

OFFICE OF THE ATTORNEY GENERAL



CHARLES A. GRADDICK
ATTORNEY GENERAL
STATE OF ALABAMA

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JAMES R. SOLOMON, JR.
DEPUTY ATTORNEY GENERAL

WILLIAM M. BEKURS, JR.
EXECUTIVE ASSISTANT

WALTER S. TURNER
CHIEF ASSISTANT ATTORNEY GENERAL

JANIE NOBLES
ADMINISTRATIVE ASSISTANT

ADMINISTRATIVE BUIL
64 NORTH UNION ST
MONTGOMERY, ALABA
AREA (205) 834-515

Dr. Wayne Teague
State Superintendent of
Education
Department of Education
State Office Building
Montgomery, Alabama 36130

State Board of Education -
Teacher Certification -
Contracts - Indemnification
Clause

Under the extraordinary circum-
stances set out below the State
Department of Education can
include an indemnification/hold
harmless clause in a contract
with Educational Testing Service
in order to obtain access to
the National Teacher's
Examination (NTE).

Dear Dr. Teague:

Your recent request for an opinion reads as follows:

"Attached is a copy of a letter which I received from the director of Educational Testing Service's Teacher Programs and Services and NTE Programs which outlines conditions under which Educational Testing Service would allow the NTE to be used by the State Board of Education as part of its initial teacher certification program. Paragraphs 3 and 4 taken together require that the State Board of Education deliver to Educational Testing Service a formal opinion from your office that the State

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Department of Education has the authority to bind the State to an indemnification/hold harmless clause which would recompense Educational Testing Service for all cost, expenses and damages of any type incurred in connection with any litigation challenging the National Teacher Examination's validity, including the reasonable fees of attorneys whom ETS may retain to represent its interest, whether or not ETS is a party to any such litigation.

Based on this letter, I respectfully request your opinion about whether the State Department of Education can give to Educational Testing Service an indemnification/hold harmless clause and whether such clause would be binding against the State. The State Board of Education has directed me to give it on June 27, 1985 a preliminary report concerning the feasibility of the State's using the NTE. Thus I would appreciate your giving this request the highest priority."

As you are well aware there is now pending in Federal Court a "Motion to Enforce the Settlement" in Allen v. State Board of Education, a case pertaining to teacher certification testing. If the Federal District Court should enforce the settlement and if the appeal of such an action is unsuccessful then the NTE could never be used in Alabama. If the Federal District Court allows the Allen case to proceed to trial and the State Board of Education prevails at trial then there will not be any need for the NTE in the foreseeable future. Only in the event that Allen proceeds to trial and the teacher certification test is held to be in whole or in part invalid will Alabama need to institute the NTE. The State Board has wisely sought to take certain preliminary steps necessary for the adoption of the NTE in order to prevent, if possible, Alabama from being unable to give a teacher certification test for a period of years while a new test is developed. Unfortunately, the State Board cannot take the necessary preliminary steps because Educational Testing Service will not cooperate unless the conditions set out in your request letter are met.

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I do not blame Educational Testing Service for setting such extraordinary conditions. They know, as do we, that as sure as night follows day, a lawsuit will be filed by those who fail the NTE in the event it is adopted in Alabama. It is becoming evident on an almost daily basis that there are powerful forces at work in this State whose sole goal is apparently the short term financial gain of the incompetent, the mediocre and their attorneys. Any attempt, no matter how reasonable and fair, which is made to improve public education in Alabama by allowing only competent people to teach in our schools will be met with a lawsuit. In short, Educational Testing Service, a nonprofit organization, knows that by coming to Alabama it could be buying into an expensive and time consuming lawsuit.

As a matter of public policy the State should not enter into indemnification/hold harmless agreements with vendors. Such agreements would take away the vendor's incentive to exercise due care and open the State Treasury to incalculable liability. In addition, Constitution of Alabama 1901, Section 93, prohibits the State from lending its credit to a private corporation. Almost any indemnification/hold harmless agreement between the State and a vendor would violate Section 93. However, there are certain unique facts that pertain to the situation which now confronts the State.

1. The NTE has been upheld by the United States Supreme Court.
2. The NTE is the only nationally applicable teacher certification test in existence. It is presently in use in 18 states.
3. It is my understanding that Educational Testing Service will merely provide the NTE. The State Board of Education will hire experts to validate the NTE for use in Alabama.

The practical effect of this is that if the NTE is properly validated for Alabama then a future challenge in Federal Court will be unsuccessful. If the NTE is not

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properly validated for Alabama then a future challenge in Federal Court might well result in some liability. However, it is difficult to see how Educational Testing Service can be a party much less ever be held liable if it plays no part in validating the test.

In this particular situation, the public interest in maintaining a mechanism for permitting only competent people to teach in our public schools far outweighs any public policy arguments against indemnification/hold harmless agreements in general. In addition, it is my opinion that in the present situation an indemnification/hold harmless agreement would not violate Section 93. Any lawsuit against Educational Testing Service will be frivolous and the chances of success will be almost nil. The indemnification/hold harmless agreement contemplated is not for the benefit of Educational Testing Service, it is for the benefit of Alabama. If Alabama does not agree to this indemnification/hold harmless clause and if the Allen case is decided in favor of the plaintiffs, then Alabama will be doomed to a mediocre public educational system. Alabama will have no way to keep incompetents out of our public school classrooms.

The most serious problem with the contemplated indemnification/hold harmless agreement concerns Constitution of Alabama 1901, Section 14, which says Alabama shall never be made a defendant in any lawsuit. It could be argued that by entering into an indemnification/hold harmless agreement, the State would, in practical effect, be agreeing to substitute itself as a defendant in any lawsuit against Educational Testing Service. Of course, the State Board of Education is a defendant in the Allen case and if the plaintiffs win, state money might be used to pay the damages. If this does not violate Section 14 then it is hard to see how entering into an indemnification/hold harmless agreement would be a violation of Section 14.

This is a unique and truly extraordinary situation. Quality public education in Alabama may very well hang in the balance. After considering all of the facts, it is my opinion that the State Department of Education can give to Educational Testing Service an indemnification/hold harmless clause which would be binding against the State. I would like to point

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out that the State Department of Education can limit its exposure by securing a liability insurance policy to insure against any loss in damages and for attorneys' fees which might be incurred by the Educational Testing Service. This could protect the Board of Education from having to pay any damages or attorneys' fees with State funds.

This opinion concerns a unique set of facts and applies to this particular situation alone and is not to be construed to apply to any other situation.

Sincerely,

CHARLES A. GRADDICK
Attorney General

Patrick L. Robinson

PATRICK L. ROBINSON
Assistant Attorney General

CAG:PLR:dn