



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

MEMORANDUM
ATTORNEY – CLIENT PRIVILEGE

TO: TRACIE L. BENT
CHIEF PLANNING AND POLICY OFFICER
STATE BOARD OF EDUCATION

FROM: EDITH L. PACILLO *EP*
DEPUTY ATTORNEY GENERAL

SUBJECT: TEACHER CERTIFICATION

DATE: JANUARY 15, 2014

QUESTIONS PRESENTED

You have asked whether a teacher certification test may have a subjective component. You have also asked for a summary of potential due process¹ issues that the State should be aware of when considering a tiered-certification system for public school teachers.²

SUMMARY ANSWER

Yes, teacher testing may be subjective, as long as the teachers and teacher candidates are afforded due process. However, if challenged, the State must be able to show that the test and the cut-off scores are properly validated and supported. Meeting this requirement could be difficult where the test is subjective. Analysis of testing

¹ This memorandum does not address other potential types of challenges such as those arising under equal protection, the contracts clause, Title VII of the Civil Rights Act, or the Idaho constitution.

² This memorandum assumes that the certification program has express statutory authority and was adopted in accordance with IDAPA.

validity is beyond the expertise of this Office. In general, however, the State must be able to show that the test is fair and measures what it purports to measure. This could prove difficult for a subjective test.

Due process has two components: procedural due process and substantive due process. Procedural due process requires that the State give teachers notice and an opportunity to be heard prior to taking action that might negatively impact the teachers' certification. In order to prove a procedural due process violation, teachers must establish that they have a liberty or property interest in continued employment. Candidates for certification will have a harder time establishing this interest than an already certified teacher. Assuming a candidate or teacher satisfies this requirement, the State must provide adequate advance notice of the testing requirements so that candidates and teachers can adequately prepare. Ideally, the program would be adopted when the newest class of candidates enters an undergraduate teaching program and not implemented until that class of candidates graduates. It would be helpful if teachers have the opportunity to retake the exam if they are unsuccessful, and if the State provided remedial instruction.

The State must also provide some type of hearing prior to revoking a certificate. This can include the opportunity to be heard in person or in writing. The type of hearing might vary depending on the type of challenge.

Substantive due process prohibits the State from impermissibly restricting a fundamental right. This places a higher burden on the State than procedural due process. However, unless the teacher can show that the certificate is a "fundamental" right, a court will likely uphold the certification program because it is rationally related to the legitimate government interest of improving teacher competency. On the other hand, if a teacher challenges the validity of the certification test, then the certification program might not withstand the rational basis scrutiny. Accordingly, when developing the test, the State should document its process for determining that the test measures what it is designed to measure, and that the cut-off score for failure reflects a minimally competent level of performance on the test.

BACKGROUND

Certification is required for employment as a public school teacher in Idaho. The Governor's Task Force on Education is considering a tiered credentialing system that would require public school teachers to pass a test at different intervals of their careers in order to stay certified. The credentialing system might include a subjective portion that would be graded by a team of educators. The Task Force would like some guidance about due process issues raised by such a credentialing system.

DISCUSSION

A. Procedural Due Process

The United States Constitution prohibits states from depriving any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 471 (1972), the United States Supreme Court held that in order to establish a liberty interest, an untenured professor would have to show some evidence that the professor's "good name, reputation, honor, or integrity" had been impugned, or that the university's decision not to reemploy the professor "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 537.

Plaintiffs seeking to prove a due process violation must first show that a protected life, liberty, or property interest was affected. Next, they must show that the process afforded was insufficient. Teacher certification implicates liberty and property interests, as discussed below.

1. Liberty

An adverse employment decision based on a teacher's failure to pass a certification test is not likely to impugn the teacher's good name unless the employer publicized the reason for dismissal. For this reason, the employer should not disclose the reason for termination.

A teacher who failed certification testing could meet the second prong of the *Roth* test if certification is needed to be employed as a teacher in the State. If, on the other hand, the failure only resulted in something like the denial of a pay raise, it probably will not amount to a deprivation of liberty requiring due process.

2. Property

To have a protected property interest in continued employment, plaintiffs must show "a legitimate claim of entitlement" to it. *Id.* at 578. Often, this comes in the form of an employment contract. Even in the absence of an express employment contract, however, plaintiffs could establish that a property right was created by the circumstances. For instance, in *Perry v. Sinderman*, 408 U.S. 593 (1972), a non-tenured college professor alleged that he had a property interest in continued employment because the faculty guide stated that professors should "feel" as though they had permanent tenure as long as they performed satisfactorily. *Id.* at 600. The Court found that Sinderman had sufficiently alleged a property interest. *Id.* at 602-03. In *Connecticut Educ. Assoc. v. Tirozzi*, 554 A.2d 1065 (Conn.1989), the Connecticut Supreme Court held that public school teachers had a protected property interest in teaching certificates because Connecticut statute provided that a certificate could only be revoked for "cause." Thus, when developing a certificate program, the State should consider all potential sources of protected property interests.

3. Adequate Due Process

If a protected liberty or property interest exists, the next question is whether procedural protections are adequate. Due process has two elements: Notice and an opportunity to be heard. Each of these is discussed below.

a. Notice

In the context of teacher certification, courts will consider the amount of time that teachers and candidates have to prepare for the test. The precise amount of time needed is not clear, but one commentator suggests that states initiating certification programs set the effective date of the requirement so as not to affect students presently enrolled in teacher training programs. Chris E. Vance, *Teacher Competency Testing: 'Decertification' and Federal Constitution and Title VII*, 37 Emory L.J. 1077, 1089 (1988). Another commentator notes that a range of two to four years' notice exists among some states that have implemented certification programs. Jerry R. Parkinson, *The Use of Competency Testing in the Evaluation of Public School Teachers*, 39 U.Kan. L. Rev. 845, 866-67 (1991). Another important factor is whether the teachers can take the test more than once. *Id.* at 867-69. Further, courts might consider whether the statutory scheme requires the state to provide remedial assistance to applicants who ask for it. *Id.*

In addition to providing an adequate length of time to prepare for the test, the notice should also contain an accurate description of the test's subject areas. *Id.* The description will typically be in a statute or rule. The test should also adhere strictly to the description in the notice. *Id.*

b. Opportunity to be heard

Courts will judge the adequacy of the teachers' opportunity to be heard based on the test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires courts to consider the interest at stake, whether alternative procedures would increase the accuracy of the employer's determination, and whether additional procedures would burden the employer. Notably, at least one court has found that no hearing is required when a teacher is terminated for failing the certification test, but the termination happens at the end of a contract year. *Nunez v. Simms*, 341 F.3d 385 (5th Cir. 2003). Generally, though, the State should provide an opportunity to be heard. The opportunity for a teacher to provide written reasons why the State's proposed action is wrong might be sufficient in some cases. Nonetheless, providing teachers with an opportunity to appear in person is more likely to survive a due process challenge.³

The State must also consider what administrative or judicial body would hear such appeals. In *State v. Project Principle, Inc.*, 724 S.W.2d 387 (Tex.1987), the Supreme Court of Texas held that the teachers' due process rights were met because they

³ It is beyond the scope of this memorandum to address whether such a hearing must comply with the Idaho Administrative Procedures Act.

had the opportunity to appeal to the Commissioner of Education as well as a right of judicial review. *See also, Frazier v. Garrison*, 980 F.2d 1514 (5th Cir.1993)(holding that plaintiffs failed to establish trial court erred in finding due process requirements were met where teachers had opportunity to re-take test, to appeal to commissioner of education, and to judicial review). It is unclear whether the right to both an administrative appeal and judicial review are required to satisfy due process requirements. In determining what type and amount of hearings will suffice, courts will likely consider whether the applicant can take the test multiple times. *See, Jane G. Noble, Teacher Termination and Competency Testing*, 63 Tex. L. Rev. 933, 957 (1985)(analogizing to attorney licensing due process case law).

B. Substantive Due Process

Substantive due process prohibits the State from impermissibly restricting substantive rights. *Harrish v. Independent School District v. Martin*, 440 U.S. 194 (1979). Even if a teacher has received all procedural protections, they can still challenge a certification exam on substantive due process grounds. However, unless the teacher can show that the certificate is a “fundamental” right, a court will likely uphold the certification program because it is rationally related to the legitimate government interest of improving teacher competency. *Id.* at 199-201; *Project Principle*, 724 S.W.2d at 391.

On the other hand, if a teacher can show that the test bears no reasonable relationship to a legitimate government interest, the teacher might prevail. For instance, if a teacher establishes that the test was not properly validated, it will not be rationally related to a government interest. Courts that have delved into the topic of test validity have done so in equal protection and discrimination cases, not substantive due process cases. Nonetheless, it is conceivable that a plaintiff in a due process case could argue that the State’s test does not bear a “fair and substantial relationship to the State’s goal of improving public education. *United States v. South Carolina*, 445 F. Supp 1094 (D.S.C 1977), *aff’d National Educ. Ass’n. v. South Carolina*, 434 U.S. 1026 (1978). Therefore, as one commentator urged, “School officials must make every effort to ensure that tests being used measure what they are intended to measure.” Parkinson, *supra*, at 873.⁴ The test validity is especially important, but perhaps difficult to prove, where one portion of the test is subjective.

⁴ It is beyond the scope of this memorandum to address test validity in detail. For a more detailed explanation of validity, see Ralph D. Mawdsley and Paul Williams, *Teacher Assessment and Credentialing: The Role of the Federal Government in a State Function*, West’s Education Law Reporter 735 (2011) and Jane G. Noble, *Teacher Termination and Competency Testing*, 63 Tex. L. Rev. 933 (1985).