



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

FAX TRANSMITTAL

TO: Bill Kincaid

ORGANIZATION:

PHONE NUMBER:

FAX NUMBER: 4 x67022

NUMBER OF PAGES: 4 + cover

FROM: NORMA V. CANTU

PHONE NUMBER: (202) 205-5557

FAX NUMBER: (202) 205-5381

MESSAGE: _____

IF RE-TRANSMISSION IS NECESSARY, PLEASE CALL WAYNE WALKER
(202) 205-5557



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

May 2, 1997

Isabelle Katz Pinzler
Acting Assistant Attorney General
for Civil Rights
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Mexican-American Educators v. California (9th Circuit)

Dear Ms. Pinzler:

It is our understanding that the EEOC seeks to participate as amicus curiae in support of plaintiffs in this appeal. We strongly recommend against a Government challenge to the district court's opinion in this case. Indeed, if the Government were to participate in this case, we believe it should do so in support of the State defendants, for the reasons discussed below.

The district court upheld a state-wide requirement that applicants must pass the California Basic Educational Skills Test (CBEST) before they can teach in California public schools. This Administration strongly advocates that schools set high standards for student performance. Our quintessential educational policy is to raise educational standards for all children, especially children with special educational needs who too often are short-changed by low expectations, less challenging curricula, and less qualified teachers.¹ California's effort to ensure the competency of its teachers is thus laudable. As the district court noted: "[T]he importance of basic skills cannot be ignored. Teachers are role models. Students learn not only what they are taught directly, but also what they observe." 937 F. Supp. 1397, 1402 (N.D. Cal. 1996). Moreover, the State presented strong evidence that the CBEST measures skills that are important elements of a teacher's job. We believe that a government challenge to the CBEST would undermine Administration policy and have a far-reaching chilling effect on local and state efforts to set high standards for student performance and to test to ensure that these standards are being met.

As you know, President Clinton, in his State of the Union address, announced that this Department will be funding the development of voluntary national tests in reading and mathematics to let parents know how their children stack up against national and international standards. The President announced these tests as a public challenge to spur dramatic educational improvement for minority, low-income, and other children.

600 INDEPENDENCE AVE. S.W. WASHINGTON, D.C. 20202-2100

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

Page 2 - Ms. Isabelle Katz Pinzler

The CBEST is designed to test basic skills, or minimum competency, in reading, writing, and mathematics. After a trial on the merits, the court found that the State properly established the content validity of the test, i.e., that basic skills in reading, writing, and mathematics were important elements of teaching and other school-related jobs, and that the CBEST actually measured such basic skills. Id. at 1411. The court also found that the passing score set by the State had been appropriately set by a "systematic process that reflect[ed] the good-faith exercise of professional judgment." Id. at 1420-21.

The EEOC recognizes the Administration's strong commitment to improving student performance through national testing standards. Nevertheless, the EEOC believes that the validity of the CBEST was not properly established and, thus, that it must challenge California's use of the test in order to ensure that increased reliance on standards does not unfairly screen out minorities from teaching jobs.

The Department firmly agrees with the EEOC that high stakes tests should not be used to discriminate based on race or national origin. The Department also believes that high academic standards, and tests that measure whether students are meeting these standards, are essential to improving student performance. Teachers who are qualified to teach high standards are also essential to improving educational achievement and accountability. Raising standards for teachers is an integral part of Administration education policy. In a September 12, 1996 memorandum to Secretary Riley, the President said:

Every child needs -- and deserves -- dedicated, outstanding teachers, who know their subject matter, are effectively trained, and know how to teach to high standards and to make learning come alive for students....[A]s a Nation we must: Require tougher licensing and certification standards for teachers, invest in high-quality preparation and ongoing training to help teachers meet these standards, and increase dramatically the number of teachers who meet the demanding standards set by the National Board of Professional Teaching Standards. (emphasis added)

The President's memorandum went on to direct the Secretary to assist States and local communities in meeting the challenge to promote excellence in teaching.

High standards can be achieved without discriminating against minority students or teachers by permitting schools only to use valid tests. We believe the district court stated the correct legal standard for evaluating tests with a disparate impact, i.e., that tests should actually measure those important skills that schools intend to measure and that cutoff scores should reflect sound professional judgment. Moreover, these are the standards applied by the Department's Office for Civil Rights.

Here, the EEOC recognizes the difficulty in challenging the district court's analysis, and acceptance, of the State's validity evidence because the court engaged in a detailed, and "highly fact bound" review of the expert evidence presented by the State. Memorandum from

Page 3 - Ms. Isabelle Katz Pinzler

C. Gregory Stewart to Gilbert F. Casellas, Chairman, EEOC (Casellas Memo) at page 11. Nevertheless, the EEOC has suggested several narrow grounds to challenge the State's validity evidence. While it may be possible to make technical objections to the court's analysis of specific validity studies, we do not believe as a policy matter that the government should challenge a test that appears highly likely to be a valid measure of minimum teacher competence.

For instance, the EEOC agrees that it would be impossible to challenge the cutoff score set for the mathematics and reading portions of the test. Nevertheless, it urges a challenge to the State's cutoff score on the writing section of the CBEST. The EEOC argues that the court incorrectly found that the State used the cutoff recommended by testing experts when, in fact, the State "arbitrarily" raised the score 2 or 3 points above the recommended cutoff (it was allegedly raised from 9 to either 11 or 12). Assuming that the EEOC is correct on the facts, we do not believe this provides a strong basis to challenge the court's decision.

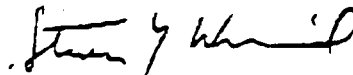
First, California determined only to measure minimum competency for teaching. The Department believes that the State could require potential teachers to meet even higher standards and, thus, could use a higher cutoff score as long as it obtained evidence that the score measured higher levels of competence. Indeed, Administration policy is to support State and local efforts to set and implement higher standards for teachers. See President Clinton's memorandum of September 12, 1996. Second, as EEOC acknowledges, the court found that even as related to the State's goal of minimal competency, not only had the State properly justified its cutoff score for the other two parts of the three-part exam, but it could have justifiably raised the minimum cutoff score for these sections: "[I]f anything, the passing scores should have been raised rather than lowered. This is particularly true in light of the fact that many of the CBEST skills were judged to be crucial to the job of teaching; logically, therefore, an examinee would need to get such items correct to be considered minimally qualified." *Id.* at 1425. In light of the Administration's goal of high standards, as well as the court's holding regarding the State's cutoff scores, we could not support a challenge to the minimum competency cutoffs set by the State.

At a fundamental level, reading, writing, and mathematics are essential skills necessary for a well-trained teacher. The EEOC recognizes that it would be "fundamentally implausib[le]" to argue that the basic skills measured by the CBEST are not highly relevant to teacher competence. Casellas Memo at 10. It alleges, however, that the State did not provide evidence that the test items actually measured these skills. We agree with the EEOC that such evidence is necessary to properly validate a test. It is not clear from the opinion, however, that the State failed to present, or that the district court failed to consider, such evidence. See *Id.* at 1416-17. Moreover, based on the court's detailed description of the CBEST, it appears highly likely that the CBEST items measure the basic competency skills that the State set out to measure. Thus, even if the State should have presented additional validity evidence, we could not support a challenge to what appears to be a valid test.

Page 4 - Ms. Isabelle Katz Pinzler

In sum, the State's goal in using the CBEST is consistent with the Administration's efforts to raise standards. In the absence of any indication that the test is not a valid measure of teacher competence, we believe it would be inappropriate to assert the narrow, technical challenges proposed by the EEOC. Accordingly, the Department strongly opposes a government challenge to the CBEST under these circumstances. If you have any questions, please feel free to contact me at (202) 401-6000.

Sincerely,



Steven Y. Winnick
Deputy General Counsel
for Program Service

cc: C. Gregory Stewart
General Counsel, EEOC

Norma V. Cantú