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Belma Krijestorac

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ENGLISH FLUENCY REQUIREMENTS FOR TEACHERS IN MASSACHUSETTS: A TITLE VII ANALYSIS

BELMA KRIJESTORAC*

INTRODUCTION

America is generally thought of as the land of equal opportunity, spurred by laws prohibiting employers from discriminating against a potential or current employee on the basis of national origin.¹ Therefore, it may be surprising that the Equal Employment Opportunity Commission (“EEOC”), the very organization established to protect individuals from employment discrimination, permits national origin discrimination based on accent when it materially interferes with job responsibilities.² Similarly, English fluency requirements are permissible when required for the effective performance of a position.³

This note examines a Massachusetts Department of Education (“DOE”) regulation, 603 Code Mass. Regs. Section 14, mandating that all teachers be fluent and literate in English, in relation to a potential Title VII claim of national origin discrimination. Pursuant to Title VII of the Civil Rights Act of 1964, employers cannot discriminate against present or potential

* J.D., May 2012, St. John’s University School of Law; B.A., 2007 Hofstra University.

¹ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(b) (2006) (“It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.”); Mary E. Mullin, *Title VII: Help or Hindrance to the Accent Plaintiff*, 19 W. ST. U. L. REV. 561, 562–63 (1992) (“The Title VII legislation was passed to mandate that job ability, rather than prejudice against race or national origin, would govern employment decisions.”).

² EEOC Compliance Manual Section 13: National Origin Discrimination (2002), <http://www.eeoc.gov/policy/docs/national-origin.html> (last visited November 28, 2010) [hereinafter *EEOC Compliance Manual*] (“An employment decision based on foreign accent does not violate Title VII if an individual’s accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual’s accent affects his or her ability to perform job duties. Employers should distinguish between a merely discernible foreign accent and one that interferes with communication skills necessary to perform job duties.”).

³ *Id.* (“[A] fluency requirement is permissible only if required for the effective performance of the position for which it is imposed.”).

employees on the basis of national origin.⁴ This includes discrimination based on the physical, cultural or linguistic characteristics of a national origin group.⁵ There are three types of language based discrimination: (1) English only rules, (2) accent based discrimination,⁶ and (3) English fluency requirements.⁷ This note will focus on the latter two. A plaintiff alleging national origin discrimination based on accent⁸ or English fluency requirements can plead under a theory of disparate impact or disparate treatment.⁹

This note asserts that a discrimination claim based on national origin against the Massachusetts DOE regulation would probably fail. Tolerating some level of national origin discrimination based on linguistic characteristics in certain employment contexts is practical: some employment fields, like education, simply require English fluency. Nonetheless, the policies currently employed by the Massachusetts DOE raise several concerns and should be amended accordingly.

In November 2002, sixty-eight percent of Massachusetts voters approved an initiative petition¹⁰ replacing the transitional bilingual education (“TBE”) classroom with the new sheltered English immersion classroom (“SEI”),¹¹ and mandating that “all children in Massachusetts public schools

⁴ 42 U.S.C. § 2000e-2(a); *EEOC Compliance Manual*, *supra* note 2 (noting the protections afforded under Title VII).

⁵ See *EEOC Compliance Manual*, *supra* note 2; *Tseng v. Fla. A&M Univ.*, 380 F. App’x 908, 909 (11th Cir. 2010) (“Discrimination based on accent can be national origin discrimination.”).

⁶ See *Tseng*, 380 F. App’x at 909; *Fragante v. City of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989) (noting that EEOC guidelines which define discrimination on the basis of national origin include within the definition the denial of equal employment opportunity because of linguistic characteristics of a national origin group); *EEOC Compliance Manual*, *supra* note 2 (stating that an employer may only discriminate on the basis of accent if it materially interferes with an individual’s ability to communicate orally in English).

⁷ See Edward M. Chen, *Labor & Immigration: Examining the Intersection Speech: Labor Law & Language Discrimination*, 6 *ASIAN L.J.* 223, 226 (1999) (“The third kind of discrimination is English fluency requirements.”); see also, Denise Gilman, *A “Bilingual” Approach to Language Rights: How Dialogue Between U.S. and International Human Rights Law May Improve the Language Rights Framework*, 24 *HARV. HUM. RTS. J.* 1, 21 (2011) (explaining that English fluency requirements have been found illegal in workplaces where English communication skills are not required, but have been upheld in other contexts).

⁸ For purposes of this note, accent refers to an individual’s inflection and tone, not choice of words.

⁹ Mullin, *supra* note 1, at 567 (discussing disparate impact and treatment theories).

¹⁰ ANTONIYA OWENS, MASS. OFFICE FOR REFUGEES AND IMMIGRANTS, *IN THE AFTERMATH OF QUESTION 2: STUDENTS WITH LIMITED ENGLISH PROFICIENCY IN MASSACHUSETTS* 8 (2010), available at <http://www.doe.mass.edu/research/reports/0610ori.pdf>; Bethany Li, *From Bilingual Education to OELALEALEPS: How No Child Left Behind Act has Undermined English Language Learners’ Access to a Meaningful Education*, 14 *GEO. J. ON POVERTY L. & POL’Y* 539, 554 (2007).

¹¹ *Id.* (explaining the former transitional bilingual classroom, which offered courses in English and the student’s native language with transition into a mainstream classroom to occur after three years, and the new sheltered English immersion classroom. The SEI program, taught exclusively in English, consisted of academic content instruction and English as a Second Language training. Students were expected to transfer into a mainstream classroom within one school year of SEI instruction. The SEI

be taught . . . in English language classrooms.”¹² An English language classroom includes both mainstream and SEI classrooms, in which “such teaching personnel are *fluent and literate* in English.”¹³ Commonly referred to as the English Language in Education Act (“ELEA”) or Question 2, the initiative failed to define fluency and literacy.¹⁴

In response, the Massachusetts Department of Education’s Commissioner of Education issued a Memorandum (“DOE guidelines”) providing guidance to school districts on the ELEA fluency and literacy requirements.¹⁵ The DOE guidelines compel school superintendents to sign an assurance verifying that all teachers are fluent and literate in English. This must be completed at the beginning of each school year, commencing with the 2003–2004 year.¹⁶ According to the DOE guidelines, a teacher is literate if the teacher possesses either (a) a teaching license, (b) a vocational approval or license, (c) holds a Bachelor’s degree from a college or university taught in English, or (d) passes the Massachusetts Communication and Literacy Test.¹⁷ The DOE guidelines define fluency as

program two components: all academic content instruction and English as a Second Language training, taught exclusively in English. Students were expected to transfer into a mainstream classroom within one school year of SEI instruction); David Nieto, *A Brief History of Bilingual Education in the United States*, 6 PERSP. ON URB. EDU. 61, 66 (2009), available at <http://www.urbanedjournal.org/archive/V6I1-Immigration&UrbanSchools/Vol.%206%20Immigration%20Issues%20in%20Urban%20Schools/61-72--Nieto.pdf> (“Parents or guardians were given the option to apply for a waiver not to be included in SEI programs or to place their children in a bilingual program exclusively when one of these conditions were met: (1) the student is already able to speak English; (2) the student is at least ten and the school principal and teachers firmly believe it is in the students’ best interest; or (3) the student has special physical or psychological needs.”).

¹² MASS. ANN. LAWS ch. 71A, § 4 (LexisNexis 2011).

¹³ *Id.* § 2(b) (LexisNexis 2011) (emphasis added).

¹⁴ See H.B. 4839, 182nd Gen. Court, Reg. Sess. (Mass. 2001) (requiring that all teaching personnel be fluent and literate in English, but failing to define what “fluent and literate” in English means.)

¹⁵ See Memorandum from David P. Discoll, Comm’r of Educ. on English Language Proficiency Requirements for Teachers under Question 2, to Superintendents of Sch. and Charter Sch. Leaders (Mar. 27, 2003), available at <http://www.doe.mass.edu/ell/proficiencyreq.html> [hereinafter *DOE Guidelines*] (“General Laws c. 71A, as amended by Chapter 386 of the Acts of 2002, is the new Massachusetts law governing the education of limited English proficient students. Known as ‘Question 2,’ it becomes effective at the start of the 2003-2004 school year. Section 2 of Question 2 requires teachers in English language classrooms to be ‘fluent and literate in English.’ Under Question 2, English language classrooms encompass both sheltered English immersion classrooms and English language mainstream classrooms. Teachers in classrooms other than English language classrooms (e.g., bilingual education and foreign language classrooms) do not need to meet the English literacy and fluency requirements of Section 2 of Question 2.”).

¹⁶ See *id.* (“[D]istrict superintendents and charter school leaders are required to sign an assurance that all teachers in English language classrooms are literate and fluent in English, beginning with the 2003-2004 school year.”); Sch. Comm. of Lowell v. Robishaw, 925 N.E.2d 803, 805 (Mass. 2010) (“The memorandum required that, beginning with the 2003-2004 school year, every superintendent and charter school head sign an assurance verifying the English fluency and literacy of all teachers in English language classrooms in his or her district or school.”).

¹⁷ See 603 MASS. CODE REGS. 14.05(2) (LexisNexis 2011); see also *DOE Guidelines*, *supra* note 15 (“Teachers who possess a Massachusetts teaching license or vocational approval fulfill Question 2’s requirement for literacy in English. Any teacher who does not hold a Massachusetts teaching license but

“oral proficiency in English that consists of comprehension and production.” Furthermore, production refers to “accurate and efficient oral communication using appropriate pronunciation, intonation, grammar, and vocabulary in an interactive professional context.”¹⁸ A teacher’s fluency can be determined through one or more the following methods:

- (a) classroom observation and assessment by the teacher’s supervisor, principal, or superintendent; or
- (b) an interview and assessment by the teacher’s supervisor, principal or superintendent; or
- (c) the teacher’s demonstration of fluency in English through a test accepted by the Commissioner of Education; or
- (d) another method determined by the superintendent and accepted by the Commissioner.¹⁹

The DOE guidelines recommend the American Council on the Teaching of Foreign Languages (ACTFL) Oral Proficiency Interview (OPI) test.²⁰ The OPI test is a standardized tape-recorded test where one or more certified and trained OPI testers evaluate a teacher’s general speaking ability.²¹ However, a “test is needed only in cases where the teacher’s English fluency is not apparent through classroom observation and assessment or interview and assessment.”²² Therefore, the classroom assessment is essentially a screening process.

The DOE guidelines were ultimately codified within the Department of Education Regulations as Title 603 of the Code of Massachusetts Regulations, Section 14.²³ For purposes of this Note, Title 603 of the Code

who has received a Bachelor’s degree from a college or university where the language of instruction was English fulfills Question 2’s requirement for literacy in English. Teachers who have taken and passed the Massachusetts Communication and Literacy Test fulfill Question 2’s requirement for literacy in English.”).

¹⁸ *DOE Guidelines, supra* note 15.

¹⁹ 603 MASS. CODE REGS. 14.05(3) (LexisNexis 2011); *DOE Guidelines, supra* note 15.

²⁰ *DOE Guidelines, supra* note 15 (“[A] test is needed only in cases where the teacher’s English fluency is not apparent through classroom observation and assessment or interview and assessment. The Department is recommending use of the American Council on the Teaching of Foreign Languages (ACTFL) Oral Proficiency Interview (OPI) assessment instrument made available through Language Testing International (LTI).”).

²¹ See American Council on the Teaching of Foreign Languages, *Testing for Proficiency*, <http://www.actfl.org/i4a/pages/index.cfm?pageid=3348> (last visited Nov. 28, 2010) (describing the procedure of the OPI exam); *DOE Guidelines, supra* note 15 (“The OPI assesses oral language proficiency in terms of the speaker’s ability to use the language effectively and appropriately in real-life situations. The test content is adapted to the candidate’s professional and academic experiences. The test lasts 20–30 minutes.”).

²² *DOE Guidelines, supra* note 15.

²³ See 603 MASS. CODE REGS. 14.05 (LexisNexis 2011) (also known as the English Literacy and

of Massachusetts Regulations, Section 14 will be referred to as the DOE guidelines.

Part I of this Note discusses the history which led to the implementation of the ELEA. Specifically, Part I lists several significant events that led the ultimate adoption of the ELEA, including a 1992 petition where parents sought to implement fluency guidelines, the Unz initiative, and the federal No Child Left Behind Act. Part II examines the immediate impact that the DOE guidelines had on non-native English-speaking teachers and the ensuing lawsuits that alleged discrimination based upon race or national origin. Part III articulates the standard for proving a Title VII national origin discrimination claim based on linguistic characteristics. Part IV then applies the Title VII standard to the DOE guidelines and argues that the DOE guidelines are not discriminatory because English fluency is a necessary skill for a teacher. Part V acknowledges that, while the DOE guidelines do not discriminate on the basis of national origin, some of the practices utilized by Massachusetts school districts could potentially become discriminatory. These alarming practices are highlighted in *Lowell School Committee v. Vong Oung*²⁴ and *Lowell School Committee v. Robishaw*.²⁵

I. BACKGROUND: THE PATH TO ENGLISH LITERACY AND FLUENCY REQUIREMENTS FOR TEACHERS

Several notable events influenced the passage of the ELEA, including a controversy in Westfield, Massachusetts, the Ron Unz initiatives, and the No Child Left Behind Act. In 1992, Mr. Ramon Vega, a first and second grade bilingual teacher and native Spanish speaker,²⁶ was transferred to teach in a mainstream classroom in Westfield, Massachusetts. Parents of Mr. Vega's new students had difficulty understanding him, and were concerned their children did too.²⁷ As a result, over "four hundred of them proceeded to sign a petition asking that instructors in early grades be

Fluency Requirements for Teachers of English Language Classrooms); *DOE guidelines*, *supra* note 15.

²⁴ Sch. Comm. of Lowell v. Vong Oung, 893 N.E.2d 1246, 1250 (Mass. App. Ct. 2008).

²⁵ Sch. Comm. of Lowell v. Robishaw, 925 N.E.2d 803, 805 (Mass. App. Ct. 2010).

²⁶ Walter Olson, *Say What Civil Rights Enforcers Go After Accent Discrimination*, REASON (Nov. 1997), available at <http://reason.com/archives/1997/11/01/say-what> (articulating the events and reactions surrounding the controversy); Philip Bennett, *Voices Rise on Plan to Bar Teacher Accents*, BOSTON GLOBE (July 2, 1992), available at <http://pqasb.pqarchiver.com/boston/access/61798088.html?FMT=ABS&date=Jul%20201992,%201992> (describing Vega's background).

²⁷ Olson, *supra* note 26 ("Some parents had trouble understanding Vega's conversation themselves and worried that their kids might have the same problem.").

proficient in the accepted and standard use of pronunciation.”²⁸ That same week, the Westfield School Committee accepted the petition for study. The petition was endorsed by the Westfield Mayor, an immigrant with an accent, stating that “persons like myself . . . should not be in charge of 5- and 6-year-olds’ first language skills. I would only impart my confusion and give them my defects in terms of language.”²⁹ However, academics and language experts criticized the petition as a form of “linguistic racism” and discrimination.³⁰ Several civil rights attorneys argued that a discrimination claim based on national origin could easily defeat the proposal should the school district approve it.³¹ Moreover, the Attorney General of Massachusetts threatened to sue the school district if they transferred Vega out of the mainstream classroom.³² Ultimately, the school district rejected the proposal, but the issue did not end there.³³

The ELEA was also influenced by the Unz initiative.³⁴ The Unz initiative is financed by multi-millionaire Ron Unz. It advocates replacing traditional bilingual programs with English-immersion programs, as well as ensuring that teachers are proficient in English. In 1997, California passed Proposition 227, eliminating all ESL classrooms and requiring that teachers possess a “good knowledge of the English language.”³⁵ Arizona and Colorado passed similar initiatives in 2000 and 2001 respectively, mandating English language classrooms and English fluency for English-

²⁸ *Id.*; see Bennett, *supra* note 26 (noting that the petition was accepted for review by the school district).

²⁹ Olson, *supra* note 26. In return the Westfield Mayor received bundles of support mail from across the country.

³⁰ *Id.* (“Experts popped up and were quoted saying expert things. Donaldo Macedo, described as ‘director of graduate studies in bilingual education’ at a local university, accused the parents of ‘linguistic racism.’”); Bennett, *supra* note 26 (quoting Piedad Robertson, the state’s education secretary, as describing the petition as a form of “bigotry, racism, and discrimination”).

³¹ Bennett, *supra* note 26 (“[C]ivil rights attorneys said that, if adopted, the proposal would have virtually no chance of withstanding a legal challenge on the grounds that it involved discrimination on the basis of national origin.”).

³² Olson, *supra* note 26 (“[I]t was Massachusetts Attorney General Scott Harshbarger who had the last word. Harshbarger’s office quickly ruled that it would be unlawful for the school system to consider Vega’s accent, threatened to sue if they transferred him to another job, and that apparently was that.”).

³³ Randolph Ryan, *Bilingualism Still on Track*, BOSTON GLOBE, Sept. 18, 1994, at 34 (“Warned by the attorney general’s office of possible lawsuits, the School Committee reaffirmed Vega’s assignment, and he is still teaching at the Franklin Avenue School.”).

³⁴ As the Unz initiative gained momentum across the country, it found supporters in Massachusetts. See Anand Vaishnav, *17 Lawrence Teachers Fight Fluency Rule*, BOSTON GLOBE, July 25, 2003, at B1 (“[The] English immersion ballot question was financed by Silicon Valley entrepreneur Ron Unz.”). See also Editorial, *A Grave Betrayal; Proposal Continues Assault on Initiative Petition*, WORCESTER TELEGRAM & GAZETTE, INC., Jan. 2, 2003, at A10.

³⁵ Vaishnav, *supra* note 34 (“In California and Arizona, for example, teachers must possess ‘a good knowledge of the English language.’”).

as-a-Second-Language teachers.³⁶ Shortly thereafter, backed by Mr. Unz, Massachusetts followed suit and proposed the English-immersion ballot initiative.³⁷ Critics associate anti-immigrant sentiment and dwindling school budgets with the rise of these Unz initiatives.³⁸

The federal No Child Left Behind Act also played a crucial role in influencing the Massachusetts Legislature to propose ELEA. The act was enacted in January 2002 in an “effort to improve the academic achievement of students in the American educational system.”³⁹ It requires government-funded schools to certify that all teachers who instruct limited English proficient children are fluent in English as a pre-condition to receiving federal funds.⁴⁰ The act allows states to define the fluency standard.⁴¹ Approximately ten years after the Vega incident and in light of the Unz initiative and the No Child Left Behind Act, the Massachusetts House of Representatives proposed the ELEA.

On January 7, 2002, the Massachusetts Legislature introduced the ELEA, which sought to amend Chapter Seventy-One A of the General

³⁶ See Miriam Jordan, *Arizona Grades Teachers on Fluency*, WALL ST. J., (Apr. 30, 2010), <http://online.wsj.com/article/SB10001424052748703572504575213883276427528.html> (providing that the superintendent of the state’s schools job “is to make sure the teachers are highly qualified in fluency of the English language.” Arizona teachers who do not meet the fluency requirements may take classes or other steps to improve their English, but if fluency continues to be a problem the teacher can be reassigned into a mainstream classroom or fired); *Arizona Ethnic Studies Classes Banned, Teachers With Accents Can No Longer Teach English*, HUFFINGTON POST, (Apr. 30, 2010), http://www.huffingtonpost.com/2010/04/30/arizona-ethnic-studies-cl_n_558731.html (articulating that Arizona had passed a new education initiative most likely as a result of NCLBA); David Nieto, *A Brief History of Bilingual Education in the United States*, 6 PERSP. ON URB. EDU. 61, 64 (2009), available at <http://www.urbanedjournal.org/archive/V6I1-Immigration&UrbanSchools/Vol.%206%20Immigration%20Issues%20in%20Urban%20Schools/61-72--Nieto.pdf> (discussing the standards employed by Arizona and Colorado).

³⁷ See Vaishnav, *supra* note 34 (reporting that Unz financed the ballot and that “he toughened the language after hearing from supporters in Massachusetts that some bilingual teachers did not speak English well”); see also, Carey Goldberg, *Bilingual Education Challenge*, N.Y. TIMES, (Aug. 1, 2001) <http://www.nytimes.com/2001/08/01/us/national-briefing-new-england-massachusetts-bilingual-education-challenge.html?ref=ronkunz>.

³⁸ See Jordan, *supra* note 36 (quoting Bruce Merrill, a professor emeritus at Arizona State University who conducts public-opinion research as describing the Unz initiative in Arizona as “just one more indication of the incredible anti-immigrant sentiment in the state” and the tightening of the school budget); see also, Adrian Walker, *Issues Over Images*, BOSTON GLOBE, Nov. 4, 2002, at B1.

³⁹ Alan Jay Rom, *Ensuring An “Adequate” Education For Our Nation’s Youth: How Can We Overcome the Barriers?: Symposium Article: Is There Any Parent Here?: Fixing the Failures of the Massachusetts Public School System*, 27 B.C. THIRD WORLD L.J. 159, 168 (Winter 2007).

⁴⁰ 20 U.S.C. § 6319 (2001); see Jordan, *supra* note 36 (“Arizona’s enforcement of fluency standards is based on an interpretation of the federal No Child Left Behind Act. That law states that for a school to receive federal funds, students learning English must be instructed by teachers fluent in the language.”).

⁴¹ See Jordan, *supra* note 36 (“[D]efining fluency is left to each state, a spokesman for the U.S. Department of Education said.”); see also, *No Child Left Behind Fact Sheet on Assessment of English Language Learners*, AM. SPEECH-LANGUAGE-HEARING ASS’N 1, <http://www.asha.org/uploadedFiles/advocacy/federal/nclb/NCLBELLAssess.pdf> (last visited August 11, 2013).

Laws.⁴² The bill stated the English language is the “language of economic opportunity” and “[i]mmigrant parents are eager to have their children become fluent and literate in English” in order to achieve the “American Dream.”⁴³ To that end, the Legislature wanted to ensure that all children in Massachusetts public schools were placed in “English language classrooms” taught by teachers who were fluent and literate in English.⁴⁴ In July 2002, the Governor expressed his support for the proposed initiative.⁴⁵ In November 2002, Massachusetts voters overwhelmingly approved the initiative.⁴⁶

II. IMMEDIATE EFFECTS OF THE DOE GUIDELINES AND DISCRIMINATION CLAIMS

The first assurance verifying that all teaching personnel were fluent and literate in English was due on August 15, 2003 to the Commissioner of Schools.⁴⁷ The literacy requirement was easily met, as most teachers were already licensed to teach in Massachusetts. However, several teachers failed to satisfy the fluency requirement; as the deadline approached, those teachers lost their jobs.⁴⁸ Bilingual-education teachers were most affected by the fluency requirement, and a number of them challenged the new regulations in court.⁴⁹ For example, in July 2003, seventeen teachers from Lawrence hired a lawyer to contest their terminations.⁵⁰ In August 2003,

⁴² See H.B. 4839, 182nd Gen. Court, Reg. Sess. (Mass. 2001).

⁴³ *Id.*

⁴⁴ *Id.* Defining an English language classroom as one in which “such teaching personnel are fluent and literate in English.” An English language classroom includes both mainstream and SEI classrooms.

Id.

⁴⁵ *Id.*

⁴⁶ OWENS, *supra* note 10, at 8 (stating that 68% of voters approved the initiative).

⁴⁷ See Anand Vaishnav, *17 Lawrence Teachers Fight Fluency Rule*, BOSTON GLOBE, July 25, 2003, at B1 (“[As the] August 15 deadline for proving fluency [was] approaching, dozens of foreign-born teachers in school districts across Massachusetts [were] scrambling to clear the testing hurdle or change the rules in time.”); see also Max Heuer, *In Plain English, Teachers Fired Up*, BOSTON HERALD, July 20, 2003.

⁴⁸ See *English Proficiency: Teachers Lose Fluency Ruling*, ASIAN WEEK, available at <http://www.asianweek.com/2003/08/15/upfront-news-briefs-45/> (“In Lowell, 26 teachers have taken the English test and 22 failed, according to the school district.”); see also *Bilingual-Education Teachers Flunking English Tests*, NAT’L CTR. FOR POLICY ANALYSIS (Mar. 15, 2012), http://www.ncpa.org/sub/dpd/index.php?Article_Category=27.

⁴⁹ *English Proficiency: Teachers Lose Fluency Ruling*, *supra* note 48 (“[The immersion law] has caught numerous former bilingual-education teachers across Massachusetts. Many are fighting the law in court.”); *Bilingual-Education Teachers Flunking English Tests*, *supra* note 48.

⁵⁰ *English Proficiency: Teachers Lose Fluency Ruling*, *supra* note 48 (“[In] Lawrence, Mass., where 20 teachers failed an English proficiency test, 17 have hired a lawyer to challenge the rule and convince the district they should keep their jobs.”); see also *Bilingual-Education Teachers Flunking English Tests*, *supra* note 48.

fifteen of those teachers asked a Massachusetts Superior Court judge to reinstate them, alleging that the OPI test was flawed⁵¹ and that the school district discriminated against teachers with Hispanic surnames, as they were overwhelmingly subjected to the test.⁵² Similarly, in Somerville, all five teachers who took the exam failed, and three of them suggested that they would confer with a lawyer.⁵³

Moreover, in Lowell, two separate lawsuits alleging discrimination arose. In *Vong Oung*, the court refused to review the validity of such claims, but it nevertheless suggested the exams were not discriminatory.⁵⁴ Similarly, in another case, four Cambodian-born teachers from Lowell asserted that the district discriminated against them because of their ethnicity.⁵⁵ Three of the plaintiffs had failed the mandated exams⁵⁶ and one refused to take them.⁵⁷ Their lawyer told the press that the exams administered to his clients were part of a plan by the city to get “rid of” Hispanic and Cambodian bilingual-education teachers.⁵⁸ The judge disagreed, stating “[t]o the extent that this is a broad-brushed attack on the state law and the regulations there under, I don’t see any indication that

⁵¹ See Caroline Louise Cole, *Bilingual Teachers Press for Reinstatement*, BOSTON GLOBE, Aug. 23, 2003, at B2 (“[F]ifteen Lawrence bilingual teachers who have been on unpaid leave since failing the state’s new English fluency test asked a Superior Court judge yesterday to order the district to reinstate them on grounds that the test is flawed.”); see also Jenna Russell, *Lowell Teachers Say Test is Racist*, BOSTON GLOBE, July 20, 2003, at B5.

⁵² See Cole, *supra* note 51 (“[T]he Lawrence petition alleges that officials were discriminatory in selecting only teachers with Hispanic surnames to take the test.”); see also Russell, *supra* note 51.

⁵³ Anand Vaishnav, *17 Lawrence Teachers Fight Fluency Rule*, BOSTON GLOBE, July 25, 2003, at B1 (noting that in Somerville, at least three teachers who failed the test have also said they are consulting with a lawyer to explore legal options); see also Editorial, *It’s Time to Shutter The Bilingual Ghetto*, BOSTON HERALD, July 26, 2003, at B18.

⁵⁴ See Sch. Comm. of Lowell v. *Vong Oung*, 893 N.E.2d 1246, 1254–55 (Mass. App. Ct. 2008). While the arbitrator found the practices of the school committee discriminatory, the Superior Judicial Court found that it did not need to resolve to the validity of these grounds as they “are gratuitous to the award. Their invalidity would not require its reversal.” *Id.* From this language, it seems that had the court reviewed the discrimination claims, it would have invalidated them, finding instead that exams were not a discriminatory measure. *Id.*

⁵⁵ *English Proficiency: Teachers Lose Fluency Ruling*, *supra* note 48 (discussing that a judge rejected these public school teacher’s claim of discrimination because of their ethnic backgrounds); Russell, *supra* note 51.

⁵⁶ See *Vong Oung*, 893 N.E.2d at 1248. The Lowell School Committee required teachers whose fluency could not be assessed by classroom observation to take a SPEAK exam, an off-the-shelf version of the Test of Spoken English. *Id.* at 1249. If the teachers passed the SPEAK exam they were exempt from taking the OPI exam. *Id.*

⁵⁷ Michael LaFleur, *Lowell Teacher Lose Job Fight over Fluency*, LOWELL SUN, (Aug. 8, 2003) (articulating that the new fluency guidelines leave “the four teachers facing the prospect of losing their jobs after an Aug. 14 fluency certification deadline”); *English Proficiency: Teachers Lose Fluency Ruling*, *supra* note 48 (“[T]he plaintiffs were three who failed the test . . . and a fourth, Songim Imm, who refused to take it.”).

⁵⁸ *English Proficiency: Teachers Lose Fluency Ruling*, *supra* note 48; LaFleur, *supra* note 57 (quoting Plaintiff’s lawyer stating that “[t]his was a plan by the city of Lowell to get rid of all these bilinguals that they didn’t want . . . They just want them out of there. It stands of ethnic cleansing.”).

[these teachers] were singled out because they were Cambodian. It appears to me that the schools were trying to fulfill the law.”⁵⁹ Since fired teachers have the right to appeal to an arbitrator, a city official commented, “[i]t’s very rare that a judge will rule from the bench. It speaks volumes for the case.”⁶⁰ Not only does the judge’s decision speak volumes for the case, but it also deters future litigation on the basis of national origin discrimination.

As it stands today, the Massachusetts Superior Judicial court has yet to review the DOE guidelines as they relate to national origin discrimination.

III. REQUIREMENTS FOR A TITLE VII CLAIM

At least three possible causes of actions can be brought to challenge the constitutionality of the DOE guidelines, including a claim based on Title VII of the Civil Rights Act of 1964, the Equal Protection Clause, and 42 U.S.C. Section 1981.⁶¹ For the purposes of this Note, only a Title VII claim will be discussed. In particular, this note will evaluate a claim of disparate impact based on the English fluency requirements and a claim of accent discrimination based on disparate treatment of a particular individual.

Proving discrimination based on national origin is difficult.⁶² A Title VII claim requires the exhaustion of administrative remedies.⁶³ Specifically, the plaintiff must first file “a timely complaint with the EEOC and obtain[] a right-to-sue letter”⁶⁴ before filing a Title VII claim.⁶⁵

⁵⁹ LaFleur, *supra* note 57.

⁶⁰ *Id.*

⁶¹ Kenneth King, *Mandating English Proficiency for College Instructors: States’ Responses to “The TA Problem”*, 31 VAND. J. TRANSNAT’L L. 203, 246 (1998) (discussing the various claims to challenge English proficiency legislation); WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING*, 371, 449–50 (4th ed., John Wiley and Sons 2006).

⁶² See Gerrit B. Smith, *I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff’s Burden of Proof in Title VII Accent Discrimination Cases*, 66 OHIO ST. L.J. 231, 233 (2005) (“Proving discrimination under the Title VII proof scheme is a difficult task.”); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1334 (1991).

⁶³ See *Vaughn v. City of New York*, No. 06-CV6547, 2010 U.S. Dist. LEXIS 50791, at *10 (E.D.N.Y. May 24, 2010) (“Title VII requires, as a prerequisite to filing suit, the exhaustion of administrative remedies.”); *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (“Exhaustion of administrative remedies through the EEOC is ‘an essential element’ of the Title VII . . . statutory scheme[] and, as such, a precondition to bringing such claims in federal court.”).

⁶⁴ *Vaughn*, 2010 U.S. Dist. LEXIS 50791, at *10.

⁶⁵ See Beatrice Bich-Dao Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CALIF. L. REV. 1325, 1333 (1993) (outlining the different options for a plaintiff alleging a national origin discrimination claim); *Fragante v. City of Honolulu*, 888 F.2d 591, 594 (9th Cir. 1989).

A. Disparate Impact and the Requirement of English Fluency

Generally, an English fluency requirement is permissible only if necessary for the effective performance of the position for which it is imposed.⁶⁶ A successful disparate impact claim requires a showing that “certain employment practices or criteria have an unfair, discriminatory impact on a protected group.”⁶⁷ The U.S. Supreme Court in *Griggs v. Duke Power Co.*, and later in *Wards Cove Packing Co. v. Antonio*, articulated that a Title VII claim “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”⁶⁸ To prove a disparate impact case, the plaintiff must first establish a *prima facie* case by showing: (1) there is a significant statistical disparity between the proportion of certain classes in the labor pool and the proportion of those classes hired or promoted; (2) there is a specific, facially-neutral, employment practice which is the alleged cause of the disparity; and (3) that a causal nexus exists between the specific employment practice identified and the statistical disparity shown.⁶⁹ “If a plaintiff can make out a *prima facie* case, then the burden shifts to the defendant to establish that the practice serves a legitimate, non-discriminatory business objective.”⁷⁰ A showing of disparate impact can be rebutted by demonstrating that “the challenged practice is job related for the position in question and consistent with business necessity,”⁷¹ such that it “bear[s] a demonstrable relationship to successful performance of the jobs for which it [is] used.”⁷² The plaintiff does not have to prove discriminatory motive in a disparate impact case.⁷³

B. Disparate Treatment Cases and Accent Discrimination

A disparate treatment case requires a showing of different or unfavorable treatment of an individual or class of individuals.⁷⁴ The plaintiff must first

⁶⁶ *EEOC Compliance Manual*, *supra* note 2; *Sampath v. Concurrent Techs. Corp.*, 2008 U.S. Dist. LEXIS 25715, at *120-21 (W.D. Pa. Mar. 31, 2008).

⁶⁷ *King*, *supra* note 61, at 251 (internal quotation marks omitted).

⁶⁸ *Id.* (internal quotation marks omitted) (discussing the paradigm for disparate impact analysis).

⁶⁹ *See* *Nguyen*, *supra* note 65, at 1333 (“Plaintiff establishes a *prima facie* case by showing that the adverse effects of defendant’s employment criteria fall in significant disproportion on the plaintiff’s protected group.”); *see also* *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000).

⁷⁰ *Dalmau v. Vicao Aerea Rio-Grandense, S.A.*, 337 F. Supp. 2d 1299, 1311 (D. Fla. 2004).

⁷¹ *King*, *supra* note 61, at 251 (internal quotation marks omitted).

⁷² *Nguyen*, *supra* note 65, at 1333 (internal quotation marks omitted).

⁷³ *Id.* at 1334 (“The plaintiff need not prove discriminatory motive in making a disparate impact claim.”); *Segar v. Smith*, 738 F.2d 1249, 1266 (D.C. Cir. 1984).

⁷⁴ *Nguyen*, *supra* note 65, at 1331 (“Both individual and group claims may rest on a disparate treatment theory. Individual claims normally concern allegations of different and unfavorable treatment of a single employee or applicant.”); *Palmer v. Shultz*, 815 F.2d 84, 90 (D.C. Cir. 1987).

establish a *prima facie* case by a preponderance of the evidence,⁷⁵ through either direct evidence of discrimination or circumstantial evidence warranting an inference of discrimination.⁷⁶ A claim based on circumstantial evidence is evaluated through the McDonnell-Douglas framework, where the “plaintiff must show that (1) she is a member of a protected class; (2) she was qualified for the job; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that gave rise to an inference of discriminatory intent.”⁷⁷ Like in disparate impact cases, once the plaintiff establishes a *prima facie* case, a presumption of discrimination arises.⁷⁸ The defendant can rebut the presumption by offering a legitimate non-discriminatory reason for the defendant’s employment actions.⁷⁹ The burden of proof is then shifted back to the plaintiff to demonstrate that the defendant’s reason is only a pretext for discrimination.⁸⁰ However, unlike in disparate impact cases, disparate treatment cases must prove that the employer acted with a discriminatory motive.⁸¹

In the case of accent discrimination, the employer is afforded two defenses. First, rather than rebutting the presumption of accent discrimination, the defendant can assert its actions fell within the bona fide occupational qualification (BFOQ) exception to disparate treatment.⁸² “To

⁷⁵ See King, *supra* note 61, at 250; see, e.g., Tseng v. Fla. A&M Univ., 380 Fed. App’x. 908, 910 (11th Cir. 2010) (stating that the plaintiff has to prove a *prima facie* case of discrimination).

⁷⁶ Tseng, 380 Fed. Appx. at 910 (“[I]n the absence of direct evidence, a plaintiff may establish a Title VII of the Civil Rights Act of 1964 claim through circumstantial evidence that creates an inference of discrimination. To evaluate a claim based on circumstantial evidence, courts use the McDonnell-Douglas framework.”); Forsythe v. Bd. of Educ., 956 F. Supp. 927, 931 (D. Kan. 1997) (“[I]n the absence of direct evidence of discrimination, a plaintiff in Title VII actions must abide by the complicated formula first set out in McDonnell Douglas for proving discrimination by indirect evidence.”).

⁷⁷ Altman v. N.Y. City Dep’t of Educ., No. 06 Civ. 6319, 2007 U.S. Dist. LEXIS 91348, at *10 (S.D.N.Y. Dec. 12, 2007) (outlining the burden-shifting process); see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

⁷⁸ See Altman, 2007 U.S. Dist. LEXIS at *10 (outlining the burden-shifting process); Fullen v. Galveston Indep. Sch. Dist., 564 F. Supp. 2d 719, 729 (S.D. Tex. 2008).

⁷⁹ See Altman, 2007 U.S. Dist. LEXIS at *10 (“[I]f plaintiff establishes these elements, the burden of going forward shifts to the employer to ‘articulate some legitimate, non-discriminatory reason for the employer’s rejection.’”); McDonnell Douglas Corp., 411 U.S. at 792, 802 (“[T]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”).

⁸⁰ Altman, 2007 U.S. Dist. LEXIS at *10 (“[I]f the employer is able to do so, then the plaintiff, who has the burden of proof throughout, must show that the stated reason is pretextual.”); Daniels v. Health Ins. Plan of Greater N.Y., 02 Civ. 6054, 2007 U.S. Dist. LEXIS 130, at *17 (S.D.N.Y. 2007).

⁸¹ Nguyen, *supra* note 65, at 1331 (“[T]he plaintiff must prove a discriminatory motive on the part of the employer and must carry the initial burden of establishing a *prima facie* case of disparate treatment.”); Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977).

⁸² See Nguyen, *supra* note 65 at 1332 (“The defendant, rather than rebutting the plaintiff’s *prima facie* case, may justify explicit discrimination by invoking the bona fide occupational qualification

qualify as a BFOQ, a discriminatory job qualification must affect an employee's ability to do the job and must relate to the essence or to the central mission of the employer's business."⁸³ Second, the EEOC Compliance Manual states that employers may lawfully base an employment decision upon an individual's accent if effective oral communication is required and the individual's accent materially interferes with his or her ability to communicate.⁸⁴ The material interference exception permits employers to circumvent discrimination claims especially in areas of teaching, customer service, and telemarketing.⁸⁵

Lastly, the trier of fact determines whether discrimination actually occurred.⁸⁶ An EEOC release proposed that claims of accent discrimination should be carefully scrutinized⁸⁷ because complaints about poor communication could mask accent discrimination.⁸⁸ Even with careful scrutiny, courts fail to validate accent discrimination claims.⁸⁹ While the

(BFOQ) exception to disparate treatment. The courts have construed the BFOQ exception as an affirmative defense for which the employer bears the initial burden of production and the ultimate burden of persuasion. Moreover, the BFOQ defense 'provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities.'"); *see, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

⁸³ Nguyen, *supra* note 65, at 1332 (internal quotations omitted).

⁸⁴ *See* Daly v. U.S. Postal Service, EEOC no. 01933547, 96 FEOR 3008 (1995) (providing that in determining what constitutes a material interference, the EEOC recommends utilizing a three-part test: 1) the level and type of communication demands in the job; 2) whether the employee's speech was fairly evaluated as to its intelligibility; and 3) the level, if any, to which the employee's speech intelligibility would present communication difficulties in the job at issue, but taking into account any provision that could be made to overcome any difficulties in understanding the employee); *EEOC Compliance Manual*, *supra* note 2 ("[A]n employment decision based on foreign accent does not violate Title VII if an individual's accent materially interferes with the ability to perform job duties.").

⁸⁵ *EEOC Compliance Manual*, *supra* note 2 ("Positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing."); *Facts About Employment Rights of Immigrants Under Federal Anti-Discrimination Laws*, U.S. EQUAL OPPORTUNITY COMMISSION, <http://www1.eeoc.gov/eeoc/publications/immigrants-facts.cfm?renderforprint=1> (last visited Mar. 14, 2012).

⁸⁶ Daly v. U.S. Postal Service, EEOC no. 01933547, 96 FEOR 3008 (1995).

⁸⁷ *EEOC Compliance Manual*, *supra* note 2 ("[B]ecause linguistic characteristics are a component of national origin, employers should carefully scrutinize employment decisions that are based on accent to ensure that they do not violate Title VII."); *Fragante v. City of Honolulu*, 888 F.2d 591, 596 (9th Cir. Haw. 1989).

⁸⁸ *See* Allison Uehling, *Complaints About Poor Communication Can Mask Accent Discrimination in the Workplace*, 4 FED. EEO ADVISOR 2 (2001) (discussing how a claim of an employee's poor communication skills can mask accent discrimination); *Policy and Guidelines on Racism and Racial Discrimination*, ONTARIO HUMAN RIGHTS COMMISSION, <http://www.ohrc.on.ca/en/resources/Policies/RacismPOLICY?page=race-Part-2.html> (last visited Mar. 14, 2012).

⁸⁹ *See* Allison Uehling, *Claims of Accent Discrimination are Hard to Prove*, 11 FED. EEO ADVISOR 5 ("[A] survey of EEOC decisions in recent years shows that complainants who allege disparate treatment on the basis of their accents have a hard time discrediting well-documented agency actions."); Matsuda, *supra* note 62, at 1355 ("[T]he courts and the EEOC have made an unmistakably clear statement that discrimination against accents associated with foreign birth is national origin discrimination and is thus violative of Title VII. If this clear statement is in fact true, one would expect to see plaintiffs regularly winning accent cases. In fact the opposite is true.").

EEOC guidelines explicitly state that “employers may not rely on coworker, customer, or client discomfort or preference as the basis for a discriminatory action,”⁹⁰ the EEOC has overwhelmingly allowed customer preference defenses in accent discrimination cases.⁹¹

The acceptance of accent discrimination may be explained by the notion that an Anglo accent is considered the social norm. Deviations from it are inferior, and the acceptability of a foreign accent is based upon its closeness to the Anglo accent.⁹² As such, native speakers tend to be regarded as the model of speech,⁹³ while accented individuals are considered outliers.⁹⁴ Thus, this socially accepted theory affords employers some leeway when terminating or refusing to hire individuals with an accent.

IV. APPLICATION OF A TITLE VII CLAIM

This section utilizes the framework established above to analyze whether the DOE guidelines discriminate on the basis of national origin discrimination.

A. Disparate Impact Theory and English Fluency Requirements

English fluency requirements are usually challenged pursuant to a disparate impact theory.⁹⁵ The following arguments can be asserted, but would most likely fail:

(1) An argument can be made that, for all practical purposes, the statute is directed towards individuals whose native language is not English. Given that fluency is defined as “oral proficiency consisting of accurate and

⁹⁰ Gerrit B. Smith, *I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases*, 66 OHIO ST. L.J. 231, 259 (2005).

⁹¹ *Id.* at 261 (“While customer preference defenses have been rejected in the majority of Title VII cases, they are still allowed in accent cases.”); Nguyen, *supra* note 65, at 1338 (1993).

⁹² See Matsuda, *supra* note 62, 1394 (proposing that the “Anglo speech is normal, everything else is different, and acceptability of any given speech depends upon its closeness to Anglo speech”); Nguyen, *supra* note 65, at 1338.

⁹³ See Kun-huei Wu, *Haunting Native Speakerism? Students' Perceptions toward Native Speaking English Teachers in Taiwan*, 3 ENG. LANGUAGE TEACHING 44 (Sept. 2009), available at <http://www.ccsenet.org/journal/index.php/elt/article/viewFile/2715/3284> (discussing the social effects of the native speakerism phenomenon, i.e. the preference of native speakers in teaching their foreign language); Nguyen, *supra* note 65, at 1338.

⁹⁴ William Y. Chin, *Linguistic Profiling in Education: How Accent Bias Denies Equal Education Opportunities to Student of Color*, 12 SCHOLAR 355, 357 (2010) (noting that African-American and Hispanic accents are prime targets for this practice as well as other foreign accents); see Chen, *supra* note 7, at 228.

⁹⁵ Chen, *supra* note 7, at 228 (“[W]ith respect to English fluency requirements, the appropriate analysis in most instances, is disparate impact theory under Title VII.”); see Chin, *supra* note 94, at 357.

efficient oral communication,” a native English speaker would not have difficulty meeting the burden of “using appropriate pronunciation, intonation, grammar, and vocabulary in an interactive professional context.”⁹⁶ As such, the statute’s facially neutral practice, has a disparate impact on non-native English speakers. In order to successfully prove this, the plaintiff must also present statistical evidence that non-native English speaking teachers were specifically targeted as a result of the English fluency requirement.⁹⁷ While this data and causal relationship may exist and a *prima facie* case may be established, the business necessity defense would easily rebut a finding of disparate impact. Good communication skills are a genuine job qualification necessary for effective classroom performance.⁹⁸ In fact, “language acts as the basic communication channel for knowledge transfer and learning from the educator to the learner. If the knowledge communication channel is obscured and hindered by limited English proficiency — both on the side of the learner and of the teacher — knowledge transfer cannot be effective.”⁹⁹ Additionally, when students struggle to understand a teacher, they retain less information.¹⁰⁰ Since poor English fluency can hinder a student’s learning ability, it is a business necessity that directly bears a relationship to a teacher’s successful classroom performance.

(2) Furthermore, claims that the DOE guidelines discriminate against certain ethnicities by showing a statistical disparity between the proportion of certain classes in the labor pool and the proportion of those classes hired or promoted are also undermined by the fact that the school districts

⁹⁶ Memorandum from David P. Discoll, Comm’r of Educ. on English Language Proficiency Requirements for Teachers under Question 2, to Superintendents of Sch. and Charter Sch. Leaders (Mar. 27, 2003), available at <http://www.doe.mass.edu/ell/proficiencyreq.html> [hereinafter *DOE Guidelines*]. Moreover, here, the DOE guidelines seem to be facially neutral: they specifically state that “such teaching personnel” meaning all teachers of English language classrooms, which include SEI and mainstream classrooms, must be fluent and literate in English. Thus, the guidelines do not explicitly target non-native English speaking instructors. *See id.*

⁹⁷ Nguyen, *supra* note 65, at 1333 (listing the factors to prove a *prima facie* case, including showing that there is a significant statistical disparity between the proportion of certain classes in the labor pool and the proportion of those that are hired or fired); *see* Chen, *supra* note 7.

⁹⁸ King, *supra* note 61, at 251 (arguing that while a court may conclude that an instructor is not qualified, “a failure to assess all instructors may indicate that English or oral proficiency is not a genuine job qualification.”); *see* Nguyen, *supra* note 65, at 1333.

⁹⁹ Norma Nel, et. al., *The Impact of Teachers’ Limited English Proficiency on English Second Language Learners in South African Schools*, 30 S. AFR. J. OF EDUC. 635-50 (2010), available at <http://ajol.info/index.php/saje/article/viewFile/61790/49875>.

¹⁰⁰ Karin Kloosterman, *Putting the “Accent” on Language Perception*, ISRAEL 21C (Mar. 7, 2010), available at <http://www.israel21c.org/201003077751/culture/putting-the-accent-on-language-perception> (“It’s best to learn from a teacher who teaches with a majority accent - the accent of the language being spoken, or an accent like your own. If not, it’s an added burden for the student.”); *see* King, *supra* note 61, at 251.

provided tutoring options for teachers who had difficulty passing the OPI exam. For example, in August 2003, the Lawrence School District expended \$14,580 for English tutoring for six of the teachers that failed the OPI exam.¹⁰¹ Courts have found that a recommendation to take “accent reductions classes” is “a beneficent design to afford [the teacher] the opportunity to improve his communication skills, an absolute prerequisite for adequate job performance by a teacher, rather than evidence of a discriminatory intent.”¹⁰² By the same reasoning, offering actual tutoring would also amount to a “beneficent design” and refute evidence of discrimination.

(3) The DOE guidelines may also be challenged for specifically requiring oral proficiency instead of overall teaching proficiency. An oral proficiency requirement targets non-native English-speaking teachers. Conversely, teaching proficiency is directed towards all instructors and is a more accurate measurement of teaching capacity. Therefore, the oral proficiency requirement is discriminatory. This argument too is without merit. “[A] comprehensive assessment would be less effective because it would dilute consideration of [a teacher’s] ability to speak understandable English.”¹⁰³ For example, a teacher whose lessons are well organized may receive an overall better evaluation, despite the teacher’s poor English fluency. The benefits of a well-planned lesson are greatly undermined when students cannot understand the instructor.

In conclusion, a disparate impact claim would not be successful for the reasons stated above.

B. Disparate Treatment Theory and Accent Discrimination

Challenging the DOE guidelines based on an accent discrimination claim pursuant to a disparate treatment theory, would also be an unsuccessful claim.

Applying the Title VII disparate treatment framework, the plaintiff first has to establish a *prima facie* case of discrimination. The plaintiff can meet the *prima facie* burden by showing: (1) s/he is a member of a protected class based on national origin, for example, Cambodian; (2) s/he was

¹⁰¹ Anand Vaishnav, *17 Lawrence Teachers Fight Fluency Rule*, BOSTON GLOBE, July 25, 2003, at B1 (providing that the Lawrence school district paid “\$14,580 for English tutoring for six of the teachers who failed,” and that the Somerville school district likewise offered English improvement tutoring).

¹⁰² *Thelusma v. New York City Bd. of Educ.*, No. 02 CV 446, 2006 U.S. Dist. LEXIS 64855, at *8 (E.D.N.Y. Sept. 12, 2006).

¹⁰³ See King, *supra* note 61, at 252.

qualified for the job because his/her previous assessments were satisfactory; (3) s/he suffered an adverse employment action, i.e., termination; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discriminatory intent, such as the school committee was attempting to remove foreign teachers.¹⁰⁴

Once the *prima facie* case of disparate treatment is established, the defendant must assert a legitimate non-discriminatory reason for its actions. The notion that a teacher's accent materially interferes with the presentation of subject matter is valid for all reasons proffered above.¹⁰⁵ Additionally, a Massachusetts Department of Education ("MDE") study found that, after the DOE guidelines were implemented, limited English proficient ("LEP") and English proficient ("EP") students improved their overall performance on state exams.¹⁰⁶ While this slight improvement may also be attributed to a variety of factors, one could argue that, by removing teachers who were not fluent, students were exposed to teachers they could understand and their ability to retain information increased corresponding with their academic improvement. Alternatively, the defendant can offer a bona fide business qualification as a defense. In *Poskocil v. Roanoke County School Division*, the court found that "[t]he ability of a person to effectively communicate is the most basic and essential qualification of a teacher."¹⁰⁷ Similarly, in *Yili Tseng v. Florida A&M University*, the court held that "an employee's heavy accent or difficulty with spoken English can be a legitimate basis for an adverse employment action where effective communication skills are reasonably related to job performance, as they certainly are in a teaching position."¹⁰⁸

In light of the cases justifying the termination of or refusal to hire accented teachers, it is unlikely that a court will classify a school district's defense as a pretext for discrimination. Moreover, it is hard to believe that the intent of the DOE guidelines was to remove foreign teachers. While

¹⁰⁴ King, *supra* note 61, at 251 (explaining that a disparate impact claim does not require a showing of discriminatory purposes, whereas in disparate treatment cases "proof of discriminatory motive is normally necessary"); see Kloosterman, *supra* note 100.

¹⁰⁵ See discussion, *supra* Sec. IV.1. Difficulty in understanding a teacher presents communication barriers. In fact, studies have shown that an instructor's accent affects a student's ability to comprehend subject matter. Specifically, an accent forces a student to concentrate more on understanding the teacher, and less on the subject matter. This added burden results in the student retaining less information. Students should not be subjected to teachers they cannot understand, and "no teacher should have an accent so marked that his or her students cannot understand." Kloosterman, *supra* note 100.

¹⁰⁶ OWENS, *supra* note 10, at 23 (2010); see Kloosterman, *supra* note 100.

¹⁰⁷ *Poskocil v. Roanoke Cnty. Sch. Div.*, No. 98 0216 R, 1999 U.S. Dist. LEXIS 259 at *17 (D. Va. Jan. 11, 1999).

¹⁰⁸ *Yili Tseng v. Fla. A&M Univ.*, 380 Fed. App'x. 908, 909 (11th Cir. 2010).

courts have recognized that comments about an individual's accent may be probative of discriminatory intent, they have also found that there is nothing improper in making an honest assessment of an individual's English proficiency.¹⁰⁹ As such, supervisor complaints about a teacher's accent are usually statements "expressing a concern about [a teacher's] ability to communicate with students," not discrimination.¹¹⁰ Lastly, ensuring that students understand their educators is a legitimate concern especially since it correlates to the student's learning ability.¹¹¹

Therefore, a claim alleging the DOE guidelines violate Title VII's prohibition of national origin discrimination based on accent will probably fail.

Nonetheless, as the following section discusses, the DOE should amend several policies currently utilized by school districts if it wants to render effective and accurate assessments of the English fluency of its teachers.

V. CONCERNS AND PROPOSALS

While the DOE guidelines may pass constitutional muster under Title VII, several of the practices employed by Massachusetts school districts are alarming and have the potential to become discriminatory. The cases of *Lowell School Committee v. Vong Oung*¹¹² and *Lowell School Committee v. Robishaw*¹¹³ below highlight these concerns.

In *Vong Oung*, three foreign-born teachers appealed their dismissal to an arbitrator pursuant to their teachers' collective bargaining agreement and Massachusetts General Laws Chapter 71, §§ 41 and 42.¹¹⁴ The arbitrator reinstated the teachers finding the district failed to prove the "just cause"

¹⁰⁹ *Fragante v. City of Honolulu*, 888 F.2d 591, 596-97 (9th Cir. 1989) ("An adverse employment decision may be predicated upon an individual's accent when --but only when--it interferes materially with job performance. . . . [However,] [t]here is nothing improper about an employer making an honest assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance."); see *Madiebo v. Div. of Medicaid*, 2 F. Supp 2d 851, 857 (S.D. Miss. 1997).

¹¹⁰ *Tseng*, 380 Fed. App'x. at 909.

¹¹¹ Norma Nel, et. al., *The Impact of Teachers' Limited English Proficiency on English Second Language Learners in South African Schools*, 30 S. AFR. J. OF EDUC. 635-50 (2010), available at <http://ajol.info/index.php/saje/article/viewFile/61790/49875>.

¹¹² 893 N.E.2d 1246, 1248 (Mass. App. Ct. 2008).

¹¹³ 925 N.E.2d 803 (Mass. 2010).

¹¹⁴ See MASS. GEN. LAWS. ch. 71, § 41 ("[A] teacher . . . who has served in the public schools of a school district for the three previous consecutive school years . . . shall be entitled to professional teacher status as provided in section forty-two."); MASS. GEN. LAWS. ch. 71, § 42 (noting that under § 42, a teacher with professional teacher status "shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section 38 of this chapter or other just cause").

required to fire the educators.¹¹⁵ In particular, the arbitrator: (1) excluded the OPI exam results because the test administrators were not available for cross-examination; (2) excluded the Spoken Proficiency English Assessment Kit (“SPEAK”)¹¹⁶ test results because the Lowell School Committee never sought approval from the Commissioner of Schools as required by the DOE guidelines; and (3) found that the school erred in failing to first assess the teachers fluency through classroom observation or an interview.¹¹⁷ The Superior Judicial court affirmed the arbitrator’s award when the Lowell School Committee appealed.

Similarly, in *Robishaw*, the court upheld the arbitrator’s award finding in favor of plaintiff teacher, Ms. Robishaw.¹¹⁸ The arbitrator excluded the principal’s assessment because the principal failed to apply the correct fluency measurement standard.¹¹⁹ Likewise, the arbitrator precluded the results of the SPEAK and OPI exams.¹²⁰ He found that the results were unreliable indicators of Ms. Robishaw’s English fluency because they were administered to her while she was on medical leave for posttraumatic stress disorder.¹²¹ As such, the Lowell School Committee had no evidence to

¹¹⁵ *Vong Oung*, 893 N.E.2d at 1252-53. The judge also found: (4) concluded that the teachers, who escaped the Khmer Rouge regime in Cambodia served as positive role models, (5) determined that as a result of their seniority, their failing grades did not warrant dismissal, rather retraining or reassignment, and (6) that the “Committee’s imposition of fluency testing upon nonnative English speakers but not upon native English-speaking teachers (those educated in the mainland United States for at least four of their years from kindergarten through grade twelve) in supposed violation of the prohibition of G.L. c. 151B, § 4(1), against employment discrimination upon the basis of national origin.” However, the judge refused to review these public policy grounds. *Id.*

¹¹⁶ The SPEAK test is a standardized exam, developed by the TOEFL program to “provide a valid and reliable instrument for assessing the English speaking proficiency of people who are not native speakers of the language.” It is an “off-the shelf” version of the Test of Spoken English. The Lowell School Committee exempted teachers who attended American elementary or secondary schools for at least six years or who passed the locally administered SPEAK from taking the OPI test. However, the Lowell School committee never sought approval from the Commissioner of Schools as required by the DOE guidelines. See *TSE & SPEAK Score User Guide*, EDUC. TESTING SERV. (2001-02), <http://ftp.ets.org/pub/toefl/008659.pdf>.

¹¹⁷ See *Vong Oung*, 893 N.E.2d at 1248.

¹¹⁸ See *Sch. Comm. of Lowell v. Robishaw*, 925 N.E.2d 803, 804 (Mass. 2010).

¹¹⁹ See *id.* at 809 (“[I]f the superintendent chooses to base her determination of a teacher’s English fluency for purposes of 603 Code Mass. Regs. § 14.05(1) on classroom observation and assessment, § 14.05(3)(a), the underlying classroom assessment must have been conducted in a procedurally appropriate manner and must be based on the use of substantively valid standards. If it was not, the superintendent’s fluency determination need not be accepted.”).

¹²⁰ See *id.* at 811 (“In concluding that he would not accept the OPI test results because none of the test graders or raters was available for cross-examination, the arbitrator exceeded his authority by declining to accept that test, or more particularly, the results of that test, without additional indicia of reliability. Nevertheless, the error does not alter the result in this case. The arbitrator rested his decision on the independent ground that both the SPEAK and the OPI test results must be viewed as an unreliable indicator of Robishaw’s English fluency in the particular circumstances here.” The court cannot overturn an arbitrator’s finding of fact, therefore the arbitrator’s decision stands.).

¹²¹ See *id.* (“Robishaw’s medical condition negatively affected her ability to demonstrate her English language proficiency/fluency, and hence any tests taken during that time cannot be viewed as a

support its case, and Ms. Robishaw was reinstated.¹²²

A. Ensure That School Officials Follow the Procedures Outlined in the DOE Guidelines

First, individual school districts should ensure that school officials comply with the procedures outlined in the DOE guidelines. The courts' affirmation of the arbitrator's award emphasizes procedure is key. A failure to adhere to the procedural posture as defined in the DOE guidelines will preclude the admission of principal, superintendent or supervisor evaluations and SPEAK and OPI exam results. Without such evidentiary proof, a school district has no case and a terminated teacher will necessarily be reinstated, regardless of that teacher's actual English fluency. *Vong Oung* exemplifies this notion because all three teachers resumed their positions even though they all failed both exams.¹²³ Therefore, individual school districts should monitor and focus on assuring that its school officials act in accordance with the DOE guidelines. If not, the fluency requirement will be futile.

Moreover, following the DOE guidelines is consistent with justice. Otherwise, school districts could employ unfair and biased practices without being reprimanded. For example, school districts could administer exams to a teacher on medical leave, like Ms. Robishaw.¹²⁴ To place this burden on an individual suffering from posttraumatic stress disorder is unjust. Additionally, Ms. Robishaw might not have been reinstated had the school followed procedure and administered the exams upon her return from medical leave.

B. Ensure School Officials Are Qualified to Make Fluency Assessments

Second, the method currently recommended by the DOE guidelines may be susceptible to discrimination, as supervisors, principals, and superintendents are not qualified to make fluency assessments.¹²⁵ The DOE

valid indicator of that ability.”).

¹²² *Id.*

¹²³ See *Sch. Comm. of Lowell v. Vong Oung*, 893 N.E.2d 1246, 1248 (Mass. App. Ct. 2008).

¹²⁴ See *Robishaw*, 925 N.E.2d at 806–07 (“Robishaw experienced symptoms of posttraumatic stress disorder and took a medical leave of absence from her teaching position.”).

¹²⁵ See Anand Vaishnav, *17 Lawrence Teachers Fight Fluency Rule*, BOSTON GLOBE, July 25, 2003, at B1 (stating an attorney's opinion that “[s]ome administrators are not qualified” to determine “through classroom observation, which teachers should take the test”); *English Language Proficiency Requirements for Teachers Under Question 2*, MASS. DEP'T ELEMENTARY & SECONDARY EDUC. available at <http://www.doe.mass.edu/ell/proficiencyreq.html> [hereinafter *English Language Proficiency Requirements*].

guidelines advise school officials to apply the OPI exam's advanced-mid level standard when determining a teacher's English fluency through classroom observation.¹²⁶ The guidelines also encourage school officials rendering the fluency determinations to "[r]eview the [OPI] descriptors for the ten speaking levels" and "discuss the descriptors together to ensure consistent application."¹²⁷ In order to effectively conduct a fluency analysis, however, more should be done to ensure that all supervisors, principals, and superintendents are qualified to make these assessments. Otherwise, their reviews run the risk of being biased and flawed. Individual perceptions of accents are based upon a variety of factors, including prior exposure to accents, personal preferences, and prejudice.¹²⁸ For example, studies where individuals listened to an actor speak in different accents revealed a high correlation between an individual's racial prejudices and the ensuing negative evaluation of accents of those races.¹²⁹ Even more alarmingly is a study where students listened to a lecture by the same individual while looking at a picture of either an Asian or Caucasian professor and found that the Asian professor's speech was "significantly more" accented.¹³⁰ A trained evaluator will be able to put aside any prejudice, or at least be cognizant of it, and will be able to carry out a more precise review.

Moreover, "[b]ecause misevaluation of speech, and particularly of speech associated with historical targets of discrimination, is common,

¹²⁶ Brief for Petitioner as Amici Curiae Supporting Respondents, Sch. Com. Lowell v. Robishaw, 456 Mass. 653 (Mass. 2010) (No. SJC-10512); *English Language Proficiency Requirements*, *supra* note 125.

¹²⁷ See *English Language Proficiency Requirements*, *supra* note 125 (recommending that school officials "review the descriptors for the ten speaking levels in Attachment A. There are ten (10) speaking levels for the Oral Proficiency Interview test. The Massachusetts Department of Elementary and Secondary Education has determined that levels 1 (Superior), 2 (Advanced High), and 3 (Advanced Mid) are acceptable levels for teachers in Massachusetts English language classrooms. Descriptors for all ten levels are provided in Attachment A as guides for district officials to use when deciding if a teacher meets or does not meet the oral proficiency requirement of Question 2. It is recommended that the school officials who will be making the fluency determinations review and discuss the descriptors together to ensure consistent application").

¹²⁸ See Matsuda, *supra* note 62, at 1361 (arguing that the way an individual perceives an accent can be attributed to prejudice); Mullin, *supra* note 1, 574 ("Due to the nature of accent, bias in the evaluation of accent is unavoidable. The evaluation of a particular accent will be, absent some training in overcoming the prejudice inherent in such evaluation, a function of the prejudice and stereotypes learned by the evaluator Such individual perceptions that a certain accent is more pure or beautiful are merely value judgments.").

¹²⁹ Matsuda, *supra* note 62, at 1378 ("The subjects are also tested separately to determine what racial stereotypes and prejudices they harbor. In repeated studies of this type, there is a high correlation between negative stereotyping of certain races and negative evaluations of accents with those races.").

¹³⁰ See King, *supra* note 61, at 217 (summarizing studies which suggest that student complaints about a TA's pronunciation are reactions to variables other than accent and discussing other studies that analyze students' perceptions of speaker's pronunciations).

claims that accent impeded job performance are not credible unless they stem from fair evaluation.”¹³¹ Federal district and appellate courts, likewise, value an honest evaluation of a teacher’s classroom performance. In *Altman v. N.Y. City Department of Education*, the court found while “comments about a person’s accent may be probative of discriminatory intent . . . there is nothing improper about an employer making an *honest assessment* of oral communications skills” when such skills are reasonably related to job performance.¹³² In *Thelusma v. New York City Board of Education*, the court refused to deem a supervisor’s evaluation commenting on the teacher’s difficulty in communicating with students discriminatory.¹³³ In particular, the court reasoned that to hold otherwise would mean any comment about a teacher’s communication skills by an evaluator would expose the evaluator to a lawsuit.¹³⁴ The court would not “place such a chill on a supervisor’s responsibility to render an *honest evaluation* of a teacher’s classroom performance.”¹³⁵

Thus, there is a clear need for proper fluency assessment guidelines,¹³⁶ and there are several things that the DOE can do to ensure an honest evaluation. First, OPI test administrators or English fluency assessment experts should hold yearly conventions to educate school officials on fluency evaluation techniques, the meaning of different OPI level descriptors, and how to utilize such descriptors in determining a teacher’s English fluency. A training session raising awareness of potential subconscious bias against certain accents and stressing objectivity should also be offered to evaluators. In fact, “uniform and objective methods of evaluation which work to eliminate, or at least bypass, the effects of

¹³¹ Matsuda, *supra* note 62, at 1372.

¹³² *Altman v. N.Y.C. Dep’t of Educ.*, No. 06 Civ. 6319, 2007 U.S. Dist. LEXIS 91348, at *10 (S.D.N.Y. Dec. 12, 2007) (emphasis added) (quoting *Fragante v. Honolulu*, 888 F.2d 591, 596–97 (9th Cir. 1989)); *see* *Thelusma v. N.Y.C. Bd. of Educ.*, No. 02 CV 446, 2006 U.S. Dist. LEXIS 64855, at *6–*7 (E.D.N.Y. Sept. 12, 2006).

¹³³ *Thelusma*, 2006 U.S. Dist. LEXIS at *2 (“When writing the Aim [of the lesson] and/or subsequent information on the board, you need to look more closely at the language used. For instance, when writing/explaining ‘theorem,’ you wrote ‘Theorm.’ Also, the Aim literally has a numbering problem. ‘What are the sums of the interior angles of a triangle’ should have read as what is the sum of the interior angles of a triangle? Sum is singular and takes a singular verb. . . . While explaining the theorem, you stated: ‘I can draw a line on the outside we call dis a terum!’ Coupling these verbal digressions with the quick pacing and soft-spoken nature, made much of the lesson difficult to hear. Thus, following the Mathematics involved strained the learning process.”).

¹³⁴ *See id.* at *7.

¹³⁵ *Id.* (emphasis added).

¹³⁶ *See* Matsuda, *supra* note 62, at 1352 (arguing that there are numerous factors that affect how accents are evaluated, which causes confusion in accent discrimination cases under Title VII); Mullin, *supra* note 1, at 573 (“[T]he nature and process of the evaluation is extremely important to any ultimate decision as to the existence or nonexistence of unlawful discrimination.”).

unconscious prejudice on the part of employers should be applied,"¹³⁷ and training sessions focused on this would accomplish that goal. Alternatively, instead of training school officials, the DOE can hire OPI administrators or English fluency assessment professionals to conduct the yearly classroom evaluations.

While it is expensive and time-consuming to train evaluators or to hire OPI test administrators or English fluency professionals, the money should nevertheless be expended. It would be more cost-effective to do so in the long run. A proper in-classroom evaluation will only subject teachers that seriously fail to meet the advanced-mid level descriptor to the OPI exam. Therefore, money will not be expended on teachers who take the exam and pass. More importantly, qualifying school officials with the ability to conduct objective fluency assessments or utilizing already qualified professionals will severely undermine potential claims of discrimination or attempts to invalidate an evaluation. Deterring lawsuits is always cost-effective.

A fair evaluation can also be achieved by a weeklong classroom observation of every teacher. The more time an evaluator dedicates to analyzing a teacher's English fluency, the more likely their subjective bias will fade and an objective assessment will be rendered.¹³⁸ Additionally, a longer observation affords the teacher an opportunity to become comfortable in having someone observe him or her. This will allow him or her to perform his or her responsibilities under normal circumstances without an audience, providing a better picture of the teacher's oral fluency capabilities. Ultimately, since a teacher's English proficiency is best determined through classroom observation, a weeklong assessment ensures a more accurate review.¹³⁹

Moreover, the lack of guidance provided to school officials in making the initial fluency assessment cannot be cured by an argument that the OPI exam serves as a buffer against potential accent discrimination arising from classroom observation. Reliance should not be placed on the OPI exam because an arbitrator can exclude the OPI results from evidence if the test

¹³⁷ Mullin, *supra* note 1, at 573.

¹³⁸ See *id.* (discussing the vagaries of subjective assessments and the importance of an objective approach to evaluations).

¹³⁹ See Matsuda, *supra* note 62, at 1352 (arguing that the everyday job duties affects the importance of accent in job performance); Mullin, *supra* note 1, at 573 (pointing out that the relevance of language skills depend on the specific functions of a job, revealing the importance of distinguishing situations where an employee is not able to perform her job because of accent from those where accent does not interfere with performance). Classroom observation also allows the evaluator to provide substantive feedback in terms of content and would also foster a relationship between the supervisor, principal, or superintendent and the teacher, improving the overall morale of the education system.

administrators are not available for cross-examination. By precluding the admission of the OPI exam, it renders the exam futile, forces the school to rely on its classroom observation, and reinforces the importance of an accurate and properly-conducted classroom evaluation. Therefore, it is imperative that the classroom assessment be as credible as possible, in order to compel the arbitrator to not only accept its findings, but afford it great weight. Qualifying school officials or employing the services of professionals to render these evaluations furthers the validity of the classroom assessment.

C. Ensure the Validity of the OPI Test or Utilize a Different Test

The integrity of the OPI exam has been severely damaged by the criticism it has recently faced. An expert on the OPI exam testified that, while the ten descriptors range from native-like language proficiency to no language proficiency, the breakdown of the ten descriptors is arbitrary.¹⁴⁰ Another study found that the OPI test scale was flawed, as some of the lower ratings actually tended to be higher in comparison to ratings from other tests, essentially setting an elevated standard.¹⁴¹ An *amicus* brief submitted to the court in *Lowell School Committee v. Robishaw* alleged that the OPI exam was not valid under an Equal Protection Analysis, which requires that the test scores be rationally related to the purpose for which they are used. In particular, the *amici* argued “the OPI Test has [n]ever been validated to demonstrate that [it] measure[s] whether a teacher possesses sufficient English language proficiency to instruct students effectively” and the test failed to simulate the classroom environment.¹⁴²

While the OPI exam has never been validated to specifically measure a teacher’s oral proficiency, the OPI exam is explicitly utilized for determining English oral fluency.¹⁴³ The set up of the test seems to be fair

¹⁴⁰ Brief for Petitioner as Amici Curiae Supporting Respondents, *Sch. Com. Lowell v. Robishaw*, 456 Mass. 653 (Mass. 2010) (No. SJC-10512), 2009 WL 5207151, at *38-39 (“Not only have the tests not been validated, but Lowell’s own expert witness, Dr. Marja Urponen, testified at the arbitration hearing that both the SPEAK and OPI Tests have proficiency scales that represent a continuum ranging from no language proficiency to native-like language proficiency, and that it is ‘completely arbitrary how we break [those] scale[s].’”); see *An Overview of ACTFL Proficiency Interviews (Part 2)*, 1 JALT TESTING & EVALUATION SIG NEWSLETTER 2–13 (Sept. 1997), http://jalt.org/test/yof_2.htm.

¹⁴¹ Brief for Petitioner, *supra* note 140, at *39 (“[R]atings of ‘Novice High’ speaking and writing in English tended to be higher in comparison to ratings of the ‘Intermediate Low’ scores from other tests, demonstrating that the OPI Test scale is flawed.”).

¹⁴² *Id.* (discussing the validation process, flaws and why the OPI exam is invalid).

¹⁴³ The OPI exam is a 20 to 30 minute test conducted through either a face-to-face or telephone interview. The OPI tester asks a series of personalized questions, and adjusts the conversation based upon the examinee’s performance, which is compared to ten detailed proficiency levels. To pass, the DOE guidelines require a score above the third proficiency level, the “advanced-mid” descriptor.

and objective. The test-takers are asked common everyday questions, and their answers are examined by one or more qualified evaluators in order to reduce subjectivity associated with accent.¹⁴⁴ A teacher must have the ability not only to effectively communicate subject matter but also to carry on everyday conversations with her students. Therefore, the OPI exam is rationally related in determining a teacher's oral English fluency. Additionally, the OPI test cannot be flawed because it is accepted across the scientific community and utilized globally by academic institutions, government agencies, and private corporations.¹⁴⁵

Nevertheless, in light of the concerns, it may very well be advisable for the DOE to look into another exam and also to have principals, supervisors, and superintendents use a different scale to conduct classroom assessments. The Test of Spoken English (TSE) can be used as an alternative by the OPI exam.¹⁴⁶ The TSE objectively measures oral English proficiency of non-native English speakers.¹⁴⁷ The speaker talks into a microphone and answers several personalized questions,¹⁴⁸ the answers to which are

Advanced-mid level speakers are classified as handling a large number of communicative tasks with ease and confidence as well as demonstrating an ability to narrate and describe in all time frames. Additionally, advanced-mid level speakers are described as being "readily understood by native speakers unaccustomed to dealing with non-natives." *Testing for Proficiency*, AM. COUNCIL ON THE TEACHING OF FOREIGN LANGUAGE, <http://www.actfl.org/i4a/pages/index.cfm?pageid=3348> (last visited Nov. 28, 2010) [hereinafter *Testing for Proficiency*]; see Karen E. Breiner-Sanders et. al., *ACTFL Proficiency Guidelines – Speaking*, 33 FOREIGN LANGUAGE ANNALS 1, 14–17 (Jan/Feb 1999), available at <http://www.actfl.org/files/public/Guidelines.pdf>. Outlines the ten proficiency levels as Superior, Advanced High, Advanced Mid, Advanced Low, Intermediate High, Intermediate Mid, Intermediate Low, Novice High, Novice Mid, and Novice Low described within the ACTFL Proficiency Guidelines-Speaking. The examinee's are rated based on a top-down approach which "emphasizes that the High levels are more closely related to the level above than to the one below, and represents a considerable step towards accomplishing the functions at the level above, not just excellence in the functions of the level itself." *Id.*; *English Language Proficiency Requirements for Teachers Under Question 2*, MASS. DEP'T ELEMENTARY & SECONDARY EDUC. available at <http://www.doe.mass.edu/ell/proficiencyreq.html> [hereinafter *English Language Proficiency Requirements*]

¹⁴⁴ *Testing for Proficiency*, *supra* note 143 (finding that an examinee's general functional speaking ability is evaluated by one or more certified and trained OPI testers through this standardized tape-recorded test); *Oral Proficiency Interviews*, LANGUAGE TESTING INT'L, http://www.language-testing.com/acad_opi.htm (last visited Mar. 21, 2012).

¹⁴⁵ *Testing for Proficiency*, *supra* note 143 ("The ACTFL OPI is currently used worldwide by academic institutions, government agencies, and private corporations for purposes such as: academic placement, student assessment, program evaluation, professional certification, hiring and promotional qualification."); *Why ACTFL Testing*, LANGUAGE TESTING INT'L, http://www.language-testing.com/acad_opi.htm (last visited Mar. 21, 2012).

¹⁴⁶ See Nguyen, *supra* note 65, at 1348 (suggesting the courts use the TSE exam in testing a plaintiff's oral fluency in accent discrimination cases).

¹⁴⁷ See *id.* at 1347 ("[The] Educational Testing Service (ETS) developed the Test of Spoken English (TSE) in order to provide a reliable measure of proficiency in spoken English, affording educational institutions, government agencies, and other organizations an objective means of assessing the linguistic ability of nonnative speakers of English."); *The TSE Tests*, EDUC. TESTING SERV., available at <http://www.ets.org/tse> (last visited Nov. 28, 2012).

¹⁴⁸ Nguyen, *supra* note 65, at 1348–49 ("[The] examinee is asked to: (1) answer questions about

evaluated by three language experts.¹⁴⁹ TSE was developed to maximize objectivity and experts have praised the format of TSE as retaining “the high degree of validity inherent in the direct interview procedure while virtually eliminating the subjective measurement problems associated with interviewing.”¹⁵⁰

Most importantly, unlike the OPI exam, the validity of the TSE exam has been proven in the specific context of oral teacher proficiency. “A nine-university study supported the TSE’s validity in testing college and university instructors, finding that an instructor’s TSE comprehensibility score correlated with students’ assessment of the instructor’s ability to handle common situations involving language skills.”¹⁵¹ While the OPI exam may be sufficient in evaluating a teacher’s fluency, the TSE test could be an alternative for the DOE if it wishes to mitigate the risk of any constitutional challenges.

CONCLUSION

After the enactment of ELEA and the DOE guidelines that expounded its requirements, several teachers attempted to challenge the regulations as discriminatory. Massachusetts courts have yet to review the validity of such a claim pursuant to a Title VII analysis. There are several potential claims that could be asserted by plaintiffs. As discussed, the EEOC and courts generally allow for English fluency requirements and some level of “accent discrimination” in the workplace, especially in the field of education. A teacher’s job is to communicate and educate students. When students struggle to understand the teacher, they retain less information. Thus, a disparate impact case alleging that the English fluency requirement discriminates against non-native speakers fails because requiring oral fluency is a business necessity in the field of education. Likewise, a

herself (Section 1); read a printed passage aloud (Section 2); complete partial sentences (Section 3); tell a story about a series of pictures (Section 4); answer questions about a single picture (Section 5); answer questions about general topics (Section 6); and give a short presentation as if speaking to a group of students or colleagues (Section 7).”); see *Test for Spoken English*, LANGUAGE COURSE FINDER, <http://www.language-learning.net/en/articles/language-certificates/english-language-certificates/certificates-for-pupils-and-students/test-of-spoken-english-tse-> (last visited Aug. 20, 2013).

¹⁴⁹ See Nguyen, *supra* note 65, at 1349 (“Two raters evaluate each tape, both of whom are experienced teachers and specialists in English, English as a second language, or linguistics. Neither rater knows the scores that the other assigns. A third rater evaluates the examinee’s tapes whenever there is a significant discrepancy in the overall comprehensibility scores that the first two raters assigned.”); see *TSE-Test for Spoken English*, OTTAWA ESL SCH., <http://www.eslottawa.com/tse.html> (last visited Aug. 20, 2013).

¹⁵⁰ Nguyen, *supra* note 65, at 1349.

¹⁵¹ *Id.* at 1351.

disparate treatment case asserting an accent discrimination claim lacks merit as: (1) poor communication skills materially interfere with a teacher's ability to effectively relay information to students, and (2) since a teacher's essential role is to educate an accent hinders the successful execution of that duty.

While the DOE guidelines do not discriminate on the basis of national origin, some of the practices utilized by Massachusetts school districts are alarming. First, a schools official's classroom observation assessment and the OPI exam results can be excluded from evidence during arbitration if school officials fail to adhere to the procedures outlined in the DOE guidelines. Therefore, school districts should focus on ensuring that school officials comply with the DOE guidelines. Additionally, because school officials currently charged with assessing a teacher's English fluency are not specialized to render such evaluations, their analysis could be flawed and potentially biased, lending itself to discrimination and lawsuits. As such, supervisors, teachers, and superintendents should receive training that would better equip them to render fluency judgments. Alternatively, school districts could hire professionals who are already trained to conduct classroom observations. The importance of an accurate assessment of a teacher's fluency through classroom observation is further augmented due to concern with the validity of the OPI exam. Thus, the DOE should look into assuring the validity of the OPI exam or replace it with another exam that has been validated in the education field, such as the TSE.

In conclusion, the Massachusetts DOE guidelines are justified in requiring that teachers be fluent in English. However, in order to ensure that a teacher's English fluency is properly assessed, they should amend the practices mentioned above accordingly.

