When Good Intentions Go Bad: The MCAS Graduation Requirement and Special Education Children

Madeline's parents adopted her from a foreign orphanage when she was three years old. Despite her age, she was unable to walk, talk, or eat solid foods. Once back in the United States, she received intensive help from her family and the local school district. Madeline was diagnosed with cognitive learning disabilities and remained in the special education program throughout her school career. In spite of these hurdles, Madeline made excellent progress, to the point of making the honor roll consistently throughout middle and high school. She also excelled in the arts, particularly dancing and acting. She dreamed of attending college and majoring in Theater Arts. During high school, however, Madeline could not pass the MCAS exam, which is a requirement to earn a high school diploma in Massachusetts. Despite having overcome many obstacles, making the honor roll, having near-perfect attendance for thirteen years of public schooling, having spent hours studying everyday, and being well-respected by her teachers and peers, Madeline's dreams were shattered when MCAS prevented her from earning a high school diploma.

I. INTRODUCTION

A conflict exists between the goals of the Massachusetts special education program and the requirements of the Massachusetts Comprehensive Assessment System (MCAS).[1] The special education program in Massachusetts ensures that school systems identify and address the unique learning needs of each special education student.[2] It acknowledges that some students learn at a pace different from the general population.[3] In contrast, Massachusetts also requires that all students obtain a minimum score on the

1. *Compare* 603 MASS. CODE REGS. 28.01(3) (2005) (setting special education goal of developing individual educational potential), *with* 603 MASS. CODE REGS. 30.03(1) (2005) (setting minimum score for passing MCAS), *and* MASS. DEP'T OF EDUC., REQUIREMENTS FOR THE PARTICIPATION OF STUDENTS WITH DISABILITIES IN MCAS 1 (2004) [hereinafter SPECIAL ED MCAS REQUIREMENTS], *available at* http://www.doe.mass.edu/mcas/alt/spedreq.pdf (requiring special education students pass MCAS at same level as regular education students).

2. 603 MASS. CODE REGS. 28.01(3) (2005) (stating purpose of special education law).

3. 603 MASS. CODE REGS. 28.05(2)(a)(1)(i) (2005) (acknowledging disability may prevent special education students from progressing); *see also* Brookhart v. Ill. State Bd. of Educ., 697 F.2d 179, 187 (7th Cir. 1983) (quoting school superintendent admitting slower pace of learning for special education students).

MCAS exam in order to receive a high school diploma.[4] This minimum score is the same for both regular and special education students.[5] Thus, a disparity exists between the Commonwealth's policy requiring local school systems to acknowledge and treat the unique learning needs of special education students throughout their entire schooling, and its policy requiring special education students to pass MCAS at the same level as their regular education counterparts in order to graduate high school.[6]

For many special education students, the Commonwealth's shift from acknowledging to ignoring their unique educational challenges and limitations places an insurmountable hurdle between them and the diploma for which they may otherwise qualify.[7] The result is that many special education students complete their schooling without a diploma to serve as evidence of their efforts, or even worse, simply give up hope of graduating and drop out of school.[8] Without a high school diploma, these students will likely be stigmatized, unable to attend college, and unable to realize their aspirations.[9]

The special education and the MCAS programs were both designed to improve education for the students of Massachusetts, reflecting the Commonwealth's long-standing obligation to "cherish" education.[10] Since the

4. 603 MASS. CODE REGS. 30.03(1) (2005) (defining MCAS minimum passing score). The minimum passing score for all students is 220, both for English Language Arts and Mathematics. *Id.* A score of 220 corresponds to "Needs Improvement" in the four reporting bands created by the Department of Education. *See* MASS. DEPT. OF EDUC., SPRING 2005 MCAS TESTS SUMMARY OF STATE RESULTS 7, 12 (2005) [hereinafter MCAS SUMMARY 2005], *available at* http://www.doe.mass.edu/mcas/2005/results/summary.pdf (describing MCAS scoring). The three passing bands, in order of performance, are Advanced, Proficient, and Needs Improvement. *Id.* at 12. The one failing band is Warning (Failing). *Id.*

5. *See* MCAS SUMMARY 2005, *supra* note 4, at 7 (listing 220 as minimum passing score for all students); *id.* at 9-10 (allowing accommodations in test conditions but not in test content or results).

6. *Compare* 603 MASS. CODE REGS. 28.01(3) (2005) (describing purpose of special educational services), *with* 603 MASS. CODE REGS. 30.03(1) (2005) (setting minimum score for passing MCAS), *and* SPECIAL ED MCAS REQUIREMENTS, *supra* note 1, at 1 (summarizing MCAS graduation requirement).

7. *See* Christopher M. Morrison, Note, *High-Stakes Tests and Students with Disabilities*, 41 B.C. L. REV. 1139, 1153-54 (2000) (describing two cases involving potential graduates denied diplomas due to failing graduation tests). The Fifth Circuit has recognized that "some handicapped children may not be able to master as much of the regular education curriculum as their nonhandicapped classmates. This does not mean, however, that those handicapped children are not receiving any benefit from regular education." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1047 (5th Cir. 1989).

8. *See* David A. Mittell, Jr., Commentary, *Brunch with the Boss - Romney: Leadership or Politics?*, PROVIDENCE J., Mar. 9, 2006, at B5 (reporting Governor Romney's acknowledgement of increasing drop out risk due to MCAS); Maria Sacchetti & Tracy Jan, *High School Dropout Rate Reaches Highest in 14 Years*, BOSTON GLOBE, Oct. 22, 2005, at B1 (analyzing trend of increasing dropout rate). "More than half of the juniors and more than a third of the seniors who dropped out failed the test." *Id.*

9. *See* Cuillo v. Cuillo, 763 A.2d 1105, 1111-12 (Conn. Super. Ct. 2000) (quoting chairperson of Connecticut Bar Association Committee regarding effect of not having diploma). "[A]n individual who lacks a high school diploma in this country today, is both socially stigmatized and vocationally handicapped." *Id.*

10. *See* MASS. CONST. pt. 2, ch. 5, § 2 (defining duty of state to educate). *Compare* 603 MASS. CODE REGS. 28.01(3) (2005) (describing purpose of special educational services as developing individual potential in least restrictive environment), *with* SPECIAL ED MCAS REQUIREMENTS, *supra* note 1, at 1 (listing improvement of student performance as goal of education reform).

early colonial period, Massachusetts has stressed the importance of education.[11] John Adams, designer of the Massachusetts Constitution, was said to favor the clause concerning education more than any other section of the document.[12] As a result of this historic commitment to education, the Commonwealth created one of the first and most liberal special education programs in the country.[13] Similarly, Massachusetts created the MCAS exam as part of the 1993 Education Reform Act, which was passed into law just days after the Supreme Judicial Court (SJC), in *McDuffy v. Secretary of the Executive Office of Education*,[14] declared that Massachusetts was no longer meeting the Constitutional requirement to "cherish" education.[15]

This Note addresses the many legal issues resulting from the confluence of the MCAS exam and the special education program in Massachusetts.[16] Part II examines the legal history of the special education program in Massachusetts, focusing on the state and federal Constitutions, statutes, regulations, legislative intent, and case law that helped to formulate the current special education environment.[17] Part II also addresses the legal history behind the MCAS exam, again looking at the state and federal Constitutions, statutes, regulations, legislative intent, and case law.[18] This Note then introduces the legal issues that resulted from the combination of special education and MCAS requirements, such as due process and equal protection.[19] Part III analyzes those legal issues, and offers suggestions for reconciling the competing goals and requirements of special education and MCAS.[20]

11. *See* MASS. CONST. pt. 2, ch. 5, § 2 (illustrating state's early commitment to education); *see also* McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 529 (Mass. 1993) (describing Massachusetts educational history dating back to 1630).

12. *See McDuffy*, 615 N.E.2d at 534 n.40 (documenting creation of Massachusetts Constitution).

13. MATHEW R. TOBIN, ET AL., *School Law*, *in* 1 MASSACHUSETTS MUNICIPAL LAW 9, § 9.3.1 (2002), *available at* Westlaw MLI MA-CLE 9-1 (explaining history of special education in Massachusetts). "Massachusetts was one of the first states to initiate a comprehensive scheme for the education of students with disabilities when 'Chapter 766' was enacted in 1972." *Id.* Massachusetts has since weakened its special education standard, from requiring the "maximum possible development of the child's potential," to the federal standard of a "free and appropriate" education. *Id.* at § 9.3.2(b).

14. 615 N.E.2d 516 (Mass. 1993).

15. *See id.* at 555-56 (declaring Commonwealth failed in meeting its constitutional obligation); *see also* RHODA E. SCHNEIDER, *The State and Federal Roles in Massachusetts Public Schools*, *in* SCHOOL LAW IN MASSACHUSETTS, § 3.4.1 (2003), *available at* Westlaw SL MA-CLE 3-1 (describing background of Education Reform Act of 1993). *See generally* SPECIAL ED MCAS REQUIREMENTS, *supra* note 1 (describing MCAS requirements, accommodations, and alternatives for special education students).

16. *Infra* Parts II, III (describing and analyzing special education and MCAS relationship).

17. *Infra* Part II (tracing special education history).

18. *Infra* Part II (tracing MCAS history).

19. *Infra* Part II (examining issues surrounding special education and MCAS).

20. *Infra* Part III (analyzing special education and MCAS issues).

II. HISTORY

A. Special Education in Massachusetts

1. Overview

To understand the current status of special education in Massachusetts, it is necessary to go back hundreds of years to examine the colonists' view of education.[21] Historically, Massachusetts has been an educationally "revolutionary" state.[22] Because of the importance that Massachusetts colonists placed on education, the Massachusetts Constitution contains something that even the United States Constitution does not: a section dedicated to education.[23] This has allowed Massachusetts to become a ground-breaking state in special education.[24]

Massachusetts has a long history of "cherishing" education for all youths.[25] John Adams, the primary author of the Massachusetts Constitution, wrote that "no expense for this purpose would be thought extravagant."[26] He believed that ignorance led to oppression, while knowledge led to liberty.[27] Samuel Adams, another member of the Massachusetts constitutional drafting committee, wrote that one of his few regrets of the Revolutionary War was that it took resources away from the public schools.[28] The Massachusetts colonists believed so strongly in education that they devoted an entire section of the Massachusetts Constitution to it, entitled "The Encouragement of Literature, etc."[29] This section declares that "it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of . . . public schools and grammar schools in the towns . . . ."[30]

21. *See* MASS. CONST. pt. 2, ch. 5, § 2 (creating duty of education); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 536 (Mass. 1993) (describing view of John Adams toward education).

22. *See infra* notes 25-30 and accompanying text (documenting achievements in education during colonial period).

23. *Compare* MASS. CONST. pt. 2, ch. 5, § 2 (defining duty of education), *with* U.S. CONST. (lacking reference to duty of education)

24. *See supra* note 13 and accompanying text (describing Massachusetts's influential role in special education).

25. *See* MASS. CONST. pt. 2, ch. 5, § 2 (requiring duty of education); *see also McDuffy*, 615 N.E.2d at 535-36 (describing colonial view of education as vital to government). The term "cherish" as used in colonial times is different from current usage. *McDuffy*, 615 N.E.2d at 525. At that time, "cherish" meant to support, nourish, or nurture. *Id.*

26. *See McDuffy*, 615 N.E.2d at 536 (describing John Adams's view toward education).

27. *See id.* at 535-36 (describing importance placed on education by John Adams).

28. *See id.* at 536-37 (describing view of Samuel Adams toward education).

29. *See* MASS. CONST. pt. 2, ch. 5, § 2 (declaring duty of education); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 537 (Mass. 1993) (summarizing intent of MASS. CONST. pt. 2, ch. 5, § 2).

30. MASS. CONST. pt. 2, ch. 5, § 2 (defining duty of education). Massachusetts provides compulsory education for nearly all children. MASS. GEN. LAWS ch. 76, § 1 (2004) (requiring compulsory education, with exceptions for certain employed teenagers).

Despite this proud history, handicapped children in schools were usually segregated, if they were educated at all.[31] Segregation of special education students was intended to relieve stress on the regular education classroom teachers and children, as well as on the special education children.[32] This started to change with the landmark case of *Brown v. Board of Education*,[33] which articulated that separate was not equal.[34] Though *Brown* is best known for mandating the integration of minorities into classrooms, it also served as the catalyst for "mainstreaming," which is a similar concept of integrating special education children into the regular classroom.[35]

From the time of the *Brown* decision through the early 1970s, attempts to mainstream special education children, even in Massachusetts, were mostly unsuccessful.[36] The state and federal governments each responded separately to this problem.[37] Massachusetts responded first, and its approach became the template for the federal response.[38]

2. Massachusetts Legislation

Massachusetts enacted its special education statute, known as Chapter 766, in 1972.[39] The two major purposes of Chapter 766 were to ameliorate past inadequacies and to provide flexibility to ensure that all children who need special education services receive them.[40] Popularized as Chapter 766, the

31. *See* LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 11-12 (3d ed. 2000) (acknowledging past segregation of special education students); TOBIN ET AL., *supra* note 13, at § 9.3.1 (describing past practice of schools refusing admission to special education students).

32. *See* ROTHSTEIN, *supra* note 31, at 11 (describing reasons for past segregation of special education students).

33. 347 U.S. 483 (1954).

34. *See id.* at 495 (holding separate education facilities unequal); ROTHSTEIN, *supra* note 31, at 11-12 (tracing history of segregation of special education students).

35. *See* ROTHSTEIN, *supra* note 31, at 12 (describing parallel between racial integration and special education mainstreaming).

36. *See* ROTHSTEIN, *supra* note 31, at 12 (describing lack of success of mainstreaming effort); TOBIN ET AL., *supra* note 13, at § 9.3.1 (documenting past segregation of special education students in Massachusetts). By 1975, nearly half of the eight million special education students in the United States were receiving either an inadequate education or no public education at all. *See* ROTHSTEIN, *supra* note 31, at 12.

37. *Compare* Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482 (2000) (defining federal special education laws), *with* Chapter 766, MASS. GEN. LAWS ch. 71B (2004) (defining state special education laws).

38. TIM SINDELAR, *Legal Requirements of Special Education*, *in* 1 LEGAL RIGHTS OF INDIVIDUALS WITH DISABILITIES 6, § 6.2.1 (2002), *available at* Westlaw LRIDI MA-CLE 150 (describing purpose of IDEA (quoting 20 U.S.C. § 1400(d)(1))). "The Massachusetts statute in some respects served as a template for the federal special education law." *Id.* at § 6.2.3 (discussing Massachusetts special education law); *see also* Massachusetts Office on Disabilities, *Federal Individuals with Disabilities Education Act – 1975*, *available at* http://www.mass.gov/mod/DisabilityLaw.html#Education (last visited June 15, 2006) (explaining federal special education law modeled after Chapter 766).

39. *See* TOBIN ET AL., *supra* note 13, at § 9.3.1 (describing history of Chapter 766).

40. *See* Brief of Amicus Curiae Federation for Children With Special Needs, Inc., in Support of Plaintiffs-Appellees at 5-6, Hancock v. Comm'r. Of Educ., 822 N.E.2d 1134 (Mass. 2005) (No. SJC-009267) (describing purposes of Chapter 766).

special education statute is now also known as General Law Chapter 71B.[41]

Chapter 766 defines several aspects of the special education program.[42] It directs the state Department of Education to create regulations requiring schools to develop "educational programs" for each special education child.[43] Schools are required to assure that each special education child is receiving a "free and appropriate public education in the least restrictive environment . . . ."[44]

A "free and appropriate public education" (FAPE) must be consistent with the federal definition.[45] The "least restrictive environment" requires that children be mainstreamed, or integrated, as much as possible.[46] Removal of a child from the regular classroom is meant as a last resort in those cases where the severity of the disability prevents the child from learning in a regular classroom, even with accommodations.[47] Chapter 766 prohibits the exclusive use of standardized tests in evaluating or considering a child for special education services.[48]

3. Federal Legislation

The first major Congressional action for special education came in 1974, when Congress required states to provide "full educational opportunities to all handicapped children" in order to receive federal education funds.[49] Based on this stopgap measure, Congress passed the Education for All Handicapped Children Act (EAHCA) in 1975, though it did not become effective until 1977.[50] By passing EAHCA, Congress intended for all handicapped children to

41. *See* Massachusetts Trial Court Law Libraries, *Mass. General Laws Popular Name Table*, *available at* http://www.lawlib.state.ma.us/popname.html (last visited June 15, 2006) (linking popular statute names with actual citations).

42. MASS. GEN. LAWS ch. 71B (2004) (creating special education laws).

43. *Id.* at § 2 (defining eligibility for special education services).

44. *Id.*

45. *Id.* at § 1 (defining terms used throughout Chapter 766). The federal definition of "free and appropriate public education" will be addressed further in the next section dealing with federal special education statutes. *See infra* notes 54-56 and accompanying text.

46. Ch. 71B, § 1 (2004) (announcing disabled and non-disabled children should be taught together).

47. *Id.* (requiring education in least restrictive environment). Although much progress has been made, as of 2006, over forty-four percent of special education students in Boston are still segregated during at least half of their education. Tracy Jan, *In Boston, Special Ed Students Find Barrier to Mainstream Classes*, BOSTON GLOBE, Mar. 1, 2006, at A1 (reporting lack of success mainstreaming special education students).

48. MASS. GEN. LAWS ch. 71B, § 7 (2004) (requiring multiple methods of analysis for special education students). The prohibition on exclusive use of standardized testing contrasts with the MCAS requirement of a single standardized test to determine competency for a diploma. *Compare* MASS. GEN. LAWS ch. 71B, § 7 (2004) (prohibiting exclusive use of standardized testing for special education students), *with* MASS. GEN. LAWS ch. 69, § 1D(i) (2004) (requiring MCAS success in order to graduate high school).

49. *See* ROTHSTEIN, *supra* note 31, at 20 (describing Congress's initial stopgap measure).

50. *See* ROTHSTEIN, *supra* note 31, at 20-21 (introducing principles of EAHCA). While debating the EAHCA, the Senate weighed the cost of supporting handicapped individuals against the cost of providing an adequate education to allow them to become productive citizens. Tamara J. Weinstein, Note, *Equal Educational Opportunities for Learning Deficient Students*, 68 GEO. WASH. L. REV. 500, 503 (2000)

receive a FAPE in the least restrictive environment.[51] Congress also required that the education be "individualized and appropriate to the child's unique needs."[52] Although the basic tenets remained the same, Congress amended the EAHCA in 1990, renaming it the Individuals with Disabilities Education Act (IDEA).[53]

IDEA and Chapter 766 both mandate that children with disabilities between the ages of three and twenty-one receive a FAPE.[54] A FAPE requires a special education provided at public expense, meeting the standards of the state's educational agency and the requirements of the individualized education program (IEP).[55] To establish that a student was denied a FAPE, the student must prove that there was a procedural violation which, among other things, "caused a deprivation of educational benefits."[56]

Section 504 is another federal statute that increases the rights of special education students.[57] The statute states, "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[58] Although IDEA and Section 504 overlap significantly, IDEA has been the more powerful tool in the struggle for special education rights.[59] One reason that IDEA has been more powerful is that it provides for federal subsidies to carry out its requirements, while Section 504 does not.[60]

(discussing Senate report accompanying EAHCA).

51. *See* ROTHSTEIN, *supra* note 31, at 21 (describing principles of EAHCA).

52. *See* ROTHSTEIN, *supra* note 31, at 21 (listing main beliefs of EAHCA).

53. *See* ROTHSTEIN, *supra* note 31, at 21 (describing transformation from EAHCA to IDEA). IDEA requires "special education and related services be designed to meet the unique needs of children with disabilities 'to prepare them for employment and independent living.'" SINDELAR, *supra* note 38, at § 6.2.1 (quoting 20 U.S.C. § 1400(d)(1)). Congress amended IDEA in 1997, and again in 2004. RICHARD N. APLING & NANCY LEE JONES, CRS REPORT FOR CONGRESS, 108TH CONG., INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): ANALYSIS OF CHANGES MADE BY P.L. 108-446 1 (2005) [hereinafter IDEA 2004 CHANGES], *available at http://www.cec.sped.org/pp/docs/CRSAnalysisofNewIDEAPL108-446.pdf* (highlighting dates of IDEA changes since inception).

54. *Compare* 20 U.S.C. § 1412(a)(1) (2000) (defining federal requirement for a free appropriate public education), *with* MASS. GEN. LAWS ch. 71B, § 1 (2004) (defining terms used throughout Chapter 766).

55. 20 U.S.C. § 1401(9) (2000) (defining FAPE). A child with a disability is defined in Massachusetts as a child "who, because of a disability consisting of a developmental delay or any intellectual, sensory, neurological, emotional, communication, physical, specific learning or health impairment or combination thereof, is unable to progress effectively in regular education and requires special education services . . . ." Ch. 71B § 1 (2004) (defining "school age child with disability").

56. *See* SINDELAR, *supra* note 38, at § 6.2.1 (quoting Amann v. Stow Sch. Sys., 982 F.2d 644, 652 (1st Cir. 1992)) (describing elements of denial of FAPE).

57. 29 U.S.C. § 794 (2000) (protecting disabled in programs receiving federal funds).

58. *Id.* (preventing discrimination against disabled in programs receiving federal money). Among the many prohibited discriminatory practices under Section 504 is any activity that denies "a qualified handicapped person the opportunity to participate in or *benefit from* the aid, benefit, or service." 34 C.F.R. § 104.4(b)(1)(i) (2005) (emphasis added).

59. *See* ROTHSTEIN, *supra* note 31, at 22-23 (comparing IDEA with Section 504).

60. ROTHSTEIN, *supra* note 31, at 22-23 (discussing differences between IDEA and Section 504).

4. Individualizing the Education Plan

The cornerstone of special education is the IEP.[61] Federal statutes and state regulations require each special education student to have an IEP.[62] The IEP "identifies a student's special education needs and describes the services a school district shall provide to meet those needs."[63] As its name implies, an IEP is individualized, addressing the unique and changing needs of each special education child throughout the child's schooling.[64] A team, consisting at a minimum of the child's parents, a special education teacher, a regular education teacher, and a school district representative, defines the child's IEP and then updates it annually.[65] When determining whether a child is eligible for special education, IDEA prohibits the use of a "single measure or assessment as the

61. *See* THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 101-03 (2d ed. 2001) (introducing key components of IEP).

62. *See* 20 U.S.C. § 1414(d) (2000) (requiring IEP); 603 MASS. CODE REGS. 28.05 (2005) (describing IEP team and process).

63. 603 MASS. CODE REGS. 28.02(11) (2005) (defining IEP).

64. *See* 20 U.S.C. § 1414(d)(1)(A)(i) (2000) (detailing contents of IEP); *see also* GUERNSEY & KLARE, *supra* note 61, at 102 (summarizing statutory requirements of IEP). The IEP must include:

> (I) a statement of the child's present levels of academic achievement and functional performance, including—
> (aa) how the child's disability affects the child's involvement and progress in the general education curriculum;. . . .
> (cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
> (II) a statement of measurable annual goals . . . designed to—
> (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
> (bb) meet each of the child's other educational needs that result from the child's disability;
> (III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured . . . .
> (IV) a statement of the special education and related services and supplementary aids and services . . . to be provided to the child . . .
> (aa) to advance appropriately toward attaining the annual goals;
> (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
> (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;
> (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);
> (VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and
> (bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—
> (AA) the child cannot participate in the regular assessment; and
> (BB) the particular alternate assessment selected is appropriate for the child . . . .

20 U.S.C. § 1414(d) (2000).

65. 20 U.S.C. § 1414(d)(1)(B) (2000) (defining IEP team).

sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child."[66]

B. MCAS

1. State Standards (Education Reform Act)

In order to earn a high school diploma in Massachusetts, a child must pass the English Language Arts and Mathematics portions of the MCAS exam.[67] This requirement applies to all students, including those in special education.[68] Accommodations are allowed to compensate for any disabilities as long as the accommodations do not alter what the test measures.[69]

The Commonwealth created the MCAS exam pursuant to the requirements of the Education Reform Act (ERA) of 1993.[70] The Massachusetts Legislature passed the ERA into law as an emergency measure just three days after the Supreme Judicial Court ruled in *McDuffy v. Secretary of the Executive Office of Education* that the state was not fulfilling its constitutional educational requirements.[71] In *McDuffy*, several students filed suit against the Commonwealth, alleging that because Massachusetts did not properly finance public education, the state was not fulfilling its constitutional obligation to educate.[72] The SJC agreed that students in poorer communities had fewer educational opportunities and lower quality education than students in wealthier communities.[73] The SJC declared that the state bore the responsibility to provide an adequate education for all children, rich or poor.[74]

66. 20 U.S.C. § 1414(b)(2)(B) (2000) (defining initial evaluation procedures). The federal concept of prohibiting a single measure or assessment when evaluating a special education student is very similar to the requirements of Chapter 766 in Massachusetts, and stands in stark contrast to the MCAS single-test standard of determining high school competency. *Compare* 20 U.S.C. § 1414(b)(2)(B) (2000) (prohibiting exclusive use of single measure or assessment for special education students), *and* MASS. GEN. LAWS ch. 71B, § 7 (2004) (prohibiting exclusive use of standardized testing for special education students), *with* MASS. GEN. LAWS ch. 69, § 1D(i) (2004) (requiring MCAS success in order to graduate high school). Dependency on a single assessment test involves risk that a student will be adversely and erroneously affected. *See generally* Marcella Bombardieri & Tracy Jan, *Colleges Scramble Amid SAT Glitch*, BOSTON GLOBE, Mar. 9, 2006, at A1 (reviewing extreme consequences of single-exam scoring mistake).

67. *See* MCAS SUMMARY 2005, *supra* note 4, at 7 (describing purpose and usage of MCAS exam).

68. *See* MCAS SUMMARY 2005, *supra* note 4, at 9 (describing MCAS requirement for students with disabilities).

69. *See* MCAS SUMMARY 2005, *supra* note 4, at 10 (describing MCAS accommodations).

70. *See* MCAS SUMMARY 2005, *supra* note 4, at 7 (describing purpose and usage of MCAS exam).

71. *See* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137-38 (Mass. 2005) (describing relationship between *McDuffy* and the ERA).

72. McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 517-18 (Mass. 1993) (describing plaintiff's complaint).

73. *Id.* at 616-17 (discussing imbalance of educational opportunities between communities).

74. *Id.* at 555 (requiring state to improve educational opportunities and quality). The SJC borrowed concepts from the Kentucky Supreme Court in declaring that the State must ensure that all educated children possess at least seven capabilities:

When it enacted the ERA, the Massachusetts legislature wanted to ensure a consistent level of funding so that all children would be able to reach their full potential.[75] The legislature expected that consistent funding would allow children to grow up to be active contributors to the political, social, and economic life of the Commonwealth.[76] The statute itself provides a more detailed, four-pronged description of legislative intent.[77] In particular, the legislature wanted to ensure:

> (1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement.[78]

MCAS was created to satisfy the fourth prong of the legislative intent.[79] That prong holds *educators*, not students, accountable for the students' success or failure.[80] In contrast to the intent of the ERA, Massachusetts holds *students* accountable for MCAS success or failure, as evidenced by the MCAS graduation requirement.[81]

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 554 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)) (describing seven requirements of an educated child).

75. *Hancock*, 822 N.E.2d at 1138 (highlighting purpose of ERA).

76. *Id.* (describing long-term benefits of education reform).

77. MASS. GEN. LAWS ch. 69, § 1 (2004) (describing legislative intent of ERA).

78. *Id.* (describing four legislative goals of education reform).

79. 603 MASS. CODE REGS. 30.03 (2005) (creating MCAS graduation requirement).

80. Ch. 69, § 1 (2004) (requiring educators held accountable for students achieving goals).

81. *See* Ch. 69, § 1D(i) (2004) (requiring MCAS success for students to graduate high school); 603 MASS. CODE REGS. 30.03(1) (2005) (requiring students to pass both parts of MCAS with scaled score of 220). "Satisfaction of the requirements of the competency determination shall be a condition for high school graduation." Ch. 69, § 1D(i) (2004). "The Board intends to raise the threshold scaled score required for the Competency Determination and add additional subjects in future years." 603 MASS. CODE REGS. 30.03(1)

2. Federal Standards (No Child Left Behind)

Independent of the educational changes occurring in Massachusetts, the federal government passed its own educational reform, known as the No Child Left Behind Act of 2001 (NCLB).[82] NCLB describes itself as an Act "[t]o close the achievement gap with accountability, flexibility, and choice, so that no child is left behind."[83] NCLB's purpose "is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."[84] In contrast to the term "flexibility" as described above, NCLB requires each state receiving federal funds to utilize "the same academic standards that the State applies to all schools and children in the State."[85]

Each state is allowed to set its own standards, as long as the standards meet certain criteria.[86] NCLB lists guidelines for standards for both academic content and academic achievement.[87] The standards for academic content for each subject must be clearly defined, rigorous, and encourage advanced skills.[88] The academic achievement standards must align with the state's academic content standards, and must list three academic levels: basic, proficient, and advanced.[89] The "basic" standard is the lowest of the three achievement levels, and is intended to "provide complete information about the progress of the lower-achieving children."[90]

NCLB also requires schools to make Adequate Yearly Progress (AYP) toward enabling all students to meet the defined standards.[91] Although NCLB

(2005).

82. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. §§ 6301-7941 (Supp. 2002)). NCLB is a voluminous act, comprising 670 pages. *Id.* NCLB is actually an amendment to and reauthorization of the Elementary and Secondary Education Act of 1965, codified as 20 U.S.C. §§ 6301-7941 (2000). § 101, 115 Stat. 1425, 1440 (2002).

83. Pub. L. No. 107-110, 115 Stat. 1425, 1425 (2002) (introducing No Child Left Behind).

84. *Id.* at § 1001 (stating purpose of NCLB).

85. *Id.* at § 1111(b)(1)(B) (requiring same academic standards for all children).

86. *Id.* at § 1111(b)(1) (defining guidelines for academic standards). States are required to test mathematics, reading or language arts, and as of the 2005–2006 school year, science. *Id.* at § 1111(b)(1)(C) (defining academic subjects states must test).

87. *Compare* No Child Left Behind Act of 2001 Pub. L. No. 107-110, § 1111(b)(1)(D)(i), 115 Stat. 1425, 1445 (2002) (defining guidelines for academic content standards), *with* Pub. L. No. 107-110, § 1111(b)(1)(D)(ii), 115 Stat. 1425, 1445 (defining guidelines for academic achievement standards).

88. § 1111(b)(1)(D)(i), 115 Stat. 1425, 1445 (defining guidelines for academic content standards). At a minimum, states are required to define content standards for mathematics, reading or language arts, and science. *Id.* at § 1111(b)(1)(C) (defining subjects requiring standards).

89. *Id.* at § 1111(b)(1)(D)(ii) (defining guidelines for academic achievement standards).

90. *Id.* at § 1111(b)(1)(D)(ii)(III) (describing purpose of tracking lowest category). In contrast to the NCLB standards implemented by Massachusetts, NCLB itself does not require or even mention a "warning" or "failing" level below "basic." *Compare* MCAS SUMMARY 2005, *supra* note 4, at 12 (listing warning level for MCAS), *with* § 1111(b)(1)(D)(ii)(III), 115 Stat. 1425, 1445 (requiring "basic" as lowest level for tracking).

91. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111(b)(2)(B), 115 Stat. 1425, 1446 (2002) (requiring each state to make adequate yearly progress).

allows states to define AYP, it does provide extensive guidelines.[92] Each state must track the performance and progress of its general school population, as well four distinct subgroups: economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.[93] Despite NCLB's requirement that students with disabilities meet the *same* academic achievement standards as other students, NCLB also demands that states use *separate* measurable objectives for students with disabilities when determining AYP.[94]

NCLB requires that states use test results to assess the progress made by the state, the local school districts, and the individual schools in meeting the academic standards.[95] NCLB holds those entities, *not the individual students*, accountable for poor performance.[96] In fact, NCLB states, "[n]othing in this part shall be construed to prescribe the use of the academic assessments described in this part for student promotion or graduation purposes."[97]

3. Accountability for MCAS Failure

The Massachusetts Department of Education believes that MCAS satisfies the assessment requirements of both the Massachusetts Education Reform Act, as well as the federal No Child Left Behind Act.[98] Accountability for failure in Massachusetts schools, however, is much different than described in NCLB.[99] If a school district or school is found to be under-performing, the consequences can be severe.[100] For example, if a school is found to be chronically under-performing, the principal and teachers *may* be replaced.[101] Similarly, for school

92. *Id.* at § 1111(b)(2)(C) (setting AYP guidelines for states, while leaving details for states to set).

93. *Id.* at § 1111(b)(2)(C)(v)(II) (mandating states to track four subgroups). NCLB defines a twelve-year timeline, starting in the 2001–2002 school year, for states to ensure that all students meet or exceed the "proficient" level on the assessment tests. *Id.* at § 1111(b)(2)(F)-(G). Concurrently, states must meet certain intermediate goals to ensure that they are making adequate yearly progress. *Id.* at § 1111(b)(2)(H).

94. *Compare* § 1111(b)(1)(B)-(C), 115 Stat. 1425, 1445 (requiring states to apply same academic standards to all children), *with* § 1111(b)(2)(C)(v)(II)(cc), 115 Stat. 1425, 1446 (requiring states to create separate measurable objectives for students with disabilities for determining AYP).

95. § 1111(b)(1), 115 Stat. 1425, 1444-45 (imposing challenging academic standards).

96. *Id.* at § 1111(b)(2) (creating accountability for states, school districts, and schools but not individual students).

97. *Id.* at § 1111(l) (clarifying assessment results not intended as graduation requirement).

98. *See* Mass. Dept. of Educ., *MCAS Overview: Frequently Asked Questions* (listing testing requirements created by ERA), *at http://www.doe.mass.edu/mcas/overview_faq.html?section=1* (last visited Jan. 3, 2006). "In addition to meeting the requirements of the Education Reform Law, the MCAS tests also fulfill the requirements of the federal No Child Left Behind (NCLB) law." *Id.*

99. *Compare* No Child Left Behind Act Pub. L. No. 107-110, § 1111(b)(2), 115 Stat. 1425, 1445 (2002) (holding states, school districts, and schools accountable for educational success), *and* § 1111(l), 115 Stat. 1425 (declaring assessment results not intended as graduation requirement), *with* MASS. GEN. LAWS ch. 69, § 1D(i) (2004) (requiring students pass MCAS to graduate high school).

100. Ch. 69, § 1J-1K (defining sanctions for under-performing schools and districts). The MCAS exam is used to determine whether a specific program is low performing. *See* 603 MASS. CODE REGS. 2.05(1) (2005) (defining low performing Mathematics program based on MCAS failure rate).

101. Ch. 69, § 1J (creating penalties for under-performing schools). *But see* Tracy Jan, *Hundreds of*

districts determined to be chronically under-performing, the State Board of Education is authorized, *but not required*, to appoint a receiver, who has the power of the superintendent and school committee.[102]

In stark contrast to the subjectivity involved in sanctioning schools and districts, a student's failure on MCAS *will* have severe consequences.[103] If a student does not pass MCAS, the student will not graduate high school.[104] The SJC, however, has indicated that preventing graduation was not the intent of the MCAS exam.[105]

C. Special Education and MCAS Converge

1. MCAS Accommodations and Alternate MCAS

The Massachusetts Department of Education does not allow for any leeway in MCAS test results for special education children.[106] Despite requiring the same results for both regular and special education children, the state admits that test scores do not accurately measure effective progress in special education children.[107] Even though special education children must bear the personal consequences of failing MCAS, the state removes special education results when determining whether a program within a school is low performing.[108]

Teachers not Qualified, City Says, BOSTON GLOBE, Mar. 24, 2006, at A1 (reporting nine percent of Boston teachers not licensed).

102. Ch. 69, § 1K (listing sanctions for low-performing school districts).

103. *See* Ch. 69, § 1D(i) (requiring MCAS success in order to graduate high school); 603 MASS. CODE REGS. 30.03(1) (2005) (requiring students pass both parts of MCAS with scaled score of 220). While the assessment test can single-handedly prevent a student from graduating, it represents "merely one factor that shall be considered" by the commissioner in determining whether a school is under-performing. Mass. Fed'n of Teachers v. Bd. of Educ., 767 N.E.2d 549, 560 (Mass. 2002) (allowing several factors in determination of under-performing schools).

104. *See* Ch. 69, § 1D(i) (requiring MCAS success in order to graduate high school); 603 MASS. CODE REGS. 30.03(1) (2005) (setting 220 as minimum passing score for MCAS). The consequences of not obtaining a high school diploma are very serious. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 879 (2002). "[H]aving a high school diploma greatly influences both whether a person obtains employment and the salary level of that person." *Id.*

105. Hancock v. Comm'r. Of Educ., 822 N.E.2d 1134, 1143 (Mass. 2005) (stating MCAS requirement not intended to prevent underperforming students from graduating). "The requirement is not designed . . . to winnow underperforming students from the graduation process." *Id.*

106. 603 MASS. CODE REGS. 30.03(1) (2005) (setting 220 as minimum passing score for each part of MCAS). The Massachusetts Department of Education, however, does allow for certain accommodations in the administration of MCAS testing for special education students. *See infra* notes 113-122 and accompanying text (describing available MCAS options for special education students).

107. MASS. DEP'T OF EDUC., IEP PROCESS GUIDE 7 (2001), *available at* http://www.doe.mass.edu/sped/iep/proguide.pdf (recommending IEP teams consider more than just test scores in evaluating special education children). "Relying on a single test or single test battery for all students would not be adequate or legally appropriate." *Id.*

108. *Compare* 603 MASS. CODE REGS. 30.03(1) (2005) (requiring students to pass both parts of MCAS

When the federal and state governments created their educational reform acts (IDEA and ERA, respectively), they both understood that special education children have unique needs.[109] The federal government requires a state to coordinate its implementation of NCLB with the requirements of IDEA.[110] It also requires "reasonable adaptations and accommodations for students with disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards."[111] Consequently, the Commonwealth included similar language in its own guidelines: "The assessment instruments shall . . . recognize sensitivity to different learning styles and impediments to learning . . . [and] shall comply with federal requirements for accommodating children with special needs."[112]

Based on the federal and state requirements, the Massachusetts Department of Education allows for accommodations in MCAS test administration for special education students.[113] According to the Department of Education, "[a]ccommodations are allowed in four areas: changes in timing or scheduling of the test; changes in test setting; changes in test presentation; and changes in how the student responds to questions."[114]

The Commonwealth allows the most severely disabled students to utilize the MCAS Alternate Assessment (MCAS-Alt).[115] This option is intended only for those students whose disabilities prevent them from taking the regular MCAS

with scaled score of 220), *with* 603 MASS. CODE REGS. 2.05(1) (2005) (defining low performing mathematics programs). "Any middle or high school in which 30% or more of the students fail the MCAS mathematics test, *excluding those students who are enrolled in special education* . . . , shall be considered to have a Low-Performing Mathematics Program." 603 MASS. CODE REGS. 2.05(1) (2005) (excluding special education students from definition of low-performing mathematics programs) (emphasis added).

109. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111(b)(3)(C)(ix)(II), 115 Stat. 1425, 1450 (2002) (defining federal requirement of accommodations for special education children); MASS. GEN. LAWS ch. 69, § 1I (2004) (defining Massachusetts requirement of accommodations for special education children).

110. § 1111(a)(1), 115 Stat. 1425, 1444 (requiring coordination between NCLB and IDEA).

111. § 1111(b)(3)(C)(ix)(II), 115 Stat. 1425, 1450 (creating federal requirement of accommodations for special education children).

112. MASS. GEN. LAWS ch. 69, § 1I (2004) (mandating accommodations for special education children in Massachusetts).

113. *See* SPECIAL ED MCAS REQUIREMENTS, *supra* note 1, at 7 (guaranteeing right to accommodations for special education children).

114. MCAS SUMMARY 2005, *supra* note 4, at 10, (describing MCAS accommodations). Examples of allowable accommodations in test administration include: changes in test timing, scheduling, or presentation; use of a Braille edition; use of a scribe for students who have trouble writing; use of graphic organizers, checklists, and word banks; and use of a word processor. SPECIAL ED MCAS REQUIREMENTS, *supra* note 1, at 7-16 (articulating allowable accommodations).

115. MASS. DEP'T OF EDUC., MCAS ALTERNATE ASSESSMENT (MCAS-ALT): SUMMARY OF 2003 STATE RESULTS 1 (2004) [hereinafter MCAS-ALT SUMMARY], *available at* http://www.doe.mass.edu/mcas/alt/03statesum.pdf (describing MCAS Alternate Assessment and results).

test, even with accommodations.[116] The student's IEP team is responsible for deciding whether to use the MCAS-Alt.[117] To utilize the MCAS-Alt, a student will submit to the Massachusetts Department of Education a portfolio of representative work samples and other data intended to show that the student has learned the required skills and knowledge.[118] To pass, students must earn a minimum rating of "Needs Improvement," which is the same requirement as the regular MCAS exam.[119] The state requires that students utilizing MCAS-Alt show a level of performance "comparable to or higher than" students taking the regular MCAS exam.[120] Massachusetts does not utilize an option available through IDEA and NCLB, which is to allow alternate standards against which students taking alternate assessments would be measured.[121] Despite offering the MCAS-Alt to severely disabled students while simultaneously holding them to the same standards as non-disabled students, the state does not expect the disabled students to do well on the assessment: "the vast majority of students taking alternate assessments (about 90%) have significant cognitive disabilities, and therefore do not address learning standards at or near grade-level expectations. Therefore, these students are not likely to earn scores of Needs

116. *See* MCAS-ALT SUMMARY, *supra* note 115, at 1 (limiting availability of MCAS-Alt to certain disabled children). The State advises that the MCAS-Alt is intended for a student who is "a) generally unable to demonstrate knowledge on a paper-and-pencil test, even with accommodations; and is b) working on learning standards that have been substantially modified due to the nature and severity of his or her disability; and is c) receiving intensive, individualized instruction . . . ." MASS. DEP'T OF EDUC., 2006 EDUCATOR'S MANUAL FOR MCAS-ALT 9 (2005) [hereinafter 2006 MCAS-ALT MANUAL] *available at* http://www.doe.mass.edu/mcas/alt/manual.pdf (advising teachers which students are appropriate candidates for MCAS-Alt).

117. *See* MCAS-ALT SUMMARY, *supra* note 115, at 1 (assigning responsibility for utilizing MCAS-Alt to IEP Team).

118. *See* MCAS-ALT SUMMARY, *supra* note 115, at 1 (highlighting MCAS-Alt procedure). Teams may submit evidence such as data charts, work samples, and video clips. *See* 2006 MCAS-ALT MANUAL, *supra* note 116 *passim* (describing materials submitted for MCAS-Alt).

119. *See* MCAS-ALT SUMMARY, *supra* note 115, at 8 (requiring all students to pass at the same level).

120. *See* 2006 MCAS-ALT MANUAL, *supra* note 116, at 21 (defining competency standards for students utilizing MCAS-Alt). The Massachusetts approach is in contrast to the United States Supreme Court's recognition that

> [t]he requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons . . . . It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end . . . . One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

Bd. of Educ. v. Rowley, 458 U.S. 176, 198-202 (1982).

121. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 612(a)(16)(C)(ii)(II)(2004), 118 Stat. 2647, 2687 (allowing states to utilize alternate assessments and standards); *see also*, IDEA 2004 CHANGES, *supra* note 53, at 16 (describing option of utilizing alternate academic standards).

Improvement, Proficient, or Advanced on the MCAS-Alt."[122]

2. MCAS & Special Education Students: The Actual Experience

Special education students fail the Mathematics portion of the MCAS exam at a rate almost four times as high as regular education students.[123] Special education students fail the English Language Arts portion at a rate more than six times as high as regular education students.[124] For those students electing to submit a portfolio for the MCAS Alternate Assessment, the statistics are even more bleak: over ninety-nine percent fail.[125]

If any student, whether regular or special education, fails MCAS, he or she will be allowed to retake the exam several times.[126] If the special education student continues to fail, but otherwise meets certain requirements, the superintendent of the child's school district must file an appeal.[127] Despite treating special and regular education students the same in the scoring process, the state treats them differently in the appeals process.[128] For special education

122. *See* MCAS-ALT SUMMARY, *supra* note 115, at 8 (reducing expectations for students utilizing MCAS Alternate Assessment).

123. *See* MCAS SUMMARY 2005, *supra* note 4, at 23 tbl.17 (listing MCAS Mathematics results). Only ten percent of regular education students fail the Mathematics portion, while thirty-nine percent of special education students fail that same portion. *Id.*

124. *See* MCAS SUMMARY 2005, *supra* note 4, at 22 tbl.17 (listing MCAS English Language Arts results). Only five percent of regular education students fail the English Language Arts portion, while thirty-one percent of special education students fail that same portion. *Id.*

125. *See* MASS. DEP'T OF EDUC., MCAS ALTERNATE ASSESSMENT (MCAS-ALT): SUMMARY OF 2003 STATE RESULTS 5 tbl.3 (2004), *available at* http://www.doe.mass.edu/mcas/alt/03statesum.pdf (listing results for students participating in MCAS Alternate Assessment). For 2003 (the last year reported), out of 610 portfolios submitted in grade ten, only three passed the English Language Arts portion. *Id.* Of those three, none was higher than the lowest acceptable rating of "Needs Improvement." *Id.* Likewise, out of 610 submissions, only three passed the Mathematics portion. *Id.* The State breaks down the passage rate according to each portion, but does not list a pass rate for the two portions combined. *Id.* The State does allow resubmission of the portfolio in grades eleven and twelve. *Id.* at 8. However, out of eighty-two resubmissions, only eight passed the English Language Arts portion, and only twelve passed the Mathematics portion (none higher than the lowest acceptable rating of "Needs Improvement"). *Id.* at 5.

126. *See* MCAS SUMMARY 2005, *supra* note 4, at 7 (discussing option of retaking exam).

127. *See* 603 MASS. CODE REGS. 30.05(2)(a) (2005) (allowing only superintendents or their designees to file appeals). "A performance appeal on behalf of a student may be filed only by the superintendent of schools for the school district in which the student is enrolled, or by the superintendent's designee." *Id*. For special education students, this appeal is mandatory if the parent requests it and the child meets certain requirements. *Id.* at § 30.05(2)(b). First, the student must have taken the MCAS exam at least three times. *Id*. at § 30.05(3)(a). Second, barring disability or serious illness, the student must have a ninety-five percent or better attendance record. *Id.* at § 30.05(3)(c). Third, the school must have offered, and the student participated in, tutoring and other academic services. *Id.* at § 30.05(3)(d). The superintendent's appeal must include (1) one or more teacher recommendation(s); (2) a statement that the student is on track to complete local graduation requirements; (3) a statement that the IEP team supports the graduation; (4) the student's grades; (5) the grades and MCAS scores of the student's peers; and (6) other information requested for inclusion by the IEP team or the superintendent to prove the child's level of knowledge. *Id.* at § 30.05(5)(a)-(h). A Performance Appeals Board reviews the submission and makes a recommendation to the Commissioner. *Id.* at § 30.05(7)(a)-(c).

128. *See*, *e.g.*, 603 MASS. CODE REGS. 30.05(3)(b) (2005) (requiring only students without disabilities to score 216 or higher to appeal); *id.* at § 30.05(5)(b)-(c),(h) (2005) (allowing only students with disabilities to

children, if the superintendent can show by a "preponderance of the evidence" that the child possesses the necessary knowledge and skills, "the Commissioner shall grant the appeal."[129] If the appeal is granted, the student is treated as having passed the disputed portion of the MCAS.[130]

3. Challenges to MCAS

a. Standard of Review: Rational Basis

When presented with a constitutional challenge, a Massachusetts court will analyze fundamental rights and suspect classifications to determine the appropriate standard of review.[131] From the federal standpoint, the United States Supreme Court, in the case of *Plyler v. Doe*,[132] ruled that education is not a fundamental right.[133] Although the Massachusetts Constitution devotes an entire section to education, a split SJC ruled in the case of *Doe v. Superintendent of Schools*[134] that education is not a fundamental right.[135] Accordingly, the SJC analyzed *Doe v. Superintendent of Schools* using the rational basis rather than the strict scrutiny test.[136]

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submit additional supporting material); *id.* at § 30.05(10) (2005) (requiring Commissioner to grant appeal of special education students meeting requirements). *But see Settlement Offers More MCAS Help to Students*, BOSTON HERALD, May 27, 2006, at 14 (reporting legal settlement of case brought by students concerning MCAS). The state agreed to eliminate "the requirement that students earn a minimum of 216 on the grade 10 MCAS test to qualify for a performance appeal." *Id.*

129. 603 MASS. CODE REGS. § 30.05(10) (2005) (requiring Commissioner to grant appeal of special education students meeting requirements). A "preponderance of the evidence" is defined primarily either by the grades of the student as compared to peers in their class who passed MCAS, or by an analysis of the work samples produced by the student. *Id.*

130. 603 MASS. CODE REGS. 30.05(11) (2005) (treating student as passing MCAS if appeal is approved).

131. *See* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 960 (Mass. 2003) (summarizing standard of review).

132. 457 U.S. 202 (1982).

133. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982) (declaring education not fundamental right). "Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population." *Id.*

134. 653 N.E.2d 1088 (Mass. 1995).

135. *Compare* MASS. CONST. pt. 2, ch. 5, § 2 (declaring importance of education), *with Doe*, 653 N.E.2d at 1095 (declaring education not fundamental right in Massachusetts). *But see Doe*, 653 N.E.2d at 1098 (Liacos, C.J., dissenting) (arguing education is fundamental right in Massachusetts). In *Doe*, the plaintiff, who was expelled from school for behavioral issues, claimed that she should be allowed back to school because education is a fundamental right. *Id.* at 1095. The SJC made a qualified statement that education was not a fundamental right "which would trigger strict scrutiny analysis whenever school officials determine, in the interest of safety, that a student's misconduct warrants expulsion." *Id.* In an accompanying footnote, the SJC stated its opinion without qualification: "[W]e join the courts of several other jurisdictions in holding that education is not a fundamental right." *Id.* at 1095 n.4. In a dissenting opinion, Chief Justice Liacos stated that because the Massachusetts Constitution made such explicit reference to the state's duty to educate, education should be considered a fundamental right in Massachusetts. *Id.* at 1098-99 (Liacos, C.J., dissenting). "There is no Federal constitutional right to education comparable to that provided by the Massachusetts Constitution." *Id.* at 1099 n.4 (Liacos, C.J., dissenting).

136. *See Doe*, 653 N.E.2d at 1097 (applying rational basis analysis rather than strict scrutiny because

Another factor that a court examines to determine whether it should use rational basis or strict scrutiny analysis is the classification of a party as suspect or quasi-suspect.[137] In the case of *City of Cleburne v. Cleburne Living Center, Inc.*,[138] the Supreme Court ruled that the mentally retarded plaintiffs were not a quasi-suspect class, and therefore applied rational basis analysis.[139] In Massachusetts, mentally retarded children are treated as a subset of special education students.[140] Thus, a Massachusetts court will apply a rational basis analysis when it adjudicates either general or special education issues.[141]

b. Comparing MCAS Challenges to Similar Challenges in Other States

To date, there have been very few court challenges to MCAS, and none have been successful.[142] In the leading case of *Student No. 9 v. Board of Education*,[143] the plaintiffs failed to obtain an injunction against the administration of the MCAS exam, arguing unsuccessfully that MCAS was unlawful because it was not sufficiently comprehensive.[144] In its opinion, the

education not considered fundamental right). "In light of our conclusion that the plaintiff does not have a fundamental right to an education under Part II, c. 5, § 2, we apply the lowest level of scrutiny, the rational basis test . . . ." *Id.* Under rational basis analysis, it does not matter if a less onerous alternative exists as long as the state's chosen option is rationally related to a legitimate state interest. *Id.*

137. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (reversing decision of Court of Appeals treating retarded citizens as quasi-suspect class); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 960 (Mass. 2003) (subjecting suspect classification to strict scrutiny). "Where a statute implicates a fundamental right or uses a suspect classification, we employ 'strict judicial scrutiny' . . . . For all other statutes, we employ the 'rational basis' test." *Goodridge*, 798 N.E.2d at 960.

138. 473 U.S. 432 (1985).

139. *See Cleburne*, 473 U.S. at 442 (reversing Court of Appeals' treatment of retarded citizens as quasi-suspect class). In *Cleburne*, a city tried to prevent the opening of a home for the mentally retarded. *Id.* at 435. While the Court did not apply strict scrutiny, it ultimately held that preventing the home from opening was not rationally related to any reasonable interest of the city. *Id.* at 448 (holding no rational basis for believing retarded citizens posed special threat to community). In fact, the Court held that the city's viewpoint was based "on an irrational prejudice against the mentally retarded." *Id.* at 450.

140. *See* 603 MASS. CODE REGS. 28.02(7)(c) (2005) (defining "intellectual impairment" as category of disability).

141. *See Cleburne*, 473 U.S. at 442 (reversing decision of Court of Appeals to treat retarded citizens as quasi-suspect class); Plyler v. Doe, 457 U.S. 202, 223 (1982) (declaring education not a fundamental right); *Goodridge*, 798 N.E.2d at 960 (describing when courts use rational basis or strict scrutiny); Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1096 (Mass. 1995) (declaring education not fundamental right in Massachusetts).

142. *See* Student No. 9 v. Bd. Of Educ., 802 N.E.2d 105, 114-15 (Mass. 2004) (rejecting contention state not providing adequate education).

143. 802 N.E.2d 105 (Mass. 2004).

144. *See* MASS. GEN. LAWS ch. 69, § 1D (2004) (requiring assessment of mathematics, science and technology, history and social science, foreign languages, and English); *Student No. 9*, 802 N.E.2d at 115 (holding Massachusetts meets educational requirements). The plaintiffs based their argument on the Massachusetts statute that requires the State to base its competency determination on not just English language arts and mathematics, but also on science and technology, history, social science, and foreign languages. *Student No. 9*, 802 N.E.2d at 113 (summarizing plaintiffs' interpretation of statutory MCAS requirements). The plaintiffs claimed that "the MCAS exam is unlawful because the competency determination does not take into account the other core subjects mentioned in the statute." *Id.* The SJC refused to hold MCAS unlawful

SJC stated that MCAS may present equal protection or disparate impact concerns, particularly in regard to special education students, but it refused to address those issues because they were not raised by the plaintiffs.[145] In an earlier case concerning education reform in general, *Hancock v. Commissioner of Education*,[146] the SJC requested a report from a Superior Court judge on the status of education in Massachusetts, but rejected the judge's findings that the state was still not meeting its constitutional educational mandate.[147]

While court challenges to MCAS have so far been unsuccessful, challenges to similar high-stakes exams in other states have met with at least a small amount of success.[148] One of the key differences between the court challenges in Massachusetts and elsewhere is that due process and equal protection have not yet been the contested issues in Massachusetts, whereas they have been in other states.[149] In the case of *Debra P. v. Turlington*,[150] Florida's use of an assessment test violated both equal protection and due process.[151] The main problem was that due to past segregation and insufficient notice, the examination did not test what was actually taught to all students.[152] The court enjoined Florida's use of the test until the state ensured that all students were integrated during their entire schooling, and that all students were provided

because the State was making progress phasing in the various requirements of G.L. ch. 69. *Id.* at 114 (allowing phase in of requirements). Further, the SJC stated that *McDuffy*, the case that spawned the Education Reform Act and MCAS, did not require a graduation requirement. *Id.* at 115 (stating agreement with plaintiffs would undermine education reform despite lack of graduation requirement in *McDuffy*).

145. *Student No. 9*, 802 N.E.2d at 116 n.16 (refusing to address special education issue).

146. 822 N.E.2d 1134 (Mass. 2005).

147. *See id.* at 1136-37 (rejecting conclusion and recommendation of lower court judge). *See generally* Hancock v. Driscoll, No. 02-2978, 2004 WL 877984 (Mass. Super. Ct. Apr. 26, 2004) (recommending Massachusetts still not meeting educational requirements). *Hancock v. Driscoll* is the report and recommendations provided by Superior Court Judge Margot Botsford, as requested by the SJC. *See id.* at *1. Judge Botsford compared four low-income districts with three high-income model districts, and found serious problems with both the level of funding and the level of MCAS performance. *See id.* at *157-60 (summarizing report). Judge Botsford concluded that Massachusetts is still not properly funding education in the poorer districts, and therefore children in those districts are still "not receiving the education to which they are constitutionally entitled." *See id.* at *160 (reporting insufficient progress since *McDuffy* case).

148. *Compare* Student No. 9 v. Bd. Of Educ., 802 N.E.2d 105, 107 (Mass. 2004) (affirming decision of Superior Court denying injunction to prevent MCAS), *with* Brookhart v. Ill. Bd. of Educ., 697 F.2d 179, 184 (7th Cir. 1983) (finding due process violation due to insufficient notice of testing), *and* Anderson v. Banks, 520 F. Supp. 472, 509 (S.D. Ga. 1981) (finding substantial due process violation due to testing material not taught).

149. *Compare Student No. 9*, 802 N.E.2d at 116 n.16 (noting equal protection issue not properly presented before SJC), *with Brookhart*, 697 F.2d at 184 (finding due process violation due to insufficient notice of testing), *and Anderson*, 520 F. Supp. at 509 (basing violation of due process on testing material not taught).

150. 730 F.2d 1405 (11th Cir. 1984).

151. *Id.* at 1407 (describing two reasons for delaying implementation of assessment test). In Massachusetts, "[a] statute that arbitrarily and capriciously discriminates against a class of litigants violates the equal protection provisions of the Constitution of the Commonwealth." Murphy v. Comm'r of the Dep't of Indus. Accidents, 612 N.E.2d 1149, 1158 (Mass. 1993) (summarizing equal protection in Massachusetts).

152. *Debra P.*, 730 F.2d at 1407 (finding equal protection and due process violations). The district court found an equal protection violation due to the use of the SSAT-II test as a diploma sanction against students who had suffered through segregation earlier in their schooling. *Id.* The district court also found that insufficient notice of testing caused a due process violation. *Id.*

proper notice.[153]

Brookhart v. Illinois State Board of Education[154] is another notable case for a couple of reasons.[155] Like *Debra P.*, the court held the state to be in violation of due process by not providing enough notice of the testing.[156] More importantly, however, were the failed arguments made on behalf of the special education plaintiffs, which claimed that the state violated the Education for All Handicapped Children Act, as well as Section 504.[157]

In addition to the courts, other branches of government have presented challenges to the way states handle the issue of special education children and exit exams.[158] In Arizona, for example, the Attorney General issued an opinion that special education students in that state should not be required to take the exit exam.[159] Instead, the Attorney General declared that local school boards should establish graduation requirements.[160] In response, the Arizona state superintendent approved a change to allow special education students to graduate high school if they have passed their courses and met the requirements

153. *Id.* (delaying use of diploma sanction). The district court remedied both problems by delaying testing until 1983, which allowed for six years' notice, and also allowed any students who had been segregated to graduate without being subjected to the testing. *Id.* After a series of appeals questioning whether the test was appropriate for students after 1983, the circuit court ultimately held that the State met its burden of proving that it was testing what was actually taught. *Id.* at 1412 (rejecting inference of State testing material not taught).

154. 697 F.2d 179 (7th Cir. 1983).

155. *See id.* at 184 (declaring liberty interests violated by insufficient notice); *id.* at 183 (finding no violation of EHA); *id.* at 183-84 (finding no violation of Section 504).

156. *See id.* at 187 (finding one and one-half years insufficient notice). The court held that the plaintiffs had "an interest in protecting their reputations and avoiding the stigma attached to failure to receive a high school diploma." *Id.* at 185. The court also held that the plaintiffs had "a right conferred by state law to receive a diploma if they met the requirements . . . . In changing the diploma requirement, the . . . School District deprived the individual of a right or interest previously held under state law." *Id.* at 185. The court also held significant that the IEPs of the students were geared toward meeting their unique needs, rather than toward passing the assessment test. *Id.* at 187. "'[I]n an educational system that assumes special education students learn at a slower rate than regular division student,' a year and a half at most to prepare . . . is insufficient." *Id.* at 187 (quoting school superintendent).

157. *See id.* at 183 (finding no violation of EHA); *id.* at 183-84 (finding no violation of Section 504). The court refused to accept the argument that by denying a diploma to the special education students, the state denied them a "free appropriate public education," which would have been a violation of the Education for All Handicapped Children Act. *Id.* at 182-83. Although failing the exit exam was the only reason the child did not graduate, the court held that because the child needed to meet two other requirements in order to graduate, the test did not violate the EHA requirement that there be no single procedure or criterion "for determining an appropriate educational program for a child." *Id.* at 183 (quoting 20 U.S.C. § 1412(5)(C)). The court also held that, while Section 504 requires the school to make accommodations in testing procedure, any modification to the test itself would result in a "substantial modification" and a "'perversion' of the diploma requirement." *Id.* at 184 (quoting respectively S.E. Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979) and Brookhart v. Ill. State Bd. of Educ., 534 F. Supp. 725, 728 (C.D. Ill. 1982)).

158. *See* PATRICIA SULLIVAN ET AL., CENTER ON EDUCATION POLICY, STATE HIGH SCHOOL EXIT EXAMS: STATES TRY HARDER, BUT GAPS PERSIST 64 (2005), *available at* http://www.cep-dc.org/highschoolexit/reportAug2005/hseeAug2005.pdf (surveying approaches of different states to exit exam requirements for special education children).

159. *Id.* (stating opinion of Arizona Attorney General).

160. *Id.* (assigning local school boards responsibility for establishing graduation requirement).

of their IEP.[161]

c. Due Process and Equal Protection: Other Useful Cases

Two additional cases, both decided by the United States Supreme Court, provide important insight regarding equal protection and due process analysis.[162] In the landmark case of *Yick Wo v. Hopkins*, the Court held there was an equal protection violation, not in a statute, but in the way a statute was applied.[163] San Francisco had passed a statute effectively shutting down all laundries housed in wooden buildings, unless the board of supervisors granted consent.[164] The board denied all applications by Chinese owners, while approving all but one of the applications from non-Chinese owners.[165] The Court held the implementation of the statute to be discriminatory and illegal.[166]

In *Mathews v. Eldridge*, the Court defined three factors that a court must consider in a due process claim.[167] First, the court must examine the private interest affected by the governmental action.[168] Second, the court must weigh the risk of an erroneous deprivation of that interest against the value of alternative safeguards.[169] Finally, the court must examine the government's interest.[170]

161. *Id.* (allowing otherwise qualified special education children in Arizona to graduate). Similarly, in Washington, the state legislature recently passed a bill allowing students to substitute poor test results with good grades or results of college entrance examinations. *See* Jason McBride, *Alternatives to WASL Passed; 4 Options Would Be Available to Those Who Fail*, SEATTLE POST-INTELLIGENCER, Mar. 8, 2006, at B2 (reporting recently passed bill allowing options for exit exam failure).

162. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976) (describing three considerations in due process analysis); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding equal protection violation in application of statute).

163. *Yick Wo*, 118 U.S. at 373-74 (finding discrimination and violation of Fourteenth Amendment).

164. *Id.* at 366 (disagreeing with Supreme Court of California). The statute was implemented for fire safety reasons. *Id.* The Court was troubled, however, by the "naked and arbitrary power to give or withhold consent" from "a competent and qualified person . . . having complied with every reasonable condition demanded . . . ." *Id.*

165. *Id.* at 356 (describing prior history).

166. *Id.* at 373-74 (holding statute unconstitutional). The Court stated that our government is "'a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails . . . ." *Id.* at 370 (partially quoting Massachusetts Bill of Rights (MASS. CONST. pt. 1, art. 30)). The Court agreed that government needs the power to regulate, unless "such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself." *Id.* at 371 (quoting Capen v. Foster, 29 Mass. 485, 489 (1832)). The Court held that there was no reason, other than the will of the supervisors, that the plaintiffs should "not be permitted to carry on . . . their harmless and useful occupation, on which they depend for a livelihood." *Id.* at 374.

167. *Mathews*, 424 U.S. at 334-35 (requiring consideration of three factors in due process analysis).

168. *Id.* at 335 (describing first factor in due process analysis).

169. *Id.* (describing second factor in due process analysis).

170. *Id.* (describing third factor in due process analysis). As part of examining the government's interest, the court will also examine "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

III. ANALYSIS

A. Rational Basis Analysis

Any attempt to prove the MCAS exam unconstitutional requires rational basis analysis.[171] Proving a constitutional violation under the rational basis standard is difficult, but not impossible.[172] Under this standard, courts presume that the government's policy is constitutional.[173] The plaintiff bears the burden of proving that the policy is not rationally related to a legitimate state interest.[174]

In order to apply rational basis analysis to the MCAS graduation requirement for special education children, it must be determined what the Commonwealth's legitimate interest is, and whether the MCAS policy is rationally related to that interest.[175] As previously discussed, the MCAS exam was developed as a result of the Education Reform Act.[176] The purpose of the Act was to improve education to enable all children to reach their full potential and become active contributors to the political, social, and economic life of the Commonwealth.[177] The Commonwealth's goal was to provide children with a high-quality, enjoyable education.[178] The Act calls for children to learn without any threats to their sense of security or self-esteem.[179] The Legislative intent was also to create "an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their

171. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (reversing decision of Court of Appeals to treat retarded citizens as quasi-suspect class); Plyler v. Doe, 457 U.S. 202, 223 (1982) (declaring education not fundamental right); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 960 (Mass. 2003) (describing when rational basis used); Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095 (Mass. 1995) (declaring education not fundamental right in Massachusetts).

172. *See* Murphy v. Comm'r of the Dep't of Indus. Accidents, 612 N.E.2d 1149, 1157-58 (Mass. 1993) (describing difficulty of rational basis argument).

> We do not lightly undertake to invalidate a statute under the rational basis standard. A party challenging the constitutionality of a legislative enactment bears the heavy burden of overcoming the presumption of constitutionality that is the starting point for courts reviewing statutes under the rational basis standard. . . . This standard, however, is not a "toothless" one. . . . Where the plaintiff demonstrates that a challenged classification lacks any rational basis to a legitimate State interest, we must declare such classification unconstitutional.

Id.

173. *See id.* (explaining plaintiff's burden in rational basis analysis).

174. *See id.* (describing plaintiff's requirement of proving no rational relationship).

175. *See id.* (applying rational basis standard to MCAS debate).

176. 603 MASS. CODE REGS. 30.03 (2005) (creating requirement of passing MCAS to graduate high school).

177. Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005) (highlighting purpose of ERA).

178. MASS. GEN. LAWS ch. 69, § 1 (2004) (describing educational environment envisioned by Commonwealth).

179. *Id.* (requiring threat-free learning environment).

achievement."[180]

It is also imperative to remember that children have no choice but to attend school.[181] During their entire compulsory education, the state treats special education children differently.[182] The State recognizes that these children learn at a different pace and at a different level than regular education children, and requires schools to meet the unique learning needs of special education children.[183]

Ensuring that each child receives an education uniquely suited to his or her needs is rationally related to making education enjoyable without threatening the security or self-esteem of the special education children.[184] Creating the MCAS test is rationally related to assessing whether all children in all schools are receiving the education demanded by the Massachusetts Constitution.[185] Utilizing the MCAS test results to hold educators accountable for the success or failure of their teaching is rationally related to the ERA goal of creating "an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement."[186]

The State treats special education children differently for administrative purposes as well.[187] Because special education children learn at a different pace and may not be at grade level when they take the MCAS exam, it is rational for the State to remove their scores in determining whether a school program is low performing.[188] It is also rational for the State to allow accommodations for special education children taking the MCAS exam, because this may increase the chance for those children to successfully show what they have learned.[189] Furthermore, because the State recognizes that a child may have difficulty demonstrating his or her level of knowledge, it is

180. *Id.* (intending creation of progress monitoring and accountability of educators).

181. MASS. GEN. LAWS ch. 76, § 1 (2004) (requiring education for all children).

182. 603 MASS. CODE REGS. 28.02(11) (2005) (mandating documentation of student's special needs as part of IEP).

183. 603 MASS. CODE REGS. 28.02(11) (2005) (defining IEP requirement of tailoring programs to meet child's special needs); 603 MASS. CODE REGS. 28.05(2)(a)(1)(i) (2005) (acknowledging disability may prevent special education students from progressing).

184. *Compare* 603 MASS. CODE REGS. 28.05(2)(a)(1)(i) (2005) (conceding student not progressing possibly result of disability), *with* MASS. GEN. LAWS ch. 69, § 1 (2004) (articulating intention of ERA for enjoyable, non-threatening environment).

185. *See* ch. 69, § 1 (requiring use of assessment mechanism); Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137-38 (Mass. 2005) (describing relationship between *McDuffy* and ERA). Note that the Massachusetts statute requires use of an assessment "mechanism," not a single assessment "test." Ch. 69, § 1 (2004).

186. Ch. 69, § 1 (2004) (holding educators responsible for meeting goals).

187. *See generally* 603 MASS. CODE REGS. 2.05(1) (2005) (defining low performing mathematics programs).

188. *Id.* (excluding special education students from definition of low-performing mathematics program); *see also* Brookhart v. Ill. State Bd. of Educ., 697 F.2d 179, 187 (7th Cir. 1983) (quoting school superintendent admitting slower pace of learning for special education students).

189. *See* MCAS SUMMARY 2005, *supra* note 4, at 10 (describing MCAS accommodations).

rational for the State to allow appeals of the MCAS results.[190] By processing appeals, and allowing the child to earn a diploma, the State ensures that the child has the chance to continue on to college, reach his or her full potential, and become active contributors to the political, social, and economic life of the Commonwealth.[191]

Through the many ways in which the State treats special education children differently, it has proved a rational relationship between its interest and the different treatment.[192] Given the rational ways in which Massachusetts treats special education children differently in both education and administration, the Commonwealth's requirement that special education children pass the MCAS exam at the exact same level as regular education children in order to receive their high school diploma is not rationally related to any legitimate state interest.[193] Indeed, by using the MCAS exam to prevent an otherwise-qualified special education child from earning a diploma, the State helps to ensure that its legitimate interests—helping the child reach his or her full potential and become a productive member of society—will not be fulfilled.[194]

190. *See* 603 MASS. CODE REGS. 30.05 (2005) (allowing performance appeals).

191. *See* MASS. GEN. LAWS ch. 69, § 1 (2004) (describing goals of statute); Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005) (highlighting purpose of ERA); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 584 (Mass. 1993) (describing view of John Adams toward education); Gerber, *supra* note 104, at 879 (describing life-long impact of not having high school diploma).

192. *See supra* notes 176-191 and accompanying text (detailing rational relationship between state's interests and treatment of special education children). It is rationally related to the state's legitimate interests to (1) have a system of compulsory education, (2) acknowledge and address the unique learning needs of each special education child during their compulsory education, (3) acknowledge and address the effect that special education children may have on assessment results when determining low-performing school programs, (4) acknowledge and address accommodations which special education children may require to take the MCAS exam, (5) acknowledge that special education children may learn at a different pace and may not be at grade level, and (6) acknowledge, via the appeals process, the unfairness of preventing an otherwise-qualified special education child from obtaining a diploma. *See supra* notes 176-191 and accompanying text.

193. *See Brookhart*, 697 F.2d at 187 (quoting school superintendent admitting slower pace of learning for special education students); *see also* MCAS-ALT SUMMARY, *supra* note 115, at 8 (requiring all students to pass MCAS at same level while admitting many will not pass). The SJC recognized this issue when it stated that MCAS was not intended to "winnow underperforming students from the graduation process." *Hancock*, 822 N.E.2d at 1143 (stating MCAS requirement not intended to prevent underperforming students from graduating).

194. *Compare Hancock*, 822 N.E.2d at 1138 (highlighting purpose of ERA), *with* Gerber, *supra* note 104, at 879 (describing life-long impact of not having high school diploma). Special education children, who have IEPs and are treated differently during their schooling, will likely suffer a threat to their sense of security and self-esteem, knowing that they are expected to show on the MCAS exam that they learned the same amount of material in the same amount of time as the regular education children. *See* Debra P. v. Turlington, 730 F.2d 1405, 1407 (11th Cir. 1984) (finding equal protection violation when exam does not test material actually taught); Sacchetti & Jan, *supra* note 8 and accompanying text (analyzing trend of increasing dropout rate). Governor Mitt Romney admitted that MCAS may be increasing the risk of students dropping out of school, but sees this risk "as a regrettable by-product of making the state competitive in the world economy . . . ." Mittell, *supra* note 8 (summarizing Governor's acknowledgement of increasing drop-out risk). The goals of the Education Reform Act include helping children to reach their full potential and become productive members of society, but make no reference to helping the State become competitive in the world economy. *Compare id.* (approving higher drop out rate to make state competitive in world economy), *with* MASS. GEN. LAWS ch. 69, §

NCLB uses federal financial assistance as the incentive to ensure that states follow its requirements.[195] Massachusetts has a legitimate interest in meeting the NCLB provisions so that it can continue to receive federal grants.[196] NCLB requires states to hold educators responsible if a school does not meet its AYP educational goals.[197] Furthermore, NCLB specifically states that its requirements should not be construed to mandate the use of the assessment test for graduation purposes.[198] In contrast, Massachusetts, by using its assessment test to deny diplomas to otherwise-qualified special education students, holds those students, rather than the educators, accountable for a school's failure to meet the students' educational needs.[199]

B. Due Process Analysis

As described in *Mathews*, a court should examine three factors when analyzing a potential due process violation.[200] First, the private interest affected by the MCAS graduation requirement is the ability to earn a high school diploma.[201] A child who made excellent progress during school, received high grades, had perfect attendance, and truly tried his best may be unable to earn a diploma due solely to failing the MCAS exam.[202] This erroneous deprivation of a diploma can have a high price for the student.[203]

1 (2004) (failing to list competitiveness in world economy as goal of ERA).

195. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111(a)(1), 115 Stat. 1425, 1444 (2002) (requiring state compliance with NCLB if it desires to receive federal grant). "For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary a plan, developed by the State educational agency . . . that satisfies the requirements of this section and that is coordinated with . . . the Individuals with Disabilities Education Act . . . ." *Id.* MCAS satisfies most requirements, not only of the Massachusetts Education Reform Act, but also of the NCLB Act. MASS. DEPT. OF EDUC., MCAS OVERVIEW: FREQUENTLY ASKED QUESTIONS, *at* http://www.doe.mass.edu/mcas/overview_faq.html?section=1 (last visited Jan. 3, 2006).

196. § 1111(a)(1), 115 Stat. 1425, 1444 (requiring State compliance with NCLB if it desires to receive federal grant).

197. § 1001(4), 115 Stat. 1425, 1440 (holding only educators responsible for poor performance). NCLB instructs that its purpose be accomplished by "holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students . . . to receive a high-quality education." *Id.*

198. § 1111(l), 115 Stat. 1425 (clarifying assessment results not intended as graduation requirement).

199. *Compare id.*(clarifying assessment results not intended as graduation requirement), *and* § 1001(4), 115 Stat. 1425, 1440 (holding only educators responsible for poor performance), *with* MASS. GEN. LAWS ch. 69, § 1D(i) (2004) (requiring MCAS success in order to graduate high school), *and* 603 MASS. CODE REGS. 30.03(1) (2005) (requiring students to pass both parts of MCAS with scaled score of 220).

200. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing due process analysis). To summarize, the court will examine the private interest affected by the governmental action, the risk of an erroneous deprivation weighed against the value of alternative safeguards, and finally the government's interest.

201. *See* MASS. GEN. LAWS ch. 69, § 1D(i) (2004) (requiring MCAS success in order to graduate high school).

202. *See* Morrison, *supra* note 7, at 1167 (describing two cases where potential graduates denied diplomas due to failing graduation tests).

203. *See* Cuillo v. Cuillo, 763 A.2d 1105, 1111-12 (Conn. Super. Ct. 2000) (quoting chairperson of

Examining the second factor described in *Mathews*, the State should consider extending safeguards already in place in order to counteract the risk of an erroneous deprivation of a high school diploma.[204] For instance, the State now evaluates multiple pieces of information when it determines whether a student should be placed in special education, when it judges an MCAS appeal, and when it determines a school program to be low performing.[205] If multiple pieces of information are required for these purposes, they might also be helpful in determining whether a failing MCAS score should prevent a special education student from receiving a diploma.[206] For special education students, there should be a safeguard in place such that if a student meets certain criteria, a failing MCAS score will not prevent that student from earning a diploma he or she files a formal appeal.[207] Allowing an otherwise-qualified special education child who fails MCAS to earn a diploma will reduce the number of appeals, which in turn will reduce the administrative costs to local school districts and the state Board of Education.[208] Not only will such safeguards reduce the cost of administration, but more importantly, they will ensure that the state meets the ERA's objective of allowing each child to reach his or her full potential and become a productive member of society.[209]

The state's interest, which is the third factor considered in *Mathews*, is to ensure the integrity and value of a high school diploma.[210] Extending the current appeals process to become an automatic safeguard for otherwise-qualified special education students will do nothing more than ensure that all

Connecticut Bar Association Committee regarding effect of not having diploma). "[A]n individual who lacks a high school diploma in this country today, is both socially stigmatized and vocationally handicapped." *Id.*

204. *See infra* note 205 and accompanying text (explaining State uses several pieces of information determining low performing schools).

205. *See* 20 U.S.C. § 1414(b)(2)(B) (2000) (defining initial evaluation procedures); 603 MASS. CODE REGS. 2.05(1) (2005) (defining low performing mathematics programs); 603 MASS. CODE REGS. 30.05 (2005) (allowing performance appeals).

206. *See supra* note 205 and accompanying text (highlighting State's use of multiple pieces of information for school analysis).

207. *See supra* note 205 and accompanying text (summarizing steps taken by state analyzing schools). For instance, similar to the criteria for approving an appeal, if a child has a ninety-five percent or better attendance record, above average grades, and perhaps meets certain other requirements, the child should automatically obtain, rather than be denied, a diploma. *See* 603 MASS. CODE REGS. 30.05 (2005) (allowing performance appeals).

208. *See* 603 MASS. CODE REGS. 30.05 (allowing performance appeals). In the current appeal process, with the parent's approval, the child's superintendent must file an appeal. *Id.* at § 30.05(2)(b). If all criteria are met, the Commissioner must grant the appeal. *Id.* at § 30.05(10) (*requiring* Commissioner to grant appeal of special education students meeting requirements).

209. Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005) (requiring state to educate children to enable full potential and contribution to society).

210. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing three considerations in due process analysis); Brookhart v. Ill. State Bd. of Educ., 697 F.2d 179, 182 (7th Cir. 1983) (ensuring value of diploma). "The School District's desire to ensure the value of its diploma by requiring graduating students to attain minimal skills is admirable, and the courts will interfere with educational policy decisions only when necessary to protect individual statutory or constitutional rights." *Id.*

students who deserve a diploma get one.[211] By guaranteeing that each and every student who deserves a high school diploma receives one, the State will raise, not lower, the integrity and value of a high school diploma.[212]

C. Equal Protection Analysis

The MCAS exam presents an equal protection violation because of its "arbitrary and capricious" treatment of special education children.[213] In *Murphy v. Commissioner of the Department of Industrial Accidents*,[214] the SJC held that "[a] statute that arbitrarily and capriciously discriminates against a class of litigants violates the equal protection provisions of the Constitution of the Commonwealth."[215] Massachusetts enforces compulsory education for all special education children.[216] Massachusetts demands that schools recognize and address the different learning needs and abilities of special education children throughout their schooling.[217] Massachusetts goes so far as to allow an alternate assessment method for certain special education children.[218] The State does all of this to fulfill its constitutional mandate concerning education, and to meet the goal of the Education Reform Act to help all children—even special education children—to grow up to fulfill their goals and become active contributors to society.[219] After recognizing and addressing the unique learning needs and abilities of special education children during their entire compulsory schooling, the Commonwealth's demand that these children pass an exam at the exact same level as the general population in order to earn their diploma is arbitrary, capricious, and thus an equal protection violation.[220]

The MCAS-Alt exam presents another equal protection issue.[221] Just as the ordinance in *Yick Wo* was a violation of equal protection because of its application rather than its plain language, the MCAS-Alt exam is also a

211. *See* 603 MASS. CODE REGS. 30.05 (2005) (allowing performance appeals).

212. *See supra* notes 210-211 and accompanying text (explaining benefit of extending appeals procedures).

213. *See infra* notes 214-220 and accompanying text (explaining arbitrary and capricious treatment of special education students).

214. 612 N.E.2d 1149 (Mass. 1993).

215. *Id.* at 1158 (explaining reason for equal protection violation).

216. MASS. GEN. LAWS ch. 76, § 1 (2004) (requiring compulsory education for all children).

217. 603 MASS. CODE REGS. 28.02(11) (2005) (defining IEP for special education children).

218. *See* MCAS-ALT SUMMARY, *supra* note 115, at 1 (describing MCAS Alternate Assessment and results).

219. *See* MASS. CONST. pt. 2, ch. 5, § 2 (defining duty to educate); Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005) (highlighting purpose of ERA).

220. *Compare* MASS. GEN. LAWS ch. 76, § 1 (2004) (requiring compulsory education for all children), *and* 603 MASS. CODE REGS. 28 *passim* (2005) (defining special education regulations), *and* 603 MASS. CODE REGS. 30.03(1) (2005) (requiring minimum score of 220 for all students to pass MCAS), *with* Murphy v. Comm'r of the Dep't of Indus. Accidents, 612 N.E.2d 1149, 1158 (Mass. 1993) (describing arbitrary and capricious statute as violating equal protection).

221. *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (recognizing discrimination in application of ordinance rather than wording of ordinance), *with* MCAS-ALT SUMMARY, *supra* note 115, at 5 (illustrating high failure rate for students participating in MCAS Alternate Assessment).

violation of equal protection.[222] The plain language of the ordinance in *Yick Wo* did not specify that all Chinese laundries would be shut down, yet its application had that effect.[223] Similarly, the MCAS-Alt does not state that all special education children who utilize MCAS-Alt will be denied diplomas, yet because of the way in which the process is administered, it has that effect.[224] The State presents the MCAS-Alt as an alternative for students who are unable to display their knowledge in a regular paper and pencil test.[225] On the other hand, over ninety-nine percent of the students who attempt the MCAS-Alt fail.[226] Despite allowing this option, the State admits that it expects such a high failure rate because the MCAS-Alt students do not work at a high enough cognitive level.[227] Compounding this problem, the State has refused to utilize the option provided by the federal government to implement alternate standards for those students submitting an alternate assessment.[228] The Commonwealth denies the equal protection rights of special education students by giving them the MCAS-Alt option and demanding that they perform at the same level as regular education children, while simultaneously expecting them to fail and in fact failing over ninety-nine percent of them.[229]

D. Alternatives

To avoid violating the due process and equal protection rights of special education students, Massachusetts should consider several options that are rationally related to the state's goals and that meet the demands of IDEA, NCLB, and the ERA.[230] First, the State should consider implementing a true assessment *mechanism*, as required by state statute, rather than an assessment *test*, as implemented in the state regulations.[231] Such a mechanism would look similar to the mechanism used in the appeals process, but would apply to all

222. *Yick Wo*, 118 U.S. at 374 (finding discrimination and violation of Fourteenth Amendment).

223. *Id.* at 356 (describing prior history).

224. *See supra* note 125 and accompanying text (detailing MCAS-Alt results).

225. *See* MCAS-ALT SUMMARY, *supra* note 115, at 1 (intending use of MCAS-Alt only by severely disabled students).

226. *See* MCAS-ALT SUMMARY, *supra* note 115, at 5 (listing results for students participating in MCAS Alternate Assessment).

227. *See* MCAS-ALT SUMMARY, *supra* note 115, at 8 (acknowledging reduced expectations for students utilizing MCAS Alternate Assessment).

228. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 612(a)(16)(C)(ii)(II)(2004), 118 Stat. 2647, 2687 (allowing states to utilize alternate assessments and standards); *see also* IDEA 2004 CHANGES, *supra* note 53, at 15-16 (describing option of alternate academic standards).

229. *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (recognizing application of ordinance discriminatory), *with* MCAS-ALT SUMMARY, *supra* note 115, at 5 (illustrating high failure rate for special education students utilizing MCAS-Alt), *and* MCAS-ALT SUMMARY, *supra* note 115, at 8 (acknowledging lower expectations for special education students utilizing MCAS-Alt).

230. *See infra* Part III.D (discussing MCAS alternatives).

231. *Compare* MASS. GEN. LAWS ch. 69, § 1 (2004) (requiring use of assessment mechanism), *with* 603 MASS. CODE REGS. 30.03(1) (2005) (defining high school competency based upon MCAS test results).

special education children in their initial assessment, not just those who are forced to endure the process of failing several times before applying for an appeal.[232] The mechanism would utilize different standards, as allowed by federal law, and would utilize multiple assessment instruments, such as grades, progress as measured against the IEP, attendance records, teacher evaluations, and other evidence of progress and knowledge.[233]

A second option is to allow special education children to pass MCAS at a different level than regular education children.[234] By limiting this exception to the granting of diplomas, the State can continue to utilize a single test as its assessment mechanism while continuing to meet the requirement of holding schools accountable for the progress of their students.[235] Arizona implemented a similar process, allowing both regular and special education students to increase their exit exam score by up to twenty-five percent if they earn grades of A, B, or C in key subjects.[236]

A third option is to ensure that special education children pass MCAS at the same rate as the general population.[237] One way to accomplish this is to analyze the pass rate for regular education children and apply that same pass rate to special education children.[238] For example, in 2005, utilizing 220 as the minimum passing score, ninety-five percent of the regular education population passed the English Language Arts exam, compared to only fifty-nine percent of special education children.[239] Under this option, the state would therefore allow ninety-five percent of special education children to pass as well.[240]

232. *Cf.* MASS. GEN. LAWS ch. 69 *passim* (2004) (requiring multiple assessment instruments); 603 MASS. CODE REGS. 30.05 (2005) (defining criteria and process for MCAS performance appeal).

233. *See* 603 MASS. CODE REGS. 30.05(3),(5) (2005) (describing criteria considered for MCAS performance appeal); *see also* IDEA 2004 CHANGES, *supra* note 53, at 16 (allowing alternate academic standards). Massachusetts G.L. Chapter 69 uses only the plural "instruments," rather than the singular "instrument." MASS. GEN. LAWS ch. 69 *passim* (2004) (describing assessment mechanism Department of Education will create). Washington is an example of a state that has recently implemented a true assessment mechanism. *See* Jason McBride, *Alternatives to WASL Passed*, SEATTLE POST-INTELLIGENCER, Mar. 8, 2006, at B2 (reporting Washington Legislature passed bill providing options to students who fail exam). While Washington does utilize a test similar to the Massachusetts MCAS exam, it also provides four alternatives for students to obtain a diploma if they fail the exam. *Id.* For example, the grades of a student can be used to offset a failed exam. *Id.* The results of other standardized tests, such as the SAT, can also be used in place of the official WASL exam. *Id.*

234. *But see* 603 MASS. CODE REGS. 30.03(1) (2005) (defining same passing score applicable to all students).

235. *See* MASS. GEN. LAWS ch. 69, § 1 (2004) (establishing educator accountability for student achievement); No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001(4), 115 Stat. 1425, 1440 (2002) (holding educators accountable for student achievement).

236. SULLIVAN, *supra* note 158, at 2 (describing innovative approach used by Arizona to supplement test scores).

237. *But see* 603 MASS. CODE REGS. 30.03(1) (2005) (defining MCAS minimum passing score).

238. *But see* MCAS SUMMARY 2005, *supra* note 4, at 7 (setting 220 as minimum passing score).

239. *See* MCAS SUMMARY 2005, *supra* note 4, at 22 (listing pass rates for different subsets of student population).

240. *But see* MCAS SUMMARY 2005, *supra* note 4, at 7 (setting 220 as minimum passing score without

NCLB requires that states hold educators accountable for making adequate yearly progress, mandates that states utilize the same assessment standards for all students, and prohibits states from construing NCLB as a diploma sanction.[241] Therefore, this proposed change to equalize the percentage of regular and special education students who pass should only be allowed for purposes of granting diplomas for children, and not for purposes of assessing schools and districts.[242] This change would ensure that the state meets the federal requirements of using the same assessment test and standards for all children, while not treating special education children arbitrarily and capriciously.[243] Further, this modification would allow the State to use MCAS for its true purpose – Improving education and holding educators accountable – while not penalizing special education students because of their disabilities.[244]

IV. CONCLUSION

Special education children learn at a different pace and at a different level than regular education children. Federal, state, and local governments all recognize this fact. This is manifested by the existence of programs such as IDEA and Chapter 766. School systems treat these children differently, as required by their IEPs, throughout their entire schooling. Most of these children do make progress, meeting goals defined in their IEPs from year to year. Despite the proper way that school systems treat special education children differently, when it comes to taking the MCAS exam in high school, the State ignores these differences and suddenly treats the children the same as regular education children. Compounding this injustice, when the children do not meet these unrealistic expectations, the Commonwealth denies them a diploma.

The injustice of denying a diploma to a special education child, simply because he or she is unable to perform at the same level as a regular education child on one exam, is a problem the State must resolve. While the State has made some progress by allowing accommodations in administration and permitting appeals of results, the root problem remains unaddressed: after

exceptions for special education children).

241. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001(4), 115 Stat. 1425, 1440 (2002) (holding educators responsible for poor student performance); § 1111(b), 115 Stat. 1425, 1445 (requiring same assessment standards for all children); § 1111(l), 115 Stat. 1425 (clarifying assessment results not intended as graduation requirement).

242. *See* § 1001(4), 115 Stat. 1425, 1440 (requiring educator accountability for AYP); § 1111(b)(1)(B), 115 Stat. 1425, 1445 (mandating all children take same assessment exam); § 1111(l), 115 Stat. 1425 (prohibiting State interpretation of NCLB as graduation requirement).

243. *See* § 1111(l), 115 Stat. 1425 (clarifying assessment results not intended as graduation requirement); § 1001(4), 115 Stat. 1425, 1440 (holding only schools, local educational agencies, and states responsible for poor student performance); § 1111(b)(1)(B), 115 Stat. 1425, 1445 (requiring same assessment standards for all students).

244. *See supra* notes 78-79 and accompanying text (explaining MCAS purpose and goals).

years of learning in an environment that recognizes and addresses their unique difficulties, special education children are ultimately expected to pass the MCAS exam at the same level as regular education children in order to receive their high school diplomas. Treating special education children one way during their entire schooling and a different way on the high-stakes MCAS exam is arbitrary and capricious. Such children are denied both due process and equal protection rights. The State must develop an alternative that strikes a balance between ensuring special education student participation in the public educational system, and recognizing their unique needs and challenges.

James M. Baron