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## High School Exit Exams Meet IDEA—An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers

Jennifer R. Rowe

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HIGH SCHOOL EXIT EXAMS MEET IDEA—AN  
EXAMINATION OF THE HISTORY, LEGAL RAMIFICATIONS,  
AND IMPLICATIONS FOR LOCAL SCHOOL  
ADMINISTRATORS AND TEACHERS

*Jennifer R. Rowe\**

The marvelous richness of human experience would lose something of rewarding joy if there were no limitations to overcome.

—Helen Keller<sup>1</sup>

Born in Alabama in 1880, Helen Keller learned how to adapt to a world where being deaf and blind was much more difficult than it is today. In fact, with the help of her one-to-one assistant, teacher, and tutor, Ann Sullivan, Helen was able to graduate with honors from Radcliff College in 1904. However, Helen was an exception to the rule; people celebrated her successes and worked to see that she was able to succeed in spite of her disabilities. Other disabled children were not so lucky. Many were institutionalized and very few were educated.

Years of work, legislation, and advocacy on behalf of disabled children have helped turn things around, to some extent. Today, there are laws that help students with disabilities attain an education, and place specific responsibilities for that education squarely on the shoulders of states and local public school districts. Yet, there still seems to be no limit to the obstacles that disabled students must overcome to successfully make it through America's public education system. While

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\* B.S. in Elementary Education, 1993, B.Y.U.; M.A. in Special Education, 2003, St. Mary's College of California; J.D., 2003, J. Reuben Clark Law School, B.Y.U. Ms. Rowe is an Associate practicing in the area of Special Education Law and Student Issues with Lozano Smith in their San Ramon, California office. She joined the firm as an experienced educator in the California school system. She was a classroom teacher for more than six years in elementary and middle schools. During that time, she also instructed classroom teachers and student teachers in the areas of special education and language arts. She holds both a Multiple Subject and a Learning Handicapped Specialist California Teaching Credential. This paper was presented at the Education Law Association Conference in Savannah, Georgia, in November 2003. It was written as an academic work, and the opinions reflected herein are those of the author and should not be attributed to the firm Lozano Smith or any other organization.

1. Ann Donegan Johnson, *The Value of Determination: The Story of Helen Keller* 61 (Value Commun., Inc. 1976).

some laws, written by well-meaning legislators, require certain levels of education for special education students, other laws impede student success by setting unrealistic expectations for and placing limitations on special education students.

Regardless of the legislative difficulties impeding the progress of special education students, educators should feel good about the amount of progress special education programs have made in the last thirty-five years. More students receive a free appropriate public education (FAPE) and are being educated in the general education classroom than ever before. More students are taught according to grade-level standards, learning things they were previously thought to be incapable of learning. Parents and educators are working together more successfully. Technological advances are used more readily in classrooms to help students cope with learning, communication, and physical disabilities.<sup>2</sup> These advances are all codified and required under the 1997 Amendments to the Individuals with Disabilities Education Act (IDEA or IDEA '97).<sup>3</sup>

During the last two decades in particular, many states have examined education in general and have attempted to raise the bar for all students. States were spurred on by the National Commission on Excellence in Education's 1983 announcement that the United States' "educational institutions seem to have lost sight of the basic purposes of schooling, and of the high expectations and disciplined effort needed to attain them."<sup>4</sup> The Commission's report, *A Nation at Risk*, is oft quoted in its assertion that there is a "rising tide of mediocrity that threatens our very future as a Nation and a people."<sup>5</sup>

In answer to this report, states made many changes to their educational systems. One such change was the addition of "exit exams"<sup>6</sup> to high school graduation requirements.<sup>7</sup> At their inception, most of these exams were minimum competency exams; however, today they are much more difficult and pose a distinct barrier to high school graduation for many students, including those in special education.<sup>8</sup>

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2. See William L. Heward & Michael D. Orlansky, *Exceptional Children: An Introductory Survey of Special Education* 23-24 (4th ed., Merrill Publ. Co. 1992).

3. 20 U.S.C. § 1400 *et seq.* (2000).

4. Natl. Commn. on Excellence in Educ., *A Nation at Risk* 5-6 (U.S. Govt. Printing Off. 1983).

5. *Id.* at 5.

6. Also known as "certification exams" or "competency exams."

7. Paul T. O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & Educ. 185, 186 (2001).

8. See generally Naomi Chudowsky, Nancy Kober, Keith S. Gayler & Madlene Hamilton, *State High School Exit Exams: A Baseline Report* (Ctr. on Educ. Policy, Aug. 2002) (available at <<http://www.ctredpol.org/pubs/statehighschoolexitexams2002/statehighschoolexitexams2002.pdf>>

Given the requirements of IDEA and the specifications of exit exam legislation, many states that give high school exit exams may be in violation of IDEA. Teachers and administrators must follow both special education and exit exam laws. So how do they reconcile the differences between the two? There are several specific recommendations that, if followed, will allow teachers and administrators to be in compliance with both.

As a basis for the contention that both laws can be successfully followed, Part I of this paper will examine the history of special education law, including the requirements of the law today. Part II will examine the history of high school exit exams and look at the regulations and requirements of the exams administered in each state today. Then, in Part III, the paper will discuss the issues that arise under special education law when exit exams are given to, and required of, special education students. Finally, in Part IV, this paper will give suggestions to local school administrators and teachers for complying with both special education and exit exam laws.

## I. SPECIAL EDUCATION LAW

Special education is no longer a separate or pullout program where students are educated in another classroom by special teachers for all or part of the school day. Today, students with disabilities are included<sup>9</sup> in general education classrooms and taught alongside their non-disabled peers.<sup>10</sup> So how did we get from the “separate-but-equal”/“trailer-on-the-back-of-the-playground” concepts of special education to a high school special education program where students are being instructed in the general education classroom, taught according to general education standards and curriculum, and given a high school exit exam upon which their hopes of graduation rest?

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accessed Oct. 29, 2003)); Stephen B. Thomas & Charles G. Russo, *Special Education Law: Issues & Implications for the '90s* 155-67 (Nat'l. Org. on Legis. Problems in Educ. 1995).

9. “Inclusion . . . means that students attend their home school with their age and grade peers. . . . Included students are not isolated into special classes or wings within the school. To the maximum extent possible, included students receive their in-school educational services in the general education classroom with appropriate in-class support.” Bruno J. D’Alonzo, Gerard Giordano & Tracy L. Cross, *Inclusion: Seeking Educational Excellence for Students with Disabilities*, 31 *The Teacher Educator* 82, 84 (Summer 1995) (quoting Natl. Assn. of St. Bds. of Educ., *Winners All: A Call for Inclusive Schools* 12 (Nat'l. Assn. of St. Bds. of Educ. Oct. 1992)).

10. Robert A. Gable, Virginia Laycock McLauflin, Paul Sindelar & Karen Kilgore, *Unifying General and Special Education Teacher Preparation: Some Cautions Along the Road to Educational Reform*, 37 *Preventing Sch. Failure* 5, 5 (Winter 1993).

A. *Early Beginnings: Buck v. Bell and Brown v. Board of Education*

The development of services for special education students began in mid-nineteenth century Boston with an experimental school for children with mental retardation. Prior to that, these children were educated and cared for in their homes, if they were educated at all.<sup>11</sup> Only upper-income families could provide a proper education for their disabled children.<sup>12</sup> The mentally retarded were perceived as incurably sick and many were institutionalized. By 1926, twenty-three states had mandatory sterilization laws for people in institutions<sup>13</sup> to prevent the United States from “becoming swamped with incompetence . . . .”<sup>14</sup> Supporters of sterilization argued that it was better for the entire world, if instead of producing degenerate offspring or letting them starve for their imbecility, society would prevent those who are manifestly unfit from continuing their kind.<sup>15</sup>

During the 1950’s, parents of children with disabilities began to organize and speak out against institutionalization and for inclusion of their children in the public schools.<sup>16</sup> An important victory in this battle came from an unexpected source in 1954—a landmark year for *all* of education—*Brown v. Board of Education*.<sup>17</sup> In *Brown*, the United States Supreme Court held that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>18</sup>

The Court also noted that education was one of the most important undertakings of local and state governments. Many states required compulsory school attendance and spent a lot of money on education, thereby demonstrating their commitment to education and the importance of education in a democratic society. The Court held that “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>19</sup> Segregation was condemned because it deprived students of their Fourteenth

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11. Seguin Services Inc., *Understanding Developmental Disabilities: History of Disability Services in the United States* <[http://www.seguin.org/links\\_udd2.htm](http://www.seguin.org/links_udd2.htm)> (accessed Oct. 13, 2003).

12. Bartholomew A. Seymour, III, Student Author, *Creating Substantive Rights for Children with Disabilities*, 3 *Geo. J. on Fighting Pov.* 183, 183 (1996).

13. Seguin Services, Inc., *supra* n. 11.

14. *Buck v. Bell*, 274 U.S. 200, 207 (1927), *rev'd in part on other grounds*, 349 U.S. 294 (1955).

15. *Id.*

16. Seguin Services, Inc., *supra* n. 11.

17. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

18. *Id.* at 495.

19. *Id.* at 493.

Amendment rights to equal protection of the law.<sup>20</sup>

This decision gave parents of special education students several key points to use in their own battle for inclusion in the public school system.<sup>21</sup> The movement toward inclusion of special education students turned into its own civil rights crusade, but it had little true success until the 1990s.<sup>22</sup>

### B. Section 504 of the Rehabilitation Act of 1973

Between 1958 and 1970, Congress attempted numerous times to assist in the cause of educating disabled students in the public schools, but made very little real progress.<sup>23</sup> By 1971, only seven states had legislation that mandated public education for all disabled students; although, twenty-six other states had legislation requiring some form of education for some disabled students.<sup>24</sup>

Congress made great legislative strides toward public education for all disabled children with the passage of the Rehabilitation Act of 1973, Section 504.<sup>25</sup> Section 504 was “the first federal civil rights law protecting the rights of the disabled.”<sup>26</sup> It prevented discrimination against disabled persons<sup>27</sup> in federally funded programs<sup>28</sup> including public education.<sup>29</sup>

20. *Id.* at 495.

21. Daniel H. Melvin II, Student Author, *The Desegregation of Children with Disabilities*, 44 DePaul L. Rev. 599, 606 (1995).

22. David Krantz, *Not So Special*, 4 Teacher Mag. 38, 39 (Aug. 1993).

23. In 1958, Congress passed the Expansion of Teaching in the Education of Mentally Retarded Children Act providing federal funds for training teachers of the mentally retarded. Pub. L. No. 85-926, 72 Stat. 1777 (1958); see Melvin, *supra* n. 21, at 605. In 1965, Congress passed the Elementary and Secondary Act (ESEA), which was designed to strengthen, improve, and increase opportunity in American Schools. Pub. L. No. 89-10, 79 Stat. 27 (1965); see Richard L. Horne, *The Education of Children and Youth with Special Needs: What do the Laws Say?*, #ND15 NICHCY News Dig. (Nat'l. Info. Ctr. for Children and Youth with Disabilities) 3 (Oct. 1996) (available at <<http://www.nichcy.org/pubs/outprint/nd15.pdf>> (accessed Oct. 13, 2003)). ESEA was amended eight months later (Pub. L. No. 89-313, 79 Stat. 1162) (1965) and again in 1966 (Pub. L. No. 89-750, 80 Stat. 119), 1967 (Pub. L. No. 90-247, 81 Stat. 783), and 1970 (Pub. L. No. 91-230, 84 Stat. 175), to include grants for special education programs, create the Bureau of Education for the Handicapped (BEH) to administer all Office of Education programs for disabled children, create the National Council on Disability, fund research, fund and create regional centers, and recruit teachers. Horne, NICHCY News Dig. at 4. The 1970 Amendments were also known as the Education of the Handicapped Act (EHA).

24. Charles J. Russo, Timothy E. Morse & Marian C. Glancy, *Special Education: A Legal History and Overview*, 64 Sch. Bus. Affairs 8, 9 (Aug. 1998).

25. Pub. L. No. 93-112, 87 Stat. 355 (1973).

26. Thomas & Russo, *supra* n. 8, at 15.

27. Section 504 defined a disabled person as “[a]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment.” Horne, *supra* n. 23, at 6 (quoting Pub. L. No. 93-112, 87 Stat. 355 (1973)).

28. Sabrina Holcomb, Ed Amundson & Patti Rababate, *The New IDEA Survival Guide* 9 (Nat'l. Educ. Assn. of the U.S. 2000). “[N]o otherwise qualified handicapped individual in the United

However, the implementing regulations of Section 504 took over three years to develop.<sup>30</sup> Five of those months were spent deciding that the enforcement of the regulations would be assigned to the Office of Civil Rights (OCR) of the Department of Education.<sup>31</sup>

Regulations were finally released on May 4, 1977.<sup>32</sup> The regulations required recipients of federal funds to file an assurance of compliance, take remedial action if violations were found, take voluntary action to overcome historical discrimination against persons with disabilities, designate an employee to be responsible for compliance, create and adopt grievance procedures, and give notice they do not discriminate against disabled persons.<sup>33</sup>

The implementing regulations were not the fix-all solution, however, particularly given the fact that "OCR already had a substantial backlog of complaints dealing with race and gender. As a general rule, cases were investigated on a first-come, first-served basis."<sup>34</sup> An order had to be secured to expand OCR's investigations.<sup>35</sup>

### C. *Public Law 94-142: The Education for All Handicapped Children Act*

By 1975, most states had some form of state special education legislation requiring public education for at least some disabled students, but the laws varied dramatically from state to state and lacked specific guidelines and administrative procedures.<sup>36</sup> The Bureau of Education for the Handicapped (BEH) estimated that of the approximately eight million handicapped children (aged birth to twenty-one years) in the United States, 1.75 million were not served at all by the public school system and 2.5 million were not receiving an appropriate education.<sup>37</sup> To

States . . . shall, solely by reason of his handicap, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." Kathleen S. Monzie, Student Author, *The Right to a Special Education*, 57 Mont. L. Rev. 151, 161 (1996) (quoting Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. § 701 (1988 & Supp. V 1993)).

29. Richard A. Culatta & James R. Tompkins, *Fundamentals of Special Education: What Every Teacher Needs to Know* 14 (Ann Castel Davis ed., Prentice-Hall, Inc. 1999).

30. Thomas & Russo, *supra* n. 8, at 16.

31. *Id.*

32. *Id.*

33. *Id.* at 17.

34. *Id.* at 16.

35. *Id.* at 17.

36. Russo et al., *supra* n. 24 at 9; Mitchell L. Yell, David Rogers & Elisabeth Lodge Rogers, *The Legal History of Special Education: What a Long, Strange Trip It's Been!*, 19 Remedial and Spec. Educ. 219, 223 (July/Aug. 1998).

37. Sen. Rpt. 94-168, at 8 (June 2, 1975) (reprinted in 1975 U.S.C.C.A.N. 1425).

ensure public education for all disabled students, a different kind of federal involvement was necessary.<sup>38</sup>

On November 29, 1975, Congress passed Public Law 94-142, the Education for All Handicapped Children Act (EAHCA),<sup>39</sup> which provided a federal guarantee to a free appropriate public education (FAPE) for disabled children aged three to twenty-one.<sup>40</sup> EAHCA was heralded as the “single most far-reaching legislative act ever passed for children with exceptionalities.”<sup>41</sup>

Special education gained its own life under the EAHCA because it finally had its own source of federal funding, and teachers were required, for the first time, to obtain a special certification to teach special education.<sup>42</sup> Federal funds supplemented money that was often inadequate at the state and local levels.<sup>43</sup> The EAHCA corrected many of the problems found in enforcing and funding past legislation.

States that received federal funds under the EAHCA had to submit a plan that included the state’s policies and procedures for educating disabled students, as well as an explanation of how those policies and procedures complied with the Act. The plan then had to be approved by the BEH. Approval obligated the states, and therefore local school districts that received state funds, to follow the provisions of the EAHCA. All states but New Mexico submitted a plan so that they could receive the federal funding. New Mexico soon learned, however, that under Section 504, it would be required to provide a free appropriate public education to its disabled students regardless of the EAHCA;<sup>44</sup> thus, New Mexico submitted a plan.<sup>45</sup>

Rights guaranteed by the EAHCA included “fairness, appropriateness, and due process in decision making about providing special education and related services to children and youth with disabilities.”<sup>46</sup> The EAHCA provided safeguards in placement and special education program decisions. School districts could no longer refuse service to disabled students or force parents to place their children in a special education program of which they did not approve.<sup>47</sup>

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38. Yell et al., *supra* n. 36, at 223.

39. Pub. L. No. 94-142, 89 Stat. 73 (1975).

40. Horne, *supra* n. 23, at 7.

41. Culatta & Tompkins, *supra* n. 29, at 14.

42. Holcomb et al., *supra* n. 28, at 10.

43. Culatta & Tompkins, *supra* n. 29, at 15; Harvey B. Polansky, *The Meaning of Inclusion: Is It an Option or a Mandate?*, 60 Sch. Bus. Affairs 27, 27 (July 1994).

44. *N. M. Assn. for Retarded Citizens v. N.M.*, 678 F.2d 847, 852 (10th Cir. 1982).

45. Yell et al., *supra* n. 36, at 225.

46. Culatta & Tompkins, *supra* n. 29, at 15.

47. Polansky, *supra* n. 43, at 27.



The EAHCA included specific eligibility criteria for special education services including non-discriminatory testing and evaluation<sup>48</sup> and individualized education plans (IEPs).<sup>49</sup> It required schools to provide FAPE in the least restrictive environment (LRE) possible.<sup>50</sup> The LRE was defined as “appropriate placements along a continuum. . . . This continuum [could] run from a self-contained, highly-structured environment, to inclusion in a [general education] classroom. The placement [had to] allow the student to be educated as much as possible with students who [were] not disabled.”<sup>51</sup> The law also guaranteed related services such as transportation to and from school, speech pathology, and physical therapy.<sup>52</sup>

In 1982, the United States Supreme Court first interpreted and defined the provisions of the EAHCA in *Board of Education v. Rowley*.<sup>53</sup> The Court held that Congress defined FAPE to include the combination of special education and related services necessary for a handicapped student to benefit from classroom instruction.<sup>54</sup> The Court ruled that Congress’ main goal was “to make public education available to handicapped children . . . . [T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level once inside.”<sup>55</sup>

The Court further held that there was no requirement under the EAHCA to give disabled students every service needed to maximize their potential.<sup>56</sup> The EAHCA “was designed . . . to provide a ‘basic floor of opportunity’ consistent with equal protection—either the Act nor its history persuasively demonstrates that Congress thought that equal

48. Yell et al., *supra* n. 36, at 225.

49. Culatta & Tompkins, *supra* n. 29, at 14.

The IEP is developed at a meeting among qualified school officials, the child’s teacher, the child’s parents or guardians, and, when appropriate, the child. It must include, among other things, statements of the child’s present level of educational performance, annual goals for the child, the specific educational services to be provided the child, and the extent to which the child will be able to participate in [general] education programs. School officials must convene a meeting at least annually to review and, when appropriate, revise the IEP. As this court has recognized, “the IEP is more than a mere exercise in public relations. It forms the basis for a handicapped child’s entitlement to an individualized and appropriate education.”

*Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991), *aff’d*, 967 F.2d 470 (11th Cir. 1992). (quoting *Doe v. Ala. St. Dept. of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990)).

50. Culatta & Tompkins, *supra* n. 29, at 14–15; Yell et al., *supra* n. 36, at 225.

51. Polansky, *supra* n. 43, at 27–28.

52. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 n. 10 (1982)

53. *Id.* at 187.

54. *Id.* at 188–89.

55. *Id.* at 192.

56. *Id.* at 198–99.

protection required anything more than equal access [to the public schools].”<sup>57</sup> The Court held that all school districts had to do was provide services necessary “to enable [a disabled] child to achieve passing marks and advance from grade to grade.”<sup>58</sup>

While court battles defined and clarified the terms of the EAHCA and more disabled students were educated in public schools and provided with the services necessary to participate in a public education, disabled students were still rarely mainstreamed or included in a general education classroom. When students were mainstreamed, it often consisted of going to a classroom where they sat in the back corner and colored or did nothing at all.<sup>59</sup> A specially trained special education teacher in a self-contained, special day class provided primary services and curriculum for disabled students in a classroom with peers who had similar learning abilities and disabilities.<sup>60</sup> In fact, from 1979 to 1989, the number of students educated in separate, self-contained special education classes doubled.<sup>61</sup> Practice was still aligned with the “separate but equal” ideology.

#### D. *The Individuals with Disabilities Education Act (IDEA)*

In response to the misconceptions about mainstreaming and inclusion and the growing number of students placed in special day classes, the Office of Special Education and Rehabilitative Services, a division of the United States Department of Education, issued a federal government initiative known as the Regular Education Initiative (REI).<sup>62</sup> This countermovement supported the idea that students with disabilities should be educated in the general education classroom. REI’s objective was to search for ways to make inclusion possible for as many disabled children as possible.<sup>63</sup>

57. *Id.* at 200.

58. *Id.* at 204.

59. Nancy A. Madden & Robert E. Slavin, *Mainstreaming Students with Mild Handicaps: Academic and Social Outcomes*, 53 *Rev. of Educ. Research* 519, 521 (1983).

60. Diane F. Bradley, *Moving into the Mainstream*, 59 *The Educ. Forum* 81, 82 (Fall 1994).

61. James McLeskey & Debra Pacchiano, *Mainstreaming Students with Learning Disabilities: Are We Making Progress?*, 60 *Exceptional Children* 508 (1994) (available in 1994 WL 13268242).

62. Harold W. Heller & Jeffrey Schilit, *The Regular Education Initiative: A Concerned Response*, 20 *Focus on Exceptional Children* 1, 1 (Nov. 1987).

63. Bradley, *supra* n. 60, at 82–83. (Inclusion differed from mainstreaming because a disabled student was not just sent to a general education classroom and expected to fit in for a subject or two; the classroom and teacher were expected to adapt to the disabled student. This meant modification of curriculum to meet all of the needs of all of the students in the classroom. The disabled child was a member of the general education classroom rather than being a guest for part of the day.); Anthony E. Conte, *Blurring the Line Between Regular and Special Education*, 21 *J. of Instructional Psychol.* 103, 103 (June 1994). See also Heller & Schilit, *supra* n. 62, at 2 (REI sought general education

As a major rationale for inclusion, the Council of Exceptional Children (CEC) explained that the benefits of inclusive education included an equal education for all students. Inclusion promoted independence and self-sufficiency. It increased the opportunity for disabled students to show other members of their community that they could function with their non-disabled peers and increased their opportunities to function as a part of their communities later in life.<sup>64</sup> Inclusion also provided an environment where the needs of all students would be taken into consideration because instruction was designed for all students' strengths and needs.<sup>65</sup>

Thanks, in part, to REI, inclusion began to gain momentum in the late 1980's and early 1990's. The EAHCA was again amended with minor changes in 1983<sup>66</sup> and 1986.<sup>67</sup> However, in 1990, before the 1986 amendments could be implemented, Congress amended the EAHCA<sup>68</sup> and changed its name to the Individuals with Disabilities Education Act (IDEA).<sup>69</sup> Unfortunately, there was little substantive change to the law and little encouragement for inclusion, but the name change was significant because it "symbolized a rejection of the patronizing attitude associated with the term 'handicapped' and demonstrated a renewed interest in the education of the nation's disabled citizens."<sup>70</sup>

IDEA encompassed all previous legislation; thus, it guaranteed the right to FAPE for all disabled students ages three to twenty-one, regardless of the severity of a student's disability. FAPE was to be provided based on a complete and individual assessment of each disabled child's needs and performance levels. An IEP could then be written based on the outcomes of the assessment. An IEP had to include specific services in an attempt to meet the goals of the child's IEP. To the maximum extent possible, each disabled child was supposed to be educated in the general education classrooms of the local neighborhood school. Disabled students were entitled to supplemental services like

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inclusion for students labeled with "mild speech or language impairment, mild specific learning disability, mild mental retardation, mild behavior disorder or emotional disturbance, sensory impairment, physical impairment, disadvantaged or migrant socioeconomic status, limited English proficiency, [and/or] need for remediation in one or more subject or skill areas . . ." REI did not target students with severe disabilities.).

64. Ray Van Dyke, Martha Ann Stallings & Kenna Colley, *How to Build an Inclusive School Community: A Success Story*, 76 Phi Delta Kappan 475, 476 (1995).

65. Linda Couture Gerrard, *Inclusive Education: An Issue of Social Justice*, 27 Equity & Excellence in Educ. 58, 64 (Apr. 1994); Bradley, *supra* n. 60, at 82-83.

66. Pub. L. No. 98-199, 97 Stat. 1357 (1983).

67. Pub. L. No. 99-457, 100 Stat. 1145 (1986).

68. Pub. L. No. 101-476, 104 Stat. 1103 (1990).

69. Horne, *supra* n. 23, at 5.

70. Monzie, *supra* n. 28 at 162.

transportation to and from school and developmental, corrective, and other supportive services including speech therapy, speech pathology and audiology, psychological services, counseling (including rehabilitative), physical therapy, occupational therapy, therapeutic recreation, school health services, social work services in the school, parent counseling and training, and medical diagnosis or evaluation.

Under IDEA, as had been guaranteed by previous legislation, parents of disabled students had the right to be involved in the decisions surrounding their child's assessment, placement, and IEP. Parents had to give consent before initial assessment could even take place. Parents were to be notified of any changes in their child's program(s) and be included in any meetings involving the writing of, or changes in, the IEP. A parent's signature was required on the IEP before it could be implemented. Parents also had the right to challenge or appeal in a due process procedure any decision made by the school in regard to their child's assessment, placement, IEP, or the provision of a free, appropriate education.<sup>71</sup>

The small legislative changes made in IDEA included the addition of autism and traumatic brain injury as classifications of disabilities covered by the Act. In addition, a transition plan<sup>72</sup> with goals to prepare the disabled student to transition into higher education, employment, and/or the community after graduation was now required by age sixteen.<sup>73</sup>

#### *E. 1997 Amendments to the Individuals with Disabilities Education Act (IDEA '97)*

Despite legislation, additional court battles, and movements toward inclusion, by 1996, many students were still not being educated in the general education classroom. The United States Department of Education reported that only forty percent of all general education classrooms contained special education students. Some states encouraged inclusion more than others. Eighty-nine percent of Vermont classrooms, seventy-six percent of North Dakota classrooms, and sixty-six percent of Idaho classrooms contained inclusion students. However, some states like Arizona had inclusion students in only six percent of their classrooms.<sup>74</sup>

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71. Horne, *supra* n. 23, at 3.

72. A transition plan is often called an Individualized Transition Plan or ITP.

73. Horne, *supra* n. 23, at 4; Lilliam Rangel-Diaz, *Ensuring Access to the Legal System for Children and Youth With Disabilities in Special Education Disputes*, 27 WTR Human Rights 17, 18 (Winter 2000); Yell et al., *supra* n. 36, at 226.

74. Kristen Girard Golomb & Peggy Hammeken, *Grappling with Inclusion Confusion?*, Learning 49, 49 (Jan./Feb. 1996).

While these statistics reflected a difference from those reported to Congress prior to the passage of the EAHCA in 1975, they showed that the United States was still a long way from granting all disabled children the right to FAPE with the maximum amount of time possible in a general education classroom. So in 1997, Congress issued significant amendments to IDEA. The result was IDEA '97.<sup>75</sup>

IDEA '97 was aligned with research and court decisions that suggested that disabled students performed better in the general education classroom (with supplemental aids and services, if necessary).<sup>76</sup> Students had to be given access to the general education curriculum and standards as well as assessments.<sup>77</sup> Congress's findings in conjunction with this access requirement included:

[T]he implementation of this Act has been impeded by low expectations. . . . Over twenty years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible.<sup>78</sup>

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75. Pub. L. No. 105-17, 111 Stat. 37 (1997).

76. Holcomb et al., *supra* n. 28, at 10-11.

77. Barbara Guy, Hyeonsook Shin, Sun-Young Lee & Martha J. Thurlow, *State Graduation Requirements for Students With and Without Disabilities: Technical Report No. 24* <<http://education.umn.edu/nceo/OnlinePubs/Technical24.html>> (Apr. 1999) (accessed March 30, 2003). See also e.g. 20 U.S.C. § 1412(a)(17)(A).

Discipline was also a significant topic to be added to IDEA '97:

To deal with behavioral problems in a proactive manner, the 1997 amendments required that if a student with disabilities [had] behavior problems (regardless of the student's disability category), the IEP team [should] consider strategies, including positive behavioral interventions, strategies, and supports, to address these problems. In such situations a proactive behavior management plan, based on functional behavioral assessment, should be included in the student's IEP.

Yell et al., *supra* n. 36, at 226.

Schools could still use the same methods of discipline for children with disabilities that they would use with a non-disabled child. The difference was that a disabled child could not be suspended for more than 10 days. If the student brought a weapon to school or a school activity or was involved with drugs at school or a school activity, the child could be placed in "an interim alternative educational setting for up to forty-five days." *Id.*

The IEP team, however, had to determine this alternative setting before the placement could begin. If the child posed a substantial threat to him/herself and/or other students on campus, a state hearing officer could expedite the hearing process and order a forty-five day placement. Holcomb et al., *supra* n. 28, at 31; Yell et al., *supra* n. 36, at 226.

The hearing office could also extend an alternative placement by forty-five days if the student continued to be dangerous. And, if a child's behavior was not a result of a disability, the school could still use normal suspension and expulsion rules. Schools could also report criminal behavior to law enforcement and judicial authorities and request a temporary restraining order against a child to protect other students or faculty on the school campus regardless of a student's disability. Holcomb et al., *supra* n. 28, at 31.

78. Judith E. Heumann & Kenneth R. Warlick, *Memorandum, Questions and Answers about*

The largest changes made by IDEA '97 involved the IEP process and team. Each of the old IEP components was expanded and two new components were added.<sup>79</sup> The IEP must include annual goals that are measurable by benchmarks and short-term objectives that will allow teachers and parents to measure a child's progress.<sup>80</sup> The IEP must also explain how a disability affects a child's access to the general education curriculum and link the goals specifically to grade level curriculum areas and standards.<sup>81</sup> However, goals that are "independent of the general [education] curriculum" cannot be ignored; children also have other needs resulting from their disability(ies).<sup>82</sup> The IEP should also consider a student's strengths.<sup>83</sup>

Formal testing with normed and standardized scoring is no longer the sole form of assessment to qualify a child for special education. Instead, a combination of formal and informal assessments (including observations and classroom work) can be used in a student's referral and identification process. The hope of lawmakers is that this combination of assessments will help keep a student in general education and encourage classroom-focused goals to be written into the IEP.<sup>84</sup>

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*Provisions in the Individuals with Disabilities Education Act Amendments of 1997 Related to Students with Disabilities and State and District-wide Assessments* OSEP 00-24, 2 (Off. of Spec. Educ. & Rehabilitative Services, Off. of Spec. Educ. Programs Aug. 24, 2000).

79. Dixie Snow Huefner, *The Risks and Opportunities of the IEP Requirements Under IDEA '97*, 33 J. of Spec. Educ. 195, 196 (2000).

80. Yell et al., *supra* n. 36, at 226.

81. Huefner, *supra* n. 79, at 196.

82. *Id.* at 198.

83. Holcomb et al., *supra* n. 28, at 11. Note that now the IEP must also include a statement about how parents will be kept informed of their child's progress. No longer will parents have to wait for the annual IEP meeting or ask for an update on progress toward IEP goals. IEP progress reports must be given to parents at least as often as non-disabled student parents are informed (i.e., at each report card period), but the specifics of this report were left to each individual district or IEP team. 20 U.S.C. § 1414(d)(1)(A)(viii); 34 C.F.R. § 300.347(a)(7) (1999). IDEA '97 expanded the IEP team requirements. Under IDEA, a representative of the local educational agency (i.e., the school district) is required to supervise the meetings of the team. This is often the school principal or a school district administrator. The representative of the local education agency could be an administrator or a teacher. However, they not only have to be qualified to supervise (i.e., commit school and district resources), they also have to be knowledgeable about the general curriculum and materials available to teach that curriculum. "The Teacher" member of the IEP team now means both a general and a special educator who have contact with the child. Parents of the child and the child, if appropriate, still have to be included. Huefner, *supra* n. 79, at 199-200. However, if the parents refuse to attend an IEP meeting, it can still be held without them as long as the school keeps a detailed record of their attempts to contact the parent at home and work, and IEP records are sent to the parent after the meeting. Holcomb et al., *supra* n. 28, at 43. Other individuals can now be included in IEP meetings at the discretion of the parents or the local educational agency. This provision includes specialists, advocates, and legal counsel as long as they have some area of expertise or knowledge that will add to the meeting. The definition of "expertise," however, is unspecified by the Act. Huefner, *supra* n. 79, at 200-01.

84. Holcomb et al., *supra* n. 28, at 11. Note that under the old IDEA, students were also

In addition to the IDEA guarantee of special education and related services, IDEA '97 guarantees supplementary aids, services, and program modifications for students and supports for school personnel. These additions maximize the possibility of inclusion or mainstreaming in the general education classroom.<sup>85</sup> Supplementary aids include assistive-technology, defined as any technology or equipment that can be acquired at a store or that can be custom-built if it will "increase, maintain, or improve functional capabilities of a child with a disability."<sup>86</sup> Supports for school personnel include training for teachers, assistants, and other school personnel to facilitate inclusion.<sup>87</sup> Any aids and services need to be included in a child's IEP.

Like IDEA, IDEA '97 requires transition plans for college, vocation, and/or life in the community to be developed no later than age sixteen. However, students now also need to be enrolled in courses that are headed in that direction by the time they are fourteen.<sup>88</sup>

Because of the requirement to be included in district and statewide assessments as well as an increase in such assessments, the IEP must include accommodations and modifications, if necessary, for a student to participate in these assessments. If a child is not able to participate in these assessments for some reason, the IEP must contain an explanation of why and how the child will be alternatively assessed.<sup>89</sup> Assessments that must be addressed in an IEP include high school exit exams. However, before we can address the interaction between IDEA '97, IEPs, and high school examinations we must look at past and current high school exit exam requirements.

## II. HIGH SCHOOL EXIT EXAMS

For a growing number of high school students in the United States, including those in special education, "a plain paper test booklet has become a powerful gatekeeper of their future."<sup>90</sup> Because exam results are so significant for those who are required to take high school exit exams, they are known as "high-stakes" tests. Today, nineteen states, or

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formally reassessed for qualification of special education services every three years. This three-year reevaluation was still required by IDEA '97, but parents could now opt out of formal testing at this stage, too, in favor of more objective observations and review of existing data. *Id.* at 25.

85. Huefner, *supra* n. 79, at 198.

86. 20 U.S.C. § 1401(1).

87. Holcomb et al., *supra* n. 28, at 34.

88. 20 U.S.C. § 1414(d)(1)(A)(vii).

89. Huefner, *supra* n. 79, at 198-99.

90. Chudowsky et al., *supra* n. 8, at 5.

those enrolling half of all public school students, require students to pass an exit exam before they can receive a regular high school diploma.<sup>91</sup> Within the next six years, this number will rise to at least twenty-four states, affecting approximately seven out of every ten public school students.<sup>92</sup> In order to truly understand the impact of these examinations, it is necessary to look at where these exams came from, what current high school exit exam requirements look like, and the legal challenges some of these examinations have faced.

#### A. *The History of High School Exit Exams*

The expansion of high school exit exams can be, for the most part, attributed to standards-based reform.<sup>93</sup> Standards-based education has “given a more solid foundation to the concept of exit exams by laying out what students should know and be able to do by the time they graduate from high school.”<sup>94</sup> Standards-based reform has made any state testing, including exit exams, more important as both a yardstick for measuring student progress toward meeting standards and as a means for holding students and educators accountable for higher performance.<sup>95</sup> State policymakers, not educators, are the main force behind this movement.<sup>96</sup>

Exit exams are not, per se, a new thing. “Public accountability has always been a hallmark of public schooling in the United States.”<sup>97</sup> In the late 1970s and 1980s, as people questioned the “back to basics” movement in education, many states adopted minimum competency exams to make sure that students could read, write, and do relatively basic computation before they graduated from high school.<sup>98</sup> One author reported in 1991 that “millions of children were graduating from high school without the competence to go to the grocery store with a shopping list and come back with the right items and the right change.”<sup>99</sup> Even today, statistics show that while seventy percent of students enroll in college soon after leaving high school, the percentage of those that finish

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91. *Id.* at 5.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Natl. Research Council, *Educating One and All: Students with Disabilities and Standards-Based Reform* 151 (Lorraine M. McDonnell, Margaret J. McLaughlin & Patricia Morison eds., Natl. Acad. Press 1997).

98. Chudowsky et al., *supra* n. 8, at 23, 27.

99. *Id.* at 27 (quoting Barbara Lerner, *Good News About American Education*, 91 *Commentary* 19 (Mar. 1991)).



and earn a bachelor's degree is the same as it was in 1950.<sup>100</sup> In addition, more than one-fourth of the students that enroll in college are required to take remedial courses in one or more subject-areas.<sup>101</sup>

Proponents and authors of exit exams say the exams are designed to make a diploma "mean something."<sup>102</sup> In other words, a diploma will mean that a diploma holder actually has the skills and knowledge needed to succeed in a job, college, or other aspects of daily life. State policymakers claim the exams answer the public outcry concerning the quality of public education and the skills with which students graduate.<sup>103</sup>

Advocates say these exams will motivate students to work harder and help teachers identify and address student weaknesses. Critics contend, however, that these tests lead to higher dropout rates, place too much weight on a single imperfect measure, and do nothing to ensure that students have an opportunity to learn the material being tested.<sup>104</sup>

One study found that "once states tie standardized tests to graduation, fewer students tend to get diplomas. After adopting such mandatory exit exams, twice as many states had a graduation rate that fell faster than the national average as those with a rate that fell slower."<sup>105</sup> Robert Schaeffer of FairTest, an advocacy group in Cambridge, Massachusetts, asserts that "there is no evidence that the use of exit exams... actually improves the education students receive.... Believing we can improve schooling with more tests is like believing you can make yourself grow taller by measuring your height."<sup>106</sup>

Even superintendents jump on the critic's wagon. Scarsdale, New York Superintendent Michael McGill wrote to parents in 2001 complaining that state tests have promoted "rigid uniformity" or teaching to the test. The superintendent also shared concern about the statewide consequences of the new high school graduation exams for special education students and non-native English speakers. "What will happen," he asked, "if large numbers of (former) students are on the streets without a high school diploma?"<sup>107</sup>

100. Debra Viadero, *Getting Serious About High School*, 20 Educ. Week 1 (April 11, 2001) (available at <[http://www.edweek.org/ew/ew\\_printstory.cfm?slug=30highschool.h20](http://www.edweek.org/ew/ew_printstory.cfm?slug=30highschool.h20)> (accessed Feb. 17, 2003)).

101. *Id.*

102. Chudowsky, *supra* n. 8, at 9.

103. *Id.*

104. *Id.*

105. Greg Winter, *More Schools Rely on Tests, But Study Raises Doubts*, N.Y. Times (Dec. 28, 2002) (available at <<http://www.asu.edu/educ/eps/EPRU/documents/EPRU-0212-12-OWI.doc>> (accessed Oct. 15, 2003)).

106. Rebecca Gordon & Libero Della Pina, *No Exit? Testing Tracking, and Students of Color in U.S. Public Schools* <<http://www.arc.org/Pages/Estudy.html>> (Feb. 1999) (accessed Feb. 17, 2003).

107. Ben Wildavsky, *The Question is: Are Tests Failing the Kids? And No One Knows Who Has*

The movement in favor of exit exams was aided and encouraged in 1983 by *A Nation at Risk*, a report on the quality of America's schools issued by the National Commission on Excellence in Education.<sup>108</sup> The Commission proclaimed that "educational institutions seem to have lost sight of the basic purposes of schooling, and of the high expectations and disciplined effort needed to attain them."<sup>109</sup> The Commission expressed concern that the quality of the "intellectual, moral and spiritual strengths of our people" was endangered;<sup>110</sup> while the United States was once the envy of the world, competitors have overtaken it across the world.<sup>111</sup> In one of the most quoted phrases in education, the Commission spoke of a "rising tide of mediocrity that threatens our very future as a Nation and a people."<sup>112</sup>

At the time *A Nation at Risk* was published, 50% or more of the credits required for high school graduation in thirteen states could consist of electives chosen by the student.<sup>113</sup> In that kind of environment, many students opted for the less demanding regimen of elective classes and personal service courses such as "bachelor living."<sup>114</sup> The Commission made four major recommendations, including that high school graduation requirements should be more rigorous and require that students acquire a solid foundation in the five "new basics:" English, math, science, social studies, and computer science.<sup>115</sup> The Commission urged that "[i]n order to graduate . . . students should complete four years of English, three years each of mathematics, science, and social studies, and one and a half years of computer science."<sup>116</sup> Schools responded by increasing the basics and making high school graduation requirements tougher.<sup>117</sup> Statistics show that from 1982 to 1994, the

*the Right Answers*, 130 U.S. News & World Rep. 23 (May 21, 2001) (available at 2001 WL 6320342) (pagination not available).

108. This Commission was appointed by Terrel H. Bell, Secretary of Education under President Ronald Reagan. John Raisian, *Our Schools and Our Future . . . Are We Still at Risk?: Foreword*, ix (Paul E. Peterson ed. Hoover Instn. 2003) (available at <<http://www-hoover.stanford.edu/publications/books/osof.html>> (accessed Oct. 15, 2003)).

109. Natl. Commn. on Excellence in Educ., *supra* n. 4, at 5-6.

110. *Id.* at 7.

111. *Id.* at 6-9.

112. *Id.* at 5.

113. Koret Task Force on K-12 Educ., *Our Schools and Our Future . . . Are We Still at Risk?* 6 (Paul E. Peterson ed. Hoover Instn. 2003) (available at <<http://www-hoover.stanford.edu/publications/books/osof.html>> (accessed Oct. 15, 2003)).

114. *Id.*

115. *Id.*

116. Viadero, *supra* n. 100.

117. Koret Task Force on K-12 Educ., *supra* n. 113, at 7. High school transcripts "have shown that school officials have headed the plea for greater academic coursework, at least in mathematics and science." Williamson M. Evers & Paul Clopton, *Our Schools and Our Future . . . Are We Still at*

percentage of students taking these recommended courses grew from 14% to over 50%.<sup>118</sup> Schools also implemented minimum competency tests, but these tests were rarely targeted at standards above an eighth or ninth grade level, and were usually targeted at lower levels.<sup>119</sup>

*A Nation at Risk* was not the only thing to spur on testing and increase accountability among the schools during the last twenty years. In 1988, Congress created the National Assessment Governing Board. It was composed of elected state officials, school board members, business leaders, scholars, and others. Their task was “to develop assessments and standards for national, regional, and state comparisons of achievement in reading, mathematics, science, and other subjects.”<sup>120</sup>

In 1989, President George Bush called a National Education Summit of state governors to establish education goals for 2000.<sup>121</sup> This summit played an important role in legislation later passed by President Bill Clinton, who was a participating governor.<sup>122</sup> In 1991, the United States Department of Education funded efforts to draft national curriculum standards for core curriculum subjects.<sup>123</sup> That same year, the National Assessment Governing Board released the first-ever valid state achievement comparisons and the first-ever statistics on the number of students meeting the standards of “advanced,” “proficient,” “basic,” and “below basic.”<sup>124</sup>

In 1994, President Clinton signed Goals 2000: The Educate America Act, but he met with opposition from Congress in its implementation, so little was done as a result.<sup>125</sup> However, in 1995, national curriculum standards were finally released. This release led to the second National Education Summit where governors pledged to set standards at state and local levels.<sup>126</sup> At the same time, the Southern Regional Education Board released a report showing that states had much lower standards than those set forth by the National Assessment Governing Board.<sup>127</sup>

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*Risk?: The Curricular Smorgasbord* 241 (Paul E. Peterson ed. Hoover Instn. 2003) (available at <<http://www-hoover.stanford.edu/publications/books/osof.html>> (accessed Oct. 15, 2003)).

118. Viadero, *supra* n. 100.

119. Chudowsky et al., *supra* n. 8, at 27.

120. Herbert J. Walberg, *Our Schools and Our Future... Are We Still at Risk?: Real Accountability* 307 (Paul E. Peterson ed. Hoover Instn. 2003) (available at <<http://www-hoover.stanford.edu/publications/books/osof.html>> (accessed Oct. 15, 2003)).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

However, by 1998, thirty-eight states had adopted state standards at or above the level of national standards in core academic subjects.<sup>128</sup>

With continued pressure to improve education and a pervasive feeling among policymakers<sup>129</sup> that education had improved little since the release of *A Nation at Risk*, on January 8, 2002, President George W. Bush signed the 669-page No Child Left Behind Act (NCLB)<sup>130</sup> into law.<sup>131</sup> Building on prior federal and state education reform, NCLB has two main purposes: (1) to increase student achievement across the board, and (2) to eliminate the gap between achievement of students from different backgrounds.<sup>132</sup> To accomplish these purposes, the law requires states to test students, set high standards for those tests, and force schools to improve.<sup>133</sup> Under NCLB, all states must test all students in grades three through eight annually, and must test students at least once between grades ten and twelve.<sup>134</sup> Although all states must test their high school students, there need not be an exit exam and it need not be tied to graduation and obtaining a diploma.<sup>135</sup> In their report on state and federal effort to implement NCLB, the Center on Education Policy reports that NCLB:

places greater demands on states and school districts than ever before. States must define the level of proficiency that all students are expected

128. *Id.*

129. See *id.* at 308 (“U.S. Department of Education reports that only nineteen states meet the 1994 federal Elementary and Secondary Act requirements; all states but high-scoring Iowa have adopted curriculum standards in core subjects, but most are neither well measured nor enforced; U.S. history again stumps seniors; almost 60 percent score Below Basic”); Koret Task Force on K–12 Educ., *supra* n. 113, at 11 (“U.S. education outcomes, measured in many ways, show little improvement since 1970. The trends that alarmed the Excellence Commission have not been reversed. Though small gains can be seen in some areas (especially math), they amount to no more than a return to the achievement levels of thirty years ago. And while the United States runs in place, other nations are overtaking us. In the past, we could always boast that America educates a larger proportion of its school-age children than other lands, but this is no longer true. Many countries now match and exceed us in years of school attained by their youth, and they are surpassing us as well in what is actually learned during those years.”) Note that the Koret Task Force fails to recognize that the United States educates a larger number of their youth (years in school is not what we are talking about here) and few countries educate their special education and second language learners in the numbers and to the extent that the United States does.

130. Pub. L. No. 107–110, 115 Stat. 1425 (2001).

131. 20 U.S.C. § 6301, *et seq.* The federal regulations for NCLB can be found at 34 C.F.R. § 200.1 *et seq.* (1999).

132. Diane Stark Rentner, Naomi Chudowsky, Tom Fagan, Keith Gayler, Madlene Hamilton & Nancy Kober, *From the Capital to the Classroom: State and Federal Efforts to Implement the No Child Left Behind Act* iii (Ctr. on Educ. Policy Jan. 2003) (available at <[http://www.ctredpol.org/pubs/nclb\\_full\\_report\\_jan2003/nclb\\_full\\_report\\_jan2003.pdf](http://www.ctredpol.org/pubs/nclb_full_report_jan2003/nclb_full_report_jan2003.pdf)> (accessed Oct. 16, 2003)).

133. See *id.*

134. Chudowsky et al., *supra* n. 8, at 29.

135. *Id.*

to reach and set a timetable for schools to bring all their students up to this level by school year 2013–14. States must also expand their testing programs, analyze and report test results in new ways, provide technical assistance to under-performing districts and schools, help teachers become better qualified and much more. School districts must raise test scores in reading, math, and science, close achievement gaps, design improvement strategies and interventions for under-performing schools, hire or develop better-qualified teachers and classroom aides, and create or expand public school choice programs, among other duties.<sup>136</sup>

NCLB increases the amount of state testing required and places even greater weight on state test results.<sup>137</sup> Schools that do not make “adequate yearly progress” (AYP) toward achievement and test score improvement goals must make changes. If they do not improve, they will face “increasingly severe corrective actions, eventually leading to restructuring, staff replacements, state takeover, private management, or dissolution for those that repeatedly fail to improve.”<sup>138</sup> NCLB requires that all states reach certain levels of proficiency, but those levels can be set by each state.<sup>139</sup> Test scores are only one factor considered in proficiency. The federal government also includes graduation rates in the AYP calculation.<sup>140</sup> “These federal requirements are bound to interact with state exit exam policies, but just how remains to be seen.”<sup>141</sup>

Regardless of the effect that NCLB will have on state exit exam policies, states are giving exit exams, and the number of states giving them is increasing. The broader and more important movement demonstrated in this history is that “standards-based reform has revitalized the concept of exit exams and raised expectations beyond basic skills. Standards have given a more solid foundation to exit exams by clarifying what students should know and be able to do by the time they graduate from high school.”<sup>142</sup>

It is also important to realize that while state exit exam scores may play into the AYP calculation under NCLB, exit exams are not a federal creation; they are primarily a state creation.<sup>143</sup> The United States does not have a truly national curriculum. Authority over what is taught and

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136. Rentner et al., *supra* n. 132, at iv. It is interesting to note that teacher and aide qualifications are addressed in NCLB, but substitute teachers are not.

137. Chudowsky et al., *supra* n. 8, at 3; *see also* Rentner et al., *supra* n. 132, at 3.

138. Rentner et al., *supra* n. 132, at 3.

139. *Id.* at 22.

140. *Id.* at 24.

141. Chudowsky et al., *supra* n. 8, at 5.

142. *Id.* at 23.

143. *Id.* at 24.

how it is taught is left to the states.<sup>144</sup> So, both national and state policymakers and lawmakers look to tests as “one of the main tools available for them to shape curriculum and instruction in our highly decentralized system.”<sup>145</sup>

### B. Exit Exam Legislation in Twenty-Four States

Courts have recognized that states have plenary power over public education.<sup>146</sup> A state has a clear and “legitimate interest in improving its schools and in ensuring the value and credibility of a high school diploma. Concomitantly, a state is free to establish education policy regarding exit criteria, the curriculum, and matters of pedagogy.”<sup>147</sup> Exit exams, whether minimum competency, standards-based, or end-of-course exams, are one of the many graduation requirements that states are free to set.<sup>148</sup> Because the state is free to set these requirements, the state is also free to decide whether students must pass an exam to graduate.

States are also free to decide which subjects they will test. All states that give exit exams include English/language arts and mathematics as subjects tested.<sup>149</sup> Tests in social studies and science are slowly becoming more common. Currently, more than one-third of the states that give exit exams test these two subjects.<sup>150</sup>

144. *Id.* at 25.

145. *Id.*

146. Thomas & Russo, *supra* n. 8, at 157 (referring to cases like *Brown*, 347 U.S. at 493) (reasoning that “education is perhaps the most important function of state and local governments . . .”). See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43 (1973); *Brookhart v. Ill. St. Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981), *aff'd* 730 F.2d 1405 (11th Cir. 1984); *Chapman v. Cal. Dept. of Educ.*, 229 F. Supp. 2d 981, 984 (N.D. Cal. 2002), *aff'd in part and rev'd in part*, *Smiley v. Cal. Dept. of Educ.*, 53 Fed. Appx. 474 (9th Cir. 2002). (“The Court notes at the outset that the State of California is afforded broad latitude in crafting public education policy and setting standards for students and educators.” (citations omitted)).

147. Thomas & Russo, *supra* n. 8, at 157 (referring to *Swany v. San Ramon Valley Unified Sch. Dist.*, 720 F. Supp. 764 (N.D. Cal. 1989) (holding that school officials acted reasonably when they withheld a diploma from a student who had not turned in logs to show his completion of an independent study in physical education)).

148. See *Bd. of Educ. v. Ambach*, 436 N.Y.S.2d 564, 568 (S. Ct. N.Y. 1981), *aff'd*, 457 N.E. 2d 775 (1982). “States are moving away from the easier type of minimum competency exams, which are targeted at skills below the high school level, and toward more rigorous types of exit exams that are better aligned with what high schools are supposed to be teaching. These newer types of exams include standards-based exams, which are aligned with state standards at the high school level, and end-of-course exams, which are tied to a specific course and are often more challenging than standards-based exams.” Chudowsky et al., *supra* n. 8, at 11.

149. Chudowsky et al. *supra*, n. 8, at 11.

150. *Id.*

States are beginning to move away from multiple-choice tests and are beginning to incorporate more open-ended questions. These take the form of short answer, writing prompt, and extended/performance task questions.<sup>151</sup> Twenty-two states will have some form of essay writing on their exit exams by the year 2008.<sup>152</sup>

States that currently have high school exit exams in place include Alabama, Florida, Georgia, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Utah, and Virginia.<sup>153</sup> Alaska, Arizona, California, Massachusetts, and Washington are all in the process of phasing in exit exams, but do not yet require them for graduation.<sup>154</sup>

The Center on Education Policy has begun a three-year study on these high school exit exams. When completed, it will be one of the most comprehensive overviews on the subject.<sup>155</sup> Their first report, *State School Exit Exams: A Baseline Report*, describes their baseline findings as well as the legislation currently implemented and/or slated to be implemented in the states listed above.

For all of the states but Georgia, New Mexico, North Carolina, Ohio, and South Carolina, the exit exam at which the Center looked is currently in use or being phased in.<sup>156</sup> In the other five states—Georgia, New Mexico, North Carolina, Ohio, and South Carolina—the new exam had not yet been administered, so the old test was profiled.<sup>157</sup>

Wisconsin was not included on this list because it has allowed local school districts to decide whether to require students to pass the state exit exam before graduating.<sup>158</sup> Districts can also create their own exit exam.<sup>159</sup> Thus, it is impossible to compare Wisconsin to other states and it is impossible to determine the relative effectiveness or fairness of the exam(s) given. Delaware, Connecticut, and Michigan were also excluded because they use state high school exams to award advanced or endorsed diplomas to students who excel on their exams.<sup>160</sup> In Michigan, for example, students who do well are eligible for a college scholarship.<sup>161</sup>

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151. *Id.* at 11; *see also id.* at 94–141.

152. *Id.* at 11.

153. *Id.* at 6.

154. *Id.*

155. *Id.* at 8.

156. *Id.* at 93.

157. *Id.*

158. *Id.* at 21.

159. *Id.*

160. *Id.*

161. *Id.*

Students in these three states who do not take or pass the exam, however, still receive a regular high school diploma.<sup>162</sup>

What follows is a summary of the type of exams that are given, or are being phased-in, in all twenty-four states. Much of this information comes from the Center on Education Policy's study of high school exit exams. Note that all passage rates are initial passage rates and do not account for students who retake the test. Data on cumulative passage rates is not included because it can be misleading as it does not account for students who drop out of high school, repeat their senior year, move out of the school district, or do not take the test due to disability or language status.<sup>163</sup>

In addition, it should be understood that "exemptions" allow students to be excused from the exit exam under certain circumstances and still earn a diploma. "Waivers" differ from exemptions in that they are specific to examinations given with modifications. Students enrolled in special education with modifications for test-taking listed on their IEPs take the exam with modifications and wait for their scores. If their scores are passing, they may file a waiver with their district, or their district may file one on their behalf with the state requesting that the passing score count despite the modifications.

### 1. Alabama

Alabama gives the Alabama High School Graduation Exam (AHSGE), 3rd edition.<sup>164</sup> It is a standards-based exam aligned to tenth and eleventh grade standards.<sup>165</sup> It is a multiple-choice test in the areas of reading, language, math, and science.<sup>166</sup> Beginning in 2004, students will also be tested in social studies.<sup>167</sup> The first edition of this test was given in 1983, with diplomas withheld beginning in 1985 if a student did not pass the exam.<sup>168</sup> The current version of the test was first administered in 1999, but diplomas were not withheld for failure to pass the exam until 2001.<sup>169</sup> Students are first tested in the eleventh grade, with a choice to be tested in the tenth grade, and they have four opportunities to take the exam and pass it.<sup>170</sup>

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162. *Id.*

163. *See id.* at 10.

164. *Id.* at 94.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*



Alabama does not provide any waivers, alternative assessments, or alternative diplomas, but special education students may take the test with accommodations.<sup>171</sup> The exam is scored on a scale of 0 to 999 with a score of 563 required in reading, a score of 560 required in language, a score of 477 required in math, a score of 491 required in science, and a score of 509 required in social studies.<sup>172</sup> In 2001, 88% of all students passed the reading section in comparison to 58% of students with disabilities.<sup>173</sup> The language pass rate was 86% of all students, 53% of students with disabilities.<sup>174</sup> Eighty-three percent of all students passed mathematics versus 51% of students with disabilities.<sup>175</sup> And, 82% of all students passed science while 59% of students with disabilities passed.<sup>176</sup>

## 2. *Alaska*

Alaska has administered the Alaska High School Graduation Qualifying Exam since 2000, but the class of 2004 will be the first class required to pass it to receive a diploma.<sup>177</sup> It is a minimum competency exam testing reading, writing, and mathematics.<sup>178</sup> The exam is comprised of a combination of multiple-choice and short answer questions, as well as a writing prompt.<sup>179</sup> Students begin taking the exam in the spring of tenth grade and may take it twice yearly in both eleventh and twelfth grade as well as up to three years after leaving high school in an attempt to pass and receive a diploma.<sup>180</sup>

Alaska allows students to submit waivers and appeals.<sup>181</sup> Special education students may receive accommodations or take an alternative assessment.<sup>182</sup> The alternative assessment allows special education students to submit a portfolio of their work and behavior in place of passing the exit exam.<sup>183</sup>

The exams are scored on a scale of 100 to 600, and as of 2002, a student had to receive a score of 305 in reading, a score of 356 in writing,

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171. *Id.*

172. *Id.* at 95.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 96.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 97.

and a score of 383 in mathematics to pass.<sup>184</sup> In 2001, 66% of all students passed reading, 47% writing, and 44% mathematics.<sup>185</sup> By contrast, 21% of special education students passed reading, 4% passed writing, and 16% passed mathematics.<sup>186</sup> Due to relatively low passage rates overall, Alaska delayed requiring passage of the exam for graduation from 2002 to 2004.<sup>187</sup>

Alaska has a unique provision in their exit exam law that allows students to receive an Alaska diploma based on another state's exit exam score if the student has previously passed an exit exam in another state and then moved to Alaska to complete high school.<sup>188</sup>

### 3. *Arizona*

Arizona's high school exit exam is known as Arizona's Instrument to Measure Standards (AIMS).<sup>189</sup> It is a standards-based exam that tests the subject-areas of reading, writing, and mathematics.<sup>190</sup> The exam is comprised of multiple-choice, short answer, writing prompt, and extended/performance task questions.<sup>191</sup> It was first administered in 1999, but will not be required for graduation until 2006 "in order to ensure that the curricula are aligned to state standards and to allow districts to devise alternative routes to earning a diploma."<sup>192</sup> The exam is first given in tenth grade with at least four additional opportunities given to pass the exam by the end of twelfth grade.<sup>193</sup>

The state is planning to administer an alternative assessment named the AIMS Equivalent Demonstration, or AIMS ED, sometime after the 2004–2005 school year for students who have difficulty demonstrating their knowledge on standardized tests.<sup>194</sup> Thus all students, including those enrolled in special education, will be able to take an alternative

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184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 98.

190. *Id.*

191. *Id.*

192. *Id.* "Only 12 percent of 10th graders taking the exam in spring 1999 passed its math section prompting parents and teachers to complain that the state's schedule for phasing in high-stakes testing was too aggressive." Darcia Harris Bowman, *Delayed Again: Ariz. Moves High School Exit Exam to 2006*, 21 *Educ. Week* 27 (pagination not included) (Sept. 5, 2001) (available at <[http://www.edweek.org/ew/ew\\_printstory.cfm?slug=01ariz.h21](http://www.edweek.org/ew/ew_printstory.cfm?slug=01ariz.h21)> (accessed Feb. 17, 2003)).

193. Chudowsky et al., *supra* n. 8, at 98.

194. *Id.* at 99.

assessment.<sup>195</sup> Special education students may also take the AIMS with accommodations.<sup>196</sup>

Rather than receiving a scaled score, students are placed at proficiency levels of “Falls Far Below the Standard,” “Approaches the Standard,” “Meets the Standard,” and “Exceeds the Standard.” Students much achieve “Meets the Standard” in order to be considered passing.<sup>197</sup> In 2001, 67% of all students passed reading, 68% writing, and 31% mathematics.<sup>198</sup> However, according to sources available to this author, passage rates for students with disabilities were not reported.

#### 4. California

For more than twenty years, California has had some sort of high school exit exam. In 1977, Assembly Bill 65 mandated that all high school students pass a proficiency test in order to receive a diploma.<sup>199</sup> Individual school districts, not the state, developed their own tests and aligned them to district curriculum.<sup>200</sup> But, in 1999, California first authorized the California High School Exit Exam (CAHSEE).<sup>201</sup> Implementation was delayed to ensure fairness of the test.<sup>202</sup> Administration of CAHSEE began during the 2000–2001 school year; however, the passage of the CAHSEE will not be a graduation requirement until 2006.<sup>203</sup> Students are first tested in the tenth grade and have seven additional opportunities to take the exam—three in eleventh grade, three in twelfth grade, and one after twelfth grade.<sup>204</sup> The exam is standards-based consisting of multiple-choice questions and a writing prompt. The exam tests English language arts and mathematics.<sup>205</sup> The English section is aligned to the ninth and tenth grade standards, and mathematics is aligned to the sixth through eighth grade standards.<sup>206</sup>

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195. *Id.* at 98–99.

196. *Id.* at 98.

197. *Id.* at 99.

198. *Id.*

199. Mary Nebgen, *California's High School Exit Examination: Passing the Test*, 31 McGeorge L. Rev. 359, 360–61 (2000).

200. *Id.*

201. Chudowsky et al., *supra* n. 8, at 100. Governor Gray Davis believed that “accountability” was so crucial to California’s future that he spoke about the high school exit exam during the 1999 State of the State Address and then called a special session of the Legislature to take up the issue in January 1999. Gordon & Della Pina, *supra* n. 106.

202. Chudowsky et al., *supra* n. 8, at 100.

203. *Id.*; Cal. Dept. of Educ., Standards and Assessment Division, *Facts about the California High School Exit Examination (CAHSEE)* 1 (July 2003).

204. *Id.*

205. *Id.*

206. *Id.*

Special education students are allowed to use accommodations and modifications in accordance with their IEPs. However, a student who receives modifications must also submit a waiver to the local school board. Only if the waiver is accepted can the student's score count toward graduation.<sup>207</sup>

The CAHSEE is not timed, unlike many other states' tests. It is estimated that the English portion takes about three hours to complete and the math section takes about two and one-half hours to complete.<sup>208</sup> The state is currently reexamining the untimed aspect of the exam.

Students must score at least 60% or 350 on a scale of 250 to 450, to pass English language arts, and 55% or 350 to pass in mathematics.<sup>209</sup> In 2001, 64% of all students passed the English language arts section while only 44% passed mathematics.<sup>210</sup> Significantly lower numbers of special education students passed—18% in English language arts, and 9% in math.<sup>211</sup>

The CAHSEE was challenged in 2002 when a group of disabled students filed for a preliminary injunction to stop the administration of the CAHSEE scheduled for March 2002.<sup>212</sup> In the alternative, the students wanted the test to be voluntary.<sup>213</sup> The court granted the preliminary relief sought holding that the March 2002 administration of the CAHSEE was "likely to violate rights guaranteed to learning disabled students under federal law [namely the IDEA]."<sup>214</sup> A more detailed discussion of this case can be found *infra* Part III.

Critics of the CAHSEE have been very outspoken, but perhaps no one sums up the sentiments of all better than Michael Grisolia who said, "[t]est scores have replaced learning as the goals of California's public schools. Education is now a thing of the passed."<sup>215</sup>

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207. Cal. Dept. of Educ., Standards & Assessment Div., *Questions and Answers about the California High School Exit Examination (CAHSEE)* 3 (Dec. 2002) (Waiver changes took place Jan. 1, 2003, allowing the waiver process to go through the local school board rather than a board application to the state. The accommodations/modifications given on the exam must be listed on the student's IEP).

208. Cal. Sch. Bd. Assn., *High School Exit Exam Update* <[http://www.csba.org/is/marchExit\\_Exam.htm](http://www.csba.org/is/marchExit_Exam.htm)> (accessed Jan. 23, 2003).

209. Chudowsky et al., *supra* n. 8, at 101.

210. *Id.*

211. *Id.* at 100.

212. *Chapman*, 229 F. Supp. 2d at 983.

213. *Id.*

214. *Id.*

215. Michael Grisolia, *Education: A Thing of the Passed* <[http://www-rohan.sdsu.edu/~rgibson/rouge\\_forum/newspaper/summer\\_2001/Editorial.htm](http://www-rohan.sdsu.edu/~rgibson/rouge_forum/newspaper/summer_2001/Editorial.htm)> (accessed Jan. 24, 2003).

## 5. *Florida*

Florida was one of the first states to use exit exams, beginning in 1977.<sup>216</sup> But, students in the class of 2003 were the first students required to pass the Florida Comprehensive Assessment Test (FCAT) for graduation.<sup>217</sup> The FCAT is standards-based and aligned to state standards at the tenth grade level.<sup>218</sup> Students are given multiple-choice, short answer, writing prompt, and extended/performance task questions in the areas of reading and mathematics.<sup>219</sup> The exam also includes a writing section, but it is not required for graduation.<sup>220</sup> Tenth graders take the exam and may retake it five times by the end of twelfth grade.<sup>221</sup>

All students may ask for a waiver of the exam as a graduation requirement, and special education students may take it with accommodations.<sup>222</sup> Students must score a 300, based on a scale of 100 to 500, on both sections of the exam to pass.<sup>223</sup> In 2002, 58% of all students passed the reading section and 72% passed math.<sup>224</sup> Separate statistics for special education students were not reported in the sources consulted by this author.

## 6. *Georgia*

“Georgia has a long history of increasing the rigor of its high school exit exams. In the 1991–1992 school year, the state replaced its minimum competency exam, the Basic Skills Test, with the Georgia High School Graduation Test (GHS GT), a standards-based exam . . . .”<sup>225</sup> Passage of the GHS GT was first required for graduation in 1995.<sup>226</sup> The state is in the process of phasing out the GHS GT, however, a schedule has not yet been set.<sup>227</sup> Beginning in the spring of 2003, eight end-of-course (EOC) exams began to replace the GHS GT.<sup>228</sup>

The GHS GT is aligned to eleventh grade standards in the areas of English/language arts, writing, mathematics, social studies, and

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216. Gordon & Della Pina, *supra* n. 106.

217. Chudowsky et al., *supra* n. 8, at 102.

218. *Id.*

219. *Id.*

220. *Id.* at 103.

221. *Id.* at 102.

222. *Id.*

223. *Id.* at 103.

224. *Id.*

225. *Id.* at 104.

226. *Id.*

227. *Id.* at 105.

228. *Id.*

science.<sup>229</sup> The exam, which includes a combination of multiple-choice and writing prompt questions, is first given in the fall of eleventh grade for writing and in the spring for all other subjects.<sup>230</sup> There are four opportunities to retake the exam in twelfth grade and unlimited opportunities afterward.<sup>231</sup>

All students may obtain a waiver and special education students may receive an exemption from taking the test or may take it with accommodations.<sup>232</sup> The exam is scored pass/fail with a pass plus score available on all sections but writing.<sup>233</sup> In 2001, 94% of all students taking the exam passed the English/language arts section; 92% passed writing; 91% passed mathematics; 80% passed social studies; and 68% passed science.<sup>234</sup> By contrast, 68% of special education students passed the English/language arts section; 62% passed writing; 57% passed mathematics; 44% passed social studies; and 32% passed science.<sup>235</sup>

## 7. *Indiana*

In 1997, Indiana began administering the Graduation Qualifying Exam (GQE) as part of the Indiana Statewide Testing for Educational Progress Plus (ISTEP+).<sup>236</sup> Indiana is one of the few states that require *all* high school students, including those in private schools, to take its high school exam.<sup>237</sup> This minimum competency, standards-based exam covers English/language arts and mathematics.<sup>238</sup> Students are first tested in the fall of tenth grade and may retake the exam four times before the end of the twelfth grade.<sup>239</sup> However, students may retake the exam an unlimited number of times after high school.

All students may submit waivers<sup>240</sup> and appeals.<sup>241</sup> Special education

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229. *Id.* at 104.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 105.

234. *Id.*

235. *Id.*

236. *Id.* at 106.

237. *Id.* at 107.

238. *Id.* at 106.

239. *Id.*

240. It should also be noted here that, unlike most states, Indiana offers students who fail one or both parts of the GQE other paths to a diploma. Students who complete the "Core 40" (a core set of college-preparatory classes), earning a C or better in all classes, and who obtain a principal's recommendation can earn a diploma. A waiver can also be sought through a process that involves showing high attendance, completion of certain courses with a C or better, and meeting other criteria. Lynn Olson, *Indiana Case Focuses on Special Ed.*, 19 Educ. Week I (pagination not included) (May 31, 2000) (available at <[http://www.edweek.org/ew/ew\\_printstory.cfm?slug=38stakes.h19](http://www.edweek.org/ew/ew_printstory.cfm?slug=38stakes.h19)> (accessed Feb. 17, 2003)).

students may take the test with accommodations.<sup>242</sup> The English/language arts portion of the exam is scored on a scale of 300 to 800 with a required score of 466 to pass.<sup>243</sup> The math portion is scored on a scale of 300 to 720, and students must receive a score of 486 to pass.<sup>244</sup> Interestingly, of the students that met all of the course work and other graduation requirements in the class of 2000, the first class required to pass the test to receive a diploma, 98.5% also passed the high school exit exam.<sup>245</sup> However, when one examines the statistics of all of the students who took the exam in 2001, overall, only 68% passed the English/language arts section, and 65% passed the mathematics section.<sup>246</sup> Students with disabilities did not fare as well; 19% passed English/language arts and 24% passed math.<sup>247</sup>

Indiana's exit exam was challenged in 1998.<sup>248</sup> In January 2002, the Indiana Supreme Court finally brought a close to the lawsuit that challenged the GQE requirement as it applies to students with disabilities when it declined to take the case on appeal.<sup>249</sup> The Court of Appeals of Indiana had previously upheld the trial court's finding that the GQE requirement did not violate students' due process rights or their rights under IDEA.<sup>250</sup> The trial court found that because Indiana required remedial assistance for all students that failed the test, it was unlikely that students, even those in special education, would not be exposed to the subject matter of the test.<sup>251</sup> Additionally, the trial court held that the state was not required to make any modifications under the students' IEPs if those modifications would invalidate the test results (i.e., reading test questions to a student on the reading comprehension section or allowing a student to answer a question in a language other than English).<sup>252</sup> In short, the court found that Indiana's exit exam did not violate the rights of disabled students.

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241. Chudowsky et al., *supra* n. 8, at 106.

242. *Id.*

243. *Id.* at 107.

244. *Id.*

245. *Id.* at 106.

246. *Id.* at 107.

247. *Id.*

248. *Id.* at 28.

249. *Rene v. Reed*, 774 N.E.2d 506 (Ind. 2002) (table). See Chudowsky et al., *supra* n. 8, at 82.

250. *Rene ex rel. Rene v. Reed*, 751 N.E.2d 736, 747 (Ind. App. 2001). See Chudowsky et al., *supra* n. 8, at 82.

251. Chudowsky et al., *supra* n. 8, at 82.

252. *Id.* at 82-83.

## 8. Louisiana

Since 1989, Louisiana has had a standards-based high school exit exam called the Graduation Exit Exam (GEE).<sup>253</sup> However, the state recently implemented a second edition known as the Graduation Exit Examination for the 21st Century (GEE 21).<sup>254</sup> The first class to be affected by this new exam was the graduating class of 2003.<sup>255</sup>

The GEE 21 tests language arts and mathematics beginning in the spring of tenth grade.<sup>256</sup> Students may retake this section four times by the end of twelfth grade.<sup>257</sup> Students are then tested in science and social studies in the spring of eleventh grade.<sup>258</sup> Students may retake this section twice before the end of twelfth grade.<sup>259</sup> The test is a combination of multiple-choice, short answer, writing prompt, and extended/performance task questions. Accommodations are allowed for special education students.<sup>260</sup>

To pass the test, students must meet or exceed the “Approaching Basic” level on a scale that labels students as “Advanced,” “Proficient,” “Basic,” “Approaching Basic,” or “Unsatisfactory.”<sup>261</sup> In 2001, 78% of all students passed the language arts section and 65% passed the math section.<sup>262</sup> However, only 22% of special education students passed the language arts portion, and 17% passed the math portion.<sup>263</sup>

## 9. Maryland

Maryland is in the process of phasing out its minimum competency exam—the Maryland Functional Test.<sup>264</sup> In its place, the state is implementing the Maryland High School Assessment (HSA), which is a set of end-of-course exams that are standards-based.<sup>265</sup> Students entering ninth grade in or after the Fall of 2003 (class of 2007) and middle school students taking high school level courses will have to pass these exams to

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253. *Id.* at 108.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 109.

262. *Id.*

263. *Id.*

264. *Id.* at 110.

265. *Id.*



receive a diploma.<sup>266</sup> The first phase of exams being implemented are in English I, algebra/data analysis, biology, government, and geometry.<sup>267</sup> Additional tests will be added later.<sup>268</sup> The exams are given in January and May as students complete the courses.<sup>269</sup>

All students may retake the exams after completion of a remediation program. Special education students may take the exams with accommodations.<sup>270</sup> As of August 2002, minimum required scores had not been set for the exams, therefore, students are currently required only to take the exam, not pass it.<sup>271</sup> The Maryland State Department of Education reported that in 2002, on a scale of 0 to 800, the mean scaled score for all students on the English I exam was 396;<sup>272</sup> biology, 399;<sup>273</sup> geometry, 398;<sup>274</sup> government, 398;<sup>275</sup> and algebra, 405.<sup>276</sup> By contrast, special education scores were significantly lower: English I, 354;<sup>277</sup> biology, 361;<sup>278</sup> geometry, 365;<sup>279</sup> government, 360;<sup>280</sup> and algebra, 367.<sup>281</sup>

266. *Id.*

267. *Id.* (Note that students do not currently have to pass the Geometry end-of-course HSA exam.)

268. *Id.* at 110.

269. *Id.*

270. *Id.*

271. Nancy S. Grasmick, *Md. St. Dept. of Educ., Message from the St. Superintendent* <<http://www.msde.state.md.us/testing/Dec2002HSAletter.pdf>> (Dec. 2002) (accessed Apr. 15, 2003).

272. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/HSA.ASP?Grade=99&SubjectID=1EN&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/HSA.ASP?Grade=99&SubjectID=1EN&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

273. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/HSA.ASP?Grade=99&SubjectID=2BI&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/HSA.ASP?Grade=99&SubjectID=2BI&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

274. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/HSA.ASP?Grade=99&SubjectID=3GE&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/HSA.ASP?Grade=99&SubjectID=3GE&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

275. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/hsa.asp?Grade=99&SubjectID=4GO&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/hsa.asp?Grade=99&SubjectID=4GO&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

276. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/hsa.asp?Grade=99&SubjectID=5AL&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/hsa.asp?Grade=99&SubjectID=5AL&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

277. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/hsaspecserv.asp?Grade=99&SubjectID=1EN&Group=REGSPED&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/hsaspecserv.asp?Grade=99&SubjectID=1EN&Group=REGSPED&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

278. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/hsaspecserv.asp?Grade=99&SubjectID=2BI&Group=REGSPED&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/hsaspecserv.asp?Grade=99&SubjectID=2BI&Group=REGSPED&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

279. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/hsaspecserv.asp?Grade=99&SubjectID=3GE&Group=REGSPED&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/hsaspecserv.asp?Grade=99&SubjectID=3GE&Group=REGSPED&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

280. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/hsaspecserv.asp?Grade=99&SubjectID=4GO&Group=REGSPED&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&K=99AAAA](http://www.msp.msde.state.md.us/hsaspecserv.asp?Grade=99&SubjectID=4GO&Group=REGSPED&SCORE=MEAN_SCALE_SCORE&Detail=NO&K=99AAAA)> (accessed Apr. 15, 2003).

### 10. Massachusetts

The Massachusetts Comprehensive Assessment System (MCAS) is a standards-based exit exam aligned with the Massachusetts Curriculum Framework tenth grade standards in English and mathematics.<sup>282</sup> The state is currently testing questions in science and technology/engineering, but these do not count as part of the exam requirement.<sup>283</sup> The exam includes multiple-choice, short answer, and writing prompt questions.<sup>284</sup> The MCAS was first administered in 1998, but was not a graduation requirement until 2001, and diplomas were not slated to be withheld for failing the exam until 2003.<sup>285</sup> Students first take the exam in tenth grade, have four opportunities to retest prior to the end of twelfth grade, and have unlimited opportunities to retest after twelfth grade.<sup>286</sup>

All students may appeal their scores and special education students may take the exam with accommodations.<sup>287</sup> Special education students may also take an alternative assessment.<sup>288</sup> A passing score is in the “needs improvement” range or above, with scores falling in the “failing,” “needs improvement,” “proficient,” or “advanced” categories.<sup>289</sup> In 2001, 82% of all students passed reading and 75% passed math.<sup>290</sup> Students with disabilities fared better in Massachusetts than in many states with a 46% passage rate in reading and 39% in math.<sup>291</sup>

An interesting fact about the MCAS is that it was developed, in part, by higher education officials with the hope that state-supported colleges could, at some point, use the scores in their admissions process.<sup>292</sup>

In January 2003, two senior students with disabilities who had failed the MCAS joined six other students in a lawsuit challenging the test as a graduation requirement. The suit alleges that the state has no authority to require students to pass the test to receive a diploma.<sup>293</sup>

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281. Md. St. Dept. of Educ., *Maryland School Performance Report Card 2002: Results by State*, <[http://www.msp.msde.state.md.us/HSAspecserv.asp?Grade=99&SubjectID=5AL&SCORE=MEAN\\_SCALE\\_SCORE&Detail=NO&Group=REGSPED&K=99AAAA](http://www.msp.msde.state.md.us/HSAspecserv.asp?Grade=99&SubjectID=5AL&SCORE=MEAN_SCALE_SCORE&Detail=NO&Group=REGSPED&K=99AAAA)> (accessed Apr. 15, 2003).

282. Chudowsky et al., *supra* n. 8, at 112.

283. *Id.* at 113.

284. *Id.* at 112.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 113.

290. *Id.*

291. *Id.*

292. *Id.* at 25.

293. *More Students Join Suit Against MCAS*, Boston Globe B2 (Jan. 28, 2003) (available at 2003 WL 3377137).

The MCAS has been surrounded with controversy. Just last month, state officials announced that after four tries, 90% of the Class of 2003 had passed both the English and math sections. Boston College researchers criticized the statistics and said it should really be closer to 70% because the 90% refers to the number of students left in the class. It does not account for 22% of the class that dropped out, moved, or were held back. State officials contest Boston College's conclusion.<sup>294</sup>

### 11. Minnesota

In 1996, Minnesota began administering a set of minimum competency examinations known as the Basic Skills Tests (BST), but did not withhold diplomas for failing the tests until 2000.<sup>295</sup> Students are tested in reading and math in eighth grade and writing in tenth.<sup>296</sup> Students have eleven opportunities to retake the test before the end of twelfth grade.<sup>297</sup> The exam is aligned to sixth through eighth grade standards.<sup>298</sup> Students who do not pass may appeal.<sup>299</sup> Students must score at least 75 percent, or 600, in reading and math scored on a scale that tops out at 740.<sup>300</sup> In writing, a rubric scored from 0 to 6 is used, and students must score at least a 3 in order to pass.<sup>301</sup> In 2002, 80% of all students passed the reading portion, 75% passed math, and 91% passed writing.<sup>302</sup>

Special education students may take the test with accommodations or take an alternative assessment.<sup>303</sup> In 2002, special education students performed relatively well with 40% passing reading, 33% passing math, and 63% passing writing.<sup>304</sup>

### 12. Mississippi

Mississippi is in the process of a complicated phase-in of end-of-course exams known as the Mississippi Subject Area Testing Program

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294. Michele Kurtz, *MCAS Pass Rate Inflated, Trio Says*, Boston Globe B3 (Mar. 11, 2003) (available at <[http://www.boston.com/dailyglobe2/070/metro/MCAS\\_pass\\_rate\\_inflated\\_trio\\_saysP.shtml](http://www.boston.com/dailyglobe2/070/metro/MCAS_pass_rate_inflated_trio_saysP.shtml)> (accessed Mar. 12, 2003)).

295. Chudowsky et al., *supra* n. 8, at 114.

296. *Id.*

297. *Id.*

298. *Id.* at 298-304.

299. *Id.*

300. *Id.* at 115.

301. *Id.*

302. *Id.*

303. *Id.* at 114.

304. *Id.* at 115.

(SATP).<sup>305</sup> These end-of-course exams are replacing the Functional Literacy Examination (FLE), a minimum competency exam.<sup>306</sup> The SATP is given at the end of English II, and has sections on algebra, biology, and United States history from 1877.<sup>307</sup> The exams are primarily multiple-choice and short answer questions with a writing prompt.<sup>308</sup>

Students take the SATP exams the year they complete the coursework corresponding to each exam.<sup>309</sup> They may retake an exam three times per year until the end of twelfth grade.<sup>310</sup> All students may appeal their test scores and special education students may take the test with accommodations.<sup>311</sup>

The exams are scored on a scale of 100 to 500. Students must score at least a 300 in each subject.<sup>312</sup> Data on scores is not yet available because 2002–2003 was the first school year that the SATP was given in its entirety.<sup>313</sup>

### 13. Nevada

Prior to 1999, Nevada state high school students were required to pass a minimum competency exam.<sup>314</sup> However, in 1999, Nevada began to give a new standards-based exam known as the Nevada High School Proficiency Exam (HSPE).<sup>315</sup> The HSPE is aligned to the eighth through twelfth grade standards.<sup>316</sup> The class of 2003 was the first graduating class for which the reading, writing, and math sections were required.<sup>317</sup>

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305. *Id.* at 116.

306. *Id.* (The FLE's are being phased out slowly as the SATP exams take their place. Students who began high school (ninth grade) in 1999–2000 had to pass the FLE plus the SATP in United States history from 1877. Students who began high school in 2000–2001, had to pass the math section of the FLE plus the SATP in United States history from 1877 and English II. Students who began high school in 2001–2002 had to pass the math section of the FLE plus the SATP in United States history from 1877, English II, and biology. Students who began high school in 2002–2003 were the first class to not take the FLE and take all four sections of the FATP. These tests must be passed for graduation, even if the tests were taken while the student was still in junior high school. Note that the tests may be taken in junior high school because they are end-of-course exams and accelerated students may take the class that is matched to an exam while still in junior high.)

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 117.

313. *Id.* at 116–17.

314. *Id.* at 118.

315. *Id.*

316. *Id.*

317. *Id.*

Science will be added for the class of 2005.<sup>318</sup> The test consists of multiple-choice questions and a writing prompt.<sup>319</sup> It is first given in the tenth grade, and students have six opportunities to retake it before the end of the twelfth grade.<sup>320</sup> Students may appeal their test scores, and students with disabilities may take the test with accommodations.<sup>321</sup> Passing scores were not yet been determined at the writing of this paper, thus data regarding passage rates is not available.<sup>322</sup>

#### 14. *New Jersey*

New Jersey is phasing out the High School Proficiency Test-11 (HSPT-11) and replacing it with the High School Proficiency Assessment (HSPA).<sup>323</sup> The HSPA tests mathematics and language arts literacy with multiple-choice, short answer, and writing prompt questions.<sup>324</sup> The HSPA was first given in March 2002 and was required for graduation beginning in 2003.<sup>325</sup>

The HSPA is first given in the eleventh grade, and is a standards-based exam aligned to eleventh grade standards.<sup>326</sup> Students have two chances to retake the test prior to the end of the twelfth grade.<sup>327</sup> All students may take an alternative assessment, and special education students may request an exemption or accommodations.<sup>328</sup>

Students must score at the “partially proficient” level in order to pass the HPSA.<sup>329</sup> “Advanced proficient” students achieve a scaled score of 250 on a scale of 100 to 300; “proficient” students achieve a score of 200; and “partially proficient” students have a scaled score below 200.<sup>330</sup>

#### 15. *New Mexico*

In 1986, New Mexico began administering the New Mexico High School Competency Examination (NMHSCE)—a test that is aligned to

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318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 119.

323. *Id.* at 120.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 121.

330. *Id.*

the New Mexico Content Standards and Benchmarks.<sup>331</sup> However, beginning with the 2003–2004 school year, the state will administer a new standards-based exam known as the New Mexico High School Standards Assessment (NMHSSA).<sup>332</sup> The NMHSSA is a multiple-choice, short answer, writing prompt, and extended/performance task exam that covers the subjects of reading, language arts, mathematics, science, social studies, and writing.<sup>333</sup> It was first required for graduation in 1990.<sup>334</sup> The exam is administered to tenth graders who then have four additional opportunities to pass the exam before the end of twelfth grade.<sup>335</sup>

Any student may apply to waive the exam, appeal the results, or take an alternative assessment.<sup>336</sup> Special education students may also be exempted from the exam or take it with accommodations.<sup>337</sup> Additionally, in New Mexico, all of the tests are available in Spanish.<sup>338</sup>

Students must earn a scaled score of 175 to pass reading, language arts, math, science, and social studies.<sup>339</sup> Writing is scored on a rubric with scores from 0 to 6, and students must achieve at least a score of 3.<sup>340</sup>

In the 2000–2001 school year, 64% of the students passed all six subjects on the first attempt.<sup>341</sup> In a test-by-test analysis, 92% passed reading, 82% passed language arts, 82% passed math, 80% passed science, 79% passed social studies, and 95% passed writing.<sup>342</sup> By contrast, only 19% of special education students passed all six subjects on the first attempt with 66% passing reading, 37% passing language arts, 43% passing math, 42% passing science, and 44% passing social studies.<sup>343</sup> No passage rates for special education students were reported for writing.<sup>344</sup>

It should be noted, too, that all of these passage rates reflect a drop in passage rates across New Mexico due, in part, to raising the required score from 150 to 175.<sup>345</sup>

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331. *Id.* at 122.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 123.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

*16. New York*

In 1996, New York began to phase out its minimum competency exit exams, known as the Regents Competency Tests, and began to phase in more challenging end-of-course exams known as the Regents Comprehensive Examinations (“Regents exams”).<sup>346</sup> The freshman class of 1996 was required to pass the English Regents exam before graduation in 2000.<sup>347</sup> The graduating class of 2003 was the first class to be required to take all five Regents exams: English, mathematics, global history and geography, United States history and government, and science.<sup>348</sup> Students take the exams at the end of each tested course.<sup>349</sup> Students may retake the exams three times a year for as many years as necessary.<sup>350</sup> All students may take an alternative assessment, and students with disabilities may request an exemption or take the tests with accommodations.<sup>351</sup> It should be noted, too, that students may submit SAT II, Advanced Placement (AP), and International Baccalaureate Examination scores in place of Regents exams.<sup>352</sup> Additionally, the state has versions of the test available in Chinese, Haitian, Creole, Korean, Russian, and Spanish.<sup>353</sup>

Passing scores were initially set at 55, but the class of 2005 will be required to pass with a score of 65.<sup>354</sup> By graduation in 2000, 90% of students passed English with the required score of 55, and 63% of students with disabilities passed.<sup>355</sup> If students had been required to achieve the increased minimum score of 65, 75% of all students would have passed, and 36% of students with disabilities would have passed.<sup>356</sup>

The reaction to the Regents Exam varied widely. City University of New York (CUNY) voted to use student’s scores on the English portion of the Regents exam rather than using its own placement tests to place students in college English courses.<sup>357</sup> On the other hand, there was also some serious backlash to the adoption of the Regents exams. Students Against Testing (SAT) has worked to build a group of local students to

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346. *Id.* at 124.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 125.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* at 25.

fight against all standardized testing, including exit exams.<sup>358</sup> In 2001, over 25 organizations including the United Federation of Teachers, the Puerto Rican Legal Defense and Education Fund, the Association for Children with Learning Disabilities, and the National Center for Restructuring Education, Schools, and Teaching, demonstrated in Albany against high-stakes testing.<sup>359</sup> In 2002, the Scarsdale Board of Education issued a detailed list of complaints about New York's entire assessment system, indicating, "[a] reliance on testing has not been shown to yield long-term growth in learning or the meaningful education that should be the goal of every school."<sup>360</sup>

### 17. North Carolina

North Carolina high school students currently must pass the North Carolina High School Competency Test to graduate.<sup>361</sup> The Competency Test is aligned with eighth grade standards in reading comprehension and mathematics.<sup>362</sup> The test is purely multiple-choice.<sup>363</sup> It was first given in the 1994–1995 school year to ninth graders, and was required for graduation beginning in 1998.<sup>364</sup> Students must achieve Level III proficiency out of four levels to pass.<sup>365</sup> Students have five opportunities to pass it before the end of twelfth grade, but may take the test on multiple occasions until the age of 21.<sup>366</sup> Special education students may take the test with accommodations.<sup>367</sup> In 2001, 77 percent of all students passed both reading comprehension and math. No scores were reported as disaggregated for disabled students.<sup>368</sup>

### 18. Ohio

Since 1990, Ohio has based its high school graduation on the 9th Grade Proficiency Tests.<sup>369</sup> However, beginning in the spring of 2003,

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358. *Id.* at 87.

359. *Id.*

360. *Id.* Note that the state is developing a new exit exam—the North Carolina High School Exit Exam—to replace the minimum competency North Carolina High School Competency Test.

361. *Id.* at 126.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* at 127. (Level I—Limited Performance; Level II—Not Yet Proficient; Level III—Proficient; Level IV—Exceeds Expectations)

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* at 128.



Ohio began administering a new set of standards-based exams known as the Ohio Graduation Tests (OGT).<sup>370</sup> These exams test reading and mathematics.<sup>371</sup> The class of 2007 will be the first class required to pass the OGT.<sup>372</sup>

The 9th Grade Proficiency Tests have been available for retesting two times per year with an extra “seniors only” administration in May.<sup>373</sup> Students have also had the opportunity to retake the tests after the end of twelfth grade.<sup>374</sup>

Students with disabilities could apply for an exemption to taking the 9th Grade Proficiency Tests.<sup>375</sup> They could also take the tests with accommodations.<sup>376</sup>

On the 9th Grade Proficiency Tests, students had to score at least 200 as a scaled score in reading, math, citizenship, and science, as well as, score a 5 on an eight-point rubric in writing.<sup>377</sup> In 2001, 92% of all students passed the writing test, 91% passed reading, 73% passed math, 83% passed citizenship, and 78% passed science.<sup>378</sup> The scores were not disaggregated to allow for a comparison of passage rates for students with disabilities.<sup>379</sup>

## 19. South Carolina

South Carolina administers the Basic Skills Assessment Program (BSAP) High School Exit Exam, a minimum competency exam in the areas of reading, mathematics, and writing.<sup>380</sup> It was first given in 1986, and the class of 1990 was the first class required to pass it to earn a diploma.<sup>381</sup> Students take the BSAP beginning in the tenth grade.<sup>382</sup> The exam is comprised of multiple-choice and short answer questions, as well

370. *Id.*

371. *Id.* (Ohio’s phase-in of each test has been fairly complicated. The 9th Grade Proficiency Tests were first required for graduation in 1994. Chartered nonpublic schools were required to give the test, too, and it became a diploma requirement for such schools in 1999. Initially, the 9th Grade Proficiency Test measured competency at the eighth grade level in writing, reading, mathematics, and citizenship. Beginning with the class of 2001, students also had to pass a test in science.)

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.* at 129.

378. *Id.*

379. *Id.*

380. *Id.* at 130.

381. *Id.*

382. *Id.*

as, a writing prompt.<sup>383</sup> Students have four opportunities after the initial examination to take and pass the test with additional opportunities to pass after the twelfth grade.<sup>384</sup> Accommodations are allowed for students with disabilities.<sup>385</sup> Students must earn a scaled score of 700 in reading and mathematics and a rubric score of 3 on the writing.<sup>386</sup>

In 2001, 85% of all students passed the reading portion of the BSAP, 81% passed mathematics, and 86% passed writing.<sup>387</sup> By contrast, 49% of special education students passed reading, 51% passed math, and 57% passed writing.<sup>388</sup>

## 20. Tennessee

Tennessee is in the process of phasing out its Tennessee Competency Test and replacing it with the Gateway Examinations.<sup>389</sup> Students graduating in 2005 will be the first required to pass the Gateway Examinations to graduate.<sup>390</sup> These exams will be administered as standards-based exams aligned with tenth grade standards.<sup>391</sup> The exams are comprised of multiple-choice and writing prompt questions.<sup>392</sup> Students first take the exams after they complete the requisite coursework, and then have three times each year to retake the exams before the end of twelfth grade.<sup>393</sup> Students with disabilities may take the exams with accommodations.<sup>394</sup>

Scores are based on proficiency levels of “below proficient,” “proficient,” and “advanced.” Students must achieve the “proficient” level to pass.<sup>395</sup> In the fall of 2001, 76% of all students passed the Algebra I exam and 95% passed Biology I. Passage rates were not reported for English II in the sources consulted by the author.<sup>396</sup> The scores were not disaggregated for students with disabilities.<sup>397</sup>

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383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at 131.

387. *Id.*

388. *Id.*

389. *Id.* at 132.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* at 133.

396. *Id.*

397. *Id.*

## 21. *Texas*

Texas has phased out its Texas Assessment of Academic Skills (TAAS) and end-of-course exams and has replaced them with the Texas Assessment of Knowledge and Skills (TAKS), a standards-based exam.<sup>398</sup> The TAKS tests in the areas of English language arts, math, social studies, and science.<sup>399</sup> A combination of multiple-choice, short answer, and writing prompt questions, the TAKS was first administered during the 2002–2003 school year, but will not be required for graduation until 2005.<sup>400</sup> The TAKS is given to eleventh graders and retake opportunities are still being determined.<sup>401</sup>

Students with disabilities may take the test with accommodations, and may also request an exemption from the Admission, Review and Dismissal (ARD) Committee.<sup>402</sup> If the Committee grants the exemption, the Committee must also choose an alternative assessment or alternative assessments for the student to take.<sup>403</sup> Passing scores have not yet been determined, nor have they been reported, because the 2002–2003 school year was the first year the TAKS was given.<sup>404</sup>

## 22. *Utah*

The Utah Basic Skills Competency Test (UBSCT) is a minimum-competency exam aligned to the Utah State Core Curriculum.<sup>405</sup> It tests reading, writing and mathematics with multiple-choice, short answer, and writing prompt questions.<sup>406</sup> It was first administered in February 2003 to tenth graders and will not be required for graduation until 2006.<sup>407</sup> Students will have four opportunities to retest before the end of twelfth grade, and if necessary, they will have the opportunity to go through adult education and retest after twelfth grade.<sup>408</sup> Students with disabilities are allowed to take the exam with accommodations or to take alternative assessments.<sup>409</sup>

Passing scores had not been determined as of August 2002, and

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398. *Id.* at 134.

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.* at 135.

403. *Id.*

404. *Id.* at 134.

405. *Id.* at 136.

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

because the first administration was in 2003, scores are not available for reporting.<sup>410</sup> Utah has granted reciprocity to all other states that give exit exams, so if a student passes in another state, there is no need to retest in Utah.<sup>411</sup> The state is also developing a test for mathematics in Spanish.<sup>412</sup>

### 23. *Virginia*

Virginia is currently in the process of switching from the Literacy Passport Test to the Standards of Learning (SOL) end-of-course tests.<sup>413</sup> The class of 2004 will be the first to be required to pass the SOL tests to graduate.<sup>414</sup> These tests are aligned with the Virginia Standards of Learning.<sup>415</sup> Students graduating in 2004 must pass the “English: Writing” test and the “English: Reading Literature and Research” tests in addition to four other end-of-course tests of the student’s choosing in mathematics, history, or science.<sup>416</sup> Beginning with the class of 2007, students will be required to pass both English tests, one test in mathematics, history, and science, and one test of their own choosing in order to earn a diploma.<sup>417</sup>

The SOL tests are comprised of multiple-choice and writing prompt questions.<sup>418</sup> Students are tested at the end of the pertinent courses and may retake the tests three times each year until the end of twelfth grade.<sup>419</sup> Students with disabilities may take the tests with accommodations.<sup>420</sup> Students may substitute SAT II, Advanced Placement (AP), and International Baccalaureate Exams for some of the SOL tests.<sup>421</sup>

The tests are scored on a scale of 0 to 600 with a score of 400 required to pass or be “proficient.”<sup>422</sup> All students will be placed at the “below proficient,” “proficient,” or “advanced” level.<sup>423</sup>

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410. *Id.* at 137.

411. *Id.*

412. *Id.*

413. *Id.* at 138.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 138–39. (The state offers end-of-course exams in: math (Algebra I, Algebra II, Geometry), science (Earth Science, Biology, Chemistry), history (U.S. History, World History I, World History II, World Geography).

418. *Id.* at 138.

419. *Id.*

420. *Id.*

421. *Id.* at 139.

422. *Id.*

423. *Id.*

The SOL tests were first given in 1998. In 2001, 82% of all students passed the “English: Reading, Literature, and Research” test, and 84% passed the “English: Writing” test.<sup>424</sup> By contrast, 43% of students with disabilities passed the “English: Reading, Literature, and Research” test, and 43% passed the “English: Writing” test.<sup>425</sup>

#### 24. Washington

The Washington Assessment of Student Learning (WASL) is aligned to the tenth grade standards and was given for the first time in 2001.<sup>426</sup> It is comprised of multiple-choice, short answer, writing prompt, and extended/performance task questions in English language arts and mathematics.<sup>427</sup> With perhaps the longest phase-in, the WASL will not be a graduation requirement until 2008.<sup>428</sup>

Retake opportunities, exemptions, waivers, accommodations, alternative assessments, and so forth have not yet been determined.<sup>429</sup> Passing scores also need to be set.<sup>430</sup> Thus, passage rates are not yet reported. The use of the WASL is currently for school improvement purposes only.<sup>431</sup>

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As the above state exit exam summaries show, exit exams are far from uniform. Some are minimum competency, some are standards-based, and some are end-of-course exams. Some states use only multiple-choice questions; others use all types of questions available. Each state determines the difficulty of the exam, the format, the content, and the timing. Each state determines whether students with disabilities can file a waiver, take the test with accommodations, take an alternative assessment, or be exempted and still graduate. Regardless of the make-up of the exam, statistics show that when it is required for high school graduation, the stakes are high, particularly for special education students.

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424. *Id.*

425. *Id.*

426. *Id.* at 140.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* at 141.

431. *Id.*

III. HIGH SCHOOL EXIT EXAMS AND IDEA<sup>432</sup>

“For students, the state test with the highest stakes is the mandatory high school exit examination.”<sup>433</sup> But the stakes are highest for students who do not fit the general education mold: students with disabilities, students who fall below the poverty line, students who are second language learners, and minorities. “Instead of promoting educational excellence for all students, high-stakes tests often unfairly deny educational opportunities to students based on their . . . disability.”<sup>434</sup>

Students with disabilities tend to perform at a lower rate than their peers on high school exit exams—even those that are minimum competency exams. In no state does the passage rate for disabled students equal that of all students. This makes disabled students ineligible for a high school diploma at a greater rate than most students.

Because there are inherent differences between the Individuals with Disabilities Education Act (“IDEA ‘97,” hereinafter “IDEA”) and high school exit exam legislation and requirements, it would appear that most states are in violation of IDEA. However, because no plaintiff has ever proven that a high school exit exam or the denial of a high school diploma robs a student of a free appropriate public education (FAPE), complaints brought to court under IDEA or Section 504 usually fail.<sup>435</sup> IDEA is a strong weapon for children with disabilities in many settings, but it has not been much help in challenging high-stakes exit exams.<sup>436</sup>

Furthermore, challenges under Section 504 of the Rehabilitation Act of 1974 often fail because students cannot show that they are “otherwise qualified”<sup>437</sup> for graduation because they did not meet, even with reasonable accommodations, the other graduation requirements of

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432. High school exit exams have also been challenged on due process grounds. However, due process is not the topic of this paper so it will not be covered here. For a good summary and discussion of case law involving due process and high school exit exam issues, see *Rene ex rel. Rene*, 751 N.E.2d at 740–45.

433. Chudowsky et al., *supra* n. 8, at 19.

434. Adele P. Kimmel, *Standardized Tests: Low Marks for Fairness*, 37 *Trial* 41, 41 (Feb. 2001).

435. Thomas & Russo, *supra* n. 8, at 159. See *Brookhart*, 697 F.2d at 183 (“ . . . [H]andi-capped children who have been receiving the special education and related services required by the Act, but are unable to achieve the educational level necessary to pass the [exam], is not a denial of a ‘free appropriate public education.’”); *Ambach*, 436 N.Y.S.2d at 570. (The petitioners alleged violation of the EAHCA (a predecessor to IDEA), alleging they had been denied an FAPE. The court held that the denial of the diploma was not a violation of EAHCA because the diploma is not a necessary part of an appropriate education—specific results are not required; only appropriate access is required.)

436. O’Neill, *supra* n. 7, at 206–07.

437. *Brookhart*, 697 F.2d at 183–84. (An “otherwise qualified” individual can meet the program requirements despite a disability. Altering the content of the test is not necessary, but a state needs to offer retake opportunities and modifications.)

passing certain courses and/or achieving a certain number of credits.<sup>438</sup> Although tests must accommodate students with physical disabilities (i.e., the test must be available in Braille for the blind), Section 504 does not require schools to lower or substantially modify their standards to accommodate students with disabilities.<sup>439</sup> Section 504 guarantees only an appropriate education, not a diploma.<sup>440</sup>

Courts evaluating high-stakes tests like high school exit exams have found the tests to be discriminatory and in violation of due process rights, IDEA, or Section 504 in only a few cases and only when: (1) the tests are not used for the purpose for which they were designed or validated;<sup>441</sup> (2) the test score is the sole basis for an educational decision;<sup>442</sup> (3) there is no sound educational basis for the required passing or cutoff score;<sup>443</sup> and (4) the test predicts differently for different groups (i.e., when a test overestimates the future performance of one group and underestimates another) or contains a possible cultural bias.<sup>444</sup> Students must also be given adequate notice of the exam's administration.

Other factors examined include whether states allow modifications or accommodations on the test and whether alternative assessments are available. In addition, practitioners speak about the role of the IEP team, issues with neglecting the IEP, and procedural safeguards as possible factors that could sway a court's decision in finding that exit exams, as administered in some states, are in violation of IDEA.

### A. *Reliable and Valid*

In testing reliability, courts have indicated that exit exams can be successfully challenged if it is shown that the exam does not match what is taught in the classroom.<sup>445</sup> A graduation exam is fundamentally unfair if the information on it was not taught in the schools of the state.<sup>446</sup> There does not have to be an actual one-to-one correspondence between what is taught in the classroom and what is on the test; rather, the exam

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438. Thomas & Russo, *supra* n. 8, at 160.

439. *Id.*

440. *Ambach*, 436 N.Y.S.2d at 569.

441. *See Sharif v. N.Y. St. Educ. Dept.*, 709 F. Supp. 345, 361-62 (S.D.N.Y. 1989).

442. *See U.S. v. Fordice*, 505 U.S. 717, 734-35, 738 (1992).

443. *See Groves v. Ala. St. Bd. of Educ.*, 776 F. Supp. 1518, 1530-31 (M.D. Ala. 1991). (Due process violations are not the topic. However, because they have bearing on IDEA violations, some of them are discussed.)

444. *See Larry P. v. Riles*, 793 F.2d 969, 980-81 (9th Cir. 1984).

445. *Debra P. v. Turlington*, 730 F.2d 1405, 1409 (11th Cir. 1984).

446. *See Debra P. v. Turlington*, 644 F.2d 397, 404 (5th Cir. 1981); *Rene ex rel. Rene*, 751 N.E.2d at 741.

must match state standards and what is expected to be taught in the classroom.<sup>447</sup> Simply put, the question courts ask is: Are states teaching what is on the test?<sup>448</sup>

Additionally, IDEA states that “any standardized tests that are given to the child [must] have been validated for the specific purpose for which they are used.”<sup>449</sup> To be valid, the test must measure what it says it will measure—an algebra test must test algebra; a spelling test must test spelling, not reading comprehension.

The main problem states encounter is that accommodations and modifications for special education students may render the test invalid. The test producer is the one responsible for determining which modifications or accommodations can be used and still produce valid scores.<sup>450</sup> Modifications and accommodations will be discussed further at a later part of this section.

### B. Sole Basis for Decision

Courts have held that, for all students, a state’s high school exit exam cannot be the only basis for receiving a diploma.<sup>451</sup> Multiple measures must be involved such as passing designated courses, maintaining a certain grade point average, maintaining a certain attendance record, and, in some states, passing an exit exam. IDEA provides that “in conducting the evaluation, the [district] shall use a variety of assessment tools and strategies to gather relevant . . . information.”<sup>452</sup> Additionally, IDEA’s statutory language specifically states that the state or district cannot “use any single procedure as the sole criterion for . . . determining an appropriate educational program for the child . . . .”<sup>453</sup>

Illinois’ exit exam was scrutinized under this provision of the law in 1983.<sup>454</sup> The Seventh Circuit held that the exit exam clearly was not the sole criterion for graduation given the threefold requirement of “earning seventeen credits, completing State requirements such as a constitution

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447. Thomas & Russo, *supra* n. 8, at 161–63.

448. *Debra P.*, 730 F.2d at 1409.

449. 20 U.S.C. §1414(b)(3)(B) (2000).

450. Michael E. Smith, *High Stakes Testing of Students with Disabilities* <<http://www.lozanosmith.com/presentations/high-stakes.html>> (accessed Mar. 30, 2002).

451. *G.I. Forum v. Tex. Educ. Assn.*, 87 F. Supp. 2d 667, 670 (W.D. Tex. 2000).

452. 20 U.S.C. § 1414(b)(2)(A) (2000); *see also* 34 C.F.R. § 300.532(b) (1999).

453. 20 U.S.C. § 1414(b)(2)(B) (2000); *see also* 20 U.S.C. §1412(a)(6)(B) (2000); 34 C.F.R. § 300.532(f) (1999).

454. Note that the case to be explained took place in 1983 when the legislation challenged was the EAHCA. However, the statutory language referred to in the case is identical to the language of today’s IDEA. *See Brookhart*, 697 F.2d at 182–83.



test and a consumer education course, and passing the [exit exam].”<sup>455</sup>

Experts disagree with the Seventh Circuit’s assessment of graduation requirements. They say that in essence, exit exams are the sole criterion for deciding who gets a high school diploma:

[E]xit exams, by their very nature, operate as a sort of a sole criterion. Most states with exit exams require students to satisfactorily complete all of their coursework *and* pass the exam . . . . Each requirement essentially acts as a single measure, because a failure to achieve either one bars the path to a diploma. For students who finish the coursework, but do not pass the exam, the test becomes the sole criterion for graduation. In contrast, a true multiple measures scenario might allow good grades to compensate for failing the exit exam. But, these policies are rare and have their own drawbacks; for example, many people do not trust the meaning or credibility of course grades.<sup>456</sup>

To avoid challenges that the exit exam is the sole basis for graduation, all states have implemented policies that they feel safeguard students and give them additional options if they cannot pass the exam. The first of these safeguards is providing multiple opportunities to retake the test.<sup>457</sup> The problem with this “safeguard” is that students are still taking the same test—not an alternative assessment as will be discussed *infra*—each retake is simply a parallel version of the initial exam.<sup>458</sup>

Some states have put other safeguards into place such as an alternative state assessment. In New Jersey, for example, twelfth graders who have failed numerous retakes of the state exit exam may participate in the Special Review Assessment process (SRA).<sup>459</sup> A student who passes this process may graduate.<sup>460</sup> New York and Virginia allow schools to use substitute tests in place of the state exit exams, but these “substitute tests” may not be an option for special education students because the only substitute tests allowed are the AP, International Baccalaureate, and SAT II exams.<sup>461</sup> At least four states (Indiana, Massachusetts, Minnesota, and Mississippi) have a waiver or appeals process as a safeguard for students who repeatedly fail.<sup>462</sup> Indiana looks for a “C” grade or better in required courses and a letter from the principal or a teacher in the failed subject area of the test. Massachusetts approved an appeals process that permits

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455. *Id.* at 183.

456. Chudowsky et al., *supra* n. 8, at 62.

457. *Id.* at 63.

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

high school seniors with solid academic records but repeated failure on the exam to “present supplemental evidence of their achievement to a special board appointed by the Commissioner of Education.”<sup>463</sup>

But none of these safeguards works for every special education student, and the biggest problem for states is often the lack of individualization and flexibility for individual needs in these exit exam requirements. For many students, the exam may, indeed, operate as the sole barrier to a high school diploma.

### C. Possible Bias

High stakes tests may be harmful for students with disabilities because they are often developed and implemented with little thought for the impact they will have on such students.<sup>464</sup>

The sample population that is used by test developers to set the average scores for the tests usually does not include students with disabilities. When disabled students are included in the sample population, it is often unintentional, and the performance of these individuals is not separately tracked. Most testing publishers also do not give students with disabilities accommodations they need when testing a sample population, thus leading to a dearth of information and research about the true effect of an accommodation on a testing situation.<sup>465</sup>

Some say this lack of test development with special education students in mind is in direct violation of the IDEA. IDEA guarantees that testing used in evaluation of special education students will not be discriminatory.<sup>466</sup> Further, IDEA indicates that test materials should be available in a student’s native language.<sup>467</sup> Very few states offer exit exams in other languages. Granted, a test of English should be in English because that is the purpose of that test. But a test of mathematics need not be administered in English as language acquisition or mastery is not the objective of the test.

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463. *Id.*

464. PR Newswire (Portland, Oregon), *Students with Learning Disabilities and State of Oregon Settle Class Action Suit Over High Stakes Assessments in Public Schools: Panel of National Experts will Issue First Major Report and Recommendations on Public School Testing and Children with Learning Disabilities* <[http://www.wrightslaw.com/law/news/OR\\_settlement\\_dyslexia.htm](http://www.wrightslaw.com/law/news/OR_settlement_dyslexia.htm)> (Feb. 1, 2001) (accessed Jan. 23, 2003).

465. Disability Rights Advoc., *Do No Harm—High Stakes Testing and Students with Learning Disabilities* 3 (Disability Rights Advoc. (2001) (available at <<http://www.draregal.org/publications.dnh.pdf>> (accessed Oct. 20, 2003)).

466. 20 U.S.C. §1412(a)(6)(B)

467. *Id.*

As a result of faulty development processes, a student's performance on these tests may reflect that student's disability.<sup>468</sup> For example, standardized tests like exit exams assume that each student taking the test will read it in the same manner. However, research proves that some students with learning disabilities cannot process words like other students can. Some of these students feel like they are encountering a word for the first time every time they read it. Consequently, just the process of reading the exam can be a slow and tiring one. Content is often lost because the process of reading becomes the focus. The student then struggles just to read the test and does not concentrate on answering the questions. Thus, the student's disability, rather than ability, is assessed.<sup>469</sup>

Another way that exit exams directly test a student's disability is that they are usually required to be handwritten. Students are not allowed to use computers or typewriters. "Not only is it hard to understand any rationale for this requirement in this modern age of technology and computers, but many students with learning disabilities require a computer or wordprocessor [sic.] as a writing tool because their disability impairs the physical act of writing."<sup>470</sup> Many of these students are accustomed to using such technology as part of their every day assignments because the student's IEP or Section 504 Plan mandates it.<sup>471</sup>

Thus, to rid the exam of possible bias, test developers and state legislators need to be mindful of the population for which the exit exams were designed. They should also be sure that students are not penalized on the exams because they are second language learners or are in need of an accommodation like the use of a word processor.

Critics lament that bias is not only built into the test for special education students, it is also a result of the test. Some of the biggest criticisms of high school exit exams are that they "lead to higher dropout rates, place too much weight on a single imperfect measure, and do nothing to ensure that students have an opportunity to learn the material being tested."<sup>472</sup>

The earning of a diploma directly affects a student's future. Proponents of exit exams argue that if students cannot pass "the test," then they do not deserve a diploma and they can take the GED or another high school equivalency test. The fact is that a certificate of General Educational Development (GED) is not equivalent to a high

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468. PR Newswire, *supra* n. 464.

469. Disability Rights Advoc., *supra* n. 465, at 3.

470. *Id.* at 4.

471. *Id.*

472. Chudowsky et al., *supra* n. 8, at 9.

school diploma.<sup>473</sup> “The consequences of graduation and diploma policies last well beyond the time when a student is in school. Efforts to make the high school diploma mean something should be combined with efforts to prevent negative effects on students.”<sup>474</sup> Students who graduate from high school “are more likely to remain married and avoid incarceration. They are also less likely to bear children out of wedlock or become welfare-dependent.”<sup>475</sup> Students who leave high school without a diploma have limited choices for post-school employment. They are excluded from military service, formal post-secondary education, and high-paying jobs.<sup>476</sup>

#### D. Notice

Students may be negatively impacted by inadequate notice of the exam’s implementation. One of the seminal cases on the issue of notice and high school exit exams is *Board of Education v. Ambach*. Abby and Richard were disabled high school students within the definition of the Education for All Handicapped Children Act (“EAHCA”)—the predecessor to IDEA.<sup>477</sup> They brought suit in New York Supreme Court alleging, among other things, that the denial of their high school diplomas for failing to pass a high school exit exam was a violation of the EAHCA.

The court held that the denial of diplomas was an EAHCA violation because Richard and Abby had not received education commensurate with being able to pass the exam because students were not made aware of this requirement until April 1979.<sup>478</sup> There was no way for Abby’s and Richard’s IEP teams to fashion programs so that students could pass the exit exam by June 1979.<sup>479</sup> The court held that “[e]arly notice would allow for proper consideration of whether the goals of the students IEP should include preparation for the [exam] and would afford an appropriate time of instruction aimed at reaching that goal.”<sup>480</sup> Given that the notice was less than two school years, the notice was inadequate.<sup>481</sup>

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473. Paul E. Peterson, *Our Schools and Our Future . . . Are We Still at Risk?: Little Gain in Student Achievement* 57 (Paul E. Peterson ed. Hoover Instn. 2003) (available at <<http://www-hoover.stanford.edu/publications/books/osof.html>> (accessed Oct. 20, 2003)).

474. Martha L. Thurlow & S. Thompson, *Diploma Options and Graduation Policies for Students with Disabilities, Policy Directions No. 10* (Nat. Ctr. on Educ. Outcomes Jan. 2000) (available at <<http://education.umn.edu/nceo/OnlinePubs/Policy10.htm>> (accessed Mar. 30, 2003)).

475. Peterson, *supra* n. 473, at 55.

476. Guy et al., *supra* n. 77.

477. See *infra* Part I for a discussion of the EAHCA.

478. *Id.* at 574. Note that administrators were first given notice of the exam in April 1976. *Id.* at 573.

479. *Id.* at 573.

480. *Id.* at 574–75.

481. *Id.* at 575.

The decision in *Ambach* was used by the Seventh Circuit in determining *Brookhart v. Illinois* one year later in 1982, and is still being used today in cases like *Smiley v. California Department of Education*, decided in December 2002 in the Ninth Circuit.<sup>482</sup> The *Brookhart* court held specifically that “[d]enial of sufficient notice would make denial of a diploma and its attendant injury to reputation fundamentally unfair.”<sup>483</sup>

*Brookhart* involved fourteen elementary and secondary special education plaintiffs who manifested a broad spectrum of handicapping conditions.<sup>484</sup> Of the fourteen, eleven were notified of the high school exit exam requirement during their junior year of high school. As a result of this late notification, 90% of the material on the test was not included on the students’ IEPs nor had they been taught the information.<sup>485</sup> The court held that notification one and a half years prior to graduation was insufficient time to tailor the students’ IEPs to reflect the test content and objectives.<sup>486</sup> Goals needed to be rewritten and content taught.<sup>487</sup> Plus, the court noted that these students presumably learn more slowly than their peers.<sup>488</sup> Adequate notice allows for (1) proper consideration of IEP goals and objectives in light of the exam, and (2) appropriate time for instruction.<sup>489</sup>

Despite establishing guidelines for appropriate notice, however, the court did not determine an actual definition or timeframe for “adequate notice.”

Though we are unable on this record to define ‘adequate notice’ in terms of a specific number of years, the School District can be assured that the requirement would be satisfied if one of the following two conditions for adequate notice is met. The School District can, first, ensure the handicapped students are sufficiently exposed to most of the material that appears on the [exam], or, second, they can produce evidence of a reasoned and well-informed decision by parents and teachers involved that a particular high school student will be better off concentrating on educational objectives other than preparation for the [exam].<sup>490</sup>

Similar results were reached in *Rene ex rel. Rene v. Reed*. The Court of Appeals of Indiana noted that courts have held that not only must

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482. *Smiley v. Cal. Dept. of Educ.*, 53 Fed. Appx. 474 (9th Cir. 2002) (available at 2002 WL 31856343).

483. *Brookhart*, 697 F.2d at 186 (citations omitted).

484. *Id.* at 181.

485. *Id.* at 187.

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.* at 187–88.

students (1) be exposed to some of the material tested on the exit exam, but they must also (2) have adequate time to prepare for the exam.<sup>491</sup>

Most states have allowed several years between the initial introduction of the exam and withholding diplomas for failure.<sup>492</sup> Thus, most have met the requirement for adequate notice as far as adequate time is concerned.

### E. Other Issues Arising Under IDEA

#### 1. Accommodations and Modifications

“For children with disabilities, perhaps the most significant factor in implementing exit exams is allowing for proper accommodations.”<sup>493</sup> The special education plaintiffs in *Brookhart* helped set the standard for which accommodations and modifications should be allowed on high school exit exams. The Seventh Circuit held that

[a]ltering the content of the [exit exam] to accommodate an individual’s inability to learn the tested material because of his handicap would be a “substantial modification,” as well as a “perversion” of the diploma requirement. A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap. Thus denial of a diploma because of inability to pass the [exit exam] is not discrimination . . .<sup>494</sup>

However, the court also held that an otherwise qualified student who is unable to show his/her actual level of learning due to the test format or environment would be discriminated against on the basis of his/her disability.<sup>495</sup> Therefore, accommodations must be made so that the student’s disability is not what is tested.<sup>496</sup> For example, a blind student must be given the exam orally or in Braille.<sup>497</sup> IDEA requires that a test “accurately reflect the student’s aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student’s impaired sensory, manual, or speaking skills . . .”<sup>498</sup>

There are two main concerns surrounding modifications and accommodations. The first is explained in *Brookhart*—the test should not test a student’s disability.<sup>499</sup> The second concern is that the validity of the

491. *Rene ex rel. Rene*, 751 N.E.2d at 741–42.

492. Chudowsky et al., *supra* n. 8, at 12.

493. O’Neill, *supra* n. 7, at 191.

494. *Brookhart*, 697 F.2d at 184.

495. *Id.* (quoting *Brookhart*, 534 F. Supp 725, 728 (C.D. Ill. 1982)).

496. *Id.*

497. *Id.*

498. *Id.* (quoting 34 C.F.R. § 104.35(b)(3); see also 34 C.F.R. § 300.532(b)(3)).

499. 697 F.2d at 184.

test be preserved, as discussed *supra* in section III.A. As a result, there are four main types of accommodations that can be given without altering the validity of the test: (1) *presentation accommodations* such as the use of Braille, large print versions of the test, reduced items per page and similar changes in the presentation; (2) *response accommodations* such as signed responses; (3) *scheduling accommodations* such as administering the test over several days or giving extended time periods for testing in a given day; and (4) *setting accommodations* such as providing a distraction-free environment or the use of special lighting or adaptive furniture.<sup>500</sup>

The danger is that a particular accommodation may either provide too weak a correction or an excessive one, which may unintentionally diminish or enhance the child's performance and therefore invalidate the test. For example, if a child with poor motor skills were allowed to dictate his answers to a writing test designed to measure handwriting skill, the objective of the test would be compromised by the accommodation.<sup>501</sup>

Some of the accommodations listed on students' IEPs and used daily in the classroom do not preserve the validity of the test. These accommodations are known as modifications because they materially alter the exam. Some examples of modifications are using a calculator, having a reader read the questions on a reading test, and using spell or grammar check.

In the reauthorization of IDEA in 1997, Congress intentionally gave attention to accommodations and modifications that may be necessary to give a special education child access to the general education curriculum and assessments.<sup>502</sup> This is why an IEP must include a statement of accommodations and modifications based on a student's strengths and weaknesses in the area of assessment.<sup>503</sup>

On August 24, 2000, the United States Department of Education, Office of Special Education Programs released a memorandum stating that neither the state nor the district "can limit the authority of the IEP team to select individual accommodations and modifications in administration needed for a child . . . with a disability to participate in [the] assessments of student achievement."<sup>504</sup> Nevertheless, the state and district must make sure that assessments are valid, reliable, and consistent with professional and technical standards, particularly for assessments that

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500. Smith, *supra* n. 450; O'Neill, *supra* n. 7, at 191-92 (citing Natl. Research Council, *High Stakes: Testing for Tracking, Promotion, and Graduation* 195 (J.P. Heubert & R.M. Hauser eds. 1998)).

501. O'Neill, *supra* n. 7, at 192-93.

502. Heumann & Warlick, *supra* n. 78, at 2.

503. *Id.*

504. *Id.* at 1.

will have important consequences for the student or the school.<sup>505</sup>

Thus, it is possible for an IEP team to select individual accommodations or modifications in administration that produce scores that are deemed invalid under State or local policies for purposes of reporting, accountability, or determining student benefits such as promotion or high school diplomas. Clearly, the IEP team must base all decisions regarding accommodations or modifications on a full understanding of the consequences of reporting and accountability.<sup>506</sup>

The real problem occurs when a student needs what is determined to be a modification in order to truly have access to the exam rather than have the exam test the student's disability. For example, a student with a visual discrimination disability like dyslexia may perform poorly on the written portion of an exit exam because writing is such a laborious task for him/her. The student will concentrate on penmanship and spelling rather than expressing his/her actual writing skills.<sup>507</sup> This student may use a word processor on a daily basis as an accommodation to help overcome the visual/motor problems the student experiences, but such an accommodation is not allowed on most exit exams because it is deemed to affect the validity of the test. Simply giving the student more time to complete the test will not alleviate this problem.<sup>508</sup>

Some advocates claim, as mentioned above, that test publishers create a list of acceptable accommodations and unacceptable modifications without actually testing their validity. As a result, students are discriminated against and penalized "for using a needed accommodation on an assessment simply because the test publisher has not conducted the necessary research about the effect of the particular accommodation on the test."<sup>509</sup>

One specific example of a student who experienced accommodation and modification problems is Juleus Chapman.<sup>510</sup> He had been diagnosed with dyslexia and dysgraphia making it difficult for him to write words legibly in a defined space on a page and within a normal time frame.<sup>511</sup> Modifications written into his IEP allowed him to use a laptop and a calculator during regular classroom tests.<sup>512</sup> He was told by his

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505. *Id.* at 1–2.

506. *Id.*; see also Disability Rights Advoc., *supra* n. 465, at 8–9.

507. Disability Rights Advoc., *supra* n. 465, at 6.

508. *Id.* at 10.

509. *Id.* at 9 (emphasis omitted).

510. Sandra Gonzales, *State Exit Exam Discriminates Lawsuit Alleges*, San Jose Mercury News (May 9, 2001) (available at <[http://www.wrightslaw.com/news/2001/CA\\_highstakes.htm](http://www.wrightslaw.com/news/2001/CA_highstakes.htm)> (accessed Oct. 22, 2003)).

511. *Id.*

512. *Id.*



school district in California, however, that he would not be able to use any special accommodations on the exit exam.<sup>513</sup>

Joined by other disabled students, Juleus brought suit against the California Department of Education in the Northern District Court of California seeking a preliminary injunction to stop the administration of the CAHSEE scheduled for March 2002.<sup>514</sup> The injunction was granted on five independent grounds. The court held that the administration of the CAHSEE was likely to violate rights guaranteed to learning disabled students under federal law.<sup>515</sup> Two of the grounds dealt specifically with accommodations: (1) accommodations required by law were not provided to the students, and (2) IEP teams had not had enough time to comply with the provisions of IDEA that require the IEP to include modifications for state and district-wide assessments.<sup>516</sup> When the injunction was appealed to the Ninth Circuit, the Court of Appeals upheld the injunction, confirming, in part, the grounds determined by the district court, including the need for accommodations.<sup>517</sup>

According to the December 2002 “Questions and Answers About the California High School Exit Examination” posting on the California Department of Education website, the accommodation issues in *Chapman* have been addressed. The website states that California allows accommodations consistent with an IEP or Section 504 Plan as long as they “do not alter what the test measures.”<sup>518</sup>

California has also instituted a waiver system that allows students to use modifications that would otherwise invalidate their test scores. The California Department of Education website defines modifications as

any variation in the assessment environment or process that fundamentally alters what the test measures or affects the comparability of scores. A calculator has been determined to be a modification. A student who takes one or both portions of the test with a modification and obtains a [passing] score of 350 or higher has obtained a score equivalent to a passing score. The score report will be marked “not valid” for the applicable portion of the test because the use of a modification changes the constructs of the test (what the test is measuring) and the comparability of test scores.<sup>519</sup>

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513. *Id.*

514. *Chapman*, 229 F. Supp. 2d at 983.

515. *Id.* at 983–84.

516. *Id.*

517. *Smiley*, 53 Fed.Appx. at 474–75.

518. Cal. Sch. Bd. Assn., *supra* n. 208.

519. Cal. Dept. of Educ., *supra* n. 207, at 4.

Senate Bill 1476<sup>520</sup> allows these passing students with invalid scores to request a waiver.<sup>521</sup> The request is made to the school principal who submits it to the local school board on behalf of the student.<sup>522</sup> For the board to waive the exam, the principal must certify that the pupil has all of the following:

1. An IEP or 504 Plan that requires the accommodations or modifications provided to the pupil on the high school exit exam;
2. Sufficient coursework in a high school level curriculum—sufficient to have attained the exit exam-level skills and knowledge; and
3. A score report showing the student received a passing or higher score while using a modification that fundamentally alters the exam.<sup>523</sup>

It should be noted, however, that there may not be a way to sufficiently address the issue of an exit exam testing a student's disability simply by using accommodations and modifications.<sup>524</sup> This is why IDEA also requires that school districts offer alternative assessments.

## 2. *Alternative Assessments*

When IDEA was amended in 1997, Congress added the requirement that all states and districts have alternative assessments available by July 2000 for disabled students who cannot participate in standardized tests.<sup>525</sup>

520. Cal. Sen. 1476, 2001–2002 Reg. Sess. (Sept. 23, 2002).

521. Cal. Dept. of Educ., *supra* n. 207, at 4.

522. *Id.*

523. *Id.*

524. Disability Rights Advoc., *supra* n. 465, at 10.

525. *Id.* at 6; see 20 U.S.C. § 1412(a)(17)(A):

Children with disabilities are included in general State and district-wide assessment programs with appropriate accommodations, where necessary. As appropriate, the State or local educational agency—

(i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs; and

(ii) develops and, beginning not later than July 1, 2000, conducts those assessments.

See 34 C.F.R. § 300.138:

The state must have on file with the Secretary information to demonstrate that—

(a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, in necessary;

(b) As appropriate, the State or I.E.A.—

(1) Develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs;

This requirement would include exit exams. Although, many states did not have their legislation or exit exam requirement fully in place by July 2000, states that implemented after this date were on notice of the requirement and should have simultaneously implemented an alternative assessment. Currently, states like California still do not offer an alternative assessment.<sup>526</sup>

Case law does not yet define what alternative assessments are.<sup>527</sup> Some courts like the *Chapman* court refer to them, but rarely in more detail than to lament the fact that a definition does not exist.<sup>528</sup> Courts rely on descriptions of alternative assessments as found in academic literature to define what alternative assessments are and determine if a state offers an alternative or not.<sup>529</sup> These descriptions include a number of different performance techniques that could be combined or used alone to create an alternative assessment:<sup>530</sup> portfolio-based assessments, interviews and oral presentations that allow a student to verbalize their knowledge, constructed responses that require a student to produce his/her own answer rather than selecting from a multiple-choice list, hands-on experiments that test how well a student understands scientific concepts, or projects that include demonstrations of skills and knowledge requiring a broad range of competencies.<sup>531</sup> The United States Department of Education's commentary on alternative assessments states that "alternate assessments need to be aligned with the general curriculum standards set for all students and should not be assumed appropriate only for those students with significant cognitive impairments."<sup>532</sup>

Practitioners agree that alternative assessments should be flexible and meet the needs of the individual student. Factors that should be taken into account in determining the appropriateness and content of the alternative assessment include: the nature of the student's disabilities; accommodations received in the classroom; which standards are being tested; the student's previous exposure to testing; accommodations and modifications listed on the student's IEP or Section 504 Plan; positives

(2) Develops alternate assessments in accordance with paragraph (b)(1) of this section; and

(3) Beginning not later than, July 1, 2000, conducts the alternate assessments described in paragraph (b)(2) of this section.

526. Gonzales, *supra* n. 510.

527. Smith, *supra* n. 450.

528. *Chapman*, 229 F. Supp. 2d at 986.

529. *Id.*

530. Disability Rights Advoc., *supra* n. 465, at 10-12.

531. *Id.*

532. *Id.* at 6 (quoting 64 Fed. Reg. 12564-65 (Mar. 12, 1999)).

and negatives resulting from performance on the test; and whether the exit exam, standards, or alternative assessment directly tests the student's disability.<sup>533</sup>

### 3. *Role of the IEP Team*

The IEP team has the right and power to determine how and if a student will participate in a high school exit exam.<sup>534</sup> The team determines if any accommodations or modifications are needed for the student to participate in the assessment.<sup>535</sup> If the team determines that the child should not or cannot participate in the exam, the team states in the IEP why the assessment is not appropriate and how the student will be otherwise assessed.<sup>536</sup> Note this does not mean that the IEP team has the power to define an alternative assessment for a student—that must be done by the state—but if the state offers alternative assessments, the IEP team may choose such an assessment in place of the exit exam if that is what is appropriate for the particular student. Thus, the IEP team should have the appropriate people in attendance at IEP meetings to provide the “level of expertise needed to make these decisions in an effective manner.”<sup>537</sup>

IDEA requires that the IEP team include a student's parents in this decision-making and that the team give enough information to the parents so they may make an informed decision about the content of their child's IEP.<sup>538</sup> “The concept of ‘informed consent’ in the context of high stakes testing means, in the real world, that IEP teams must help parents realistically assess whether their child is likely to pass an exit exam and receive a diploma.”<sup>539</sup> As discussed *supra* section III.D concerning notice, parents need to be informed of the necessary information as soon as possible. IEP teams cannot sit on information about the exit exam, changes in requirements, etc. They must be forthcoming with this information to parents.

This also requires IEP teams to consider what the child wants to do in the future so that if a high school diploma is required, goals are set to earn one.

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533. *Id.* at 10–11.

534. Heumann & Warlick, *supra* n. 78, at 5.

535. *Id.*

536. *Id.*

537. *Id.*

538. Smith, *supra* n. 450.

539. *Id.*

To ensure the provision of FAPE, IEP teams should also focus on transition plans, especially for disabled students at risk of failing a required exit exam. Finally, IEP teams must also explain the consequences of testing adaptations to students and parents [i.e., making a test score invalid if it is a modification, and the option of a waiver in some states]. Thus, IEP teams must be familiar with the test producer's decisions regarding accommodations and modifications so that testing consequences are explained clearly and documented on the IEP.<sup>540</sup>

IEP teams also need to be aware of the requirement under IDEA that when parental consent is sought, as in the informed consent required to make decisions about the high school exit exam, "the parent [must be] fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication."<sup>541</sup>

#### 4. *Neglecting the IEP (a.k.a. Missing in Action: Individualized and Vocational Education)*

While it is true that IDEA requires participation of special education students in general education curriculum and assessments encouraging a closer alignment of general and special education,<sup>542</sup> it is also true that one of the stated purposes of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."<sup>543</sup> In an effort to help students pass exit exams, many IEP teams and teachers forget that individualized special education, tailored to meet the needs of the student, is an essential component of each disabled child's FAPE.

Eva Baker, co-director of the National Center for Research on Evaluation, Standards and Student Testing at UCLA, feels "[t]he most perverse problem with high-stakes tests . . . is that they have become a substitute for the curriculum instead of simply a measure of it."<sup>544</sup>

Some observers have cautioned that a heavy reliance on test-based accountability could produce unintended effects on instruction. These include "teaching to the test" (teachers giving students practice exercises that closely resemble assessment tasks or drilling them on test-taking skills) and narrowing instruction to emphasize only those

540. *Id.* (emphasis omitted).

541. 34 C.F.R. § 300.500(b)(1)(i) (1999).

542. Guy et al., *supra* n. 77.

543. 20 U.S.C. § 1400(d)(1)(A) (2000).

544. Winter, *supra* n. 105.

skills assessed rather than the full range of the curriculum [or a student's individual needs].<sup>545</sup>

Increased academic requirements for obtaining a diploma necessarily decrease the amount of time available to spend on vocational skills related to employment, independent living, and social interactions.<sup>546</sup> School staffs are also doing away with electives, meetings, school activities, and discussion groups because these are not areas tested on the exit exam.<sup>547</sup>

Studies have shown that better postsecondary employment can be found if students: (1) participate in a vocational education class during the last two years of high school; (2) are competent in functional academic skills, community living, personal-social, vocational, and self-awareness skills; and (3) participate in their own transition planning.<sup>548</sup> While graduation from high school is also a factor, if the other three are not present, the likelihood of a special education student being as successful in postsecondary employment decreases.

IDEA mandates that a student's IEP include:

(I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the child including, when appropriate, a statement of the interagency responsibilities or any needed linkages . . . .<sup>549</sup>

Thus, states need to be wary of encouraging their teachers to favor exit exam curriculum too heavily by ranking schools or teachers by passage rate. Such practices create a one-sided curriculum for students and special education students suffer the most. They lose out on individualized as well as vocational education.

545. Natl. Research Council, *supra* n. 97, at 152. One author observed:

In a survey conducted by *Education Week*, 69 percent of the teachers in poor schools reported that high-stakes tests were forcing them to concentrate excessively on material covered on the tests at the expense of other subject and content areas. Similarly, in California, because history and science are not tested on the Stanford 9, teachers are teaching these subjects less often. Science and social studies teachers are being required to suspend both subjects or to replace both subjects with math for weeks before high-stakes tests are administered.

Audrey L. Amrein & David C. Berliner, *An Analysis of Some Unintended and Negative Consequences of High-Stakes Testing* 42, 42-43 (Educ. Policy Research Unit, Ariz. St. U. Dec. 2002).

546. Guy et al., *supra* n. 77.

547. Amrein & Berliner, *supra* n. 545, at 43.

548. Michael R. Benz, Lauren Lindstrom & Paul Yofanoff, *Improving Graduation and Employment Outcomes of Students with Disabilities: Predictive Factors and Student Perspectives*, 66 *Exceptional Children* (pagination not available) (July 1, 2000) (available at 2000 WL 12697213).

549. 20 U.S.C. § 1414(d)(1)(A)(vii)(II)-(I) (2000).

#### IV. IMPLICATIONS AND SUGGESTIONS FOR LOCAL SCHOOL ADMINISTRATORS AND TEACHERS

Despite any conclusion one may reach that high school exit exams are in violation of the IDEA, both high school exit exams and IDEA bind local administrators and teachers. So how do they reconcile the differences between the two? How do they prevent themselves from being caught in the crossfire? There are several specific recommendations that, if followed, will allow teachers and administrators to be in compliance with both.

Teachers and administrators need, first of all, to be aware of the legal requirements of exit exam laws and IDEA. Then, teachers and administrators need to be sure that the exit exam is administered in compliance with the law. The exam is designed to be one requirement for high school graduation. Therefore, if the student is on the graduation track, the student's IEP goals and objectives as well as the curriculum taught should work toward graduation, including the passage of the exit exam. All students and their parents need to be given adequate notice of the exit exam, and it should be discussed and planned for at IEP team meetings, based on the needs and goals of the individual student. The IEP team should also consider appropriate exit exam accommodations and modifications. These may differ from those accommodations and modifications used in the classroom every day. Additionally, the IEP team must not ignore other IEA requirements such as transition planning and vocational education.

Teachers and administrators must also help parents understand exit exams and the interplay with IDEA. Special education law tends to be fairly complicated on its own. When you combine it with exit exam requirements there is a lot to comprehend. However, if parents understand what the exit exam is, what is tested, what is at stake with a pass or fail, what accommodations are allowed by the state, and whether an appeal, waiver, or alternative assessment is available, they will be able to better participate in the IEP and the decision-making process.

If teachers and administrators follow these recommended practices, they should be able to avoid challenges by parents or the state alleging that they are not in compliance with exit exam laws or IDEA. These practices should allow school personnel to look out for the best interests of the child as well as comply with the law. Then, if parents are unhappy with exit exam practices and regulations, they can take up their grievances with the state rather than the local level, and teachers and administrators can avoid getting caught in the crossfire.

High school exit exams can be non-discriminatory and successfully administered to special education students, but teachers and administrators must be sure they do what is necessary to plan for the exam with each student, individually, so that the unique needs and educational goals of each student are not lost in the process. The exit exam is but one factor in graduation and success in school.