

1 PUBLIC ADVOCATES, INC.
JOHN T. AFFELDT
2 MARK SAVAGE
1535 Mission Street
3 San Francisco, California 94103
(415) 431-7430

4 THE IMPACT FUND
5 BRAD SELIGMAN
MARI MAYEDA
6 1604 Solano Avenue
Berkeley, California 94707
7 (510)527-9385

8 BARRY L. GOLDSTEIN
OF COUNSEL
9 Saperstein, Goldstein, Demchak & Baller
1300 Clay Street, 11th Floor
10 Oakland, California 94612
(510) 763-9800

11 Attorneys for PLAINTIFFS

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 ASSOCIATION OF MEXICAN-AMERICAN)
EDUCATORS ("AMAE"), et al.,)

15 Plaintiffs,)

16 v.)

17 STATE OF CALIFORNIA and)
18 CALIFORNIA COMMISSION ON)

19 TEACHER CREDENTIALING,)

20 Defendants.)
21 _____)
22)
23)
24)
25)
26)

Civil No. C92-3874-WHO

Civil Rights Class Action

PLAINTIFFS' CORRECTED
TRIAL BRIEF

Trial: Sept. 18, 1995

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Page

INTRODUCTION 1

FACTS 3

I. ADVERSE IMPACT 3

II. THE CBEST’S LACK OF JOB-RELATEDNESS
IS GUARANTEED BY ITS POLITICAL GENESIS 5

ARGUMENT 9

I. ADVERSE IMPACT EXISTS FOR LATINO,
AFRICAN AMERICAN AND ASIAN CBEST TEST-TAKERS 9

II. DEFENDANTS CANNOT MEET THEIR BURDEN
OF PROVING JOB RELATEDNESS AND BUSINESS NECESSITY 10

A. General Principles 10

B. Defendants Have Failed To Prove Construct Validity 11

C. The State’s Post-Litigation Attempt to Justify
the CBEST 12 Years After Electing
Not to Make the Test Job-related
Should be Accorded Little Weight 13

III. THE CBEST PASSING SCORES HAVE BEEN
SET ARBITRARILY HIGH FOR POLITICAL
REASONS AND ARE NOT JOB-RELATED 15

IV. THE STATE HAS FAILED TO CONSIDER
THE REDUNDANCY OF THE CBEST
AND ALTERNATIVES TO IT 16

V. CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Case Law

1

2

3

4 Albermarle Paper Co. v. Moody, 422 U.S. 405, 433 n. 32 15,16

5 AMAE v. State of California, 836 F.Supp. 1534, 1551

6 (N.D. Cal. 1993) 1,10

7 Berkman v. New York, 536 F.Supp. 177, 206 (E.D.N.Y. 1982),

8 aff'd, 705 F.2d 584 (2d Cir. 1983) 11

9 Bouman v. Block, 940 F.2d 1211, 1228 (9th Cir)

10 cert. denied, 502 U.S. 1005 (1991) 9,10

11 Clady v. County of Los Angeles, 770 F.2d 1421,

12 1428 (9th Cir. 1985) 16

13 Contreras v. City of Los Angeles, 656 F.2d 1267,

14 1280-81 (9th Cir. 1981), cert. denied,

15 451 U.S. 1021 (1982) 11

16 Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) 10

17 Ga. State Conf. of Br. NAACP v. State of Ga.,

18 775 F.2d 1403, 1417 2

19 Gillespie v. Wisconsin, 771 F.2d 1035 (7th Cir. 1985),

20 cert. denied, 474 U.S. 1083 (1985) 12

21 Griggs v. Duke Power Co., 401 U.S. 424, 432,

22 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) 2,13

23 Groves v. Alabama State Bd. of Educ., 776 F.Supp. 1518,

24 1530 n. 26 (M.D. Ala. 1991) 10,16

25 Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) 10

26 Guardians Ass'n of New York City v. Civil Serv.,

630 F.2d 79, 93 (2nd Cir. 1980),

cert. denied, 452 U.S. 940 (1981) 12

James v. Stockham Valves & Fittings Co.,

559 F.2d 310, 354-355 (5th Cir. 1977),

cert. denied, 434 U.S. 1034 (1978) 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Page(s)

Kirkland v. New York Dept. of Correctional Services,
374 F.Supp. 1361, 1367, 1369 (SDNY 1974)
aff'd in part & rev'd in part on other grounds,
520 F.2d 420 (2d Cir. 1975) 10

Larry P. By Lucille P. v. Riles, 793 F.2d 969,
982 n. 9 (9th Cir. 1984, amended 1986) 2

Richardson v. Alabama State Board of Education,
935 F.2d 1240 (11th Cir. 1991) 9

Richardson v. Lamar County Bd. of Educ.,
729 F.Supp. 806, 815 (M.D. Ala. 1989) 9

Washington v. Davis, 426 U.S. 229, 247, n. 13,
96 S.Ct. 2040, 2051 n. 13, 48 L.Ed.2d 597 (1976) 10,11

Federal Regulations

C.F.R. § 1607 et seq. 11,12,14,16

INTRODUCTION

This action challenges California's public school employment certification test ("CBEST") on the grounds that it unnecessarily and illegitimately discriminates against minorities in violation of Title VI and Title VII of the Civil Rights Act of 1964, as amended. Plaintiffs, on behalf of all Latino, African American, and Asian educators injured by the CBEST will present evidence at trial that will demonstrate as follows: (1) Since its implementation in 1982 the California Basic Education Skills Test ("CBEST") has had a substantial adverse impact against Latino, African American, and Asian educators; (2) since its inception and up to the present, Defendants have failed to meet their burden of demonstrating the job-relatedness and business necessity of the CBEST; and (3) at the present time, Defendants State of California and California Commission on Teacher Credentialing ("CTC") have abundant, less discriminatory and substantially equally valid options for measuring the so-called "basic" skills they claim only the CBEST can adduce.

For nearly all certificated teaching and non-teaching jobs in California schools, an individual must pass the entire CBEST in order to be employed. The CBEST, as this Court has noted, is the "sine qua non of employment in California's schools. AMAE v. State of California, 836 F.Supp. 1534, 1551 (N.D. Cal.1993). This passing requirement applies generally to all teaching positions, from elementary (multiple subject) to secondary schools (multiple subjects in the areas of agriculture, art, business, english, foreign languages, health science, home economics, industrial and technology education, mathematics, music, physical education, science and social sciences). In addition, the CBEST passing requirement applies to most non-teaching positions in public schools including administrators, counselors, librarians, nurses, clinical and rehabilitative service personnel, and child center supervisors.

This "one size fits all" passing requirement has had a long lasting, admitted adverse impact on minorities under a variety of statistical measures.

1 Upon establishing the existence of adverse impact, the burden shifts to
2 Defendants to justify both that the CBEST's use "is job-related. . .and consistent with
3 business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); see Griggs v. Duke Power Co, 401
4 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) (Title VII); Larry P. By Lucille
5 P. v. Riles, 793 F.2d 969, 982 n.9 (9th Cir. 1984, amended 1986); Ga. State Conf. of Br.
6 NAACP v. State of Ga., 775 F.2d 1403, 1417 (Title VI elements of proof track Title VII).

7 The CBEST cannot be justified as job-related or required by business necessity for all
8 the teaching and non-teaching positions, for either the content of the test or the selected
9 passing scores. Indeed no meaningful evidence exists that the CBEST is necessary, or even
10 useful, to insure minimal teacher (or non-teacher) competency.

11 The CBEST and the selected passing scores cannot be justified under general
12 professionally accepted standards of validation. Indeed substantial evidenced exists from
13 defendant's own studies that suggest the invalidity of the CBEST and its passing scores as
14 applied to the wide range of jobs. Other evidence also suggests the lack of job relatedness
15 of the CBEST.

16 As to business necessity, Defendants will be unable to show that they were required
17 to implement and maintain the discriminatory CBEST as the exclusive means by which to
18 measure the reading, writing, and math skills needed to function as a public school educator.

19 As to job-relatedness, the evidence will show that the CBEST was specifically *not*
20 designed to measure teaching competence -- much less the ability to perform in non-teaching
21 educational jobs. The CBEST was adopted to serve wholly political ends -- without regard
22 to its job-relatedness. Faced with the impossible task of making a single test with a single
23 passing score fit a multitude of job categories, the CBEST's creators purposely eschewed
24 any effort whatever to formulate a job-related test, or to determine even whether the CBEST
25 they did formulate was job-related. The result was, and is, an abstract measure utterly
26 divorced from the realities of the day-to-day tasks of California's diverse educators.

1 **Dr. Poggio's Analysis of CBEST Passing Rates for First-Time Examinees, 1982-1994**

2

3

4

5

6

<i>Group</i>	<i>Number Tested</i>	<i>Percent Passing</i>	<i>EEOC's Adverse Impact Ratio</i>	<i>Hazelwood/Castaneda One-sample z-Test</i>	<i>Shoben Two-sample Test</i>
Asians	23,457	53.0%	.66	70.8	99.0
African Americans	25,170	37.7	.47	128.1	156.8
Latinos	42,439	49.4	.61	112.2	143.7
Whites	370,487	80.3	1.0		
All examinees	478,955	73.4			

7 Dr. Poggio also found adverse impact for those taking the test to obtain a teaching or
 8 service credential, for those taking the test as a requirement for employment, and for those
 9 already employed by a school.

10 Dr. Poggio's findings were largely replicated by defendants' expert, as the following
 11 table shows:

12 **Dr. Haworth's CBEST Pass Rate Analysis for First-Time Examinees, 1987-1994**

13

14

15

16

17

18

19

20

<i>Group</i>	<i>Number Tested</i>	<i>Percent Passing</i>	<i>Adverse Impact Under 80% Rule</i>
White	203,246	80.0%	no
Mexican American	19,073	50.2%	yes
Black	14,601	37.4%	yes
Asian	10,275	59.9%	yes
Hispanic/Latino	8,760	47.0%	yes
Filipino	3,687	42.7%	yes
Puerto Rican	1,040	45.8%	yes
Pacific Islander	723	49.9%	yes

21 Depo exh. 655, Table 2A of Haworth Report.

22 Defendants cannot deny the impact. Instead, they try to explain it away on the basis
 23 of various personal characteristics (lack of english fluency, for example) examined in an
 24 artfully constructed multiple regression analysis. In fact, even if it were relevant, the
 25 regression approach utilized by defendant failed to examine the central issues in this case--
 26

1 passing or failing the CBEST, and ethnicity. Properly constructed, a regression analysis
2 confirms the adverse impact of the CBEST.

3
4 **II. THE CBEST'S LACK OF JOB-RELATEDNESS IS GUARANTEED BY ITS
POLITICAL GENESIS.**

5 The State's adoption of the CBEST was not a reasoned scientific attempt to improve
6 the public schools. It was, rather, a political act seeking primarily to address a perceived
7 loss of confidence in public education. Haertel Second Expert Report at 5-9, Exh. 6.
8 These political -- rather than employment -- motivations have shaped the CBEST in
9 arbitrary, non-job-related directions from the outset.

10 As was conceded in 1985 by Richard Watkins, the individual then directly responsible
11 for the CBEST program at the Defendant CTC:

12 The first and most important promise of a basic skills test for teachers is that it will
13 help to restore confidence in parents and the public that standards are being applied in
14 decisions about who will be admitted to the teaching profession. *The fact that basic
skills proficiency may not be related to teaching competence* is probably immaterial in
this regard.

15 Richard Watkins, Testing Teacher Applicants with the California Basic Educational Skills
16 Test at 4, AERA Paper (March 31, 1985) (emphasis added) (Exh. 194).

17 As should be evident from Dr. Watkins' statement, the political genesis of the
18 CBEST has had fatal implications for its validity. Most notably:

19 (1) the State has been forced to attempt to use one test to measure quite diverse skill
20 positions, compelling the design of an abstract "intelligence" test, rather than a concrete,
21 job-related skills test;

22 (2) concerned over the impossibility of being able to create a single job-related test
23 for so many diverse positions, the State eschewed even investigating job-relatedness with a
24 proper job analysis for twelve years, preventing any possibility of the construction of a
25 content valid test;

1 (3) the CBEST passing scores were arbitrarily raised above reasonable norms of
2 expected proficiency; and

3 (4) stuck with the requirement to administer a test, the State did not investigate the
4 CBEST's redundancy and has not investigated alternatives to it.

5 The CBEST test specifications were written by a politically appointed "Advisory
6 Board" as mandated by the original CBEST legislation. California Department of
7 Education, California Basic Educational Skills Test: A Documentation of the
8 Implementation of AB 757 at 5-8 (June 1983) ("CDE Report"), Exh. 32. At the very first
9 Advisory Board meeting, Assemblyman Gary Hart, author of the CBEST legislation,
10 acknowledged in response to a question concerning whether the CBEST were to be job-
11 related: "I'm not sure that I have a good answer for that." Advisory Board Minutes at 3
12 (December 18, 1981), Exh. 13. At the same meeting, David Gordon, the California
13 Department of Education official in charge of implementing the CBEST legislation,
14 instructed the Board in drafting the specifications as follows:

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

17 Id. (emphasis in the original); Gordon Depo. at 97:12-15.

18 As a result, the specifications developed by the Advisory Board are extremely general
19 and abstract. Lefkowitz Expert Report at 8-10, Exh. 2. The test seeks to measure "general
20 abilities. Id. The "constructs" as set forth in the original test specifications are as follows:

21 READING: Logical Comprehension (Approximately 50%)
22 Literal Comprehension (Approximately 25%)
Critical Comprehension (Approximately 25%)

23 WRITING: Write with clarity.
24 Keep the writing focused.
Develop the ideas in the writing through support or illustration.
25 Use the conventions of standard written English.
Maintain a line of thought essentially free of non-sequiturs, internal
26 contradictions, unwarranted conclusions and confusion of fact and
opinion.

1 MATH: Problem-Solving
2 Solution of Applied Problems
3 Mathematical Concepts and Relationships
4 Functional Transfer

5 Preliminary Results of CBEST Validity Study at 9701-9706, Exh. 15.

6 The ETS Committee of Examiners, meeting in the late summer and Fall of 1982,
7 were responsible for refining and finalizing the CBEST test specifications. See 1983 ETS
8 Study at 3, Exh. 120. These Committees, one in each of the three content areas, followed
9 the direction of the politicians and the Advisory Board in focusing the test specifications on
10 abstract reasoning and purposefully avoided making the test content reflect job duties. The
11 Writing Committee noted that the second writing prompt "is to. . . primarily assess the test-
12 taker's analytic skills." August 24-25, 1982 Meeting, ETS-16252, Exh. 437. The same
13 Committee later noted that writing topics should not ask "test-takers to assess or comment
14 on pedagogic issues, e.g., the matter of who should determine curriculum", but should focus
15 on reasoning constructs like writing "free of internal contradictions and unwanted
16 conclusions." November 13-15, 1982 Meeting, ETS-16225, Exh. 438.

17 Minutes of the Reading Committee reflect that "[t]he reading subgroup of the
18 [Advisory Board] was strongly in favor of comprehension questions that required making
19 inferences and interpretations. They were not interested in questions pertaining to
20 "methods." September 20-22, 1982, ETS-16266, Exh. 442. Test passages should be
21 "drawn from a broad range of topics. . . as varied as possible." The amount of
22 "professionally relevant" literature "should be kept quite low." Id. Indeed, the reading
23 specifications themselves mandate that professionally relevant passages may constitute "no
24 more than 20%" of the sub-test. Preliminary Results of CBEST Validity Study at 9702,
25 Exh. 15.

26 A recent Math Committee meeting both took note of the decontextualized nature of
the CBEST math test and reaffirmed it. See March 12-13, 1994 Meeting (calling for math

1 specifications to "[u]se school context for some items" but determining that
2 "[N]onmathematics context is acceptable for items testing logical thinking." ETS-16248,
3 Exh. 436.

4 The fact that the CBEST seeks to measure abstract mental constructs like "reasoning"
5 and not concrete, job-related math skills has been confirmed by all those responsible for the
6 CBEST's validation since its inception. David Wright, the CTC official in charge of the
7 CBEST program since 1983 testified that the CBEST writing section tests "focus[es] on
8 cogency, the ability to develop an idea." Wright Depo. I at 36:17-18. He further testified
9 that the math section seeks to measure "not. . .knowledge or skill in geometry or knowledge
10 or skill in algebra," Wright Depo. II at 66:7-9, but "quantitative reasoning skills and logical
11 problem solving skills" Wright Depo. II at 65:21-22. Dr. Wright elaborated on the origins
12 of the CBEST's construct approach:

13 [The CBEST math sub-test] is not a discipline based test of the knowledge of teachers
14 about any form of advanced or sophisticated mathematics. It uses mathematics to
15 address the general, logical reasoning abilities of applicants for credentials in the way
16 that it was recommended by the original CBEST advisory board in 1981, which was
17 itself based upon the advice of a mathematics test development committee in 1981.
18 Analysis of the CBEST math test specifications would serve to confirm what I'm
19 saying.

20 Wright Depo. II at 68:7-16.

21 Dr. Wheeler (author of the 1983 ETS Validity Study) testified that the CBEST math
22 test assesses one's "logical reasoning [and] estimation." Wheeler Depo. at 173:8-10. She
23 further confirmed that logical reasoning and estimation are constructs as understood by
24 professional testing standards and that she was not aware of any construct validity
25 supporting the CBEST. Wheeler Depo. at 174:3-175:23. Dr. Watkins (author of the 1985
26 CTC Validity Study) testified that the "skills assessed by CBEST are needed by most
effectively functioning adults." Watkins I. Depo. at 114:12-13. Finally, Dr. Lundquist
(author of the 1995 validity study) testified that she believes the CBEST measures generic

1 basic skills of the kind that are important to effective performance in almost all adult
2 employment situations. Lundquist Depo. I at 208.

3 The Defendants have not construct validated the CBEST, as they were required to by
4 professional standards and caselaw. Content validity is the sole means by which Defendants
5 have attempted to establish the validity of the CBEST. Wright Depo. at Vol. I 114:15-
6 115:25; Vol. II 27:8-27:24; Lundquist Depo. at 89:14-94:13; Majetic Depo. at 118:2-
7 118:20; Watkins Depo. (Vol. I) at 72:5-75:24; Wheeler Depo. at 89:5-90:22; Elias Depo. at
8 98:3-99:16.

9 ARGUMENT

10 I. ADVERSE IMPACT EXISTS FOR LATINO, AFRICAN AMERICAN AND 11 ASIAN CBEST TEST-TAKERS.

12 Defendants raise three arguments to soften and to explain the CBEST's adverse
13 impact. First, Defendants maintain the test's adverse impact must be measured by way of
14 cumulative as opposed to first-time test-taker pass rates. Second, Defendants contend the
15 CBEST's impact should be measured by individual sub-test score as opposed to the overall
16 CBEST score. And third, Defendants seek to divert the court into an unnecessary and
17 ultimately illusory statistical quagmire -- explaining the cause behind the CBEST's adverse
18 impact.

19 All three arguments cannot rebut the adverse impact of the CBEST. As a matter of
20 law and practical significance, test-takers suffer a discrete injury each time they fail the
21 CBEST and lose employment opportunities. The prism through which to measure the injury
22 imposed is by first-time passing rates. See Richardson v. Lamar County Bd. of Educ. 729
23 F.Supp. 806,815 (M.D. Ala. 1989) aff'd on other grounds sub nom, Richardson v. Alabama
24 State Board of Education, 935 F.2d 1240 (11th Cir. 1991); Bouman v. Block 940 F.2d
25 1211, 1228 (9th Cir) cert den 502 U.S. 1005 (1991).

1 Similarly, because Defendants have required the entire CBEST as the *sine qua non*
2 for public school employment, AMAE v. State of California, 836 F.Supp. 1534, 1551
3 (N.D. Cal. 1993), it is the sum of the parts which defines the barrier adversely affecting the
4 Plaintiff class.

5 The employment practice at issue is not a subpart of a test; rather it is the
6 requirement that a person must pass the entire test in order to be employed. Each failure to
7 pass the test as a whole bars employment, and may deter the test taker from pursuing
8 employment. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

9 And finally, ample authority establishes that Defendants' efforts to explain away the
10 dismaying impact of the CBEST are of no probative value. Adverse impact, explained or
11 not, remains to impact the Plaintiff class. Bouman v. Block, supra at 1228; Kirkland v. New
12 York Dept. of Correctional Services, 374 F.Supp. 1361, 1367, 1369 (SDNY 1974) affd in
13 part & rev'd in part on other grounds, 520 F.2d 420 (2d Cir 1975) cert den 429 U.S. 823
14 (1976).

15 16 **II. DEFENDANTS CANNOT MEET THEIR BURDEN OF PROVING JOB 17 RELATEDNESS AND BUSINESS NECESSITY**

18 **A. General Principles.**

19 In defending a standardized test used to determine qualification for employment,
20 under either Title VI or Title VII, a defendant's claim of "job-relatedness" requires
21 establishing that the test has the necessary amount of criterion, content, or construct validity.
22 See Washington v. Davis, 426 U.S. 229, 247, n. 13, 96 S.Ct. 2040, 2051 n.13, 48 L.Ed.2d
23 597 (1976) (Title VII); Groves v. Alabama State Bd. of Educ., 776 F.Supp. 1518, 1530
24 n.26 (M.D. Ala. 1991) (Title VI); see also Guardians Ass'n v. Civil Serv. Comm'n, 463

1 U.S. 582 (1983) (application of Title VII disparate impact standards in Title VI
2 "employment" case).¹

3 In making the determination of whether a test has been sufficiently validated for
4 employment purposes, courts look to industry standards as embodied in the Federal Uniform
5 Guidelines on Employee Selection Procedure ("Uniform Guidelines"), 29 C.F.R. § 1607 et
6 seq. [Exh. 210], the *Principles for the Validation and Use of Personnel Selection*
7 *Procedures*, Society for Industrial and Organizational Psychology, Inc., (Third Edition)
8 College Park, MD (1987) ("SIOP Principles") [Exh. 207], and the *Standards for*
9 *Educational and Psychological Testing* (1985) Washington, DC: American Psychological
10 Association (jointly drafted by the American Psychological Association, the American
11 Educational Research Association, and the National Council on Measurement in Education)
12 ("APA Standards") [Exh. 208]. Contreras v. City of Los Angeles, 656 F.2d 1267, 1280-81
13 (9th Cir. 1981), cert. denied, 451 U.S. 1021 (1982) (tests must be validated "by
14 professionally acceptable methods").

15
16 **B. Defendants Have Failed To Prove Construct Validity.**

17 "The 'threshold task' in determining the validity of job-relatedness of [a] test is to
18 select the appropriate method of assessing its validity," *i.e.*, "the method by which one is
19 going to determine on a firm, factual foundation that one has tested for the abilities or
20 qualities needed for the job." Berkman v. New York, 536 F.Supp. 177, 206 (E.D.N.Y.
21 1982), aff'd, 705 F.2d 584 (2d Cir. 1983). Before even assessing the nature of the

22
23 ¹ "Empirical" or "criterion" validity, is demonstrated by correlating test scores with
24 objective measures or "criteria" of successful job performance. Washington v. Davis, 426
25 U.S. at 247 n.13. See Uniform Guidelines, 29 C.F.R. §§ 1607.5(B), 1607.14, [Exh. 210];
26 SIOP Principles at 6, 18, 25 [Exh. 207]; APA Standards at 9-11 [Exh. 209]. "Construct"
validity correlates test scores with certain identifiable characteristics of applicants -- such as
intelligence or leadership -- that, in turn, are demonstrated to be important to successful job
performance. Id. "Content" validity examines whether a test's content closely approximates
tasks to be performed on the job. Id.

1 Defendants' content validity evidence, it is appropriate to inquire whether content validity
2 can justify the CBEST at all.

3 Plaintiff's experts conclude that it cannot. Given the CBEST's intended design to test
4 for abstract mental qualities or constructs such as "logical comprehension" in reading,
5 "logical reasoning" or "problem-solving ability" in math, and "the ability to develop an
6 idea" in writing, rather than for concrete job-related reading, writing, and math tasks, the
7 test can only be validated by evidence of construct validity. Lefkowitz Expert Report at 6-
8 19.

9 The Uniform Guidelines specifically state: "A selection procedure based upon
10 inferences about mental processes cannot be supported solely or primarily on the basis of
11 content validity." Uniform Guidelines, 29 C.F.R. § 1607.14(C)(1). In interpreting the
12 application of this provision, courts have recognized that, to a certain extent, all job "skills"
13 involve mental processes and that, therefore, the focus of the inquiry is on the level of
14 abstraction of the skills being tested in a given case. See Gillespie v. Wisconsin, 771 F.2d
15 1035 (7th Cir. 1985), cert. denied, 474 U.S. 1083 (1985) ("a critical question under Title
16 VII in determining whether a content validation strategy could be used [is] whether the trait
17 is too abstract").

18 In perhaps the seminal case in the area, Guardians Ass'n of New York City v. Civil
19 Serv., the Second Circuit laid out the standard:

20 [I]f the test attempts to measure general qualities such as intelligence or
21 commonsense, which are no more relevant to the job in question than to any
22 other job, then insistence on the rigorous standards of construct validity is
23 needed. . . . [where] the abilities that the test attempts to measure are no more
abstract than necessary, that is, as long as they are the most observable
abilities of significance to the particular job in question, content validation
should be available.

24 630 F.2d 79, 93 (2nd Cir. 1980), cert. denied 452 U.S. 940 (1981) (emphasis added).

25 Here, the State has designed a test of abstract reasoning processes so as to "fit" as many
26 education jobs as possible. The State has intentionally not made the reading "professionally

1 relevant," ETS-16266, Exh. 442, the writing related to pedagogic issues, ETS-16225, Exh.
2 438, and the math related to content knowledge needed for the job. Wright Depo. II at
3 Wright Depo. II at 68:7-16.

4 The State is perfectly entitled to test its public school employees for constructs that it
5 deems appropriate for all adults in all jobs. See Watkins I. Depo. at 114:12-13; Lundquist I
6 Depo. at 208. In doing so, the State must produce construct validity evidence demonstrating
7 that whatever constructs measured actually relate to the job in question. Otherwise,
8 Defendants have violated a fundamental precept of Title VII: that tests "must measure the
9 person for the job and not the person in the abstract. . . ." Griggs v. Duke Power Co., 401
10 U.S. 424, 436 (1971).

11
12 C. The State's Post-Litigation Attempt to Justify the CBEST 12 Years After
13 Electing Not to Make the Test Job-related Should be Accorded Little
14 Weight.

15 Despite Defendants protestations that they never considered the CBEST an
16 employment exam prior to this Court's ruling in 1993, the evidence at trial will show
17 Defendants were aware of the job-relatedness issue at the outset -- and that they consciously
18 chose not to attempt to make the CBEST job-related.

19 As set forth more fully in Plaintiffs' proposed Findings of Fact, the California
20 Department of Education and the CTC issued an initial Request for Proposal in 1982 which
21 specifically asked for contractor bidders to address whether or not the CBEST should be
22 job-related. Exh. 23. One of the three contractors seriously considered by the State, NES,
23 informed Defendants that job-relatedness and a job analysis were necessary. Exh. 31 ETS
24 did not address the job-relatedness issue in their response to the RFP and was awarded the
25 contract. Exh. 46. Instead ETS told the State that it "might not be advisable" to perform a
26 job analysis. Exh. 19 at 4 (emphasis in original). At the same meeting, Merle S.
McClung, a private education attorney hired by the CDE for advice on the matter, suggested

1 that the State should consider performing a job analysis for CBEST positions. Id. at 1. His
2 suggestions were not pursued.

3 Plaintiffs Findings of Fact set forth in detail the ensuing history of the State's failure
4 to develop professionally sound evidence for the CBEST's validity. Most telling, has been
5 the State's total failure prior to this year (for teaching jobs) to undertake the necessary "job
6 analysis" for each position for which the CBEST tests. Such an analysis of each CBEST job
7 is necessary to determine what, if any, reading, writing, and math skills are required to
8 perform that particular job teaching, administrative, counseling or other job. In constructing
9 a "content valid" examination, it is essential that such an analysis (or analyses) take place at
10 the outset -- that is, prior to exam construction -- in order to enable the examination's
11 specifications, items, and passing levels to be built "organically" around the job information
12 gathered. Lefkowitz Expert Report at 80.

13 Having rejected the notion that the CBEST needed to be job-related, the State failed
14 to do the job analyses and develop the job information that might have enabled for the
15 construction of a content valid examination. Wheeler Depo. at 94:4-96:25; Elias Depo. at
16 101:13-103:5 (no job analysis done).² Later studies pre-dating this lawsuit repeated the
17 same flaws.³

18
19 ² Neither did those individuals responsible for the initial validation of the CBEST
20 "operationally" define reading, writing, and math skills in terms of observable aspects of
21 work behaviors performed by those in CBEST positions as required by the Uniform
22 Guidelines and professional employment testing standards. Wheeler Depo. at 98:16-100:5;
23 Elias Depo. at 111:1-116:22. See UGESP, 29 C.F.R. § 1607.14(C)(4); SIOP Principles at
24 21

25 ³ Watkins Depo. at 89:10-92:5 (no job analysis performed for 1985 study; would not
26 know "how you would do an analysis of such a very complex job or jobs as those for which
the CBEST was required."); id. at 89:14-89:16 (did not identify any important or critical
work behaviors). Expert Report of Dr. Joel Lefkowitz at 71-73, 30-32 (Exhibit 32) (1990-
91 study replicated flaws of earlier studies). See also Deposition of Dr. David Wright,
Director of Professional Services Division at CTC, Vol. II at 19:3-20:11 (1983 study);
42:14-44:13 (1985 study); 75:14-77:16 (1990-91 study) (admitting no a priori job analysis
done for CBEST positions during pre-litigation validation efforts by State).

1 As set forth in Plaintiffs' Findings of Fact, in 1994 and 1995 Defendants finally
2 carried out a Job Analysis. Defendants' post-litigation efforts to justify the CBEST should
3 be given little weight by the Court. James v. Stockham Valves & Fittings, Co. 559 F.2d
4 310, 354-355 (5th Cir. 1977) cert. denied, 434 U.S. 1034 (1978); Albemarle Paper Co. v.
5 Moody, 422 U.S. 405, 433 n.32 (1975).

6 Plaintiffs' expert, Dr. Lefkowitz, has detailed the several ways in which Defendants
7 belated attempts to prop up the CBEST 12 years after the fact are improperly and
8 unprofessionally biased toward justifying the test. Even so, despite Defendants' best efforts,
9 the results of their post-litigation efforts still demonstrate that the 80% of CBEST math test
10 is not job-related, Poggio Validation Report at 16, and that substantial disconfirming
11 evidence of validity exists for the reading and writing sub-tests. See, e.g., Lefkowitz
12 Expert Report at 115, Exh. 2

13
14 **III. THE CBEST PASSING SCORES HAVE BEEN SET ARBITRARILY HIGH**
15 **FOR POLITICAL REASONS AND ARE NOT JOB-RELATED**

16 The evidence at trial will demonstrate that the CBEST passing scores have also fallen
17 victim to the politics of the CBEST. Plaintiffs experts will testify that the only remotely
18 justifiable passing scores were those originally recommended by ETS in 1982. Without any
19 psychometric justification, those scores were raised substantially in late 1982 by a politically
20 appointed Advisory Board interested in making a statement about "high standards". The
21 Advisory Board's recommended scores were immediately raised even higher when
22 Superintendent Honig set the final passing scores based on "the time-honored wisdom that
23 seventy percent is passing on any test, and campaign promises to raise the quality of
24 teachers entering the California public schools." Watkins, AERA Paper at 4, Exh. 194.

25 Plaintiffs will demonstrate that Superintendent Honig's passing score determinations
26 were an arbitrary political act without psychometric justification. As such, for twelve years

1 CBEST passing levels have not corresponded to "normal expectations of proficiency within
2 the work force". 29 C.F.R. § 1607.15(C)(7). See also Groves v. Alabama State Bd. of
3 Educ., 776 F.Supp. 1518, 1521, 1529-32 (M.D. Ala. 1991) (politically arbitrary teacher test
4 cut score struck down as failing to meet standard of "educationally justified" under Title
5 VI).

6 Thousands of minority educators have improperly failed the CBEST due to
7 Superintendent Honig's arbitrary act. Poggio Validation Report at 21, Exh. 3.

8
9 **IV. THE STATE HAS FAILED TO CONSIDER THE REDUNDANCY OF THE
10 CBEST AND ALTERNATIVES TO IT.**

11 Even if defendants show job relatedness, plaintiffs prevail if they can show
12 alternatives that meet the educational necessity exist that would lesson the impact of the
13 CBEST. Albemarle, supra at 425; Clady v. County of Los Angeles, 770 F.2d 1421, 1428
14 (9th Cir. 1985).

15 The evidence at trial will establish that the CBEST was adopted as part of a political
16 campaign to respond to perceived concerns over the quality of public education. No
17 empirical evidence exists or existed to demonstrate California public school teachers were
18 particularly deficient in "basic" skills or that any student deficiencies were the result of
19 problems arising from the teacher force as opposed to a host of other social ills.

20 Nor is there any evidence that the CBEST in fact has improved teacher performance
21 or student performance. To the contrary, the only empirical studies of the CBEST produced
22 in this litigation have been produced or performed by plaintiffs. Those studies demonstrate
23 that the CBEST is not related to teacher performance in the classroom, to effective teaching
24 practices, nor to gains in student achievement. See Dick Study cited in Haertel Expert
25 Report, Exh. 4; Poggio Validity Study at 50-53, Exh. 3.

1 Plaintiffs also demonstrate that numerous, less discriminatory, substantially equally
2 valid alternatives exist by which Defendants can satisfy their interest in having public school
3 teachers sufficiently literate and numerate to succeed on the job. Among those alternatives
4 which Plaintiffs will ask the Court to order are:

5 1. Eliminate the CBEST and rely on other existing credential requirements to
6 ensure educators are literate. Those other requirements include: obtaining an undergraduate
7 degree; being in the top half of one's major (as measured by grade point average) in order
8 to obtain admittance to a post-baccalaureate fifth-year credentialing program; having to
9 satisfy the State's subject matter proficiency requirement in the area of one's teaching (either
10 by examination or by a rigorous coursework waiver); and completing a fifth-year post-
11 baccalaureate credentialing program;

12 2. Permit individuals to satisfy a coursework alternative in lieu of passing one
13 or more sections of the CBEST. Oregon, the only other state to require the CBEST has
14 established a coursework alternative;

15 3. Implement a Professional Experience alternative, exempting from CBEST
16 passage those already holding valid California credentials and those entering California from
17 out-of state with public school credentials and five years of service. Oregon employs such
18 CBEST exemptions.

19 4. Use a college coursework/grade point average cut-off in lieu of the
20 CBEST. One of Plaintiffs' experts conducted a study for the State of Kansas comparing the
21 power of three different standardized teacher tests and college coursework. Using a grade
22 point average of 2.75 was equivalent in discriminating power to use of the standardized
23 teacher tests. Plaintiffs' expert has shown such an alternative in California would
24 substantially lower, if not eliminate, the CBEST's adverse impact. Poggio Expert Report at
25 44-46, Exh. 3.

26

CERTIFICATE OF SERVICE

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

On August 18, 1995, I caused a copy of **PLAINTIFFS' CORRECTED TRIAL BRIEF**, dated August 18, 1995, to be served at the below addresses:

Via Federal Express

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

Via First Class Mail

Stephanie Wald (w/o attachments)
Supervising Deputy Attorney General
State of California
50 Fremont Street, #300
San Francisco, CA 94105-2239

Edward Washburn
Washburn, Briscoe & McCarthy
55 Francisco Street, #600
San Francisco, CA 94133

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

Dated: August 18, 1995



Daisy Thomas

Law
Offices
of
**Public
Advocates,
Inc.**

Stefan M. Rosenzweig, Executive Director

John T. Affeldt, Staff Attorney
Cheri Alley, Development Coordinator
Carmela R. Castellano, Staff Attorney
Margie Chung, Support Staff
Daisy DeGuzman, Support Staff
Clifford Loo, Support Staff
Mark Savage, Staff Attorney
Brenda Solorzano, Project Coordinator
Michael Shiro, Controller
Judy A. Tam, Director of Administration
Abigail Trillin, Law Fellow

August 18, 1995

RECEIVED
AUG 18 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

By messenger

The Honorable William H. Orrick
United States District Court Judge
450 Golden Gate Avenue, 19th Floor
San Francisco, California 94102

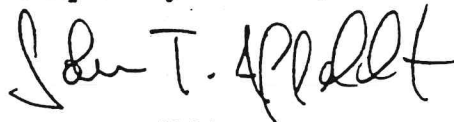
RE: ASSOCIATION OF MEXICAN-AMERICAN EDUCATORS V.
STATE OF CALIFORNIA, No. C92-3874-WHO (N.D. CAL.)

Dear Judge Orrick,

Plaintiffs Trial Brief filed yesterday has various typographical errors. Please accept the attached as a corrected copy. No changes of substance have been made.

Thank you for your consideration of this matter.

Respectfully submitted,



John T. Affeldt

enclosure

cc: Lawrence Ashe and Nancy Rafuse
Stephanie Wald