, one can only conclude that the defendants established their NTE requirements to prevent the certification and employment of minority educators who could no longer lawfully be denied positions in schools attended by white students.

^{105/} See notes 99-100, infra.

^{106/} Defendants' Brief, p. 40, ¶118; Sommerfeld dep., p. 131.

V. DEFENDANTS AND ETS ERR IN CONTENDING THAT THE STANDARDS REQUIRED BY TITLE VII AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DO NOT APPLY TO DEFENDANTS' NTE REQUIREMENTS.

A. Congress Intended Title VII to Apply to the Certification of Professional Educators in North Carolina.

In its brief, pp. 54-57, North Carolina contends that Title VII of the Civil Rights Act of 1964, the EEOC Guidelines, 29 C.F.R.. Part 1607, et seq., and cases applying Title VII and Fourteenth Amendment principles including Griggs v. Duke Power Co., 401 U.S. 474 (1971), and Walston v. County School Board of Nansemond County, 492 F.2d 919 (C.A. 4, 1974), are not applicable in determining the legality of its NTE cut-off scores because "[t]he State in certifying teachers and other professionals is not an employer."¹⁰⁷ However, as discussed in our Trial Brief at pp. 109-112, the defendants and their activities which are challenged by this suit are clearly covered by Title VII and the Fourteenth Amendment.

The legislative history of the Equal Employment Opportunity Act of 1972 (P.L. 92-261) amending Title VII to cover state and local governments, including educational institutions, also makes clear the Congressional intent to cover teacher certification, in the following statement:

¹⁰⁷ Defendants' Brief, pp. 54-57.

The presence of discrimination in the Nation's educational institutions is no secret. Many of the most famous and best remembered civil rights cases have involved discrimination in education. This discrimination, however, is not limited to students alone. Discriminatory practices against faculty, staff, and other employees is [sic] also common. The practices complained of parallel the same kinds of illegal actions which are encountered in other sectors of business, and include illegal hiring policies, testing provisions which tend to perpetuate racial imbalances, and discriminatory promotion and certification techniques. ^{108/}

Moreover, certification and employment of educators in North Carolina are not distinguishable in the manner advanced by the defendants and ETS. Certification, as discussed above and in our Trial Brief, pp. 12-17, is integrally related to teaching jobs as a required qualification for employment which must be the first consideration of the employing school district. It is anomalous to ^{109/} acknowledge, as does ETS, that an NTE cut-off score cannot be validated for selection under any circumstances since the NTE were not designed for that purpose while simultaneously to argue that a cut-off score could be validated for certification even if such a score would, as demonstrated

^{108/} Legislative History of the Equal Employment Opportunity Act of 1972 (H.R. 1746, P.L. 92-261), 92d Cong., 2d sess. (1972) pp. 420-421. Among several cases cited in a footnote to this passage were Armstead v. Starkville School District, 325 F. Supp. 560 (N.D. Miss., 1971) and Wall v. Stanly County Board of Education, 378 F.2d 275 (C.A. 4, 1967).

^{109/} ETS Brief, pp. 22-23, 41.

by the evidence of North Carolina's local school officers, have the same effect: the disqualification of teachers ¹¹⁰ proved to be effective by subsequent performance.

B. The Defendants Err in Contending that Their NTE Requirements Should Not Be Judged By the Standards Required by Title VII and the Equal Protection Clause of the Fourteenth Amendment.

Since, as discussed above, it is clear that Title VII was intended by Congress to apply to defendants' NTE requirements for certification, it is obvious that those requirements must be measured against Title VII standards. However, the defendants contend that their NTE requirements may be justified merely by "showing a rational relationship between the purpose and the ends achieved." ¹¹¹ By contrast, ETS does not contend that Title VII does not ¹¹² apply but, against the weight of authority, argues that the court should determine the constitutionality of defendants' NTE requirements under the Fourteenth Amendment before deciding their legality under the applicable statute, Title VII. Thus, ETS states that this case can be decided and the relief requested by the plaintiff and the plaintiff-

¹¹⁰/ U.S. Trial Brief, pp. 90-98; see also APA Standards (GK-3) §D2 and comment thereunder noting that "a person who has a high degree of interest or aptitude in a curriculum or occupation when compared to people in general will usually have a lower degree of interest or aptitude compared to persons actually engaged in that field."

¹¹¹/ Defendants' Brief, p. 48.

¹¹²/ E.g., Lau v. Nichols, 414 U.S. 563 (1974); United States v. City of Chicago, 385 F. Supp. 543 (N.D. Ill., 1974).

intervenors can be granted "under the fundamental Constitutional requirement that any classification of persons by a state must be rationally related to a legitimate state purpose" and that "[t]he more complex statutory standards questions need be reached only if the constitutional rational relationship test can be satisfied."^{113/}

^{114/}

While ETS is correct in stating that the defendants cannot justify their NTE requirements under the "rational relationship" test ordinarily applied in cases arising under the Due Process Clause and cases involving non-^{115/} racial classifications under the Equal Protection Clause,^{116/}

^{113/} ETS Brief, pp. 20-21. In support of this proposition, ETS incorrectly characterizes the holdings in City of Chicago, supra, Chance v. Board of Examiners, 458 F.2d 1167 (C.A. 2, 1972) and Pennsylvania v. Rizzo, 8 E.P.D. ¶9681 (E.D. Pa., 1974). In City of Chicago, the court declined to reach a decision on the applicability of the compelling state interest test specifically because it was able to dispose of the issues under Title VII and the EEOC Guidelines. 385 F. Supp. 543 at 553, 556-561. Chance, supra, was brought under the Fourteenth Amendment and the court expressly declined to consider the effect of the "recent" amendment of Title VII to cover public employers on the case. 458 F.2d at 1176, 1177, n. 15. In Rizzo, supra, there is no indication that the case was decided on constitutional rather than Title VII grounds. See 8 E.P.D. ¶9681 at pp. 5858-5860.

^{114/} ETS Brief, p. 21.

^{115/} E.g., Dent v. West Virginia, 129 U.S. 114 (1888).

^{116/} E.g., San Antonio School District v. Rodriguez, 411 U.S. 1 (1972).

ETS in asserting that the defendants' NTE requirements for certification, which concededly create a racial classification, should not be tested against Equal Protection Clause standards and the identical Title VII standards applicable to such cases. Walston v. County School Board of Nansemond County, 492 F.2d 919 at 924-925 (C.A. 4, 1974); see also Castro v. Beecher, 459 F.2d 725, 733 (C.A. 1, 1972).

The cases cited by defendants and ETS in support of the application of the "rational relationship" test to certification standards are inapposite.^{117/} Each of these cases involved a claim of denial of due process or equal protection not involving a racial classification by a state licensing statute and none concerned racial discrimination in violation of Title VII or the Equal Protection Clause of the Fourteenth Amendment.

Instead, defendants' NTE requirements must be tested against the standards enunciated in Griggs, supra, and Walston, supra. Under these standards, defendants' NTE requirements cannot withstand scrutiny because they are not, as discussed in our Trial Brief, pp. 121-128, "demonstrably a reasonable measure of job performance", Griggs, supra, 401 U.S. at 436.

^{117/} See ETS Brief, pp. 34-35, citing Dent, supra; Stephens v. Dennis, 293 F. Supp. 589 (N.D. Ala., 1968); Lombardi v. Tauro, 470 F.2d 798 (C.A. 1, 1972); Graves v. Minnesota, 272 U.S. 425 (1926); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); England v. Louisiana Board of Medical Examiners, 246 F. Supp. 993 (E.D. La., 1965), aff'd 384 U.S. 885 (1966) and Milner v. Burson, 320 F. Supp. 706 (N.D. Ga., 1970); see Defendants' Brief, pp. 50-53 citing the same cases and also State v. Harris, 216 N.C. 746, 128 A.L.R. 658 (1940); Adler v. Board of Education, 342 U.S. 485 (1951); Shelton v. Tucker, 364 U.S. 479 (1960) and Schwartz v. Board of Examiners, 353 U.S. 232 (1957).

C. The Defendants and ETS Erroneously Characterize the Standards Applied by Courts in Cases Involving Racial Discrimination in Testing.

In its brief at pp. 27-28, ETS states that in cases "involving a cut-off score requirement for prospective teachers, courts have looked first to discover whether any effort was made to relate the cut-off score to the purpose to be achieved through the classification system and, finding none, have stuck down the requirement without further inquiry", citing in support of this proposition Walston, supra; Baker v. Columbus Municipal Separate School District, 462 F.2d 1112 (C.A. 5, 1972); Morgan v. Hennigan, 379 F. Supp. 410, 456-66 (D. Mass., 1974); Armstead v. Starkville Municipal Separate School District, 461 F.2d 276 (C.A. 5, 1972); and United States v. Chesterfield County School District, 484 F.2d 70 (C.A. 4, 1973). This characterization of the standards applied to the NTE in several of these cases is incorrect.

In Walston, supra, the court of appeals, acknowledging the trial court's finding that the NTE had no predictive validity, reversed that court's decision in favor of the school district employer specifically for failure to apply the proper standard stating, in part, that:

118/ In Armstead, the ETS Graduate Records Examination (GRE) was involved. 461 F.2d at 279.

The District Court did hold 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.' (Emphasis supplied) But we find this to be error. The Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) held that the test must 'bear a demonstrable relationship to successful performance for the job for which it was used.' 401 U.S. at 431, 91 S. Ct. at 853 (Emphasis supplied). This standard is much more rigorous in its burden than the standard actually utilized by the District Court here. 492 F.2d at 924.

Similarly, in Baker, supra at 1114, the court did not apply a "rational relationship" test as suggested by ETS but held, with respect to an NTE cut-off score requirement of 1000, that

Whenever the effect of a law or policy produces such a racial distortion, it is subject to strict scrutiny. See Korematsu v. United States, 1944, 323 U.S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194. Even though this policy does not on its face purport to classify along racial lines as in Korematsu and in McLaughlin v. Florida, 1964, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d. 222, its effects can be just as devastating. See Hawkins v. Shaw, 5 Cir. 1972, 461 F.2d 1171, 1172 (en banc). In order to withstand an equal protection attack it must be justified by an overriding purpose independent of its racial effects. 119

119 As noted above, ETS also cites Morgan and Armstead, supra. In Morgan, the court did not articulate the nature of the standard to be applied in judging Boston's NTE requirement except to state, after a discussion regarding the misuse of the NTE, that "discriminatory use of the NTE has been expressly ruled to be unconstitutional", citing Baker, supra, 379 F. Supp. at 464.

In Armstead, 461 F.2d at 279, noting the trial court's holding that the school district's GRE requirement was not justified by an "overriding purpose", the Fifth Circuit held that the GRE requirement was not reasonably related to the purpose for which it was designed, citing Eisenstadt v. Baird, 405 U.S. 438 (1972) and Turner v. Fouche, 396 U.S. 346 (1970). Armstead is distinguishable from the instant case in that the former case, brought under the Fourteenth Amendment, did not permit disposition of the issues under a Federal statute such as Title VII. Nor did Eisenstadt or Turner, supra, cited by the Armstead court in support of its holding. In any event, none of the cases cited by the defendants or ETS imply that a stricter standard of review would not control if the test user were able to justify his requirement under the more lenient rational relationship standard. See, e.g., Chance, supra, at 1177.

Similarly, defendants' reliance upon Davis v. Washington, 352 F. Supp. 187, 191 (D. D.C., 1972) is misplaced. First, the statement of the district court quoted by defendants appears in context to be merely an exposition of the EEOC Guidelines' requirement that evidence

^{120/} Defendants' Brief, p. 60.

of criterion-related validity is required unless not feasible to obtain. As discussed above, defendants have made no showing of lack of feasibility. Second, as emphasized by the district court in Davis in the passage quoted by defendants, proof of content validity is acceptable "where a job analysis demonstrates the relevance of the content and the test has suitable samples of the components of the job in question." 352 F. Supp. at 191. As discussed above, the defendants have made no showing of content validity and have never even undertaken job analyses. Finally, in Davis v. Washington, ___ F.2d ___ (No. 72-2105, C.A. D.C., Feb. 27, 1975), a related case involving a police department test used for employment, the District of Columbia Circuit reversed the district court's holding that the test was valid as " 'reasonably and directly related to the requirements of the police training program' " where a validity study showed that test scores accurately predicted performance in recruit school, ^{121/} the police department's training program. Instead the court of appeals held that the test could not be validated in such a manner absent a showing of the job-relatedness of the training program itself. As discussed above, the defendants have neither shown that their cut-off score requirements are related to any teacher training program nor that any such teacher training program, or any minimum level

^{121/} Evidently, this study was conducted as a differential validity study.

122/

of success in such a program, is job-related.

VI. THE DEFENDANTS MUST SHOW A COMPELLING STATE INTEREST TO CONDITION CERTIFICATION AND EMPLOYMENT UPON QUALIFICATIONS WHICH THEY HAVE MADE MORE DIFFICULT FOR BLACKS TO OBTAIN.

Under the Fourteenth Amendment and Title VII, the defendants should not be permitted to establish prerequisites for certification and employment in a desegregated school system which would not have denied blacks certification and employment in the formerly segregated school system, under the circumstances of the case. Jackson v. Wheatley School District No. 28, 430 F.2d 1359, 1363 (C.A. 8, 1970); cf. Ricks v. Crown-Zellerbach Corp., 319 F. Supp. 314, 321 (E.D. La., 1970); United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (C.A. 5, 1971); United States v. Local No. 86, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, 315 F. Supp. 1202, 1236 (W.D. Wash., 1970), aff'd 443 F.2d 544 (C.A. 9, 1971); Griggs v. Duke Power Co., 420 F.2d 1225, 1231 (C.A. 4, 1970), reversed on other grounds 401 U.S. 424 (1970); Louisiana v. United States, 380 U.S. 145, 155 (1964).

The record is clear that the defendants' public schools and colleges were racially segregated by law at least until 1964 and that defendants' public colleges remain segregated to this day. ^{123/} While North Carolina's local

122/ As we explained above, this case raises no issues as to the validity of the North Carolina approved program since it does not appear that that program has a racially disparate impact.

123/ U.S. Trial Brief, pp. 8, 18-37, 113-120; Defendants' Brief, p. 62; RA No. 3; Cashwell dep., pp. 163-167; Taylor dep., v. 2, pp. 43-52.

school districts were racially segregated, black educators were, of course, denied employment in white schools. See, e.g, Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (C.A. 4, 1969); Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (C.A. 4, 1966). Upon desegregation, when black educators could no longer lawfully be refused positions in schools attended by white students, the defendants established racially discriminatory, unvalidated, culturally biased, imprecise and unreliable test score requirements. U.S. Trial Brief, pp. 32-36.

Now the defendants contend, in effect, that after educating black students in segregated public schools and colleges, the state may refuse to certify prospective minority teachers graduating from those same institutions because of an alleged lack of an undefined "minimum" amount of academic preparation purportedly measured by their NTE cut-off scores, even though the programs at the colleges comply with the state's approved program and/or competency-based approach to certification. If black applicants do not submit defendants' minimum NTE scores because, as contended by ETS and the defendants,^{124/} they were not provided equal educational opportunities at the segregated colleges

^{124/} ETS Brief, pp. 29-30; Defendants' Brief, p. 39. ¶112-114; pp. 41-47, Tables 1-3; p. 69, n. 40, Appendix E

which the defendants maintain, it would be anomalous to permit North Carolina to condition certification and employment upon qualifications which it has made more difficult for blacks to obtain. United States v. Local 86, supra, 315 F. Supp. at 1202; Griggs, supra, 401 U.S. at 430-431; cf. Gaston County v. United States, 395 U.S. 285, 296-297 (1968).

To permit continued use of their NTE requirements under these circumstances, the defendants would have to demonstrate that their requirements were justified by an overriding purpose independent of their racial effects. Walston, supra, at 925. Thus, should the Court determine that the NTE requirement is otherwise an acceptable condition for teacher certification, it would be necessary to reach this further question. Since the defendants have produced no evidence that the NTE is in any way a measure of a person's competency to teach or a measure of knowledge acquired in a state approved program, however, we believe that it is unnecessary for the Court to reach this question.

VII. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this action and the parties pursuant to 42 U.S.C. 2000e-6(b), as amended, and 28 U.S.C. 1345. United States Trial Brief §III A.

2. Defendant North Carolina State Board of Education is an agent of the Defendant State of North Carolina, and under North Carolina Law the State Board is responsible for the supervision of public education in the State. The Board's responsibility includes the certification of public school faculty and staff members pursuant to North Carolina General Statute §115-153. United States Trial Brief §III B.

3. The defendants State of North Carolina and North Carolina State Board of Education are persons within the meaning of 42 U.S.C. 2000e(a), as amended; employers within the meaning of 42 U.S.C. 2000e(b), as amended; and employment agencies within the meaning of 42 U.S.C. 2000e(c), as amended. United States Trial Brief, §III (B); United States Reply Brief §V(A).

4. The defendants' NTE requirements are employment practices subject to the proscriptions of 42 U.S.C. 2000e-2000e-2 (a) and (b). United States Brief § III (D) (2); United States Reply Brief § V (A).

5. Prior to 1954 the defendants State of North Carolina and North Carolina State Board of Education operated a discriminatory, dual system of public education

in the State pursuant to state law. United States Brief §I (B). Following the Supreme Court decision in Brown v. Board of Education 347 U.S. 483 (1954), defendants State of North Carolina and North Carolina State Board of Education did not comply promptly with that mandate but, instead, through the policies and practices of the state and local school boards and legislation, pursued a policy of resistance to the full implementation of the directives of Brown, Hawkins v. North Carolina State Board of Education 2 Race Rel. Rep. 745 (W.D. N.C. 1966); North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971); United States v. Scotland Neck City Board of Education 407 U.S. 484 (1972), including continued, discriminatory, separate allocation of teaching positions for black and white educators until at least the 1965-66 school year. Wall v. Stanley County Board of Education, 378 F.2d 275, 277 (C.A. 4, 1967).

6. The Fourteenth Amendment to the Constitution of the United States proscribes racial discrimination in the public schools operated by any state or state agency. Cooper v. Aaron, 358 U.S. 1, 16-17 (1958); Griffin v. County School Board, 377 U.S. 218 (1965), and this proscription includes discriminatory treatment of public school faculty and staff members by any state or state agency. Rogers v. Paul 382 U.S. 198 (1965); Singleton v.

Jackson Municipal Separate School District 419 F.2d 1211 (C.A. 5 1970); Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (C.A. 4 1966).

7. In reviewing the constitutionality of a state statute or regulation, such as those imposing North Carolina's NTE requirement, which are challenged under the Equal Protection Clause of the Fourteenth Amendment, courts must consider the act's " 'immediate objective', its 'ultimate effect', and its 'historical context and the conditions existing prior to its enactment.' " Reitman v. Mulkey, 387 U.S. 369 (1967). Courts may also consider "[e]vidence that similar and related offenses were committed . . . [tending] to show a consistent pattern of conduct highly relevant to the issue of intent." Brown v. Gaston County Dyeing Machine Co. 457 F.2d 1377, 1382 (C.A. 4 1972). Finally, in cases of alleged racial discrimination Courts have recognized the importance of statistical evidence. State of Alabama v. United States, 304 F.2d 483, 586 (C.A. 5 1962), aff'd per curiam, 371 U.S. 37 (1962); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (C.A. 8, 1970; Jones v. Lee Way Motor Freight, Inc. 431 F.2d 245, 247 (C.A. 10 1970), cert denied, 401 U.S. 954 (1971).

8. In light of the historical context in which the NTE requirements were adopted in 1964 and codified

in 1972, United States Brief, §III (C), and the strong disparate impact of the requirements, United States Brief, §II (B) (6), an inference of racial discrimination is compelled and the burden is shifted to the defendants to show by "clear and convincing" evidence that "[discriminatory] intent was not among the factors that motivated their actions." Keyes v. School District No. 1, 413 U.S. 189, 210 (1973), citing with approval the rule of Chambers v. Hendersonville City Board of Education, supra.

9. The defendants have failed to show by "clear and convincing" evidence that their NTE requirements were not adopted and continued for the purpose of discrimination. In fact, the defendants did not produce any evidence to rebut the inference of discrimination compelled by the record of this case, and by their admission, the requirements were adopted and the cut-off scores were selected, in part, for racial reasons in order, in their view, to "insure that blacks and other minorities would be properly and adequately represented on the faculties of the public schools." Defendants' Brief, p. 64.

10. Affirmatively, the record of similar and related discrimination by the defendants, the historical context and the conditions existing prior to the adoption of the requirements, the defendants' knowledge of the strong disparate impact of the requirements prior to their adoption, and the defendants' failure to conduct any study of the appropriateness of the requirements before they were adopted compel the conclusion that the immediate objective of adopting the NTE requirements was to deny certification to otherwise qualified minority educators. United States Brief, §§ II (B)(6), (c), and III (C). The sharp disproportionate decline in minority educators employed in the public schools of the state, the defendants codification of the NTE requirements in light of the known impropriety of the requirements, and known disparate impact confirms that the NTE requirements were conceived and continue to be used as tools of discrimination in violation of the Fourteenth Amendment. United States Brief, §§ II (B)(6), (C), and (D) (3).

11. While the record establishes that the defendants' NTE requirements were adopted and have been maintained for the purpose of racial discrimination, it is not necessary for plaintiff to show discriminatory motive or intent

to prevail since the record shows the defendants' NTE requirements have a discriminatory effect, Griggs v. Duke Power Company, 401 U.S. 424, 432 (1971); Castro v. Beecher, 459 F.2d 725, 732-33 (C.A. 1, 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1175 (C.A. 2, 1972); United States v. N.L. Industries, Inc., 479 F.2d 354, 360 (C.A. 8, 1973).

12. The standard of review applicable to the defendants' NTE requirements is the same under Title VII and the Fourteenth Amendment. Walston v. County School Board of Nansemond County, 492 F.2d 919, 922, (C.A. 4, 1974); Castro v. Beecher, 459 F.2d 725, 733 (C.A. 1, 1972).

13. Defendants NTE requirements have created a racial classification, subject to strict judicial scrutiny under the Fourteenth Amendment and Title VII. Griggs v. Duke Power Co., supra, at 429, 436; Walston v. County School Board of Nansemond County, supra, at 925; United States Brief III (D) (2).

14. Because defendant's NTE requirements have a disparate racial impact, the defendants would have to show a manifest relationship between the NTE cut-off score requirements and the different teaching positions to which the requirements apply in order for the requirements to meet the Fourteenth Amendment and Title VII standard. Griggs v. Duke Power Co., supra, at 432; Walston v. County School Board of Nansemond County, supra, at 924-925.

15. Because defendant's NTE requirements have a disparate racial impact, the defendants would have to show that their NTE cut-off score requirements are a "business necessity" in order for the requirements to meet the Fourteenth Amendment and Title VII standard. Griggs v. Duke Power Co., supra, at 431; Robinson v. Lorillard Corp., 441 F.2d 791, 798, (C.A. 4, 1971).

16. The EEOC Guidelines are applicable to the defendant's NTE cut-off score requirements, 29 C.F.R. §§1607.5 et seq, and in determining whether defendant's NTE requirements are a business necessity or have a manifest relationship to the teaching positions to which they apply, the EEOC Guidelines are entitled to great deference. Griggs v. Duke Power Co., supra, at 433-34. Although the Guidelines are entitled to great deference, in order for the plaintiff to prevail, this Court need not hold that the defendants must comply with "each technical form of validation procedure set out in 29 C.F.R., Part 1607." United States v. Georgia Power Co., 474 F.2d 906, 913.

17. The defendants have not made any attempt to comply with the EEOC Guidelines, or offered any proof sufficient to sustain the burden of showing that their NTE requirements are business necessity or have a manifest

relationship to any teaching position to which the requirements apply. United States Brief, §§ II. Affirmatively, the plaintiff and plaintiff-intervenors, through expert testimony and testimony of local school administrators, have shown there is no manifest relationship between the defendants' NTE requirements and effective teaching in North Carolina. United States Brief, § II (E). Additionally, plaintiff and plaintiff-intervenors, through testimony of officials of the North Carolina Department of Public Instruction have shown that satisfactory, non-discriminatory alternatives to the NTE requirements are available to the defendants. Accordingly, defendants' NTE requirements are discriminatory and are being used in violation Title VII and the Fourteenth Amendment. Griggs v. Duke Power Co., supra; Robinson v. Lorillard Corp. supra; and, Walston v. County Board of Education of Nansemond County, supra.

18. The facts show that, by the first adoption of the NTE cut-off score requirements through their continuation under G.S. §115-153, the defendants have engaged in a pattern and practices of resistance to the rights

secured by Title VII as referred to in 42 U.S.C. §2000e-6(a). The defendants' NTE requirements have consistently and continuously deprived minority educators of their rights to nondiscriminatory certification and employment. United States v. City of Chicago, 385 F. Supp. 543, 554 (N.D. Ill., 1974), United States v. Georgia Power Co., 474 F.2d 906 (C.A. 5, 1973); United States v. Dillon Supply Co., 429 F.2d 800 (C.A. 4, 1970); United States v. Masonry Contractors Association, 497 F.2d 871 (C.A. 6, 1974).

19. Since G.S. §115-153, as applied by the defendants, violates Title VII and the Fourteenth Amendment, it may not be enforced. Title VII and the Fourteenth Amendment "must prevail under the Supremacy Clause [Article VI, Cl. 2] which requires that a contrary state practice or state statute must give way." Hamm v. City Rock Hill, 379 U.S. 306, 315 (1969), rehearing denied 379 U.S. 994 (1964); Reynolds v. Sims, 377 U.S. 533, 584 (1963), rehearing denied 379 U.S. 870 (1964); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1958). See also Cooper v. Aaron, supra at 4, 16-17.

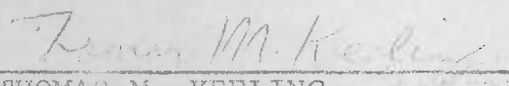
VIII. CONCLUSION

For the reasons discussed above and in our Trial Brief, the United States respectfully requests the Court to enter the proposed findings of fact included as Section V of our Trial Brief, the proposed conclusions of law included as Section VII herein and to grant the relief requested in Section IV of our Trial Brief.

Respectfully submitted,

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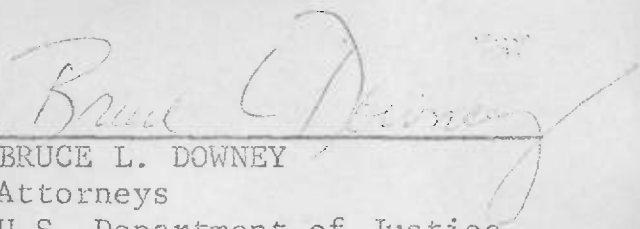
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