

CERTIFICATION OF TEACHERS, PRE-SERVICE TEACHER EDUCATION, TESTS AND LEGAL ISSUES IN AUSTRALIA AND THE UNITED STATES OF AMERICA (US): PART A CONTEXT, AND US HISTORY

RALPH D. MAWDSLEY[†]

CLEVELAND STATE UNIVERSITY, USA

J. JOY CUMMING

GRIFFITH UNIVERSITY, BRISBANE, AUSTRALIA

Teacher certification in Australia to date has been based on successful completion of an accredited teacher education program offered by a higher education institution or recognition of a qualification from another jurisdiction. However from the end of 2011,¹ Queensland teacher education graduates destined to teach in early childhood settings and primary schools² will be required to complete standardised tests in literacy, numeracy and science to attain registration.³ While such additional test requirements for registration have been in place in England for a number of years, and are common across states in the US, this requirement is a new professional certification approach in Australia. This article examines the contexts for such licensure testing and legal issues associated with such test requirements that have been identified in US case law. This article is Part A of a two part series. The companion article (Part B Implications for Queensland and Australia)⁴ draws on this discussion to identify and discuss potential challenges that may arise, or requirements that will need to be satisfied, in Queensland and Australian law, when teacher licensure tests are introduced. The discussion is offered in the possibility that such additional requirements could become federally-legislated, given the Australian Commonwealth Government's active involvement in setting education policy. Examination of US law, with its considerable history in both teacher certification testing and overall litigation in education, may provide some insights into legal issues that could arise or be challenged in the Australian context.

I INTRODUCTION: THE CONTEXT OF THE DISCUSSION

Over the last two decades, the education sector has seen increasing emphasis on accountability for public expenditure. This emphasis has been heightened by publication of outcomes from international comparative tests of student achievement which claim to provide synopses of student achievement at different ages in different subjects across countries.⁵ Further, overall, standardised tests have become an accountability tool used within countries to report student performance, and measure and compare state and/or school student outcomes. In the US, such accountability has been introduced at federal government level through the *No Child Left Behind Act*⁶ requiring all US states to identify appropriate standards of education outcomes for all students and to report on these, in return for education funding to the states. In Australia, federal government funding legislation has increasingly required states and territories and school sectors

[†]Address for correspondence: Professor Ralph D. Mawdsley, Department of Counseling, Administration, Supervision & Adult Learning, Cleveland State University, 2121 Euclid Ave, Rhodes Tower 1419, Cleveland, Ohio, 44115 USA. Email: ralph_d_mawdsley@yahoo.com

to agree to accountability and reporting requirements to receive public education funding.⁷ In a policy direction that could not be achieved under the US *Constitution*,⁸ by 2008, Australian Commonwealth government funding legislation had led to implementation of national literacy and numeracy standardised tests for all students in Years 3, 5, 7 and 9 in all schools accepting public funding.⁹

While national reports on state and territory student performance on literacy and numeracy tests have been published in Australia for some time,¹⁰ in 2010 a federally-funded website, *MySchool*, published national test outcomes for individual schools.¹¹ The site provides comparative data on a school's outcomes compared to a selection of schools with a similar socio-economic profile. This publication has heightened focus on school outcomes on these tests, with the nature of the tests changing from an initial diagnostic purpose to identify students at risk to serving as a school quality indicator, a much more high stakes purpose. The website publication and media commentary heightened Queensland Government concerns that Queensland students are performing at a lower standard than those in most other states and territories.¹² The Queensland Government therefore commissioned a report on how Queensland could improve test outcomes. While the report discussed many areas, including professional development opportunities for teachers, the first recommendation was

That all aspiring primary teachers be required to demonstrate through test performances, as a condition of registration, that they meet threshold levels of knowledge about the teaching of literacy, numeracy and science and have sound levels of content knowledge in these areas.¹³

The basic premise for such a recommendation is that high educational outcomes for students are achieved by a high quality teaching workforce and that such quality is indicated by performance in the areas to be tested.¹⁴ An underlying premise is that graduation from teacher education does not ensure such qualities in the graduates.¹⁵

In 2009, the Queensland Government endorsed the recommendation and Queensland graduates of teacher education programs intending to teach in early childhood and primary schooling are to be required to complete testing external to their teacher education programs for accreditation as teachers from the end of 2011. The Queensland College of Teachers (QCT) legislation has been amended to incorporate the requirement, with the QCT to be responsible for the development and implementation of the test program.¹⁶ Test development is underway at the time of writing, so final requirements for those seeking registration at the end of 2011 are not yet known. The question that arises is what might be the legal issues and standards that accompany the new test requirement.

II TEACHER EDUCATION PROGRAMS AND TEACHER LICENSING

The duration of teacher education programs in universities around the world varies from one year (graduate entry) to five years (undergraduate entry). In Australia, the standard expectation is a four-year qualification, either four years of undergraduate education studies or an initial degree and postgraduate studies in education. Regardless of duration, teacher education programs tend to follow a standard pattern and include:

- studies in basic discipline subjects such as English and Mathematics and teaching area specialisations (level (early childhood, primary, secondary); subject-specific; field-specific (eg, special needs));
- studies in pedagogy in these areas;

- studies in informing disciplines to education such as sociology and psychology; and
- a practicum component in a school setting.

In Australia, England and the US, as in many other countries, teacher education programs are governed by accreditation authorities which specify frameworks such as the required areas of study, professional skills to be addressed, and the minimum number of days of practicum. Successful completion of such a course then allows the graduate to be registered or licensed to enter the teaching profession. In Queensland, the authority that controls the content of programs and their accreditation also controls the registration of teachers.¹⁷

However, additional requirements for registration or licensure, including standardised tests, have been in place in the US for a considerable time. In England and Wales, similar tests were introduced following a 1998 recommendation, with all trainee teachers required to pass literacy, numeracy and information and communications technology (ICT) tests from 2002.

A *The Nature of Licensure Tests for Teachers*

In general, licensure tests assess personal skills of potential teachers in basic areas (literacy, numeracy), often through multiple choice examinations, but may also involve additional testing of pedagogical skills. In the US, a major test development company, the Educational Testing Service (ETS), has a *Praxis Series* of tests measuring Pre-Professional Skills (reading, writing and mathematics) (*Praxis I*) and Subject Assessments (including subject content knowledge and subject specific teaching skills, principles of learning and teaching tests, and teaching foundations tests) (*Praxis II*).¹⁸ *Praxis I* tests consist of multiple choice questions with an essay section for the writing test. Tests have approximately 45 questions and can be taken by paper and pencil or computer administration. *Praxis II* tests are paper and pencil format only, include multiple choice and constructed response items, and are one, two or four hours long. ETS has developed over 120 different tests for different subject areas and state licensure requirements.¹⁹ While ETS tests are the most widely used tests in the US, another agency, the National Evaluation Systems (NES), has also been a major provider of such tests.²⁰ Teacher certification testing is therefore well-established in the US, and standardised testing in general is 'big business'.²¹

B *Teacher Licensing Tests in England and Legal Issues*

England is another country that introduced standardised tests for teacher certification. As a jurisdiction more akin to Australian law, legal precedents from England in this area could be considered more applicable to possible future challenges in Australia. However, only one legal appeal regarding the teacher certification tests in England has been identified. As noted in our companion article,²² pass rates for English test takers are very high: the report on the 2001 implementation showed that following multiple attempts, overall 98 per cent of test takers passed the numeracy test, and 99 per cent passed the literacy tests.²³ It is also possible that any challenges are unreported.

The single identified appeal concerned a teacher, Mr Scott, who had a physical impairment (a shoulder that tended to dislocate) and whose contract of employment gave him until a fixed date to meet the Teacher Training Agency QTS skills tests.²⁴ As Mr Scott did not complete the tests, his contract was terminated. He appealed to the Employment Appeal Tribunal on discrimination grounds under the *Disability Discrimination Act 1995* (UK), arguing, in part that as he was absent due to his medical condition he could not complete the tests.²⁵ His appeal was dismissed, as he

had not passed the tests by the time specified in his contract. The appeal transcript shows the overall approach of the English education employers and the certification (and testing) agency to the English tests. First, the transcript shows that the school body had offered diagnostic support for the Skills Test to assist the teacher in passing. Further, the Teacher Training Agency offered, over some time, various accommodations that appear generous in the extreme:

In light of the fact that you experienced some difficulties due to the seating provision when taking one of the tests ... the TTA offered to provide a high backed chair for you at the appropriate testing centre. ... after receiving notification for you that you were unable to travel to a test centre, the TTA agreed to deliver paper based on laptop tests to you in a venue of your choice, such as a local school. ... subsequent to the receipt of a report from your Occupational Health Physician, ... the TTA exceptionally agreed to deliver laptop tests to you in your home and asked you to contact us, to provide a convenient date and time when you could take the tests.²⁶

Therefore, while legal precedents may not be available from England, the extent of available accommodations for test takers in the England may provide guidance for the accommodations the Queensland College of Teachers will need to consider. They do exceed the assistance provided in the US, as the following discussion shows. In the absence of case law from our English colleagues, we turn once more to the US to provide information on teacher challenges to licensure testing.

III EDUCATIONAL EFFECTIVENESS, ASSESSMENTS AND TEACHER CREDENTIALS IN THE US: LEGAL CONTEXTS AND CHALLENGES

The process for determining the quality of teachers in US schools has evolved over the years. From the preparation of teachers originally being determined by graduation from an approved higher education teacher education program, states have moved since World War II to the use of centralised licensing or credentialing tests similar to those required in the US for the professions of law and medicine. These controls over teacher qualifications reflect the US *Constitution's* Tenth Amendment implied power for states to control education. However, difficulties with the various states determining their own credentialing requirements have been reflected in differences among test content which have produced problems of reciprocity among states as teachers move from one state to another.

In part in response to this lack of consistency, the federal government, while not directly involved in preparing or administering teacher tests, has required in the *No Child Left Behind Act* (NCLB)²⁷ that each state receiving federal financial assistance have a plan for the adoption of 'challenging academic standards' in mathematics, reading, language arts, and science.²⁸ Basically functioning as a funding statute,²⁹ NCLB has a goal of highly qualified teachers (HQT) in schools³⁰ based on the theory previously mentioned that teachers who are highly qualified in their content areas represent a significant factor in raising student achievement.³¹ Although essentially a statute to assure student performance, the NCLB was enacted 'to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers'.³² While the details may vary among states, generally teachers are HQT if they have at least a bachelor's degree, have a certificate/licence that is appropriate to the grade and subject they are teaching, and are able to demonstrate their subject matter expertise in the core academic subjects that they teach.³³

NCLB also has a parent-right-to-know section entitling parents to know on request information regarding the professional qualifications of the student's classroom teachers. This

includes whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction or whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.³⁴

Clearly, NCLB has changed the face of teacher credentialing in the 50 US states. Although states still have their inherent authority to decide how teachers will be assessed for credentialing, the requirement of annual student progress and HQT have combined to bring focus on the process of teacher assessment. The utilisation of assessments to determine whether a person is qualified to teach presents policy concerns as to the clarity and appropriateness of what a teacher must know and be able to do. Where the issuance of teaching credentials depends on passing a state test, state credentialing bodies must address such issues as the minimum level of competency for teacher qualification, the test's relationship to best practices in the field, differences between qualifications for entry level and advanced level teachers, differences in qualifications for specialised competencies such as bilingual or special education teachers, and the likelihood that desired teaching performances can be adequately assessed.³⁵

This article addresses legal issues in the US concerning state assessments of teacher qualifications under three categories: (1) the nature of the state's interest in requiring teacher assessment; (2) validation of the test instrument; and (3) the fairness of the evaluation process.

A State Interests in Quality Education

While states have broad discretion in setting education goals, those goals must be linked to the governmental needs of the state. Generally, US courts will assume that a legislature's objectives in enacting a statute pertaining to education are the same as the purposes of the statute.³⁶ However, when the purposes of a statute are undercut or contradicted by subsequent amendments or interpretations, courts will step in to determine whether those later amendments or interpretations are consistent with the original legislative purpose.³⁷ In the US, state legislatures grant considerable discretionary authority to local school districts to define, interpret and implement educational activities and procedures as long as they are reasonably related to a valid educational purpose.³⁸ Ultimately though, control over local public school districts in the US rests with state legislatures and when district policy and actions deviate from the purpose of state requirements, courts will intervene to enforce state requirements.³⁹ Tensions between federal constitution, state policy and legislation, and district education responsibilities have become one focus of litigation in teacher licensing tests.

State licensure requirements for teachers have become a litigated area in the US as teacher applicants must not only have completed a post-secondary teacher education program but also must have passed the state licensure test. Even though the effect may be that some university graduates never qualify as a teacher as they cannot pass the state test, courts have consistently held that the mere requirement of such qualifying tests does not in itself violate the US Constitution. In the seminal case, *Dent v West Virginia*,⁴⁰ the US Supreme Court held that the Fourteenth Amendment liberty clause⁴¹ 'right of every citizen of the United States to follow any lawful calling, business, or profession he may choose'⁴² is not unconstitutionally impaired by

[t]he power of the state to provide for the general welfare of its people ... by prescrib[ing] all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.⁴³

However, the distinctions involving state authority to set licensure requirements are far more complex. State requirements that *prohibit* a person altogether from ‘a calling’⁴⁴ raise liberty clause issues while requirements that *limit*, but do *not prohibit*, such a calling do not.⁴⁵ In a related area, licensure issues present different kinds of legal questions when credentialing requirements have been applied both prospectively and retroactively.

1 *Prospective and Retrospective Imposition of Licensure Tests for Teachers*

In *Texas State Teachers Association v State of Texas*,⁴⁶ a state appeals court upheld a state statute imposing competency testing requirements on certified school teachers and administrators. The Texas legislature required literacy and knowledge tests for teachers of elementary grades, subject matter knowledge and literacy tests for secondary teachers, and administrative and knowledge tests for school administrators.⁴⁷ The appeals court upheld the retroactive application of the testing statute to teachers and administrators who already had teaching licences, rejecting a challenge under a state constitutional provision prohibiting ‘any law impairing the obligation of contracts’.⁴⁸ The appeals court observed that ‘[t]he language of the contract clause must be balanced against the state’s interest in exercising its police power’,⁴⁹ and reasoned that regulation of the teaching profession and of the public education system was a ‘valid exercise of the police power’, concluding that any impairment of teachers’ or administrators’ rights which occurred was ‘justified as an incident to the valid exercise of the police power’.⁵⁰ Finally, the appeals court held that the state could administer the knowledge and literacy tests separately and that failure of teachers and administrators to pass those tests could result in termination or nonrenewal.⁵¹

In *Feldman v Board of Education of City School District of New York*,⁵² a New York appeals court held that the Board of Education’s regulation terminating teachers’ city teaching licences was not arbitrary or capricious when teachers failed to achieve a passing grade on the National Teacher’s Examination (NTE) within five years of issuance of their provisional licences. Under the terms of the school board’s regulation, failure to meet the testing requirement within five years would cause a teacher’s provisional licence to lapse by operation of law, resulting in denial of the possibility of tenure and in the teacher’s reversion to substitute teacher status, with a concomitant reduction in pay.⁵³ The appeals court upheld the Board of Education’s policy decision that successful completion of the examination ‘measur[ing] the general knowledge gained in an academic preparatory program’⁵⁴ was neither arbitrary nor irrational, even if the teacher had been performing satisfactorily in teaching or administrative positions. The appeals court adopted the position of the respondent school board that passage of the NTE was equivalent to state requirements that law graduates pass a bar exam before being permitted to practise law. The appeals court concluded that terminating a teacher licence despite satisfactory teaching performance was no different from refusing to license a law school graduate who, despite having failed the bar exam several times, was rated highly by a legal employer.⁵⁵ In effect, the appeals court rejected the teachers’ assertion the NTE and bar exams differ in that ‘law school graduates must pass the bar *before* they are admitted to the practice of law’,⁵⁶ in contrast to the plaintiff teachers in *Feldman* who had been appointed and served as teachers, and had all passed their three-year probationary terms, but had their licences terminated for failure to pass the NTE after a minimum of five years of teaching.⁵⁷

In the US then, the introduction of new requirements as the precursor to full licensure has generally been upheld against challenges by those affected. Further, the requirements have been upheld as reasonable in meeting state policy interests when applied retroactively to the existing teacher workforce.

B *Validation of Tests*

Validity of tests relates to the fitness of a test for its purpose, both in terms of the test content and the interpretation and use of the outcomes. In *United States v State of South Carolina*,⁵⁸ a federal district court upheld a state's use of NTE scores as the basis for awarding teacher certificates. In rejecting a challenge to the state's use of higher education graduation and NTE cut-off scores as the basis for issuing teaching certificates, the federal district court held that 'a professionally designed and executed validity study [was] not necessarily required to demonstrate the relationship between a challenged use of a test and the governmental objective for which it is being used'.⁵⁹ Finding that a 975 NTE score had been 'selected in large part because it enabled the State to deny certification to only those who scored in the lowest 10 per cent of all candidates taking the NTE throughout the United States',⁶⁰ the district court determined that as the number had been selected by 'a committee of independent responsible professionals', such exercise of judgment, 'although subjective and imperfect', was sufficient to support a minimum test score requirement challenged on disparate impact⁶¹ based on a racial classification under the Equal Protection Clause (equal protection grounds).⁶² Having upheld the use of NTE scores for teaching certification, the federal district court also concluded that the state could rely on NTE scores to design a classification system for teacher pay levels and provision of incentives 'for teachers to improve their knowledge in the areas that they teach'.⁶³

In the New York case, *Feldman*,⁶⁴ the plaintiff teachers had raised a different issue, whether the NTE could be used as the basis for terminating in-service teacher licences, given the test developer, ETS, had never validated the test for such a purpose. Indeed, a federal district court in an earlier case, *York v Alabama State Board of Education*,⁶⁵ had determined that because 'the NTE guidelines, issued by the Testing Service, reflect an acute sensitivity to the fact that its examinations are easily subject to misuse',⁶⁶ black teachers who suffered disparate impact by the use of the NTE exam to terminate licensed teachers had a justiciable claim under Title VII of the *Civil Rights Act of 1964*.⁶⁷ However, in the absence of established discrimination claims based on Title VII protected categories, the court in *Feldman* observed that states are not prohibited from using the NTE for the purpose of evaluating licensed teachers,⁶⁸ even though the use of the test for that purpose has not been, and still is not, validated for that purpose.⁶⁹

By contrast, however, in *Richardson v Lamar County Board of Education*,⁷⁰ a federal district court invalidated the state's exam that teachers with probationary licences were required to pass to receive permanent licences. In a comprehensive discussion of the process by which the exam had been created, the court found, among other factors, that no effort had been made 'at any time to link' the state board of education's topic outlines and objectives to the 'state-mandated curriculum for teacher training programs',⁷¹ a classic validity expectation. While this case was grounded in the disparate impact claim of a black teacher who had failed to pass the test, with the result that her probationary licence was not renewed, the court found that the two examinations relevant to the plaintiff teacher, early childhood education and elementary education, were invalid because 'they did not measure competency'.⁷² With extraordinary insight into test validity, the *Richardson* court observed that,

mere content validity does not alone establish test validity. No matter how valid the test instrument, an inference as to competence or incompetence will be meaningless if the cut score, or decision point, of the test does not also reflect what practitioners in the field deem to be a minimally competent level of performance on that test. Again, the test developer's role in setting a cut score is to apply professionally accepted techniques that accurately marshal the judgment of practitioners.⁷³

In a different use of testing, a federal district court, in *Groves v Alabama State Board of Education*,⁷⁴ invalidated the use of college admission minimum American College Testing (ACT) test scores as an admission requirement for teacher-education programs, finding that use was not educationally justified for purposes of a disparate impact claim under Title VI,⁷⁵ ‘where there was no evidence that particular cutoff score was a valid measure of minimal ability necessary to become a competent teacher’.⁷⁶ Finding no rational basis, let alone any professional research or study relevant to the state’s minimum score rule of 16 (out of a maximum of 30), the court found that the state could make no inference ‘that otherwise qualified students scoring at or above this level will be competent to teach several years in the future, while those failing to achieve a 16 on the ACT will not’.⁷⁷

These decisions show that US courts have at least considered the validity of tests used for teacher licensure purposes, including the nature of test content, lack of question bias, construct validation procedures against curriculum, establishment of cutscores for acceptance/rejection, and appropriate use of test outcomes, but with mixed outcomes. Despite the importation of professional test development standards into legislation in the US,⁷⁸ the standards expected by the courts differ across jurisdictions and purposes.

C Fairness of the Evaluation Process

In its broadest permutation, issues concerning teacher licensure testing can include questions about the fairness of initial state assessment requirements, as well as the processes used by states to impose new requirements on teachers already holding licences. Implicit in this is the notion that licensure is not a static process and is always subject to changed legal requirements and research-based pedagogical expectations.

In another New York case, *Falchenberg v New York State Department of Education*,⁷⁹ a teacher who had been diagnosed as dyslexic and who had taught a third grade class for one year (2002-03) in a New York City public school was required to pass the Liberal Arts and Sciences Test (LAST), administered and scored by NES, if she was to continue her employment. Under contract with New York’s State Education Department (SED), as well as the departments of education of other states, NES had developed and administered customised teacher certification programs. In New York, the LAST was one of 58 different NES tests broadly referred to as the New York State Teacher Certification Examinations (NYSTCE). The LAST is a multi-faceted examination containing approximately 80 multiple-choice test questions and one constructed response (written) assignment designed to test primarily in five areas of knowledge and skills: (1) scientific, mathematical, and technological processes; (2) historical and social scientific awareness; (3) artistic expression and the humanities; (4) communication and research skills; and (5) written analysis and expression. The written part of the exam requires an examinee to construct a 300-600 word ‘organized, developed composition in edited American English in response to instructions regarding audience, purpose, and content’.⁸⁰ The plaintiff, Falchenberg, sought unsuccessfully on two occasions to pass the LAST test in July 2002 and August 2003, and, having failed to do so, her contract as a teacher was terminated on September 2 2003. For the August 2003 test, the NES had granted her request for a reader and extra time and a test administrator to transcribe her responses to the written portion of the LAST, but determined she would be responsible for indicating spelling, punctuation, capitalisation, and paragraphing, a determination Falchenberg declared was not a reasonable accommodation of her disability. When the SED refused to grant either a temporary exemption or a waiver of the test, she filed suit under the *Rehabilitation Act of 1973* (Section 504)⁸¹ and Title II of the *Americans with Disabilities*

Act (ADA),⁸² both of which require reasonable accommodations for persons with disabilities. In rejecting the plaintiff's claims, the court observed that,

[d]emonstration of the examinee's ability to spell, punctuate, capitalize and paragraph is an inherent part of the LAST. Falchenberg seeks an accommodation that would permit her to avoid having to demonstrate these skills. Falchenberg's request thus seeks a modification that would fundamentally alter the nature of the LAST.⁸³

Falchenberg had challenged whether spelling, punctuation, capitalisation, and paragraphing were skills that were 'fundamental to the LAST',⁸⁴ arguing that 'she should only have to demonstrate that she can use external spelling aids such as dictionaries or spell checkers'.⁸⁵ However, she had admitted in her own deposition that,

spelling, punctuation, capitalization, and paragraphing are important skills that students should learn, that teachers must be able to teach these fundamental skills, and that teachers must be able to demonstrate they possess, and are capable of teaching, these skills.⁸⁶

Falchenberg reinforces prior case law that failure of applicants to pass teacher licensure exams where disabilities are involved will not necessarily constitute a violation of Section 504 of the *Rehabilitation Act of 1973* or the ADA where the requested accommodations would serve to defeat the legitimate purpose of the exam. For example, in *Jacobsen v Tillman*,⁸⁷ a plaintiff who had repeatedly been unable to pass the math requirement of the Minnesota Teacher Qualification Test numerous times lost in her claim that the Minnesota Board of Teaching's refusal to award her a licence to teach had discriminated against her on the basis of her disabilities, dyslexia⁸⁸ and dyscalculia⁸⁹. In rejecting the plaintiff's request, a Minnesota federal district court found that the request for waiver of the math portion of the test sought an 'unreasonable modification that would fundamentally alter the nature of Minnesota's certification of qualified individuals ... to teach the children of the State'.⁹⁰ The court noted that the State, which must publicly validate the competency of teachers by issuing a licence, is 'entitled to demand and receive an objective demonstration of competence' and the plaintiff was 'simply unable to objectively demonstrate math competence by passing a properly chosen and administered test'.⁹¹

In *Frazier v Garrison Independent School District*,⁹² black teachers who were discharged for failing a teacher competency test failed to establish a prima facie case of disparate impact under Title VII⁹³ because they were unable to demonstrate that their employer had intentionally treated employees unfairly (direct discrimination) because of their race.⁹⁴ The law suit was in response to new state legislation (Texas Examination for Current Administrators and Teachers (TECAT)) that required passage of the TECAT by all teachers in Texas, regardless of the duration of their teaching tenure, before they could obtain recertification. The three black plaintiffs in this case were terminated from their positions with the school district when they failed to pass the TECAT. In response to the plaintiffs' claim that a higher percentage of blacks had failed the test than whites, the court noted that while statistics can be the basis for a disparate impact claim, the statistical discrepancy here between the pass rate for white and black applicants was only four and one-half per cent.⁹⁵

The court in this case did not have to address the question as to whether TECAT was a reliable job-related test as the plaintiffs' claim had been based on discrimination under Title VII. As passing TECAT was a requirement for all certified teachers in the State of Texas, not just minority teachers or older teachers, there were no subjective criteria involved in administering the TECAT, nor was there any subjective decision making on the part of the school administrators. The state's

subsequent raising of the cut-off scores to secure a teaching certificate was not evidence of intentional discrimination because the test was facially neutral — ‘all teachers who wished to be certified in the State of Texas were required to pass the exam’.⁹⁶ The court observed as self-evident ‘that any examination that purports to test competence will have an adverse effect on the test takers who do not pass because some of the test takers can be expected to fail’.⁹⁷

It is worth noting that *Frazier* has been cited as support for the appropriate provision of due process to teachers who do not pass licensure exams. In *Nunnez v Simms*,⁹⁸ the Fifth Circuit observed that providing teachers with more than one opportunity to pass a certification exam satisfies due process when teachers whose certificates have been revoked subsequently have administrative and judicial challenges available to them against the state board of education. Essentially, the local school board, in terminating an employee for not passing a state licensure exam, owes no obligation to that employee to provide a hearing before the board when termination follows state requirements and occurs at the end of the contract year.

Although teacher credentialing is normally set at the state level, nothing in the absence of state law would prohibit local school districts from setting requirements beyond the state requirements. In *Governing Board of Ripon Unified School District v Commission on Professional Conduct*,⁹⁹ a music teacher challenged her termination. Although she held the state’s certificate to teach music, she refused to obtain a state certificate to teach English language (EL) learners. Even though the teacher’s employment antedated the state’s English learner certification requirement for new teachers,¹⁰⁰ the California appeals court held that her school district employer had ‘the authority to impose the certification requirement on all of its teachers’,¹⁰¹ especially where the district was required to provide ‘EL students with equal opportunity to all of the District’s programs’.¹⁰² In response to the teacher’s claim that the district’s EL certificate requirement ‘rendered her life credential ineffective’, the court observed that the district’s requirement did not affect the validity of her credential.¹⁰³ However, the court noted that while her credential ‘licensed her to teach music, it did not guarantee her employment or tenure, nor did it preempt the District from conditioning her employment to teach music’.¹⁰⁴

IV CONCLUSIONS: TEACHER LICENSURE TESTING AND THE LAW IN THE US

As reflected in this article, teacher licensure testing is a regularised practice in the US. The control over criteria for educator credentialing, including both teachers and administrators, is left to state departments of education in the 50 states. However, the NCLB requirement of highly qualified teachers (HQT) has set a floor for teacher credentialing that has been interpreted to require some form of assessment for teachers in specified teaching areas. Although judicial attention has been drawn in some cases to the validity of assessment instruments for educators, it is worth noting that legal challenges to state assessments have not focused on the cut-off scores set by states. Applying the same kind of reasoning to educator assessments as had been used for student assessments,¹⁰⁵ US courts have seen no need to second-guess state departments of education in their setting of minimal scores for credentials as long as the assessment instruments have validity in testing such items, representing best practices in the field and the differences among teaching levels and specialty areas. While the NCLB requires some measure of assessment, nothing theoretically requires that state departments of education must use standardised tests, although the use of other forms of assessment with subjective elements would be highly unlikely because of the sheer difficulty in implementation, as well as the likelihood of legal challenges on discrimination and other grounds when teachers failed to pass those kind of tests. In the US the preparation of educators will likely continue with the subjective assessment of skills included

in the teacher preparation programs, with their on-site supervised assessments, required for graduation and an objective component set by post-graduation state exams.

The following article, Part B Implications for Queensland and Australia, draws on this analysis of US case law on teacher certification and the context of professional qualifications in Australia to consider what legal matters the new Queensland teacher certification tests will need to satisfy and the issues that may be raised by those who are required to undertake the tests for the first time in 2011.

Keywords: teacher registration/licensure/certification; standardised tests; legal issues; United States of America.

ENDNOTES

- 1 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 February 2010, 53 (Hon GJ Wilson). ('The testing requirements will only relate to new applicants for Queensland teacher registration from late 2011').
- 2 The amendments to the *Education (Queensland College of Teachers) Act 2005* (Qld) do not specify who will be required to complete the tests and the Regulations had not been amended at the time of writing. This restriction is implied from the context of the recommendation being implemented (Queensland, *Parliamentary Debates*, Legislative Assembly, 9 February 2010, Explanatory Notes on the Introduction of the Child Care and Another Act Amendment Bill 2010, 3 (Hon GJ Wilson)) and from news reports at the time the amendments were passed by parliament (see, eg, Kerrin Binnie, 'Parliament Passes New Teacher Testing Laws', ABC News, 25 February 2010 <www.abc.net.au/news/stories/2010/02/25/2829560.htm> at 13 July 2010).
- 3 In Queensland, teachers are 'registered', in other jurisdictions they may be licensed or certified. While these terms are used interchangeably in this article, in some legal contexts, eg law and medicine, licensure sets a higher standard as certification of competence to ensure public safety. This article addresses the major principles and does not consider the legal implications for 'registration' versus 'licensure'.
- 4 Joy Cumming and Ralph Mawdsley, 'Certification of Teachers, Pre-Service Teacher Education, Tests and Legal Issues in Australia and the United States of America (US): Part B Implications for Queensland and Australia' (2011) 16(1) *International Journal of Law and Education* 65.
- 5 For example, the Organisation for Economic Co-operation and Development (OECD) Programme for International Student Assessment (PISA), which tests samples of 15 year-old students in reading, mathematical and scientific literacy; the Trends in International Mathematics and Science Study (TIMSS) which tests samples of students in Years 4 & 8 in mathematics and science. Not all countries participate in these programs. However, those that do use outcomes to direct policy. There are many criticisms of the validity of such tests and the interpretations of the outcomes (see, eg, Harvey Goldstein, 'Review Essay: International Comparative Assessment: How Far Have We Really Come?' (2004) 11 *Assessment in Education: Principles, Policy & Practice* 227), however these are not the focus of this article. The point is that they have prompted political concerns about educational outcomes and are a driving force of policy in both Australia and the US.
- 6 NCLB 20 USC §6301 et seq (ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, ... are aligned with challenging State academic standards ...: §6301(1)).
- 7 In general the Australian funding acts requiring accountability have been *Education (General Provisions) Acts* (Cth) or *Schools Assistance Acts* (Cth). The most recent agreement is the *National Education Agreement* (2008) between federal and state and territory ministers for government schooling, and a revised *Schools Assistance Act 2008* (Cth) for the nongovernment school sector. For an overview of how Australian federal legislation has evolved on this point, and increasing educational

accountability requirements through standardised student testing, see J. Joy Cumming and Ralph Mawdsley, 'The Nationalisation of Education in Australia and Annexation of Private Schooling to Public Goals' (forthcoming) *Education and the Law*.

- 8 While the US federal government uses the power of the purse to direct education policy such as through the *No Child Left Behind Act*, the US Constitution reserves powers to the states for matters that are not explicitly delegated to the federal government (*The Constitution of the United States*, Amendment X: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'). Therefore, the US federal government would not succeed in setting national curriculum and testing processes.
- 9 Other tests of information communications and technology, science and civics and citizenship education are also required for sampled schools and students at different year levels.
- 10 See Ministerial Council for Education, Early Childhood Development and Youth Affairs (MCEECDYA), 'National Report on Schooling' <www.mceecdya.edu.au> at 5 July 2010.
- 11 Australian Curriculum, Assessment and Reporting Authority (ACARA), *My School* <www.myschool.edu.au> at 5 July 2010. The format of data publication led to schools and teachers threatening to boycott the national test program, averted when the then federal minister for education agreed to further consultation on future website presentation of data.
- 12 Similar validity issues as to the international comparisons can be raised (Goldstein, above n 5). As a starting point, students in Queensland schools are a year younger than their counterparts in most other states with a year less formal schooling. There was not a national curriculum at the time against which the tests could be developed. (See, for discussion, Margaret Wu, 'Interpreting NAPLAN Results for the Layperson' <http://www.edmeasurement.com.au/_docs/NAPLAN_ForLayPerson.pdf> at 19 July 2010.) However, again, these issues are not the focus of this article.
- 13 Geoff Masters, *A Shared Challenge. Improving Literacy, Numeracy and Science Learning in Queensland Primary Schools* (2009) viii [Recommendation 1]. Dr Masters is the Director of the Australian Council for Educational Research (ACER), Australia's predominant test development organisation.
- 14 However, recent US research on student achievement outcomes and teacher performance on licensure tests does not support the basic assumption, but establishes that restricting the cultural diversity of teachers through selection based on performance on such tests has negative impact on minority student achievement. See Dan Goldhaber and Michael Hansen, 'Race, Gender, and Teacher Testing: How Informative a Tool Is Teacher Licensure Testing?' (2010) 47 *American Educational Research Journal* 218; see also David Memory, Richard Antes, Noble Corey and David Chaney, 'Should Tougher Basic Skills Requirements Be Viewed as a Means of Strengthening the Teaching Force?' (2001) 15(3) *Journal of Personnel Evaluation in Education* 181.
- 15 Indeed, the use of the tests to monitor universities is considered by some a positive outcome of the new registration tests: 'Introducing this kind of test is a good way not of punishing those teachers but ensuring that they have the skills and the content knowledge they will need to front a classroom.' (Queensland, *Parliamentary Debates*, Legislative Assembly, 24 February 2010, 465 (Hon Watt)).
- 16 *Education (Queensland College of Teacher) Act 2005* (Qld) s 230A(2)(f).
- 17 The Queensland College of Teachers is established by Queensland Government legislation, *Education (Queensland College of Teacher) Act 2005* (Qld), with overall purpose to 'uphold the standards of the teaching profession ... maintain public confidence in the teaching profession ... protect the public by ensuring education in schools is provided in a professional and competent way by approved teachers' (s 3); with responsibilities for accreditation requirements and review of teacher education course delivery (s 236).
- 18 See Educational Testing Service (ETS), 'Praxis Tests' <www.ets.org/praxis/about> at 5 July 2010.
- 19 Ibid.
- 20 See National Evaluation Systems (National Evaluation Series) (NES), <www.nestest.com> at 5 July 2010. NES is now subsumed under Pearson.

- 21 ETS is a private nonprofit organisation. Its 2006 statement of income (Form 990 Return of Organization Exempt from Income Tax) indicated program revenue of approximately \$782.5m. Income for the service area incorporating higher education, including ‘assessment, teaching and certification of teachers’, was \$552.5m. <http://tfcny.fdncenter.org/990_pdf_archive/210/210634479/210634479_200612_990.pdf> at 5 July 2010. As NES is a subsidiary of the major international publishing and testing for-profit company Pearson, similar information is not available. Income reports for Australian test development companies do not specify specific revenue sources but the Australian Council for Educational Research (ACER) which conducts most test development in Australia earned \$57m in ‘services revenue’ in 2010, up from \$55m in 2009 (ACER, *Form 388 Corporations Act 2001: Financial Statements and Reports (2009-2010)* 20). Litigation costs associated with testing errors or failures are also large but generally settled out of court so not reported. In 2006, ETS agreed to pay \$11.1m to settle a class action lawsuit about errors in Praxis. The errors involved were ‘too stringent’ marking of questions, with 27,000 applicants receiving lower scores than they should have and 4,100 wrongly failed. Damages included payment for ‘lost wages, decreased earning capacity’ with claims for greater loss possible. [Karen Aronson, ‘Case Involving Errors in Teacher Test is Settled’ *The New York Times* (New York) 15 March 2006 <www.nytimes.com/2006/03/15/education/15sat.html> at 7 January 2011]. Class action suits involving standardised testing companies occur regularly in the US: *ibid*.
- 22 Cumming and Mawdsley, above n 4.
- 23 See Teacher Training Agency (TTA), ‘QTS Skills Tests in Numeracy and Literacy (February-September 2001) Reports on National Results Data’ (undated) 8 <<http://www.tda.gov.uk/>> at 10 June 2010.
- 24 *PJ Stott v The Governing Body of St Aelred’s Catholic Technology College NHS Foundation Trust* [2005] UKEAT 0322_05_0711.
- 25 The appellant had not requested an extension of time, which would not necessarily have been given, as considerable time had elapsed.
- 26 *Ibid* [11].
- 27 20 USC § 6301 et seq: ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement (20 USC § 6301(1)).
- 28 20 USC § 6311(b)(3)(A). However, states have the discretion of measuring the proficiency of other academic subjects ‘in which the State has adopted challenging academic content and academic achievement.’ (20 USC § 6311(b)(3)(C)(viii)).
- 29 20 USC § 6303(c)(1) (establishing a priority funding system with first priority going to local educational agencies that serve the lowest-achieving schools).
- 30 20 USC § 6319 (beginning on January 2, 2002 and by the end of the 2005-06 school year all teachers must satisfy their state’s highly qualified teacher requirements).
- 31 20 USC § 6311 (requiring that each state establish a timeline ‘for adequate yearly progress [with] the timeline ensur[ing] that not later than 12 years after the end of the 2001-2002 school year, all students ... meet[ing] or exceed[ing] the State’s proficient level of academic achievement on the State assessments’).
- 32 20 USC § 6311(b)(8)(C). Note, in Australia, all teachers are expected to be qualified and to have permission to teach. US and Australian experiences of teacher qualification and school resources, both staffing and financial, are not comparable.
- 33 For the State of Ohio information on HQT, see: <http://www.ode.state.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=1348Content=11581&Content=81779> (last visited March 29, 2010).
- 34 20 USC § 6311(h)(3)(i-iv).
- 35 See Diana Pullin, ‘Key Questions in Implementing Teacher Testing and Licensing’ (2001) 30 *Journal of Law and Education* 383, 393.

- 36 See *Minnesota v Clover Leaf Creamery Co.*, 449 US 456, n 7 (1981) (in a non-education equal protection case, the Supreme Court upheld a state statute prohibiting plastic milk containers while permitting cardboard ones, the Court reasoning that the state ban on plastic containers had a rational relationship to the state's purposes in promoting resource conservation, easing solid waste disposal and conserving energy and that the plaintiffs had failed to overcome the presumption that 'the objectives articulated by the legislature are actual purposes of the statute.' (ibid)). For cases related to education applying the principles in *Clover Leaf Creamery*, see *Friends of Lake View School District Incorporation No. 25 of Phillips County v Beebe*, 578 F 3d 753 (8th Cir, 2009) (rejecting equal protection clause challenge as to an Arkansas statute requiring school districts with fewer than 350 students to be annexed by another district, finding the statute to be rationally related to the advancing of legitimate governmental interests in consolidating school districts to achieve economies of scale and other efficiencies); *Clayton v White Hall School Dist.*, 875 F 2d 676 (8th Cir, 1989) (upholding school district's policy of allowing children of certified and administrative employees to attend school in the district even if they live outside the district, while not allowing children of other nonresident employees to attend school in the district, finding the policy to be rationally related to school district's desire to recruit or retain quality teachers and administrators). But see, *Christian Heritage Academy v Oklahoma Secondary School Activities Ass'n*, 483 F 3d 1025 (10th Cir, 2007) (invalidating on equal protection grounds a state athletic association requirement that private schools be approved for membership by majority of existing members of high school athletic association, unlike public schools, which were automatically admitted upon application and payment of fee under association's constitution, finding this requirement not to be rationally related to legitimate purposes of preserving equitable competitive opportunities, preventing exploitation of student-athletes, and preserving a balance between academics and athletics, especially where members' decision was ultimately unguided and entirely discretionary and could be exercised on basis of dislike or ill-will).
- 37 See, eg, *US Dep't of Agriculture v Moreno*, 413 US 528 (1973) (holding that a provision in Food Stamp Act excluding from participation in the food stamp program any person unrelated to a member of a household was unconstitutional under the equal protection clause as to unrelated individuals where the exclusion was inconsistent with the act's purpose of providing households with a nutritionally adequate diet).
- 38 See, eg, *Dawson v East Side Union High School Dist.*, 34 Cal Rptr 2d 108 (Cal Ct App, 1984) (holding that broad grant of discretion to local school districts to control curriculum permitted the district to contract for the use of video programming with commercial advertising in classrooms, as long as such use was not proscribed by the legislature); *Nichols v Western Local Bd of Educ.*, 805 N E 2d 206 (Ohio Com Pl, 2003) (upholding, against a parent's liberty clause claim, her three-month suspension from attending any athletic events following her assault on her daughter's coach, and finding that the state legislature's broad grant of rule-making authority to local school districts did not require a district to have rules addressing specific kinds of misconduct before it could discipline a parent for misconduct).
- 39 See *Barno v Crestwood Board of Education*, 731 N E 2d 701 (Ohio Ct App, 1998) (where a student had completed all state requirements for graduation, local school district could not deny a diploma where a student had missed the minimum number of days of attendance required by the district). See also, *Cardiff v Bismark Public School District*, 263 N W 2d 105 (N D, 1978) (school district prevented from charging students a user fee for textbooks where state constitution provided for a free education) (Ohio Rev Code 3313.642, boards of education allowed to charge for course materials except for 'necessary textbooks or electronic textbooks').
- 40 129 US 114 (1889) (upholding the authority of the State of West Virginia to set licensure requirements for physicians).
- 41 US Const., Amend. XIV, § 1 ('No State shall ... deprive any person of life, liberty, or property, without due process of law.').
- 42 *Dent v West Virginia* 129 US 114, 121.
- 43 Ibid.

- 44 Cf *Connecticut v Gabbert*, 526 US 286, 292 (1999) (holding that an inconvenience to the pursuance of a person's calling [practice of law in this case] did not present a due process issue where the issuance of a search warrant against an attorney at the same time his client was testifying before a grand jury did not amount to the complete prohibition of the practice of law) with *Willner v Committee on Character and Fitness*, 373 US 96, 103 (1963) (person who had passed New York bar exam on four occasions, but who had been denied admittance to the practice of law by the state bar's Character and Fitness Committee based on the ex parte statements of an attorney, was entitled to a due process hearing where the effect of denial of 'confrontation and cross-examination' under due process to challenge the allegations against him amounted to a complete prohibition of the right to engage in one's calling).
- 45 See *Rogovin v New York City Bd Educ*, 2001 WL 936191 (EDNY, 2001) (holding that a music teacher whose probationary teaching contract as a music teacher had not been renewed preventing him from teaching in any of the high schools in New York City subject to the authority of the Chancellor did not represent a 14th amendment property or liberty clause interest, the teacher could still use his credentials to teach in elementary or junior high schools, or teach in other school districts outside New York City).
- 46 711 S W 2d 421, (Tex Ct App, 1986).
- 47 Ibid 423. The literacy test required that teachers and administrators be able 'to read and write with sufficient skill and understanding to perform satisfactorily as a professional teacher or administrator'.
- 48 *Texas Constitution*, Article I, § 16.
- 49 *Texas State Teachers Association v State of Texas*, 711 S W 2d 421, 425.
- 50 Ibid.
- 51 Ibid 426.
- 52 686 N Y S 2d 842 (NY App Div, 1999) ('Feldman').
- 53 *In the Matter of the Application of Sandra Feldman, as President of United Federation of Teachers*, Reply Brief of Petitioners-Appellants, 2.
- 54 *Feldman as President of United Federation of Teachers, Local No. 2*, Brief for Respondents New York City Board of Education and New York City School Chancellor (1998 WL 34368217), 21.
- 55 Ibid.
- 56 *Feldman*, Appellants' Brief, 23-26.
- 57 Ibid.
- 58 *United States v State of South Carolina*, 445 F Supp 1094 (DSC, 1977), aff'd, *National Education Association v South Carolina*, 434 US 1026 (1978).
- 59 Ibid 1109.
- 60 Ibid 1108.
- 61 US caselaw identifies 'intentional discrimination', which, in a testing context, would mean a 'foreseeable, disproportionate adverse impact' on a specific group, and 'disparate impact', where an action has an unintended effect of disproportionate, adverse impact on a specific group (Jay Heubert and Robert Hauser (eds), *High Stakes Testing for Tracking, Promotion and Graduation* (1999) (National Academy Press) 52-62). These parallel concepts of direct and indirect discrimination in Australian statutes and case law. As in Australia, defences to both are available.
- 62 *United States v State of South Carolina*, 445 F Supp 1094 (DSC, 1977), aff'd, *National Education Association v South Carolina*, 434 US 1026 (1978) 1109.
- 63 Ibid.
- 64 *Feldman*, 686 N Y S 2d 842 (NY App Div, 1999).
- 65 581 F Supp 779, 782 (MD Ala, 1983).
- 66 Ibid 786.
- 67 42 USCA § 2000e-2(a): It shall be an unlawful employment practice for an employer —
 (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

68 See *United States v State of South Carolina*, 445 F Supp 1094, 1109 (upholding the use of NTE exam where black teachers whose licences were terminated as a result of not passing the NTE exam failed in their Title VII claim for lack of discriminatory intent).

69 See Educational Testing Services (ETS), ‘Praxis’ <www.ets.org/praxis> (at 5 April 2010), noting that the ‘Praxis [II] Series of Tests are used by most state education agencies in the US to make decisions regarding the licensing of new teachers’ (emphasis added). ETS also notes that, while the PRAXIS II assessment tests are used to ‘assess the skills of beginning teachers in classroom settings’, they are not intended ‘for use with more experienced teachers nor intended for use in making employment decisions’.

70 729 F Supp 806 (M D Ala, 1990).

71 Ibid 818.

72 Ibid 820.

73 Ibid.

74 776 F Supp 1518 (M D Ala, 1991).

75 42 USCA § 2000d (‘No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.’).

76 *Groves v Alabama State Board of Education*, 776 F Supp 1518 (M D Ala, 1991), 1530.

77 Ibid 1531.

78 This is discussed in the companion article, Cumming and Mawdsley, above n 4.

79 642 F Supp 2d 156 (SDNY, 2008) (‘*Falchenberg*’), aff’d, 338 Fed Appx 11(2d Cir, 2009), cert. denied, 130 S Ct, 1059 (2010). This case began as a lawsuit against the employer, the New York City Board of Education, for not accommodating her disabilities, but that claim was dismissed because, since plaintiff’s dismissal occurred because she had not passed the state certification exam, the proper defendant was the state board of education that administered the licensure test. See *Falchenberg v New York City Department of Education*, 375 F Supp 2d 344 (SDNY, 2005).

80 *Falchenberg*, 642 F Supp 2d 156, 160.

81 29 USC § 794.

82 42 USC § 12101 *et seq.* Title II requires reasonable accommodations by public entities (such as public school districts and state boards of education), as opposed to Title III that applies to public accommodations which can include private entities furnishing services to the public (such as private recreation facilities and private schools).

83 *Falchenberg*, 642 F Supp 2d 156, 163.

84 Ibid 164.

85 Ibid.

86 Ibid 165.

87 17 F Supp 2d 1018 (D Minn, 1998).

88 Dyslexia is a reading impairment, often manifesting itself in reversal of letters and words, inadequate distinguishing of letter sequences in written words, and difficulty in determining left from right. *Mosby’s Dictionary of Medicine, Nursing & Health Professions* (8th ed, 2009) 596.

89 Dyscalculia is an impairment of the ability to solve mathematical problems, usually resulting from brain dysfunction. See <Dyscalculia.org> at 20 April 2010.

90 *Jacobsen v Tillman* 17 F Supp 2d 1018 (D Minn, 1998), 1026.

91 Ibid 1025.

92 980 F 2d 1514 (5th Cir, 1993).

93 42 USCA § 2000e-2 (defining as a unfair employment practice the failure or refusal ‘to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin’).

- 94 *Frazier v Garrison Independent School District*, 980 F 2d 1514 (5th Cir, 1993) [298]: ‘[T]wo theories of liability [are recognised] under Title VII [*Civil Rights Act of 1964*]: the “disparate impact” theory and the “disparate treatment” theory. Under the disparate impact theory, a facially neutral employment practice can be in violation of Title VII even if there is no evidence of an employer’s subjective intent to discriminate. But, for disparate impact purposes, depending on the type of data used to compile the statistics, an allegation that there exists a statistical discrepancy in the racial composition of the workforce may not be sufficient. ... Under the disparate treatment theory, however, Title VII is violated only if the employee can show that the employer intentionally treated the employee unfairly because of race, color, religion, sex, or national origin.’.
- 95 The overall pass rate was 95.58% for African-Americans, 99.16% for Hispanics, and 99.75% for whites: *ibid* 1526. The court suggested that while statistical variations of two or three standard deviations from the mean are sufficient to establish statistical significance, plaintiffs in this case had not translated a 95.58% cumulative passage rate for African-American teachers into a statistical model capable of analysis in terms of standard deviations: *ibid* 1524, n 29.
- 96 *Ibid* 1526.
- 97 *Ibid*.
- 98 342 F 3d 385 (5th Cir, 2003).
- 99 99 Cal Rptr 4th 1379 (Cal Ct App, 2009).
- 100 California Education Code § 44259.5.
- 101 *Governing Board of Ripon Unified School Dist. v Commission on Professional Conduct (Governing Board)*, 99 Cal Rptr 4th 1379, 1386.
- 102 *Ibid*. See California Education Code § 44254.1 (declaring that all of California’s limited-English-proficient pupils ‘have the same right to a quality education as all California pupils’.).
- 103 *Governing Board*, 99 Cal Rptr 4th 1379, 1388.
- 104 *Ibid*.
- 105 See *Debra P v Turlington*, 730 F 2d 1405 (11th Cir, 1984) (holding that a state competency test students were required to pass in order to receive a high school diploma was not discriminatory and unlawful even though it had a racially disproportionate impact on black students where the discriminatory elements in the school curricula that was preparatory to taking the test had been eliminated).