The Job-Relatedness and Business Necessity of the "New and Improved" High School Diploma

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The Job-Relatedness and Business Necessity of the “New and Improved” High School Diploma

Stacy A. Hickox†

States continue to raise graduation requirements by including more onerous curriculum requirements and more difficult examinations. These heightened requirements have significantly affected students with disabilities, causing fewer students to receive a traditional high school diploma, lessening the emphasis on vocational training, and increasing dropout rates. At the same time, employers continue to require a high school diploma for many entry-level positions. This requirement may have a disparate impact on applicants with disabilities who have not earned a traditional high school diploma. Under the disparate impact analysis of the Americans with Disabilities Act (ADA), employers are required to show the job-relatedness and business necessity of holding a high school diploma if persons with disabilities are disproportionally excluded by that hiring criteria. Decisions analyzing the disparate impact of requiring a traditional high school diploma under Title VII of the Civil Rights Act of 1964 and the ADA’s required individualized inquiry raise serious questions about whether employers can demonstrate the job-relatedness and necessity of a traditional high school diploma for positions sought by applicants with disabilities. This relatedness and necessity become more difficult to establish as states raise graduation requirements and while employers place greater value on employability rather than cognitive skills. This Article will explore the nature of those requirements compared to the skills and abilities needed for many entry-level positions. The Article concludes with suggestions for employers who may need to establish the job relatedness and necessity to screen based on the possession of a “new and improved” high school diploma.

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V. CONCLUSIONS REGARDING EMPLOYERS' RELIANCE ON THE NEW AND IMPROVED HIGH SCHOOL DIPLOMA .............................. 115

People with disabilities participate in the labor force at much lower rates than other workers.1 Of the more than twenty-nine million working

age Americans with disabilities,2 29% are unemployed, and half of them are looking for work.3 Employers’ perceptions that persons with disabilities are unable to perform work effectively because they lack necessary knowledge, skills, and abilities contribute to this unemployment.4 To find applicants with such qualifications, many employers prefer applicants who hold a high school diploma.5 This requirement disparately impacts persons with disabilities, who are often unable to obtain diplomas under recently heightened state requirements.6 Such disparate impact calls for some showing of job-relatedness and business necessity to screen applicants based on possession of a diploma7 rather than some other criteria that would have less of an impact on applicants with disabilities.

While employers continue to screen applicants based on their possession of a diploma, states continue to raise the requirements to obtain what is referenced here as a “new and improved” diploma. Because of these heightened requirements, many students with disabilities receive some alternative to a traditional high school diploma, such as a certificate, when they exit high school. This lack of a traditional diploma prevents many workers with disabilities from finding employment.8 This Article does not take a position on the continuing debate regarding the value of heightened

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2. Id.


5. See Michael R. Benz et al., Improving Graduation and Employment Outcomes of Students with Disabilities: Predictive Factors and Student Perspectives, 66 EXCEPTIONAL CHILDREN 509, 524 (2000).


7. This Article will use the terms traditional high school diploma and diploma interchangeably.

graduation requirements. Instead, this Article highlights the need for employers to recognize that a diploma is becoming more difficult to obtain, especially for persons with disabilities. Given this reality, employers must determine whether the “new and improved” diploma is an appropriate screen for applicants with disabilities.

The impact of enhanced graduation requirements is significant. Twenty-two states now require passage of some type of exit examination to receive a traditional high school diploma. While early exit examinations began with measuring minimum competency, many states now require passage of course-related examinations that yield significantly lower pass rates.\(^9\) Failure to pass just one of these examinations prevents a student from receiving a diploma.\(^10\) Additionally, almost all states have adopted curriculum requirements to ensure that all high school graduates have received instruction in different subject areas to align with common core standards.\(^11\) Employers’ reliance on diplomas as screening tools can lead to broad rejection of applicants with disabilities since many of them cannot meet these enhanced requirements.

This Article demonstrates the combined effect on people with disabilities caused by enhanced graduation requirements and the continued trend of employers to screen applicants based on the possession of a traditional diploma. Employers may have limited influence over the adoption of curriculum or graduation requirements, but employers and courts reviewing these potential disparate impact claims should think carefully about whether the possession of a diploma is an accurate indicator that applicants will actually perform better.

Employers need to look beyond the possession of a diploma to determine whether the inability of a student with a disability to meet enhanced curriculum requirements and pass an exit examination renders the applicant unqualified. Instead of screening based on the possession of a traditional diploma, employers should consider other methods of measuring the potential value of applicants with disabilities to select the best-qualified applicants. These methods may include completion of high school and other work experiences, as well as alternative, job-specific methods of measuring necessary skills and competencies.

Part I of this Article demonstrates the importance of a diploma in today’s labor market. Employers increasingly demand at least a diploma for many positions that did not require a diploma in the past. Moreover, positions and industries that require at least a diploma are growing faster than areas requiring lower levels of education, resulting in growing

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9. See discussion of course-related examinations infra notes 94-97 and accompanying text.
10. See discussion of exit examinations infra notes 83-86 and accompanying text.
11. See discussion of curriculum requirements infra notes 102-106 and accompanying text.
unemployment rates for workers who lack a diploma. Additionally, holders of a diploma can expect much greater labor market success, as measured by wages, compared to non-graduates.

Part II of this Article discusses the impact of high school graduation requirements on people with disabilities by examining those requirements and their effect on teaching, learning, and receiving a diploma. Particular attention will be paid to certificates and other alternative credentials, which are often issued to students with disabilities who complete high school but cannot pass exit examinations or satisfy heightened course requirements. Part II will also explore the enhanced requirements’ effect on dropout rates for students with disabilities. Finally, this review will demonstrate how enhanced diploma requirements have indirectly caused employer screenings to disparately impact job applicants.

Part III of the Article will explore whether a traditional high school diploma is job-related and consistent with business necessity. This determination is guided by disparate impact claims under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), which often focus on screening criteria designed to prevent a direct threat. Both Title VII and the ADA require a job-specific analysis of whether a screening criterion is both job-related and necessary to the employer’s hiring practices, if a criterion has a disparate impact. While the standard for showing job-relatedness and business necessity may be easier to meet for higher-skilled positions where the risks of higher unqualified applicants are greater, employers cannot use a screening criterion for lower-skilled positions without any showing that the criterion measures the knowledge, skills, and abilities needed for the job. This discussion will show that not all employers can demonstrate that requiring a diploma is justified when that requirement screens out a disproportionate number of applicants with disabilities.

I. THE IMPACT OF A HIGH SCHOOL DIPLOMA IN THE LABOR MARKET

High school diplomas are an important factor in the labor market because of employer preference. Employers often screen applicants based on their possession of a diploma,12 which continues to be seen as a “highly valued prize—a passport to good jobs and higher education.”13 Hiring rates and earning levels, which vary significantly based on the possession of a diploma, indicate the importance of diplomas in the labor market.

12. John Zappa, Requiring a Diploma May be Discriminatory, ERE MEDIA, (Dec. 8, 2011, 5:54 AM), http://www.ere.net/2011/12/08/requiring-a-diploma-may-be-discriminatory/; see also Benz et al., supra note 5, at 524 (completion document seen as less desirable by employers).
Together, these labor market effects show the impact of the new and improved graduation requirements on all workers, but particularly on workers with disabilities who are unable to meet heightened graduation requirements to earn a traditional diploma. Without a diploma, people with disabilities are less likely to be employed, and even if they find a job, are likely to earn less than otherwise comparable employees who hold a diploma.

A. Labor Market Participation

Employers' preference for workers with at least a high school diploma can be seen in current labor market statistics. By 2013, only 8.2% of all employed, civilian workers aged twenty-five and older lacked a diploma, compared to 27.1% holding a diploma or equivalent. The decrease in workers with less than a diploma from 9.7% in 2003 to 8.2% in 2013 shows employers' increasing preference for higher educational attainment. This drop in labor market participation is most apparent among people with disabilities, who are most likely to leave high school without a diploma.

1. Effect of Education on Labor Market Participation

Employers prefer to hire applicants who have earned a diploma, regardless of the skill level of the position being filled. Some of the most notable declines in opportunities for workers who have not finished high school across various industries are shown in Table 1. This data shows a significant decrease in employment for workers without a high school diploma in almost all sectors, other than leisure and hospitality and personal services.


Table 1: Percentage of Workers Who Did Not Receive a High School Diploma Across Industries

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing</td>
<td>35%</td>
<td>19%</td>
<td>23%</td>
<td>21%</td>
</tr>
<tr>
<td>Construction</td>
<td>31</td>
<td>15</td>
<td>13</td>
<td>10</td>
</tr>
<tr>
<td>Information Services</td>
<td>25</td>
<td>9</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Financial Services</td>
<td>16</td>
<td>5</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Professional &amp; Business Services</td>
<td>22</td>
<td>10</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Government &amp; Public Education</td>
<td>17</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Healthcare Services</td>
<td>18</td>
<td>7</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Wholesale &amp; Retail Trade</td>
<td>24</td>
<td>12</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Transportation &amp; Utilities</td>
<td>26</td>
<td>9</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Leisure &amp; Hospitality</td>
<td>25</td>
<td>15</td>
<td>18</td>
<td>25</td>
</tr>
<tr>
<td>Personal Services</td>
<td>27</td>
<td>34</td>
<td>33</td>
<td>33</td>
</tr>
</tbody>
</table>

Employment opportunities for non-graduates are likely to continue to decline into the near future. Economists predict that only 9% of the total job openings by 2018 will be open to high school dropouts. Past trends and projections for 2018 in various occupations based on the required educational level are presented in Table 2.

17. Id. at 83.
18. Id. at 86.
19. Id. at 87.
20. Id. at 88.
21. Id. at 90.
22. Id. at 91.
23. Id. at 92.
24. Id. at 93.
25. Id.
26. Id. at 94.
27. Id. at 26.
28. Id. at 29-94.
29. Id. at 24.
Table 2: Opportunities in Labor Market Based on Education

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sales and Office Support</td>
<td>7%</td>
<td>6%</td>
<td>5%</td>
<td>45%</td>
<td>34%</td>
<td>29%</td>
</tr>
<tr>
<td>Blue Collar</td>
<td>29</td>
<td>22</td>
<td>21</td>
<td>45</td>
<td>47</td>
<td>44</td>
</tr>
<tr>
<td>Food &amp; Personal Services</td>
<td>27</td>
<td>19</td>
<td>19</td>
<td>43</td>
<td>39</td>
<td>37</td>
</tr>
<tr>
<td>Managerial &amp; Professional Office</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>23</td>
<td>16</td>
<td>11</td>
</tr>
<tr>
<td>Education</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>9</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Health Professional &amp; Technical</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>16</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>STEM</td>
<td>1.5</td>
<td>0.3</td>
<td>0.3</td>
<td>15.8</td>
<td>7.9</td>
<td>8.5</td>
</tr>
<tr>
<td>Community &amp; Arts</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>13</td>
<td>10</td>
<td>8</td>
</tr>
<tr>
<td>Healthcare Support</td>
<td>20</td>
<td>10</td>
<td>7</td>
<td>45</td>
<td>38</td>
<td>34</td>
</tr>
</tbody>
</table>

30. Id.
31. Id. at 29. Examples include cashiers, retail salespersons, administrative assistants, bookkeepers, and customer service representatives.
32. Id. at 32. Examples include construction, installation & repair, production, and transportation.
33. Id. at 38. Examples include food preparation, personal care (including child care workers), maintenance, and protective services (including firefighters & police officers).
34. Id. at 43. Examples include managers, accountants, human resources, lawyers, and paralegals.
35. Id. at 48. Examples include preschool, K-16, and special education teachers.
36. Id. at 50. Examples include registered nurses and health technologists.
37. Id. at 52. Examples include computer specialist, architect, engineer, life sciences, and social sciences.
38. Id. at 58. Examples include arts, design, entertainment, media, and community and social services.
39. Id. at 61. Examples include nursing aides, orderlies, home health aides, dental assistants, and medical transcriptionists.
By 2018, workers without a diploma are most likely to find employment in the leisure and hospitality industry, followed by wholesale, retail, and construction. In contrast, high school graduates will most likely find employment in blue-collar sales and office support.

Future employment opportunities for non-graduates are expected to be concentrated in certain industries. This trend means that by 2018, 55% of the opportunities for non-graduates will be concentrated in just three industries, all of which are expected to grow more slowly than other sectors. In contrast, opportunities for high school graduates are spread more broadly across industries. The most notable change since 1983 has been the 13% reduction in health care support positions for those who did not complete high school. Unfortunately, these statistics and studies do not distinguish between a high school dropout and a student who completes high school but does not receive a traditional diploma because of graduation requirements. That lack of distinction may reflect the failure of employers to distinguish between dropouts and students who finish high school with some alternative credential other than a diploma.

The shift away from employing workers without diplomas has significantly affected this group’s employment status. In 2003-2004, slightly more than 50% of those who did not graduate were employed, compared to 69% of those holding a high school diploma or GED and 75% with more than a diploma or GED. The unemployment rates for high school graduates compared to non-graduates also show this disparity in labor market participation. As shown in Table 3, the unemployment rate for workers without a diploma reached 14.1% in 2011 and then declined to 12.4% in 2012, compared to rates of 9.4% and 8.3%, respectively, for high school graduates.

40. Id. at 73, 76.
41. Id. at 24.
42. Id. at 73, 76.
43. Id.
44. Id. at 61.
45. GED refers to General Educational Development tests that certify the achievement of high school-level academic skills in four subject areas. See GED Testing Service, What is the GED Test?, available at http://www.gedtestingservice.com/testers/2014test.
48. Id.
Table 3: Unemployment Rates by Educational Attainment

<table>
<thead>
<tr>
<th>Unemployment Rate</th>
<th>Less than High School Diploma</th>
<th>High School Graduate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>11%</td>
<td>7.5%</td>
</tr>
<tr>
<td>2011</td>
<td>14.1</td>
<td>9.4</td>
</tr>
<tr>
<td>2009</td>
<td>13.7</td>
<td>10.4</td>
</tr>
<tr>
<td>2007</td>
<td>6.0</td>
<td>4.4</td>
</tr>
<tr>
<td>2005</td>
<td>6.2</td>
<td>4.5</td>
</tr>
<tr>
<td>2003</td>
<td>8.2</td>
<td>5.9</td>
</tr>
</tbody>
</table>

Those who do not graduate from high school are also more likely to drop out of the labor market and not be counted as unemployed.

2. Participation of Workers with Disabilities

Participation in the labor force among people with disabilities differs significantly from the participation of others. The limitations on opportunities in the various occupations outlined above are compounded for people with disabilities. People with disabilities are underrepresented in the fastest-growing occupations, while they are overrepresented in declining occupations.

Experts warned as early as 2002 that enhanced graduation requirements would negatively affect the access of students with disabilities to postsecondary education or employment. Since then, a lack of adequate education has been shown to significantly affect the labor force participation of persons with disabilities. In 2000, for example, the

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51. Jose Blackorby & Mary Wagner, Longitudinal Postschool Outcomes of Youth with Disabilities: Findings from the National Longitudinal Transition Study, 62 Exceptional Children 399, 402 (1996) (46% participation for people with disabilities out of high school for two to three years, compared to 59% participation by youth in the general population, and 57% versus 69% participation three to five years after high school); see also Melissa J. Bielland et al., 2010 Progress Report on the Economic Well-Being of Working-Age People with Disabilities 4 (Cornell University 2011), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1284&context=edicollect; Edward H. Yelin & Laura Trupin, Disability and the Characteristics of Employment, 126 Monthly Lab. Rev. 20, 25 (May 2003) (employment rates of 73.9% for the non-disabled and 54.1% among those with disabilities).
52. Nat’l Council on Disability, supra note 8, at 21-22. The disability rate is 6.5% in the 10 fastest-growing occupations, and 8.7% in declining occupations, compared to an overall rate of 7.2%. Id.
54. Pamela Loprest & Elaine Maag, Barriers and Supports for Work Among Adults with Disabilities: Results from the NHIS-D 7, 10 (The Urban Institute, 2001), available at
adjusted employment rate among California workers who did not graduate was 26.1% for people with a disability compared to 59.3% for those without a disability.\textsuperscript{55} Completion of high school also has been significantly related to employment among youth with disabilities.\textsuperscript{56}

The importance of high school graduation for persons with disabilities is reflected in a study of their labor market success, showing a 12% increase in employment within three years of graduation. The gain among dropouts and age-outs\textsuperscript{57} in the same study was not statistically significant.\textsuperscript{58} Within three to five years after high school, graduates with disabilities were significantly more likely to be employed than were peers who had either dropped out or aged out.\textsuperscript{59} The gap between employment for students with disabilities and the general population was more pronounced for those with mental retardation, compared to those with learning disabilities or speech impairments.\textsuperscript{60}

Unfortunately, current research has not focused on the labor market effects on students with disabilities who complete high school but do not receive a diploma. One of the few studies tracking employment of recipients of some alternative credential for completing high school showed that 77.4% of those who had graduated with a diploma had a job compared to 60.1% of those who graduated with a certificate.\textsuperscript{61} Despite this gap in the research, the existing studies show that a diploma is an important predictor for successful entry and retention in the labor market, and that diploma is even more important for workers with disabilities.

\begin{footnotesize}
\begin{enumerate}
\item http://www.urban.org/UploadedPDF/adultswithdisabilities.pdf (18% of workers with disabilities have less than high school diploma compared to almost 33% of non-workers with a disability, who report more difficulty in finding work).
\item Yelin & Trupin, supra note 51, at 25. Rates adjusted for health status and demographic characteristics.
\item Completion is defined by graduation, receiving a certificate of attendance or completion, or who passed a high school exit examination or completed a GED program. Lynn Newman et al., SRI International, Comparisons Across Time and Outcomes of Youth with Disabilities Up to 4 Years After High School: A Report of Findings from the National Longitudinal Transition Study (NLTS) and the National Longitudinal Transition Study-2 (NLTS2) xviii (2009), available at http://www.eric.ed.gov/PDFS/ED512149.pdf.
\item Age-outs are those students who stay in school through the maximum age allowable.
\item Blackorby & Wagner, supra note 51, at 402-03.
\item Id.
\item Id. at 403.
\item Karen Rabren et al., Predictors of Post-High School Employment Among Young Adults with Disabilities, 25 Career Dev. for Exceptional Individuals 25, 29 (2002).
\end{enumerate}
\end{footnotesize}
B. Labor Market Success

The value an employer places on its employees is typically measured by the level of wages received.62 There is no doubt that the possession of a diploma has a significant positive effect on workers’ wages.63 In 2004, a person who did not graduate from high school earned on average thirty-seven cents for each dollar earned by someone with more education.64 From 1983 to 2010, workers between the ages of twenty-five and fifty-four who never completed high school saw their earnings drop by 2%, as earnings for high school graduates increased by 13%.65 The greatest disparities were in sales, office support and blue-collar positions.66 Significantly, the average salary for high school dropouts declined (in 2008 dollars) in seven of the nine occupational categories between 1983 and 2008.67 These differences in earnings have a cumulative effect; over the course of a lifetime, a non-graduate is expected to earn between $260,000 and $569,000 less than a high school graduate.68

Unfortunately, most wage studies do not distinguish between those who receive a diploma and others who complete high school but receive some alternative credential. Since students who receive some alternative to a traditional high school diploma are not considered dropouts, but are also not considered graduates, their earnings are not captured in this data. Some limited studies do show that even those who complete high school but do not receive a diploma earn significantly less than high school graduates.69 This difference in earnings can be attributed to the educational level

64. Rouse, supra note 46, at 99.
66. Id. at 105.
67. Id.
68. Rouse, supra note 46, at 116-19 (finding that a non-graduate would make $260,000 less than a high school graduate); CARNEVALE ET AL., supra note 16, at 5 (finding that a non-graduate would make $569,000 less than a high school graduate). It is also noteworthy that earners of GEDs who have not completed high school are less successful in the labor market than equivalent high school graduates. Richard Rothstein & Tamara Wilder, Beyond Educational Attainment: A Multifaceted Approach to Examining Economic Inequalities, in THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 37 (Clive R. Belfield & Henry M. Levin eds., 2007).
achieved rather than personal characteristics, such as ability or family background.\footnote{Rouse, supra note 46, at 105-6.}

Like the general workforce, employees with disabilities experience earnings disparities based on attainment of a diploma. This may reflect employers’ concerns associated with hiring people with intellectual disabilities in particular.\footnote{Jana Copeland et al., Assessing Cognitive and Affective Reactions of Employers Toward People with Disabilities in the Workplace, 20 J. OCCUPATIONAL. REHAB. 427, 428 (2010).} After three to five years out of school, 41.7% of high school graduates with a disability were making more than six dollars per hour, compared to 37.9% of those who dropped out and 26.3% of those who aged out.\footnote{Id. at 405.} These results suggest that, for youth with disabilities, “the evidence for the importance of high school graduation is compelling.”\footnote{Id. at 410.}

The labor market establishes the value of a diploma in both labor market participation and wages earned. This effect can only be expected to increase as the enhanced graduation requirements described below begin to have an impact in the labor market. As discussed in the following Part, employers’ reliance on a diploma as a screening criterion for an increasing variety of positions has a significant impact on applicants with disabilities who are unable to meet the enhanced graduation requirements adopted by many states.

\section{Enhanced Graduation Requirements and Their Impact}

In recent years, many states have adopted enhanced graduation requirements that control the number of students who receive a diploma.\footnote{See discussion of enhanced graduation requirements infra notes 83-86, 94-97 and 102-106 and accompanying text.} These requirements include exit examinations and enhanced curriculum standards. States have adopted these measures to hold teachers and school districts more accountable and to improve American competitiveness in the world market.\footnote{Jacob, supra note 13, at 99-100; see also John W. Sipple et al., Adoption and Adaptation: School District Responses to State Imposed Learning and Graduation Requirements, 26 EDUC. EVALUATION AND POLICY ANALYSIS 143, 164 (2004); Naomi Chudowsky et al., Ctr. on Educ. Pol'y, State High School Exit Exams: A Baseline Report 9, 24 (2002), available at http://www.cep-dc.org/cfcontent_file.cfm?Attachment=CEP%5FHSEE01Report%5F080102%2Epdf.} Enhanced requirements arguably provide concrete goals to improve student achievement, as well as school performance, pedagogy and curriculum.\footnote{Jennifer Jellison Holme et al., Assessing the Effects of High School Exit Examinations, 80 REV. OF EDUC. RES. 476, 478 (2010); COMPETITIVENESS POLICY COUNCIL, REPORTS OF THE SUBCOUNCILS 52-53, 67 (1993), available at http://ia700400.us.archive.org/9/items/competitivepolicy0unit/competitivepolicy0unit.pdf.} It is noteworthy that twelve states have justified their
heightened criteria by invoking a desire to “ensure students who receive a diploma are ready for college . . . or [a] career.”

Regardless of the reason for their adoption, enhanced graduation requirements have had a significant effect on all students, with arguably the greatest impact on students with disabilities. Students seeking a diploma may face anything from district-specific curriculum requirements to a combination of state-imposed curriculum requirements and course-specific exit examinations. These requirements prevent some high school completers from receiving a diploma; instead, they receive a local certificate of completion or some other credential. These variations have led at least one set of experts to conclude that “not all high school diplomas are alike.” For this reason, the job-relatedness and necessity of employer diploma screening are tied to the specific requirements that determine whether students in different states receive a diploma.

A. The Requirements

Enhanced graduation requirements have significant effects on both teaching and learning in schools. Additionally, the requirements prevent many students with disabilities from obtaining a diploma, and may also affect their school retention. Schools and states have adopted these requirements in the wake of the Elementary and Secondary Education Act (ESEA), also known as the No Child Left Behind Act. Under ESEA, schools are accountable for improving the performance of students with disabilities and closing the gap between their achievements and the achievements of other students. The ESEA places significant weight on graduation rates, which only include those students who have earned a diploma. While Congress has considered relaxing ESEA requirements, many states continue to increase both the difficulty of exit examinations and

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77. McIntosh, supra note 6, at 25.
78. For example, curriculum requirements in California can vary significantly by district, whereas Florida requires twenty-four standardized curriculum credits as well as a comprehensive exit examination. William H. Clune & Paula A. White, Education Reform in the Trenches: Increased Academic Course Taking in High Schools with Lower Achieving Students in States with Higher Graduation Requirements, 14 EDUC. EVAL. & POL’Y ANAL. 2, 11, 18 (1992); McIntosh, supra note 6, at 9.
79. See infra notes 157-88 and accompanying text for a discussion of alternative credentials.
82. Margaret J. McLaughlin, Evolving Interpretations of Educational Equity and Students with Disabilities, 76 EXCEPTIONAL CHILDREN 265, 270 (2010).
83. MARTHA L. THULLOW ET AL., NAT’L CTR. ON EDUC. OUTCOMES, EARNING A HIGH SCHOOL DIPLOMA THROUGH ALTERNATIVE ROUTES (SYNTHESIS REPORT 76) (2010).
curriculum requirements. This Part explores these requirements with a focus on the relationship between different graduation requirements and future job skills and duties.

1. Exit Examinations

Exit examinations as prerequisites for graduation are becoming increasingly common, with twenty-five states requiring some type of exit examination for high school graduates in the 2011-2012 academic year. In 2012, nearly 69% of all students in public schools took exit examinations. While these examinations are intended to impact curriculum content, instructional strategies, intervention strategies, professional development support for teachers and administrators, the use of assessment results, and the use and nature of test preparation materials, it is important to keep in mind that most of these examinations were not designed to measure individual student learning.

Despite the general trend, a few states have recently moved away from requiring passage of exit examinations. In June 2014, Alaska’s legislature eliminated its exit examination and expanded opportunities for vocational and career training at the same time. Critics of Alaska’s examination described the examination as “cruel and unusual punishment” and claimed that it “did not serve any purpose in determining career or college readiness.” Similarly, South Carolina also eliminated its exit examination in 2014, replacing it with two tests—one to assess comprehension of high school course material and the other to give employers information about job-related skills. These changes may reflect some growing concern about

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84. McIntosh, supra note 6, at 2, 11-12. States with exit examinations as of September 2012: Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, South Carolina, Texas, Virginia, Washington.

85. McIntosh, supra note 6, at 8.


89. Id.

the appropriateness of conditioning a diploma on passage of these standardized examinations. Nevertheless, required exit examinations are increasingly becoming the norm.

Many states began the enhancement of graduation requirements by requiring passage of minimum competency examinations, which set a "pretty low standard." These examinations often focus on basic skills at the eighth- or ninth-grade level. By 2008, only three states continued to use minimum competency examinations while sixteen states had transitioned to standards-based exams and five required more rigorous end-of-course exams. Of these nineteen states requiring either minimum competency or standards-based examinations, eleven align their tests to content taught through grade ten, seven cover content through grade eleven, and one includes content taught through grade twelve.

The past several years have seen a movement toward end-of-course examinations measuring comprehension of specific course material. Viewing exit examinations as a way of ensuring consistent rigor across schools and districts, many states have enthusiastically embraced this new model. By 2012, at least eighteen states had adopted mandatory examinations tied directly to course requirements, and nine states had adopted end-of-course examination requirements for graduation. In 2014, four more states have taken steps toward implementing end-of-course examinations. This represents a significant increase in the requirement to pass end-of-course examinations since 2008.

End-of-course examinations typically cover at least mathematics, English, and language arts; several states’ exams also cover history and social studies and at least one state’s covers science. These examinations differ from minimum competency examinations in that they assess more

92. Jacob, supra note 13, at 100.
93. CHUDOWSKY ET AL., supra note 76, at 46-47. End-of-course exams are given to individuals when they complete a specific high school course, in order to assess what they learned in that course.
94. Id. at 14.
96. McIntosh, supra note 6, at 25.
97. Id. at 9-10.
98. Id.
99. Id. at 11-12.
difficult material and signal student achievement in that subject. The breadth and depth of subjects covered by these examinations may extend beyond the knowledge and skills required of many positions, which currently require a high school diploma of their applicants. For example, the 24% of students who do not pass science end-of-course examinations may still be well qualified for entry level positions which typically require a diploma, such as an oil change attendant or retail clerk.

Table 4: 2011 Exit Examinations in Subject Areas

<table>
<thead>
<tr>
<th>Subject</th>
<th>No. of States Testing</th>
<th>Avg. Pass Rate</th>
<th>Pass Rates – lower end</th>
<th>Pass Rates – upper end</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mathematics</td>
<td>24</td>
<td>77.5%</td>
<td>54%</td>
<td>91%</td>
</tr>
<tr>
<td>English/Language Arts</td>
<td>14</td>
<td>85.1</td>
<td>72</td>
<td>97</td>
</tr>
<tr>
<td>Reading</td>
<td>24</td>
<td>79.2</td>
<td>50</td>
<td>97</td>
</tr>
<tr>
<td>Writing</td>
<td>19</td>
<td>84.1</td>
<td>70</td>
<td>98</td>
</tr>
<tr>
<td>Science</td>
<td>12</td>
<td>75.8</td>
<td>57</td>
<td>94</td>
</tr>
<tr>
<td>Social Studies</td>
<td>9</td>
<td>84.4</td>
<td>71</td>
<td>93</td>
</tr>
</tbody>
</table>

As shown above, the average pass rate across states varies significantly between subject areas. In addition, there are significant differences in pass rates across states, as shown by the “lower end” and “upper end” passage rates shown above. This is likely due to variation in content and the amount of time an exit examination has been in effect. This shows that passage of a particular subject-area examination in one state may mean something very different than passage in another state. In states with low pass rates, this means that a significant number of students, especially those with disabilities, are not receiving a high school diploma.

2. Course Requirements

Many states or school districts have adopted mandatory course requirements in addition to or instead of adopting exit examinations.
Between 1980 and 2010, thirty-six states expanded course requirements to include more subjects and a greater number of courses in requisite subjects. Intended to increase the rigor of a high school education, curriculum requirements vary in precision and extent of implementation across states and local districts. Many schools have added courses in previously non-mandatory disciplines but have allowed non-college bound students to take less comprehensive versions of a course, including integrated, applied, or interdisciplinary courses.

The dominant trend is toward more rigorous and inflexible curriculum standards. Many states now require four years of English and three years of social studies, science, and mathematics. As of 2006, seventeen states required completion of at least Algebra II, either three or four credits of science, and at least one United States history course to graduate; some states are also requiring study of a foreign language. These course requirements are designed to force students to take more courses in core academic subjects and, consequently, increase learning of key skills and improve academic achievement. While some of these courses, such as mathematics, may directly relate to positions filled with high school graduates, others, such as a foreign language course, may exceed the needs of such positions.

Despite the continuation of the trend to heighten standards, some states are moving toward allowing substitution of vocational courses to fulfill course requirements. For example, Florida adopted changes to its graduation requirements in 2014, which allow for the substitution of

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104. \textsc{State Academic Standards (2010)}, available at \url{http://www.michigan.gov/mde/0,4615,7-140-28753--00.html} (an overview of Michigan common core academic standards).
107. \textsc{Id. at 2}, 15.
industry certification for fulfillment of certain required courses. These alternatives allow students, particularly students with disabilities, to receive a diploma without successfully completing courses that might not be directly related to their future success in the workplace.

B. Effects of Standardization

Both critics and supporters of educational standardization have found support in the research on its effects, ranging from effects on teaching and learning to effects on obtaining a diploma and dropout rates. To understand whether the new and improved high school diploma is job-related and a business necessity, it is important to understand these effects relative to a high school graduate’s qualifications for the workplace.

1. Effects on Teaching

The increasing use of exit testing and adoption of course requirements may affect the quality of students’ education and arguably shifts the focus of instruction. Exit examinations have caused schools to align curriculum with state standards and offer remedial courses to improve passage rates. Teachers may be encouraged by high stakes standardized testing to “use valuable class time coaching students on the kinds of questions they will face and giving them a chance to practice taking these tests,” especially in districts with high numbers of low-achieving students. Schools administering mandatory exit examinations have noted increased focus on test preparation in teaching; this shift in focus has been characterized by teachers and other school staff as “teaching to the test,” “time for test preparation,” “testing procedures for students,” and “narrowing of the

111. FLA. STAT. § 1003.4282 (2014).
In addition, teachers have reported teaching in ways that contradict sound educational practices in states with both minimum competency and standards-based examinations.\textsuperscript{115}

Curriculum requirements have a more direct effect on teaching. There is at least some evidence that enhanced curriculum requirements have led to substantial upgrading of high school curricula and increased academic course-taking among students, even those at risk of dropping out.\textsuperscript{116}

In addition to affecting teaching focus, adoption of exit examinations and enhanced curriculum requirements are reducing enrollment in vocational and career preparation courses.\textsuperscript{117} These courses often focus on training for a particular career, as well as developing employability skills. From 1982 to 2000, the percentage of time spent on vocational education decreased from 21.8\% to 16.2\%.\textsuperscript{118} To stem this loss of vocational training, some schools have been adapting vocational courses to meet state course requirements.\textsuperscript{119} Overall, however, fewer career and technical programs have been offered in schools in states with a required exit examination,\textsuperscript{120} and fewer occupational courses are being taken in states that have raised course requirements.\textsuperscript{121}

While schools have been moving away from vocational training, the National Association of Manufacturers (NAM) has cautioned that educational standards and testing “should not be pursued to the point where

\textsuperscript{114} Sandra L. Christenson et al., Consequences of High-Stakes Assessment for Students With and Without Disabilities, 21 EDUC. POL’Y 662, 685 (2007); see also CLARKE ET AL., supra note 113, at 47 (interviewing K-12 teachers and administrators in three states).

\textsuperscript{115} Abrams et al., supra note 113, at 23.


\textsuperscript{117} See NAT’L COUNCIL ON DISABILITY, IMPROVING EDUCATIONAL OUTCOMES FOR STUDENTS WITH DISABILITIES 30 (2004), available at http://www.ncd.gov/rawmedia_repository/4a9d429_4d8a_4dbb_a178a4b23222?document.pdf; see also Jim Ysseldyke et al., What We Know and Need to Know About the Consequences of High-Stakes Testing for Students With Disabilities, 71 EXCEPTIONAL CHILDREN 75, 85 (2004); ACHIEVE, INC., supra note 107, at 4; Johnson et al., supra note 53, at 522 (advocating for students’ continued access to a broad curriculum including vocational education, community-based work experience and independent living skills programs).


\textsuperscript{119} CLUNE ET AL., supra note 105, at 16.


other equally worthy elements are driven out of curriculum." The NAM has recommended that that "state education standards should include career education as measurable criteria for K-12 success." This concern has not been reflected in the movement of many states away from vocational courses in favor of a more academic, standardized curriculum.

Overall, the decrease in work experience and career-related activities has particularly affected students with disabilities. Students who traditionally concentrated on vocational courses have increased their academic-oriented curriculum by 27%. This shift has a greater impact on students with disabilities since they tend to take more vocational credits and have a greater tendency to complete an occupational concentration compared to students without disabilities.

Vocational courses combined with workplace learning opportunities have been central to the transition of students with disabilities to work from an educational setting because of the importance placed on occupational content. A 2012 Government Accountability Office (GAO) Report noted that decreases in vocational and life-skills training affect the acquisition of skills that are important to gaining and retaining employment for students with disabilities in particular. These effects on teaching may directly impact the job-relatedness and necessity of a diploma requirement for employment, especially for students with disabilities who are no longer...
receiving the vocational training that would prepare them for success in the workplace.

2. Effects on Learning

In addition to the effects on teaching, enhanced graduation requirements may be having a significant effect on learning, which directly impacts the job-relatedness and necessity of a diploma requirement for job applicants. An exit examination should be aligned with school curriculum and instruction before it becomes a graduation requirement. But this alignment may not be achieved if the examination is being used as a means of inducing changes in the content and methods of teaching. A test cannot both measure achievement of materials being covered and induce changes in teaching at the same time.

Some exit examinations, especially those not tied to a particular course, have been found to lack alignment with the state’s own standards for a particular subject. In 2012, only eight of twenty-five states with exit examinations believed that their examinations were aligned to college and career-readiness standards; ten states had plans to align. The majority of these states base alignment on the Common Core State Standards (CCSS), which are intended to ensure that all students graduate from high school “with the skills and knowledge necessary to succeed in college, career, and life.” Most states aligning with these standards expect that this will make their exit examinations more rigorous.

Standardization and alignment are intended to improve student learning. However, meeting standardized graduation requirements may be a poor indicator of whether a graduate is “well-educated.” A 2002 review of several studies found that student performance had only improved

131. Id. at 164.
132. Bishop et al., The Role of End-of-Course Exams, supra note 91, at 47; see also GAYLER ET AL., supra note 112, at 93-94; Jim Ysseldyke, et al., What We Know and Need to Know About the Consequences of High-Stakes Testing for Students with Disabilities, 71 COUNCIL FOR EXCEPTIONAL CHILDREN 75, 83-84 (2004) (explaning that curriculum was not aligned with what was being tested).
133. McIntosh, supra note 6, at 26.
134. Id.
136. McIntosh, supra note 6, at 32.
137. Holme et al., supra note 76, at 478.
in three to six states using standardized testing. The introduction of an exit examination requirement can unintentionally lead to “lowered expectations of students as learners, narrowing of the curriculum and instruction to focus on the specific learning outcomes assessed in state tests, and limiting the range of program options students can participate in because of intensified efforts to concentrate on areas of weakness identified by testing.”

Many educators in states with exit examinations have reported that examinations do not represent student achievement. Consequently, only 57% of educators in high-stakes testing states and 37% in other states believed that it was “appropriate” to use test results to award diplomas.

Evidence of the effect of minimum competency testing on learning is mixed. Any positive effects are only seen among lower achieving students.

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141. CLARKE ET AL., supra note 113, at 79.


students. Exit examinations have little impact on the achievement of average or high-performing students, especially when controlling for other demographic factors. States with exit examinations have not consistently shown corresponding increases on national achievement tests; any increases seen were not attributable to adoption of exit examinations. These results have led experts to recommend that high-stakes testing policies either "be substantially revised to provide the benefits supporters claim they provide or they should be abandoned."

In contrast to these studies of general competency examinations, curriculum-based exit examinations are associated with higher student performance. End-of-course examinations are more closely associated with increases in reading, science, and math achievement levels for fourth and eighth graders, compared to minimum competency examinations and other accountability measures.

One study concluded that the effect of graduation requirements on achievement depends largely on the content of the courses taken, but others have found that requirements to take certain courses may not be associated with higher achievement in those same subject areas. For

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144. Bishop et al., The Role of End-of-Course Exams, supra note 91, at 47-48.
145. Holme et al., supra note 76, at 480-87; see also Gregory J. Marchant et al., Relationships Between High-Stakes Testing Policies and Student Achievement After Controlling for Demographic Factors in Aggregated Data, 14 EDUC. POL’Y ANALYSIS ARCHIVES 1, 21-24 (2006) (reviewing studies which did not control for demographic data, finding no significant effects of testing when so controlling).
148. Eric Grodsky et al., State High School Exit Examinations and NAEP Long-Term Trends in Reading and Mathematics, 1971–2004, 23 EDUC. POL’Y 589, 611 (2009); see also Marchant et al., supra note 145, at 23 (noting that some impact may be seen among students at the lower levels, but high stakes testing does "little if anything for students at higher levels of performance").
149. Holme et al., supra note 76, at 490-91; see also John H. Bishop, The Effect of Curriculum-Based External Exit Exam Systems on Student Achievement, 29 J. ECON. EDUC. 171, 176-80 (1998) (observing that curriculum-based examinations in New York have a positive effect on student achievement).
150. Bishop et al., The Role of End-of-Course Exams, supra note 91, at 40.
151. See Bradford Chaney et al., Influencing Achievement Through High School Graduation Requirements, 19 EDUC. EVALUATION & POL’Y ANALYSIS 229, 230 (1997) (observing that student effort and course content can affect achievement); Mark C. Long et al., Effects of High School Course-Taking on Secondary and Postsecondary Success, 49 AM. EDUC. RES. J. 285, 301-2, 315-16 (2012) (taking additional subject courses in high school has positive relationship with achievement scores in those areas); Paul Attewell & Thurston Domina, Raising the Bar: Curricular Intensity and Academic Performance, 30 EDUC. EVALUATION & POL’Y ANALYSIS 51, 63 (2008) (noting that students in courses of higher intensity score higher on assessments).
152. Peter Teitelbaum, The Influence of High School Graduation Requirement Policies in Mathematics and Science on Student Course-Taking Patterns and Achievement, 25 EDUC. EVALUATION
example, a study of both minimum competency and more rigorous exit exams found no significant effects on achievement in math or reading from 1971 to 2004.\textsuperscript{153} Any positive effect may be lower for less demanding subject-matter courses and for generally high-achieving students.\textsuperscript{154}

Pressure for high passage rates may lead to the exclusion of students with disabilities from exit examinations, which may then lower academic expectations for those students.\textsuperscript{155} At the same time, the majority of educators in “standardized” states have indicated that high-stakes assessment has had a positive effect on what students were taught, how students were taught, and the development of alternative instructional options.\textsuperscript{156} Many have noted increases in the monitoring of student performance and progress, in efforts to accelerate the progress of low-achieving students, and in the clarity of instructional goals since the implementation of high-stakes assessments; however, students with disabilities may have experienced less inclusion in general education because of high-stakes testing.\textsuperscript{157}

These studies show that, at best, the impact of standardized testing on learning is mixed. While end-of-course examinations may have a more positive effect, they also have much lower passage rates. At the very least, we can conclude that the effects on learning vary across states and across students, even among those requiring high-stakes testing, depending on the type of exit examination adopted. This research also seriously calls into question the job-relatedness of a diploma that may not be linked to greater comprehension of information and possession of skills that employers deem necessary for success on the job.

### 3. Effects on Receiving a Traditional Diploma

The increasing use of exit examinations and enhanced course requirements has led to students exiting high school without a diploma; instead, students receive some alternative credential such as an “alternative diploma” or “exit certificate.”\textsuperscript{158} Supporters of such credentials argue that all students should receive some recognition of high school completion, while opponents contend that a standard-based single diploma option maintains “high expectations across diverse student groups.”\textsuperscript{159}

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\textsuperscript{153} Grodsky et al., \textit{supra} note 148, at 608-09.
\textsuperscript{154} Chaney et al., \textit{supra} note 151, at 230-31.
\textsuperscript{155} Christenson et al., \textit{supra} note 114, at 668.
\textsuperscript{156} \textit{Id.} at 673.
\textsuperscript{157} \textit{Id.} at 677-78.
\textsuperscript{158} Erickson et al., \textit{supra} note 91, at 118, 121.
\textsuperscript{159} JOHNSON ET AL., REVISITING GRADUATION REQUIREMENTS, \textit{supra} note 80, at 7-8.
The use of alternative credentials is fairly widespread in states with enhanced graduation requirements. A 2011 survey of states found that eleven offered an Individualized Education Plan (IEP) or Special Education diploma, nineteen offered a certificate of attendance, fifteen offered a certificate of achievement, and three offered an occupational diploma. Eight states allowed students with disabilities to earn some credential other than a diploma, such as Maryland’s Certificate of Program Completion or Washington’s Certificate of Academic Achievement, while seventeen states offered only a standard diploma to both students with and without disabilities.

An increase in the issuance of alternative credentials has been attributed to the increased use of exit examinations. Of the twenty-five states requiring an exit examination to receive a diploma in 2011-2012, only two exempted students with disabilities, while only four provided no alternative route to graduation for students with disabilities. Some states have expanded opportunities for students with disabilities to receive a diploma. For example, in 2014 Louisiana began allowing students receiving special education services to receive a diploma, without passage of state achievement examinations, based on criteria developed by his or her IEP program team. At the same time, other states are narrowing alternative routes to a diploma. For example, New York students with disabilities can no longer take an alternative test to substitute for the corresponding Regents examination in subjects required for graduation.

As of 2012, eight states offered waivers or appeals of exit examination requirements, while only five permitted students to graduate based on portfolios of coursework or end-of-course projects rather than passage of the exit examination. Reliance on waivers is quite common in at least

162. NAT’L CTR. FOR LEARNING DISABILITIES, HIGH SCHOOL EXIT EXAMS AND STUDENTS WITH LD 2 (2010).
164. McIntosh, supra note 6, at 19. Individual state profiles for 2011-12 can be found with the Center on Education Policy at http://www.cep-dc.org/page.cfm?FloatingPageID=79.
166. McIntosh, supra note 6, at 21. Additional information regarding states allowing waivers and states with mandatory testing are found at ACHIEVE, INC., supra note 107, at 7-9 (discussing states that permit waivers and states with mandatory testing).
167. McIntosh, supra note 6, at 18-19. States allowing alternative paths to graduation include Alaska, Maryland, New Mexico, and Oklahoma. In Oregon, students can demonstrate proficiency based on locally scored samples of student work.
some states. Other states have been more reluctant to allow waivers. For example, in 2013, Indiana removed alternative pathway provisions for students who do not pass its exit examination, with the goal of reducing the number of students who receive waivers. Alternative methods of assessment are not widely used in the states even where they are offered. Rhode Island is unique in that it will award diplomas to students who show “progress toward proficiency” when it implements its comprehensive tests in 2014.

In states with curriculum requirements, adjustments for students with disabilities include reduction of the number of credits required (three states), alternative courses to earn required credits (twenty-three states), lowered performance criteria (nine states), individual variations in IEPs (thirty-six states), and extensions (fifteen states). Each of these options can still result in the receipt of a diploma.

Differences in gathering of data make the prevalence of alternatives to a diploma somewhat difficult to measure. The ESEA focuses on graduation rates, which only include those students who have earned at least a diploma. In contrast, the Office of Special Education Programs and some states have included students completing high school with a certificate or some other alternative credential under the definition of “graduation.” In 2008, the U.S. Department of Education revised its policy to include only recipients of a diploma in graduation rates.

The receipt of diplomas by students with disabilities has been steadily decreasing, even among those who complete high school. In 2010, the percentage of students in special education who were issued diplomas averaged 63.6% of all students exiting school, with a rate of 53.2% for states with exit examinations compared to 68.4% in states without

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170. See id.; see, e.g., CTR. ON EDUC. POL’Y, MASSACHUSETTS PROFILE OF STATE HIGH SCHOOL EXIT EXAM POLICIES (2012), available at http://www.cep-dc.org/documents/HSEE2012Profiles/MassachusettsHSEE2012.pdf (finding that only 43 students in Massachusetts were assessed based on a portfolio in 2010-11).


172. JOHNSON ET AL., DIPLOMA OPTIONS, GRADUATION REQUIREMENTS, supra note 101, at 22-25.

173. Id.

174. Thurlow et al., supra note 91.

175. Id. at 1.

examinations.\footnote{177} Issuance of alternative credentials has become quite common: the number of certificates issued to special education students in all 50 states rose from 9.57% to 14.66% of all students exiting school between 2006 and 2010.\footnote{178} The impact on students with particular disabilities is more pronounced: the percentage of students with learning disabilities leaving high school with a certificate increased from 7% in 1997 to 14% in 2007.\footnote{179} Students with mental retardation, multiple disabilities, or autism are the most likely to receive a certificate, compared to other students with disabilities.\footnote{180}

The issuance of diploma alternatives is increasing, particularly among students with disabilities who complete high school in states with heightened graduation requirements. For example, as of July 2013, Tennessee allows issuance of an “occupational diploma” for students with disabilities, based on “appropriate standards and benchmarks of attendance, academic achievement and job readiness skills.”\footnote{181} States using high school exit examinations have shown a significant increase in the award of certificates to students with disabilities; the percentage of certificates issued among special education students exiting school averaged 22.2% in states with exit examinations and 25.1% in states with requisite end-of-course examinations, compared to 7.7% in states with no examination (including only those states which issue certificates, with another nine states reporting no certificates issued).\footnote{182} For example, in Virginia 43.1% of all students with disabilities leaving school in 2012 received a modified or special diploma.\footnote{183} In line with these statistics, one study found that 28% of the variance in the issuance of certificates was associated with the prevalence of exit examinations, with a much greater effect for students with mental retardation and autism.\footnote{184}

The increasing issuance of alternative credentials does not necessarily mean that students with disabilities who do not receive a diploma are any less prepared for success in the workplace. These students often have completed the required coursework and may have sufficient levels of

\footnotetext{177}{TECHNICAL ASSISTANCE & DISSEMINATION NETWORK, HISTORICAL STATE-LEVEL IDEA DATA FILES, http://tadnet.public.tadnet.org/pages/712 (last visited Nov. 20, 2014).}
\footnotetext{178}{Id.}
\footnotetext{179}{NAT’L CTR. FOR LEARNING DISABILITIES, supra note 162, at 2.}
\footnotetext{180}{Erickson et al., supra note 91, at 122, 126.}
\footnotetext{181}{2013 Tenn. Pub. Acts 2567 (codified at TENN. CODE ANN. § 49-6-6001(g) (2010)).}
\footnotetext{182}{Erickson et al., supra note 91, at 124. The author calculated percentages from Level IDEA Data files, available at http://tadnet.public.tadnet.org/pages/712.}
\footnotetext{183}{See e.g., CTR. ON EDUC. POL’Y, NEW MEXICO PROFILE OF STATE HIGH SCHOOL EXIT EXAM POLICIES (2012), available at http://www.cep-dc.org/documents/HSEE2012Profiles/NewMexico HSEE2012.pdf (finding that in New Mexico, only 6% of students with disabilities took an alternative assessment, and 18% received a diploma based on lower test scores).}
\footnotetext{184}{Erickson et al., supra note 91, at 120-22.}
comprehension, despite their poor performance on a standardized examination. The availability of these alternative credentials may be encouraging both schools and students to take advantage of them, even among students who might otherwise succeed in earning a diploma if appropriate supports were provided. Regardless of why the issuance of these credentials for students with disabilities is becoming more prevalent, employers need to understand whether a student’s possession of an alternative credential rather than a diploma means that the student is any less qualified for the workplace.

Education policymakers often see these alternative credentials as less valuable than a diploma. In a 2011 survey, 73.7% of responding state directors of special education believed that alternative diplomas were viewed as “substandard,” and 42.1% believed that evaluating students’ skills and abilities based on different diploma options is confusing for employers. If even the education experts have doubts as to their value, certificates may not be a meaningful alternative to a diploma. At a minimum, the meaning and rigor of these alternatives needs to be clarified.

Experts have noted that these alternatives “do not have as much credibility as a ‘regular’ diploma among parents, employers or institutions of higher education.” Moreover, the use of alternatives to a traditional diploma may result in students leaving high school “without the skills or documentation they need to be successful in adult life.”

Because of this lack of clarity, students with disabilities who earn some alternative credential may not find success in the labor market. A GAO 2010 report outlined the inadequate preparation of people with disabilities, reporting that a student who receives a certificate instead of a diploma “could find their employment options significantly curtailed because many employers do not recognize alternative completion documents.” State officials in Maryland, for example, reported that many of these students are not considered qualified for competitive employment. In addition, the possession of a diploma alternative may be confusing for students once they enter the job market, since they may not know how to accurately answer the question of whether they are a high school “graduate.”

185. JOHNSON ET AL., DIPLOMA OPTIONS, GRADUATION REQUIREMENTS, supra note 101, at 44.
186. Benz et al., supra note 5, at 524.
188. McIntosh, supra note 6, at 41.
189. Erickson et al., supra note 91, at 117.
191. Id. at 16-17; see also Matthew Bowers, SOL Scores Could Keep Students from Jobs, College, VIRGINIAN-PILOT (2004), available at http://www.pilotonline.com. Note that the Department of Labor can certify employers to allow them to pay individuals with disabilities less than the otherwise required minimum wage. 29 U.S.C. § 214(c) (2012).
The diploma alternatives can also be confusing for employers, who may not understand, recognize or value alternative credentials. 192 Very few studies have focused on employers’ preferences, 193 but an informal telephone survey by the author among ten employers demonstrated that many do not understand the differences between a diploma and some alternative credential. 194 In one of the few studies completed, when asked if they prefer a standard diploma to some alternative such as a certificate, 20% of employers were interested in the type of diploma earned; 40% only wanted to know if the applicants graduated from high school, and 40% did not care whether the applicant earned a specific type of diploma or just graduated. 195 This survey itself may have been misleading since “graduated” can be understood to mean that the person received a diploma. Of those twenty-five employers, nine also stated that a diploma was the minimum necessary education required for their jobs, and only fourteen out of twenty-five were willing to hire applicants with a certificate rather than a diploma. 196

Employers willing to hire those who had earned some alternative to a diploma gave examples of the more menial jobs they were willing to offer them, which included housekeeping or washing dishes and bussing tables at restaurants. 197 Hiring of employees with a certificate (rather than a diploma) was based on ability to react to situations, people skills, good hygiene, honesty, and good decision-making ability. 198 Employers did not expect these employees to be able to learn academic skills. 199 This survey led the researchers to conclude that “[t]he employability of people who have earned certificates of completion, attendance, or achievement is much lower than for those with an occupational diploma or a GED.” 200

Experts have suggested that employers should be “consulted and engaged in discussions regarding the meaning of these alternative diplomas in terms of students’ skills and knowledge.” 201 Yet one survey showed that

194. In July 2013, informal telephone and e-mail inquiries were directed at a variety of employers expected to hire applicants with no more than a high school diploma. Responses were received from a hotel, a construction company, an auto manufacturer, a retail grocery, a hospital, a nursing home, and a fast food restaurant, all located in Michigan.
195. Hartwig & Sitlington, supra note 63, at 5, 8.
196. Id. at 9-10.
197. Id. at 11.
198. Id.
199. Id.
200. Id. at 13.
201. Id.
only seven states have included business community representatives in
discussions on alternative diploma options. This lack of input has led to
recommendations that states and local school districts thoroughly discuss
the “meaning” and “rigor” of these alternative credentials with employers;
without such discussion “employers may view alternative diplomas as a
convenient screening mechanism for new employees,” and students with a
standard high school diploma “might thereby be viewed as more desirable
candidates for employment than those with an alternative or other type of
diploma.”

Both employer confusion regarding the value of alternative credentials
and the lack of employer input in developing graduation requirements have
had a significant impact on applicants with disabilities who lack diplomas.
Employers using diplomas as a screening criterion typically do not consider
whether lack of a diploma indicates a lack on aptitude or skills needed for
the particular job in question. This prevents applicants with disabilities
from demonstrating that their completion of high school, signified by some
alternative credential, establishes their qualification for the job.

4. Effects on Completion

Not all students with disabilities who cannot meet enhanced graduation
requirements earn a certificate or some other credential. Instead, an
increasing percentage of these students leave school early. For students
with disabilities, the mean cohort graduation rate was 56.6% in 2010-2011,
with states ranging from rates of 23% to 76.7%. This is significantly
lower than the cohort graduation rate for all students in 2011, which was
77.7%. Moreover, twenty-six states reported a decrease in graduation
rates between 2010 and 2011, compared to twenty-two states reporting an
increase.

203. Id. at 122.
204. Hartwig & Sitlington, supra note 63, at 5-8.
205. These statistics are based on students who were covered by an Individualized Education Plan
(IEP). OFFICE OF SPECIAL EDUCATION PROGRAMS, U.S. DEPT. OF EDUCATION, NAT’L DROPOUT
PREVENTION CENTER FOR STUDENTS WITH DISABILITIES, AN ANALYSIS OF STATES, FFY 2011 ANNUAL
PERFORMANCE REPORT DATA FOR INDICATOR B1 (GRADUATION) 3 (July 2013), available at
206. Id. It should be noted that these graduation rates do not include students who receive some
credential other than a traditional diploma after completing four years of high school. CHRIS CHAPMAN
ET AL., NAT’L CENTER FOR EDUCATION STATISTICS, TRENDS IN HIGH SCHOOL DROPOUT AND
207. OFFICE OF SPECIAL EDUCATION PROGRAMS, supra note 205, at 5.
Students with disabilities have a dropout rate that is approximately twice the rate of their peers without disabilities.\textsuperscript{208} The status dropout rate for students with disabilities was 15.5\% in 2009, compared to 7.8\% for students without disabilities.\textsuperscript{209} Dropout rates among fourteen to twenty-one-year-old students with disabilities reached 20.1\% in 2010-2011,\textsuperscript{210} a dramatic increase from what it had been from 1998 to 2005.\textsuperscript{211}

Unlike graduation rates, completion rates include students who complete high school but receive some alternative credential instead of a diploma. In 2009, students with disabilities had a status completion rate of 80\% compared to a completion rate of 90.1\% among students without disabilities.\textsuperscript{212} Increases in high school completion among students with disabilities between 1987 and 2003 were limited to students with learning disabilities, mental retardation or emotional disturbances: only 56\% of youth with emotional disturbances completed school in 2003.\textsuperscript{213} Schools with higher concentrations of students with disabilities also show a significantly lower completion rate than other high schools.\textsuperscript{214} Nationally, the cumulative promotion index (CPI) for schools with a low (less than 13\%) utilization of special education services was 69.7\% for the class of 2001, whereas the CPI for schools with a high (more than 13\%) usage of special education services was 65\%.\textsuperscript{215}

Enhanced graduation requirements have been predicted to play a significant role in lower completion rates.\textsuperscript{216} Experts have long warned that increased graduation standards would increase the dropout rate for all

\textsuperscript{208} Johnsen et al., Revisiting Graduation Requirements, supra note 80, at 4.

\textsuperscript{209} Students with disabilities include those identified as having a disability in at least one of the following: hearing, seeing, walking or climbing, dressing or bathing, doing errands alone, concentrating, remembering, or making decisions. Chapman et al., supra note 206, at 9, tbl:6.


\textsuperscript{212} Chapman et al., supra note 206, at 44, tbl:9.


\textsuperscript{214} Chapman et al., supra note 206, at 44, tbl:9.

\textsuperscript{215} Swanson, supra note 6, at 38. CPI refers to the probability that a student entering ninth grade will complete high school on time with a regular diploma.

students. The data from several states now supports this prediction. More importantly for this discussion, enhanced graduation requirements have resulted in fewer diplomas for students with disabilities, even in states only requiring passage of minimal competency examinations. In states that mandate more rigorous exit examinations, high school completion rates are more likely to be negatively affected. Among students with disabilities who exited high school in 2010, the percentage of students who dropped out averaged 22.03% in states with exit examinations, with a high of 52.3% in South Carolina. In line with these studies, a review of the cumulative promotion index for the class of 2001 in schools with a high (more than 13%) utilization of special education services shows that states with an exit examination requirement had a...


218. Johnson et al., Diploma Options, Graduation Requirements, supra note 101, at 49; David R. Johnson et al., Diploma Options and Perceived Consequences for Students with Disabilities, 17 EXCEPTIONALITY 119, 127-28 (2009). Other studies have not found that enhanced graduation requirements have significantly decreased graduation rates or increased dropout rates among all students. See Holme et al., supra note 76, at 492; Jacob, supra note 13, at 107-49; Martin Carnoy, Have State Accountability and High-Stakes Tests Influenced Student Progression Rates in High School?, 24 EDUC. MEASUREMENT: ISSUES AND PRACTICE 19, 29 (2005); John Robert Warren & Krista N. Jenkins, High School Exit Examinations and High School Dropout in Texas and Florida, 1971-2000, 78 SOCIOLOGY OF EDUC. 122, 139 (2005) (no association between exit examinations and dropout rates in Florida and Texas); Kathryn S. Schiller & Chandra Muller, External Examinations and Accountability, Educational Expectations and High School Graduation, 108 AM. J. OF EDUC. 73, 94 (2000) (no relationship between minimum competency examinations and likelihood of completing high school); see also Ohio Dep’t of Educ., Ohio Ninth Grade Proficiency Tests: Highlights of March/May 1999 Results for Grades 8-12, Class of ’98, available at http://odeO00.ode.state.oh.us/ims/proficiency/9th_prof_mar99_highlight.txt.


220. Holme et al., supra note 76, at 492; 500, 503-4; see also Bishop & Mare, supra note 143, at 211 (2001); Chudowsky et al., supra note 75, at 35; John P. Papay et al., The Consequences of High School Exit Examinations for Low-Performing Urban Students: Evidence from Massachusetts, 32 EDUC. EVALUATION & POL’Y ANALYSIS 5, 13-14, (2010) (failure of math examination associated with lower graduation rate); Dee & Jacob, supra note 108, at 20-21, 35-36 (easier exit examinations associated with a 0.5% reduction in likelihood of high school completion, more difficult examinations associated with a 5.5% increase in probability of dropping out in Minnesota).

221. Holme et al., supra note 76, at 500-01; see also Bishop et al., The Role of End-of-Course Exams, supra note 91, at 27 (New York students more likely to drop out); Sean F. Reardon et al., Effects of the California High School Exit Exam on Student Persistence, Achievement, and Graduation, 32 EDUC. EVALUATION & POL’Y ANALYSIS 498, 514-15 (2010) (negative effect on graduation rates of students of color with low academic skills from California’s exit examination).

222. Technical Assistance & Dissemination Network, supra note 177.
completion rate of 67.41% compared to a rate of 74.24% in states without an examination.\footnote{Percentages for two groups of states computed by author from CPIs reported in Swanson, supra note 5.}

Like exit examinations, increasing coursework requirements for graduation has sometimes had a significant positive correlation with dropout rates,\footnote{CHUDOWSKY ET AL., supra note 75, at 37; see also Dean R. Lillard & Phillip P. DeCicca, Higher Standards, More Dropouts? Evidence Within and Across Time, 20 ECON. OF EDUC. REV. 459, 469-70 (2001).} while other studies have shown no significant effect for students overall.\footnote{RUMBERGER, supra note 103, at 230; see also Dee & Jacob, supra note 108, at 21 (explaining that course graduation requirements are not associated with changes in high school completion rates).} Expanding curriculum requirements reduces opportunity for an individualized curriculum, and education experts agree that an individualized curriculum is crucial to reducing dropouts, especially among students with deficits in aptitude and achievement.\footnote{McDill et al., supra note 217, at 158-59, 168.} Unfortunately, not all students who would benefit from an individualized curriculum are identified before they drop out.

These studies show that the introduction of enhanced graduation requirements may lead to increases in dropout rates, especially for lower-achieving students with disabilities. The combined effects of higher dropout rates and the barriers created by the requirements themselves may leave a significant number of students with disabilities on the job market without a diploma. In considering applicants with disabilities, employers should be careful to distinguish between these dropouts and students who completed high school but could not obtain a diploma due to enhanced graduation requirements, particularly if employers are using a diploma to screen applicants with negative character traits associated with dropping out of school.

C. Impact on Students with Disabilities

The enhanced difficulty in obtaining a diploma for students with disabilities affects a large portion of the student population. Approximately 13.1\% of all students aged three to twenty-one are currently served by the Individuals with Disabilities Education Act (IDEA).\footnote{THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2010, tbl.48 (2011), available at http://nces.ed.gov/pubs2011/2011015.pdf. Compare to the disability prevalence rate of 8.3\% in the working age population. BJELLAND ET AL., supra note 51, at 2. The IDEA is codified as amended at 20 U.S.C. §§ 1400 et seq. (2010).} Of these students, relatively few graduate with a diploma: 34\% of students with intellectual
disabilities, 40% of students with multiple disabilities, and 56% of students with autism during the 2007-2008 school year.\footnote{228}

More rigorous high school graduation requirements challenge schools’ ability to meet the traditional goal of inclusion for students with disabilities.\footnote{229} Inclusion means that, to the greatest extent possible, students with disabilities must be provided with a free and appropriate education and included in all aspects of education, including standardized assessments.\footnote{230} At the same time, under the No Child Left Behind Act, schools risk serious sanctions if students with disabilities fail to make adequate yearly progress toward proficiency in reading and math.\footnote{231} Generally, schools may apply different standards for proficiency for up to 1% of all students, for those who cannot reach grade-level achievement standards.\footnote{232} Despite this limitation, some states have had up to 2.5% of their students participating in alternative assessments, including up to one third of students with more significant disabilities.\footnote{233}

Many states with enhanced graduation requirements offer a variety of alternatives for students with disabilities,\footnote{234} including “significant adjustments” to the content standards.\footnote{235} States also allow variations in the content that is assessed as well as adjustments to the assessment conditions.\footnote{236} But do these adjustments satisfy the obligation to provide a free and appropriate education to students with disabilities? More importantly, how do these adjustments or the lack thereof affect the job-relatedness and necessity of a high school diploma requirement?

\footnote{229. JOHNSON ET AL., REVISITING GRADUATION REQUIREMENTS, supra note 80, at 1-3.}
\footnote{231. See Vernon et al., supra note 230, at 4.}
\footnote{232. Frances L. Kohl et al., Alternative Achievement Standards and Assessments: A Descriptive Investigation of 16 States, 73 EXCEPTIONAL CHILDREN 107, 108-9 (2006). These assessments for students with disabilities can include alternative assessment based or alternative achievement standards (AA-AAS), alternative assessments based on grade-level achievement standards (AA-GLAS), or alternative assessment based on modified academic achievement standards (AA-MAS). In 2011, seventeen states were identified as using an alternative assessment based on modified academic achievement standards. LYNN M. PRICE ET AL., UNIV. OF MINN., NAT’L CTR. ON EDUC. OUTCOMES, CHARACTERISTICS OF STATES’ ALTERNATE ASSESSMENTS BASED ON MODIFIED ACADEMIC ACHIEVEMENT STANDARDS IN 2010-2011 (SYNTHESIS REPORT 85) 1-2, 17 (2011).}
\footnote{233. Kohl et al., supra note 232, at 110.}
\footnote{234. See discussion of alternatives supra notes 164-68 and accompanying text.}
\footnote{235. Kohl et al., supra note 232, at 120.}
\footnote{236. Id.}
1. Effect of Standardization on Students with Disabilities

Traditional students typically perform better than students with disabilities on exit examinations. The 2010-2011 academic year reveals a decrease in proficiency on standardized tests among students with disabilities, compared to the proficiencies in 2007-2008. The table below summarizes the average proficiency rates in both math and reading, with the ranges of proficiency across different states shown in parentheses. These ranges represent the significant differences in difficulty across different states’ standardized examinations.

Table 5: 2010-11 to 2007-08 Comparison of Proficiency Rates for Students with Disabilities

<table>
<thead>
<tr>
<th></th>
<th>High School Math</th>
<th>High School Reading</th>
<th>Eighth Grade Math</th>
<th>Eighth Grade Reading</th>
</tr>
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<tbody>
<tr>
<td>2010-11</td>
<td>(3-48%)&lt;sup&gt;238&lt;/sup&gt;</td>
<td>(3-62%)&lt;sup&gt;239&lt;/sup&gt;</td>
<td>22%&lt;sup&gt;240&lt;/sup&gt;</td>
<td>38.1%&lt;sup&gt;241&lt;/sup&gt; (15.0-78.1%)</td>
</tr>
<tr>
<td>2007-08</td>
<td>20.7%&lt;sup&gt;242&lt;/sup&gt; (2-72%)</td>
<td>27%&lt;sup&gt;243&lt;/sup&gt; (4-73%)</td>
<td>24.3%&lt;sup&gt;244&lt;/sup&gt; (9-83%)</td>
<td>29.4%&lt;sup&gt;245&lt;/sup&gt; (12-86%)</td>
</tr>
</tbody>
</table>

Individual states also show significantly different passage rates between general and special education students. For example, initial pass rates in Texas varied greatly between all students and special education students: 85% versus 55% in mathematics and 87% versus 56% in English and language arts. It is difficult to interpret these disparities, since some “standardized” states report inclusion of more students with disabilities in the general education curriculum, while other research shows that standardization leads to more placement of lower-achieving students in

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<sup>237</sup> LANGENFELD ET AL., supra note 140, at 11.
<sup>239</sup> Id.
<sup>240</sup> Id.
<sup>241</sup> Id.
<sup>243</sup> Id. at 49, 87.
<sup>244</sup> Id. at 51, 86.
<sup>245</sup> Id. at 48, 86.
<sup>246</sup> CHUDOWSKY ET AL., supra note 75, at 42; GAYLER ET AL., supra note 112, at 36-38.
<sup>247</sup> GAYLER ET AL., supra note 112, at 36-38.
<sup>248</sup> Johnson et al., Diploma Options and Perceived Consequences, supra note 218, at 127.
special education. To that point, one consequence of the stakes tied to standardized testing may be a decrease in participation in standardized testing by students receiving special education services.

These lower passage rates and the exclusion of students with disabilities obviously result in the lower rates of obtaining a diploma, unless the state provides for alternative routes to obtaining a diploma. This is not to suggest that students with disabilities are any less prepared for the workforce, given the lack of clear evidence that enhanced testing standards are associated with greater learning. The inability to pass these examinations does mean that many students with disabilities leave high school without a diploma even if they complete all of the course work and possess the skills necessary for success in the workplace.

2. Rights of Students with Disabilities

Students with disabilities have the right to inclusion with reasonable accommodations, which includes the right to access a free and appropriate public education (FAPE). Individualization and inclusion are important to affording equal opportunity for people with disabilities to access education services. Educational programs and policies must be "flexible enough to respond to individual differences and not be based solely on categories, labels, preconceptions, or biases." Preparation for meaningful and self-sustaining employment and independent living is an important part of special education services.

Some students with disabilities will be able to meet state standards if included in the standard curriculum and provided with appropriate accommodations. Students with disabilities can be held to the same graduation requirements as non-disabled students, as long as the students


250. Vang & Thurlow, supra note 238; Altman et al., supra note 242. 251. See discussion of alternatives and waivers, supra notes 158-162 and accompanying text.

252. See supra notes 126-152 and accompanying text.

253. McLaughlin, supra note 82, at 268.

254. Id.

255. Id. at 269.

246. Id. at 275.
have had the opportunity to learn the material. Minimum competency tests have been found to affect students’ constitutional liberty interests by stigmatizing an individual or “imposing an obstacle which forecloses his freedom in pursuing employment opportunities.” Consequently, a school’s failure to provide an opportunity for students to master subjects covered by a high-stakes examination can be considered a violation of such liberty interests, particularly where students are not given adequate notice that their diploma depends on passage of these examinations.

The IDEA permits states to offer some alternative assessment in lieu of standardized tests, but it does not control how such testing affects graduation options for students with disabilities. Consequently, denial of a diploma based on a student’s inability to pass an exit examination does not necessarily deny that student a free appropriate public education. If an examination has a disparate impact on members of a protected group, the examination must be educationally necessary, and there must be no “less discriminatory and practicable alternative that as effectively would serve the educational objectives that support the use of the test in the first instance.” An exit examination may be justified in various ways. One common explanation is that exams provide students with the motivation to learn the tested curriculum. For example, one appellate court in California declined to require the development of an alternative exit examination for students with disabilities, based on a conclusion that the right of students with disabilities to meaningful participation in statewide.

257. See Crump v. Gilmer Independent School Dist., 797 F. Supp. 552, 555 (E.D. Tex. 1993) (holding that a school may not be able to show that content was being taught); see also Debra P. v. Turflington, 644 F.2d 397, 405-6 (5th Cir. 1981) (applying due process analysis to analogous claim by African American students).

258. See Bd. of Educ. v. Ambach, 436 N.Y.S.2d 564, 572 (1981) (recognizing that a certificate rather than a diploma can “brand a group of students as second-rate and incapable of running the race reserved for other students” and “does not provide the recipient with the same opportunities for gaining employment or college entrance which accompanies a diploma.”).

259. Id. at 573-75. But see Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981) (holding that a notice period of more than two years for a high-stakes exam was sufficient notice).


testing does not mean that a state should be prohibited from "exercising its traditional authority to set diploma requirements." 267

At the same time, courts have suggested that failure to pass an exit examination cannot be the sole basis for denying a high school diploma under the IDEA. 268 Professional testing standards provide that a single test score should not have a major impact on a student, such as prohibiting receipt of a diploma. 269 Therefore, receipt of a diploma should rely on other criteria, such as alternative assessment methods or course grades. 270 Since states typically do not require that schools offer these alternative assessments to students with disabilities, these alternatives may only be offered to students with disabilities who request them.

In states with coursework completion criteria, students may request to demonstrate mastery of a subject in a variety of ways. 271 Similarly, states may be required to allow students with disabilities to use accommodations such as portfolio assessment as an alternative to state exit examinations. 272 Such alternatives follow education experts’ recommendations that graduation decisions should be based on “multiple indicators of students’ learning and skills.” 273 Many educators support the use of “multiple measures” of performance—including portfolios, classroom grades, and teacher assessment—in making high-stakes decisions like awarding diplomas. 274 It is noteworthy that in Kentucky’s standardized assessment

267. Smiley, 45 Fed. App’x at 780 (reversing in relevant part Chapman, 229 F. Supp. 2d 981). The California legislature later provided students with disabilities a temporary exemption from the exit exam requirement and established alternate routes for graduation of students with disabilities. See also McIntosh, supra note 6, at 38-39; Anderson, 520 F. Supp. at 511 (students with disabilities had no claim based on schools’ denial of diploma under its criteria).


269. NAT’L RES. COUNCIL, HIGH STAKES, supra note 130, at 166 (citing American Educational Research Association standards).

270. Id. at 165.

271. See JOHNSON ET AL., REVISITING GRADUATION REQUIREMENTS, supra note 80, at 2 for discussion of Oregon’s agreement to use juried assessment process to determine completion of coursework requirements.


273. JOHNSON ET AL., REVISITING GRADUATION REQUIREMENTS, supra note 80, at 39.

system of the 1990s, portfolios were seen as more useful for improving instruction than multiple choice testing, whereas multiple choice testing was credited as more useful for providing accurate student achievement information.\textsuperscript{275} Some experts agree that exit examinations should be used in conjunction with other measures of student performance, such as passing grades in high school courses or performance-based assessments like portfolios.\textsuperscript{276} Achievement can also be measured in terms of individualized school-based and work-based learning experiences, including performance in vocational and technical courses.\textsuperscript{277} However, many states using high-stakes testing do not allow these alternative methods of assessment.\textsuperscript{278}

Enhanced graduation requirements disparately affect students with disabilities, which can carry over into opportunities in the workplace. These requirements encourage teachers to focus on subjects being tested, often at the expense of vocational and work-readiness training. Despite this change in focus, exit examinations are not clearly associated with improved learning, although curriculum requirements may be. Moreover, enhanced graduation requirements may result in the award of some alternative credential rather than a diploma and may encourage students with disabilities to dropout. For applicants with disabilities who lack a diploma because of these enhanced requirements, employers’ preferences may severely limit both job opportunities and earning potential. If these limitations rise to the level of disparate impact on applicants with disabilities, employers must establish the job-relatedness and business necessity of a diploma requirement.

\section*{III. DISPARATE IMPACT CLAIMS}

The potential impact of diploma requirements on persons with disabilities raises the question whether an employer could defend a disparate impact claim by an applicant with a disability rejected for lacking a diploma. The answer to this question depends both on the job duties of the position which requires a diploma, and also whether the receipt of that diploma is conditioned on a state-mandated exit examination or course requirements. Legal analysis developed under Title VII of the Civil Rights Act and other impact claims under the ADA can provide guidance as to

\begin{itemize}
\item\textsuperscript{275} Daniel M. Koretz et al., Inst. on Educ. \\
\item\textsuperscript{276} Johnson & Thurlow, supra note 192.
\item\textsuperscript{277} Rumberger, supra note 104, at 271-72.
\item\textsuperscript{278} Id. See a description of alternatives to standardized testing, supra notes 158-162.
\end{itemize}
whether a diploma is an accurate indicator of the value of an applicant with a disability.

An employer cannot hire based on criteria that disproportionately excludes members of a group protected against discrimination unless that criteria is job-related and consistent with business necessity. Under Title VII, the Supreme Court established in 1971 that a high school diploma requirement with a disparate impact on African-American applicants must have “a manifest relationship to the employment in question.” Chief Justice Burger explained that “[h]istory is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress mandated the commonsense proposition that they are not to become masters of reality.” Since a diploma has become even more difficult to obtain under enhanced graduation requirements, it is even more important today to heed Justice Burger’s advice.

The impact of this Supreme Court decision has been described as “spectacular,” leading to the replacement of hiring criteria like aptitude tests and high school diplomas with “more sophisticated” selection devices. The disparate impact standard arguably has played a “significant role in expanding equal employment opportunities” for both women and minorities, including the encouragement of employers to use hiring criteria with less disparate impact. Professor Lawrence Rosenthal recently observed that “disparate-impact theory of liability continues to have importance in minimizing the impact of cognitive ability tests as barriers to the economic advance of African Americans.” This removal of “unjustifiable obstacles to equal economic opportunity” serves a compelling government interest, he argues.

To expand opportunity for people with disabilities, the ADA has adopted Title VII’s prohibition against selection criteria that have a disparate impact on protected groups. An employer cannot use any selection criteria with a disparate impact “unless the standard, test or other

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281. Id. at 433.
285. Id. at 2186, 2190.
selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity.”287 Congress intended that an employer can insist upon across-the-board qualification standards only if those standards “provide an accurate measure of an applicant’s actual ability to perform the job . . . .”288 Although no reported cases have addressed the job-relatedness of a diploma requirement under the ADA, analysis of other hiring criteria with a disparate impact on applicants with disabilities provides further insight into the job-relatedness and necessity of a new and improved diploma.

This Part will explore the development of disparate impact analysis under the ADA and Title VII, highlighting decisions that have required that an employer justify the screening of applicants based on possession of a high school diploma. ADA decisions often focus on whether an employer’s hiring criteria is justified despite its impact on applicants with disabilities because those applicants would pose a direct threat in the workplace. Decisions regarding the job-relatedness of a high school diploma under Title VII help inform an analysis under the ADA as to whether employers’ requirement of a diploma can be job-related and a business necessity, even if that requirement has a disparate impact on applicants with disabilities.

A. Viability of Disparate Impact Analysis

Disparate impact claims are intended to require that employers “take a hard look” at hiring practices and ensure that hiring criteria are “truly necessary for the performance of the job.”289 The Supreme Court and the Equal Employment Opportunity Commission (EEOC) have provided four general guidelines regarding disparate impact claims that can guide an employer in the use of high school graduation requirements. First, a stronger showing of relatedness and business necessity is required for screening criteria with a significant disparate impact.290 A stronger showing is appropriate because selection criteria with greater impact are more likely to serve as pretexts for discrimination and deny equality of opportunity.291 Because diploma requirements can significantly impact applicants with disabilities, employers screening out applicants without a diploma have a higher burden, compared to the use of other screens.

Pleadings for disparate impact claims may require factual allegations that challenge the job-relatedness and business necessity of an employer’s

291. Id.
screening criterion. This might require an allegation that a diploma is not an accurate measure of a critical job requirement, that the diploma has not been sufficiently validated as a hiring criterion, or that an alternative criterion would have less of a discriminatory impact. A claimant with a disability should not find it difficult to plead these elements of a disparate impact claim where an employer fails to accept alternative credentials from students with disabilities who completed high school but failed to receive a diploma because of enhanced curriculum and testing requirements.

Second, an employer also must make a stronger showing of job-relatedness for positions requiring relatively low levels of skill and training. For such positions, "courts should examine closely any pre-employment standard[s] or criteria" which have a disparate impact on members of a protected group. Determining whether, under the ADA, the imposition of a hearing test on a hearing-impaired court security officer was job-related and a business necessity, one appellate court explained that when a job requires a small amount of skill and training, employers bear "a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related." Thus, for relatively low-skill positions requiring no more than a diploma, employers should make a strong showing of job-relatedness.

Third, more job-relatedness must be shown if the risks associated with hiring an applicant who does not meet the employer's criteria are relatively small. For example, one court carefully distinguished between the public safety concerns associated with firefighters and police officers, finding that the duties of the latter warranted a diploma requirement, but the firefighters' duties did not. Similarly, an employer requiring a diploma would need to show that hiring persons with disabilities who lack a diploma would create significant risks.

293. Id. at 310-12.
294. See Davis v. City of Dallas, 777 F.2d 205, 213 (5th Cir. 1985).
295. Id. (quoting Spurlock v. United Airlines, Inc. 475 F.2d 216, 219 (10th Cir. 1972)).
296. Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1317 (11th Cir. 2009); see also EEOC v. Int'l Union of Operating Eng'rs, Local 14 & 15, 553 F.2d 251, 256 (2d Cir. 1977) (union admission requirements of city operator's license, ability to operate more than one piece of equipment, and 200 days experience were not job related); Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527, 541-42, 541 n.27 (5th Cir. 1980) (injunction against 20-year experience requirement for promotion to management positions upheld in view of racial impact). But see Spurlock, 475 F.2d at 219 (job of airline flight officer requires high degree of skill, and economic and human risks are great).
297. Rice v. City of St. Louis, 464 F. Supp. 138, 142 (E.D. Mo. 1978), aff'd, 607 F.2d 791 (8th Cir. 1979); see also EEOC v. Ball Corp., 661 F.2d 531, 541, 541 n.20 (6th Cir. 1981) (for jobs which do not affect public safety, employer must show "that use of the employment condition or selection device is compelled by business necessity").
Lastly, employers carry the burden of demonstrating that a selection criterion with a disparate impact is job-related and a business necessity, and must show that the criterion bears "a manifest relationship" to the employment in question. Under the ADA, requirements that may be valid as a business necessity must be "established" by the employer to defend a standard that screens out applicants with a disability. The Supreme Court's most recent decision interpreting disparate impact under Title VII has maintained a fairly onerous burden of showing job-relatedness. Under this decision, "employers still need to assess the impact, the justifications, and the alternatives of various potential courses of action before proceeding. Therefore, employers who use a high school diploma requirement to screen out applicants must demonstrate that the criterion is valid for the position to be filled and that it is necessary for that employer to rely on that criterion to hire qualified employees.

Some critics of disparate impact analysis have taken the position that it should not benefit applicants who are responsible for their exclusion based on hiring criteria. For example, a female firefighter who cannot pass a fitness test may be able to pass with additional conditioning and effort; therefore, her lack of fitness is her responsibility, and her exclusion can be overcome with some effort. In contrast, enhanced graduation requirements may not be achievable by at least some students with disabilities, regardless of the quality of the education or how hard they try. Instead, at least some states provide incentives for schools to exclude students with disabilities from testing and curriculum that are required to receive a diploma. Moreover, the purpose of the ADA is to provide employment opportunities for otherwise qualified people with disabilities, even if they exhibit shortcomings in other arenas such as the classroom.

B. Job-Relatedness

To justify the screening of applicants based on possession of a diploma, an employer should conduct a thorough job analysis for the position being filled to identify the tasks, knowledge, skills, and abilities


301. See 29 C.F.R. § 1630.2(q). The employer has the burden of proof. Bates v. United Parcel Serv., Inc., 511 F.3d 974, 992-93 (9th Cir. 2007).


The “New and Improved” High School Diploma

THE "NEW AND IMPROVED" HIGH SCHOOL DIPLOMA needed for the position. The job-relatedness of a qualification standard is established if it "fairly and accurately measures the individual’s actual ability to perform the essential functions of the job." The employer is required to prove that the standard either predicts or is correlated with successful performance of the particular job at issue. In reviewing the relatedness of a diploma, an employer should determine whether the incumbents in the position are using knowledge, skills, or abilities acquired while earning a diploma.

1. Validation of Hiring Criteria

If the employer hires in states with enhanced graduation requirements, the employer should be able to establish that the completion of those requirements is a valid indicator that the applicant will be a successful employee. An accurate job analysis outlining the knowledge, skills and abilities for the position will ensure that a diploma earned under enhanced graduation requirements is consistent and accurate in predicting successful performance. When establishing that predictive ability, employers should recognize that passage of the cognitive tests required to obtain a diploma may not be the most accurate predictor of job performance.

To elaborate on the job-relatedness and business requirements set forth by the Supreme Court, the EEOC has established uniform guidelines to assist employers in establishing the job-relatedness of a screening criterion with a disparate impact. The EEOC cautions employers against relying on the general reputation or casual reports of validity to justify use of a screening criterion. Instead, validity must be based on a statistically significant relationship between the selection criterion and performance. In addition, general expectations of “productivity” or “utility” are insufficient to validate a screening criterion.

305. See 29 C.F.R. § 1607.14(C)(2), (D) (analysis required for either content or construct validity).
306. Bates, 511 F.3d at 996, n.11 (“if a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, not marginal, aspect of the job . . . [and] be carefully tailored to measure the actual ability of a person to perform an essential function of the job.”) (internal quotation marks omitted) (citing H.R. Rep. No. 101-485 (III), at 32 (1990)).
307. Spiropoulos, supra note 289, at 1513.
308. Goldstein & Patterson, supra note 283, at 773-74.
310. Id. at 1066.
312. 29 C.F.R. § 1607.9(A).
313. 29 C.F.R. § 1607.14(B)(5).
The Supreme Court, lower courts, the EEOC uniform guidelines, and the American Psychological Association (APA) standards all recognize three accepted methods to validate a screening device: criterion, content, and construct validity.315 Content validation is appropriate where selection procedures measure the knowledge, skills, or abilities required of a job, or a representative sample thereof.316 A selection procedure based upon inferences about mental processes may not be supported solely or primarily on the basis of content validity.317

Construct validity is often used by employers to validate a selection criterion such as a high school diploma. Construct validation is shown when a hiring criterion measures whether the applicant has “identifiable characteristics that have been determined to be important to successful job performance.”318 After the employer identifies constructs needed for successful performance of critical or important work behaviors, the employer should identify a selection procedure that measures those constructs, based on “empirical evidence from one or more criterion-related studies involving the job or jobs in question.”319

Under Title VII, disparate impact analysis has challenged various screening criteria, including aptitude tests, criminal record checks320 and diploma requirements for various professions.321 This analysis provides insight into whether a new and improved high school diploma is job-related and a necessity for applicants with disabilities. In 2009, the Supreme Court clarified Title VII’s standard for validating an employer’s screening criteria that has a disparate impact in Ricci v. DeStefano, which reviewed the City of New Haven’s promotion examination for firefighters.322 Following Griggs and its progeny, the city would be justified in disregarding the examination results only if the examination was not job-related and consistent with business necessity, or if there was an equally valid selection method that did not have as much disparate impact.323

The Court found that New Haven’s test was sufficiently job-related because it was based on a thorough job analysis, identifying the tasks, knowledge, skills, and abilities that were essential for the higher

316. 29 C.F.R. § 1607.14(C).
317. Id.
319. 29 C.F.R. § 1607.14(D).
321. See discussion of these cases infra at Section III.
323. Id. at 587.
positions. Incumbents in those positions were interviewed and observed; they completed questionnaires about their duties, and the examination questions were then directly based on that job analysis. Some have seen the test for relatedness in Ricci as a step away from requiring “scientific evidence” that the EEOC suggests as a requirement for showing relatedness, since many other courts had rejected reliance on multiple choice tests that fail to effectively measure the behaviors, skills and abilities needed on a job. For example, Professor Mark Brodin questions the City’s reliance on a multiple choice examination that arguably tested understanding of materials pertaining to the job but did not necessarily result in the selection of those who would perform the best. “[T]here is a wide gulf between ability to perform a job and the ability to think about it,” he explains.

Court decisions since Ricci have held employers to a fairly high standard to show job-relatedness. For example, a court ordered that New York City stop using an examination because the City failed to ensure that passage of its examination would actually result in hiring applicants who would best perform firefighter duties. Despite a “comprehensive” job analysis, the city failed to establish a relationship between the examination and the “abstract, unobservable mental constructs” it sought. The extensive task list based on panels and job questionnaires with incumbent firefighters was not connected to the abilities measured by the examination, and the city failed to establish that the cognitive abilities tested on the examinations were the most important abilities for firefighter job duties. In addition, the cut-off score used was not shown to be related to job performance so as to be “reasonable and consistent with normal expectations of acceptable proficiency within the work force.” Eventually the City was permanently enjoined from using the disputed

324. Id. at 587-88.
325. Id. at 588.
326. Goldstein & Patterson, supra note 283, at 746.
328. Id. (italics omitted).
332. Id. at 307; see also Easterling v. Conn. Dep’t Corr., 783 F. Supp. 2d 323, 343-44 (D. Conn. 2011) (1.5 mile run test was not business necessity where corrections officers being tested were not expected to run that distance).
test.\textsuperscript{334} This case demonstrates the willingness of lower courts to require substantial proof to justify the use of an examination that causes disparate impact.

In the ADA context, courts sometimes have upheld employers' uniformly applied prohibitions against hiring or retaining employees based on specific impairments associated with a disability such as uncontrolled diabetes or hearing loss.\textsuperscript{335} For example, the diabetes exclusion was justified by the specific duties of a ranger, which included "a range of physically challenging and often isolated activities" and the potential serious effects of uncontrolled diabetes on the health of a ranger in such a position, even if these effects were not probable.\textsuperscript{336}

2. Relationship to Essential Job Duties

An employer should be able to justify its hiring criteria based on specific job duties. In one case, for instance, a city required that its maintenance workers hold a commercial driver's license (CDL).\textsuperscript{337} Only three of the fifteen categories of duties required a CDL, and new employees were given at least six months to obtain a CDL.\textsuperscript{338} Yet a CDL was deemed essential because there were a limited number of employees available to operate heavy equipment, particularly when employees were on call, and it was important to have employees available to operate such equipment.\textsuperscript{339} In contrast, a CDL may not be essential for a job performed by others who do not hold such a license or who spend an insignificant amount of time on that duty.\textsuperscript{340}

Without job-specific evidence, an employer may not be able to justify its application of a particular standard to all employees or applicants. For example, a railroad was unable to show a business necessity for its hearing standards for signalmen, who did hold safety-sensitive positions, since there was no evidence that level of hearing loss could be scientifically


\textsuperscript{335} Atkins v. Salazar, 677 F.3d 667, 683 (5th Cir. 2011) (diabetes); Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1315-17 (11th Cir. 2009) (hearing loss).

\textsuperscript{336} Atkins, 677 F.3d at 682-83.


\textsuperscript{338} Id. at *3-6, *29-30.

\textsuperscript{339} Id. at *20-21.

Even if such a determination was possible, the employer failed to explain the basis for its percentage requirement for hearing ability.

An employer must establish the relationship of hiring criteria to the essential functions of the position in question, including the accuracy of that criteria in measuring applicant abilities. The employer carries the burden of producing facts relevant to a determination regarding which job functions are essential. For example, job duties helped support the claim of police officers who were unable to make forcible arrests, which the police department was required to show were “inevitable” for all officers.

A job duty may not be deemed “essential” based solely on the employer’s inclusion of it in the job description; rather, essentiality should be based on the duties performed by past employees in that position. Under such logic, a court considering whether a driver’s license was essential for all firefighters refused to grant summary judgment for the fire department where not all firefighters were required to drive, even though the department did require every firefighter to have a license.

Like the license requirement for firefighters, certification for welders was not job-related because welders had not carried a respirator in the past, and respirators were not shown to be available in their work areas. This same reasoning would defeat the relatedness of a diploma requirement for any positions successfully held by employees without a diploma.

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345. Cripe v. City of San Jose, 261 F.3d 877, 888 (9th Cir. 2001).

346. Id. at 887.

347. Id. (investigators not required to serve warrants or make arrests); see also Risteen v. Walmart Stores, Inc., Civ. No. 09-6020-AA, 2010 U.S. Dist. LEXIS 43255, at *11-13 (D. Or. April 30, 2010) (questions of fact regarding need for sales associate with dyslexia to perform cashier duties).


349. Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 862-863 (9th Cir. 2009).
welder’s employer was also unable to show that the particular required certification was essential to the performance of the welder’s job duties, where the Occupational Safety and Health Administration (OSHA) did not specify any particular medical evaluation of employees in its safety standards for users of respirators. 350 Similarly, an employer may be unable to justify its requirement of a new and improved diploma if its other employees hold a diploma earned under less rigorous graduation requirements.

Title VII has supported a significant array of challenges to high school diploma requirements that were not sufficiently related to the job in question. The diploma requirement generally has been deemed valid for positions which require some advanced skills, including police officers, corrections officers, and social workers. 352 Yet this assumption of a diploma’s job-relatedness has been limited to positions requiring a high degree of skill, where significant risks were associated with hiring an unqualified applicant. 353

Particular job duties have justified the high school diploma requirement under Title VII. For example, a diploma requirement for corrections officers has been justified based on requirements to complete college level training and understand security regulations. 354 Similarly, police officers have been required to hold a diploma since they need to understand a variety of legal issues, the nature of social problems encountered, and the psychology of criminals. 355 In addition, the need to prepare written reports and present testimony in court, as well as interact with a diverse community, have been relied upon to justify a diploma requirement for police officers, even though one court recognized that the criterion was “somewhat arbitrary in nature.” 356 These decisions suggest

350. Id. at 862-63; see also Swanks v. Wash. Metro. Transit Auth., 179 F.3d 929, 934-35 (D.C. Cir. 1999) (police officer with disability defeats motion for summary judgment despite failure to maintain commission); Bates v. United Parcel Serv., Inc., 511 F.3d 974, 991-93 (9th Cir. 2007) (hearing requirement unnecessary for driving all of company’s trucks).


353. See, e.g., Walls v. Miss. State Dep’t of Pub. Welfare, 730 F.2d 306, 316-17 (5th Cir. 1984) (social workers required to read, understand and apply federal regulations, engage in interpersonal contact, clerks needed English background and typing skills).

354. See Donnell v. Gen. Motors Corp., 576 F.2d 1292, 1300 n.16 (8th Cir. 1978).

355. See Aguilera, 760 F.2d at 848.


that employers rejecting applicants with disabilities based on their lack of a diploma must be able to relate that diploma requirement to distinct and necessary knowledge or skills that would be indicated by a diploma and not by some alternative credential.

The validation of the diploma requirement for police or corrections officers has also rested on the fact that other jurisdictions required a diploma. One diploma requirement was accepted where all of the states within the reviewing circuit court's jurisdiction required at least a diploma. Similarly, the diploma requirement for police officers has been justified based on national studies and recommendations, some of which emphasized the need for professionalism and expertise among officers. This analysis could be used to justify a diploma requirement for jobs sought by applicants with disabilities if similar jobs also require a diploma. Conversely, if other employers hiring into similar positions at least accept alternative credentials from applicants with disabilities, then it could be argued that other employers should do the same.

In contrast to the police cases, courts have been very reluctant to validate a high school diploma requirement for jobs requiring fewer preexisting skills or knowledge. Courts have consistently rejected the validity of a diploma requirement for firefighters as well as assemblers, material handlers, or various clerical positions. The firefighter decisions recognize the limited information regarding qualifications provided by a diploma. Even accepting the fire department's position that training manual comprehension required a particular reading level, one court refused to find that a high school diploma was a valid measurement of that ability, noting that "[m]any high school courses needed for a diploma are not necessary for these abilities. A new reading and comprehension test might legitimately be used for this job ...."

363. Id.; see also Vulcan Soc'y of Westchester Cty., Inc. v. Fire Dep't of City of White Plains, 505 F. Supp. 955, 960, 964-6 (S.D.N.Y. 1981) (approving settlement agreement removing high school diploma requirement for firefighters but allowing departments to consider education and experience).
These decisions demonstrate that a screening criterion with a disparate impact should only be used if it is directly related to specific job duties for the position being filled. If the criterion is not an accurate predictor of an applicant’s ability to perform those specific duties, then it should not be used.

3. Individualized Analysis Required

Individualized analysis should be applied to the individual applicant with a disability who lacks the criteria sought by the employer. Courts have been reluctant to allow use of a broad screening criterion without performing an individualized analysis of both an applicant’s condition and the job duties.\(^{361}\) A hiring criterion must be “designed to isolate individuals who are incapable of performing the essential functions of the position due to physical or mental limitations.”\(^{365}\) If the criterion screens based on a medical condition rather than an actual physical or mental ability, the employer must establish that all individuals with the condition are limited such that they cannot perform the essential job duties.\(^{366}\)

When asserting a direct threat defense to justify hiring criteria with a disparate impact, employers typically offer medical evidence regarding the risks associated with the impairment in question and any treatment or accommodation of that impairment.\(^{367}\) Often courts require an employer to rely on an individual assessment of the particular employee to determine if they pose a risk; an employer may be able to make a holistic determination, based on substantial medical evidence, that the employee’s particular condition poses a risk.\(^{368}\) A broad restriction can be justified if based on a strong possibility that a person’s disability could create a significant risk.\(^{369}\) Even the acceptance of these fairly broad restrictions on hiring has been justified by an individualized analysis of the job in question.

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\(^{364}\) See, e.g., Belk v. Sw. Bell, 194 F.3d 946, 953 (8th Cir. 1999) (evidence supported a jury verdict in plaintiff’s favor regarding physical performance test for customer service technicians).


\(^{366}\) See id. at 1065-66.


Under this approach, employers have not been able to justify excluding any insulin-dependent diabetic from operating forklifts, driving a bus, or serving as a police officer, despite perceived safety concerns. These employers failed to establish that diabetes always caused specific physical or mental limitations that would prevent the safe performance of the job duties. Instead of rejecting all applicants with diabetes, employers are required to perform an individualized assessment to determine the validity of the screening criteria being used, to determine whether the particular employee could perform the position safely in light of his condition and the medical advances that might allow the employee to control the symptoms of that condition. This reasoning suggests that employers may need to use more individualized assessments of applicants' skills and knowledge rather than relying on a statewide, standardized exit examination to determine the qualifications of its applicants.

In direct threat claims under the ADA, medical evidence is key to the dismissal of the claim of an employee deemed to pose a direct threat in the workplace. A direct threat must be based on something more than a slightly increased risk of harm, and there must be a high probability of substantial harm. An employer’s exclusion of a person with a disability may be justified by “reasonable medical judgment” where an employer relies on “the most current medical judgment and best available objective evidence, and it reflected an individualized assessment of the plaintiff’s abilities.” In addition, conflicting medical opinions regarding the likelihood of the harm could defeat an employer’s motion for summary judgment.

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370. See Murray, 175 F. Supp. 2d at 1065 (no evidence of actual potential for all diabetics to lose attention or awareness while operating forklift); see also Nichols v. City of Mitchell, No. CIV 11-4016, 2012 U.S. Dist. LEXIS 161420, at *17 (D.S.D. Nov. 9, 2012) (individualized assessment required for driver with diabetes); Millage v. City of Sioux City, 258 F. Supp. 2d 976, 992 (N.D. Iowa 2005) (individualized assessment required for city bus driver with diabetes); Kapche v. City of San Antonio, 304 F.3d 493, 500 (5th Cir. 2002) (plaintiff with diabetes showed that he could safely perform duties of police officer).

371. See Murray, 175 F. Supp. 2d at 1065.

372. See id. at 1065 n.14; Kapche, 304 F.3d at 500; see also EEOC v. Hous. Area Sheet Metal Joint Apprenticeship Comm., No. 00-3590, 2002 U.S. Dist. LEXIS 10393, at *18-20 (S.D. Tex. June 3, 2002) (denying defendant’s motion for summary judgment, where deaf and mute applicant for a sheet metal apprenticeship program might have been able to communicate in other ways).

373. See Wurzel v. Whirlpool Corp., 482 Fed. App’x 1, 12 (6th Cir. 2012), cert. denied, 133 S. Ct. 339 (2012); see also Nelson v. City of New York, No. 11 Civ. 2732 (JPO), 2013 U.S. Dist. LEXIS 117742, at *39-42 (S.D.N.Y. Aug. 19, 2013) (refusing to grant summary judgment for the defendant where medical evidence did not definitively show that the plaintiff represented a “‘direct threat’ to herself or others”).


judgment, particularly where one report lacks individualized inquiry or reliance on the "best available objective evidence." Under the requisite individualized analysis, a diploma earned under standardized criteria may not be the best indicator of an applicant's ability to perform specific job duties. One employer was able to demonstrate the need for its employees to read with comprehension and to perform some mathematical calculations, but the diploma was seen as a "crude benchmark" to ensure that employees had these skills. Similarly, a paper company could not show that a diploma was necessary for its production jobs since a lack of a diploma may be due to reasons other than a lack of academic ability, such as "being obliged to work to support one's family, and not necessarily from inability to achieve the skills demanded by an employer." Graduation may only demonstrate an ability to pass the various examinations, which were not designed to predict vocational performance.

Like the firefighter cases, courts have consistently rejected the diploma requirement for entrance into apprenticeship programs for skilled trades based on a lack of job-relatedness. Even though basic reading and math skills might be directly related to success in such an apprenticeship program, a diploma has not been recognized as a good measure of those abilities. Employers who have required a diploma for skilled trade positions requiring specialized knowledge in mathematics still needed to establish that a diploma effectively measured "the specialized skills needed for the apprenticeship program." One court reviewing apprenticeship educational qualifications distinguished jobs requiring "a high degree of

380. Id.
383. Donnell, 576 F.2d at 1299.
skill” and “the risks of hiring an unqualified applicant [a]re great.” The employer should have compared the performance of applicants with a high school diploma with the performance of applicants who lacked a diploma. Another employer seeking certain knowledge among apprentices should have examined the course content in the high schools of its applicants to determine whether students had been exposed to coursework that is related to the job. For applicants with disabilities, it may be significant that a diploma has not been deemed necessary for entry into apprenticeship programs since those programs do include some additional education. Therefore, employers may not be able to justify rejecting applicants with disabilities from programs requiring on the job training.

These decisions demonstrate the potential lack of a relationship between the duties of the position compared to the requirements for obtaining a diploma. A diploma requirement can be both over- and under-exclusive, since some students with disabilities who do not receive a diploma may have the employability skills to thrive in the workplace, while some successful students may not adapt well to the work environment. Additionally, many of these comparisons were made before the adoption of enhanced graduation requirements in many states. In considering the potential claims of applicants with disabilities, particularly in states which have since adopted enhanced graduation requirements, employers should follow this guidance and carefully analyze the job duties of positions for which a diploma is being required to assure that performance of those duties can be accurately predicted by meeting those enhanced requirements or any alternative paths to a diploma offered in that state.

The courts interpreting the above-referenced disparate impact claims under Title VII have recognized that the lack of a diploma may not evidence a lack of the skills or abilities required for the job in question. The Fifth Circuit, for example, has recognized that diplomas are not necessarily an accurate measure of an inability to read and comprehend technical manuals. Similarly, a high school diploma requirement for firefighters was invalidated because that position required a high school reading level, but did not necessitate mastery of other courses needed for a diploma. This reasoning could support the irrelevance of a diploma in states that require passage of examinations or course completion for a variety of courses unrelated to the job in question.

384. Id. at 1299 n.16.
385. Id. at 1300.
C. Business Necessity

In addition to job-relatedness, a screening criterion with disparate impact must constitute a business necessity. This requires that the employer show "a compelling need to maintain the practice" beyond a practice justifiable by "routine business considerations." An employer may also be required to show that the employer’s criterion is "necessary to safe and efficient job performance" or that the employer’s goals are "significantly served by" the criterion. This means that the employer’s criterion must be "required or essential for the accomplishment of the goals of the employer." Professor Andrew Spiropoulos has argued that a strict business necessity standard should be applied to non-complex jobs in particular.

Under the ADA, an employer can justify a screening criterion if applicants who fail to meet that criterion would pose a direct threat to the health or safety of other individuals in the workplace. An employer can defend a safety-based qualification standard by showing a business necessity for the qualification, without proving that a particular employee who does not meet that qualification poses a direct threat. Even so, in evaluating whether a safety-related requirement is a business necessity, courts should "take into account the magnitude of possible harm as well as the probability of occurrence." For example, employers have justified exclusion of persons with disabilities based on specific, safety-sensitive job.

Business necessity is required for criteria that screen out applicants with disabilities to ensure that the criteria address real risks, rather than basing decisions on stereotypical assumptions about applicants with disabilities. Generally, business necessity can be established by evidence

393. Spiropoulos, supra note 289, at 1514.
394. Id. at 1557.
396. EEOC v. Exxon Corp., 203 F.3d 871, 873-74 (5th Cir. 2000).
397. Id. at 875.
399. See Bosket v. Long Island R.R., CV 00-7352 (RJD)(JMA), 2004 U.S. Dist. LEXIS 10851, at *23 (E.D.N.Y. June 4, 2004) (applicant rejected based on hearing impairment); Exxon Corp., 203 F.3d
regarding how a test was devised, why a standard was chosen, and how the standard should be used.\textsuperscript{400}

Mere convenience or expediency is insufficient basis for adopting hiring criteria that exclude applicants with disabilities.\textsuperscript{401} Under the ADA, an employer may not require a medical examination to determine whether an employee is disabled “unless such examination or inquiry is shown to be job-related and consistent with business necessity.”\textsuperscript{402} In interpreting business necessity in this context, one court held that an employer’s illness-reporting policy did not serve the business necessity of assuring shift coverage, despite the employer’s desire to assess when an employee would be available to return to work based on information about her medical condition.\textsuperscript{403} Instead, the employer could have better served its need to cover shifts by relying on assessments from the employee and her physician regarding her ability to return to work, which would be a less intrusive means of predicting when the employee could return to work.\textsuperscript{404} This reasoning suggests that an employer may not be justified in relying on standardized criteria that determine whether its applicants hold a high school diploma, even though a diploma may be a convenient and expedient criterion to screen applicants.

Employers may see a diploma as an indication of favorable characteristics among applicants. But at least one court concluded that a diploma would not assure that employees possessed the desired qualities of alertness, judgment, comprehension, adaptability, responsibility, and initiative.\textsuperscript{405} An applicant’s lack of a diploma may not “conclusively demonstrate that an applicant failed to possess the qualifications necessary”

\textsuperscript{400} at 875 (refusal to rehire employees who participated in substance abuse program); 29 C.F.R. § 1630.10 App. (business necessity requirement ensures a “fit between job criteria and an applicant’s actual ability to do the job”); 29 C.F.R. § 1630.10(a) App. (stating that business necessity requirement ensures a “fit between job criteria and an applicant’s (or employee’s) actual ability to do the job”).

\textsuperscript{401} C\textsuperscript{\textregistered} Ryan v. City of Highland Heights, No. 1:93CV2593, 1995 U.S. Dist. LEXIS 21024, at *9 (N.D. Ohio July 19, 1995) (denying defendant’s motion for summary judgment based on “absence of evidence demonstrating conclusively that defendants’ test is job-related and consistent with business necessity, or that plaintiff is in such poor physical condition that he cannot perform the standard essential functions of police work”).

\textsuperscript{402} Cripe v. City of San Jose, 261 F.3d 877, 890 (9th Cir. 2001) (business necessity standard is “quite high[] and ‘is not [to be] confused with mere expediency’”); El v. Se. Pa. Transp. Auth. (“SEPTA”), 479 F.3d 232, 242 (3d Cir. 2007) (mere “business convenience” insufficient to qualify as business necessity).


\textsuperscript{404} Pa. State Troopers Ass’n v. Miller, 621 F. Supp. 2d 246, 255 (M.D. Pa. 2008); see also Miller v. Whirlpool Corp., 807 F. Supp. 2d 684, 688-89 (N.D. Ohio 2011) (holding that medical inquiry was not justified by OSHA approval of medical certification process where an appropriately crafted questionnaire could have satisfied both OSHA and the ADA).

\textsuperscript{405} Payne v. Travenol Labs., Inc., 416 F. Supp. 248, 259 (N.D. Miss. 1976), aff’d, 565 F.2d 895 (5th Cir. 1978).
because the diploma requirement is “too crude a standard” to select applicants with favorable qualities.\textsuperscript{406}

The duty to accommodate may also affect the ability of an employer to screen applicants based on a diploma. In an analogous situation, an educational assistant’s inability to pass the math section of a basic skills test did not defeat his discrimination claim, even though passage was required for assistants to become “highly qualified” under the No Child Left Behind Act.\textsuperscript{407} His claim survived because the assistant had requested testing accommodations, and the school district’s failure to accommodate him may have prevented his passage of the test.\textsuperscript{408} Obviously, an employer cannot provide accommodations to enable a student with a disability to obtain a diploma, but an employer may have the obligation to accommodate by waiving a diploma requirement if an applicant lacking a diploma is otherwise qualified for the job.

The business necessity requirement suggests that for an employer to apply a diploma requirement, it must establish that the diploma—and the tests and curriculum required to obtain it—accurately measures the applicant’s ability to perform the job.\textsuperscript{409} Assumptions about those who possess a diploma, such as intelligence or characteristics of perseverance, are not enough to make the diploma requirement a business necessity.

According to these ADA and Title VII decisions, employers should only use a diploma to screen applicants for positions with duties that require successful completion of a particular state’s diploma requirements. A careful analysis of each job should establish which duties are required and what knowledge and skills are needed to successfully perform those duties. Employers should also ensure that the possession of a new and improved diploma is an accurate measure of those traits.

\textbf{D. Alternative Assessments}

If a selection criterion has a disparate impact but is job-related and consistent with business necessity, the criterion is still discriminatory if an alternative screening criterion with less discriminatory impact would satisfy the employer’s business needs.\textsuperscript{410} The general requirement to use such an

\begin{itemize}
  \item \textsuperscript{406} Id.
  \item \textsuperscript{408} Id. at 60.
  \item \textsuperscript{409} See discussion of the need for an accurate measure, supra notes 350-362 and accompanying text.
  \item \textsuperscript{410} 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C) (2012); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); see, e.g., Harless v. Duck, 619 F.2d 611, 617 (6th Cir. 1980) (alternative written intelligence exams existed for selecting police officers); Blake v. City of Los Angeles, 595 F.2d 1367,
alternative criterion was reiterated by the Supreme Court’s decision in *Ricci v. DeStefano*.

There the employer was not required to change the weighting formula for its examination or to band statistically identical scores together in order to make its selection procedures less arbitrary and more rational. Further, the Court did not require the use of an assessment center rather than or even in addition to the written test in question. The *Ricci* Court has been criticized for failing to recognize that the employer could not establish the business necessity of its test because alternative promotion procedures were available. Despite this arguable weakness, the decision still preserved the ability of a plaintiff to present such an alternative that would force an employer to consider adopting other selection criteria with less of an impact.

In line with *Ricci* and earlier decisions requiring the use of a less discriminatory alternative, the EEOC has advised that:

Even if the diploma requirement is job related and consistent with business necessity, the employer may still have to determine whether a particular applicant whose learning disability prevents him from meeting it can perform the essential functions of the job, with or without a reasonable accommodation. It may do so, for example, by considering relevant work history and/or by allowing the applicant to demonstrate an ability to do the job’s essential functions during the application process.

This advice comports with court reasoning that an employer should screen applicants based on an alternative to a diploma requirement, which has substantial validity and less disparate impact.

The EEOC’s reasoning parallels the outcome of a claim on behalf of an employee with an intellectual disability who was discharged from her job as a nursing assistant she had held for four years in a residential care facility.

The nursing assistant could not obtain her GED because of her disability; her GED instructors had offered to work with the employer to find an alternative way to assess the employee’s ability to do the job, but the

1376 (9th Cir. 1979) (holding that less discriminatory job classification system for police officers existed).


412. *Id.* at 589-91; see Goldstein & Patterson, *supra* note 283, at 750.

413. Goldstein & Patterson, *supra* note 283, at 750.


415. Goldstein & Patterson, *supra* note 283, at 771.


employer insisted that she have a diploma to remain employed.419 The employer eventually settled.420 More recently, the EEOC settled a claim of disparate impact brought against a nursing home by revising the job description for its dietary aide and assistant cook positions to substitute a diploma requirement with the more specific requirement that the applicant possess the “ability to read, communicate, and follow written or oral directions in the English language.”421 These settlements exemplify the ability of employers to directly assess the qualities needed in their employees rather than relying on a diploma to screen applicants.

Typically the burden of establishing the viability of an alternative assessment lies with the plaintiff.422 Consequently, if the plaintiff cannot show that the alternative method of assessment would be “an equally accurate predictor of success” in the position being filled, the employer need not adopt that alternative assessment.423

Generally, the expense of an alternative criterion with less of an impact does not justify use of the less expensive criterion with a greater impact.424 One court explained that “even if the creation and validation of screening tests is expensive, the expense is a burden the employer must bear if it desires to use tests that operate discriminatorily or perpetuate the effects of past discrimination.”425 These standards call on employers to consider alternative methods of assessing applicants for entry-level positions beyond simply requiring a diploma.

Under the ADA, an employer is expected to use some reasonable alternative to a criterion that screens out applicants with disabilities. For example, proof of “equivalent mobility” was an acceptable alternative for a position that typically required a valid driver’s license.426 In education and professional licensing cases under the ADA, some modification of testing procedures or scoring has been required as an accommodation. One federal trial court found that the combination of several bar exam scores was a reasonable accommodation for a person with a learning disability who had been unable to pass sufficient sections of the exam in one sitting.427 Under this reasoning, employers may need to determine whether the states where

419. Id.
420. Id.
424. See Watkins v. Scott Paper Co., 530 F. 2d 1159, 1181 n.30 (5th Cir. 1976).
425. Id.
they are located offer adequate alternatives for persons with disabilities to earn a diploma before screening applicants based on that criterion.

Alternative methods of assessment have been demanded or approved by some courts applying Title VII. This includes a consent decree allowing for the hiring of firefighters without a diploma, recognizing that the value of the diploma requirement relied on the availability of alternative means for assuring that applicants possessed the characteristics that allegedly tend to be present more frequently in high school graduates than in non-graduates. The approved decree allowed applicants without a diploma to meet the education requirements through equivalent experience “that demonstrates the applicant’s ability to perform or learn to perform the basic duties of a firefighter.” To do this, the applicant could demonstrate “the ability to follow directions and to read, understand, and retain a variety of instructions, regulations and procedures at levels comparable to that . . . of a high school graduate in the State of New York” or completion with a minimum grade of “C” of fire science or technology-related courses given by accredited institutions of higher education.

Similar to the consent decree, another court rejected a diploma requirement for a city’s zookeeper position in light of various educational alternatives. These alternatives included attainment of a certain score on the GED examination, completion of college courses, completion of an equivalent of high school graduation certified by the state department of education or local school board, completion of home study, or possession of an equivalent foreign degree. The court accepted these alternatives as sufficient indication of an applicant’s ability to read written instructions, write clear reports, and complete zoo records.

Assessment centers, which use simulations to evaluate job capabilities, could be another legitimate alternative to a diploma requirement. Assessment centers focus on simulations of the real world of work, arguably making them “both more reliable and notably less discriminatory in operation” than written examinations. Hiring for both police officers and firefighters has relied on assessment centers rather than written tests for a significant period of time. Industrial psychologists agree that “as

429. Id. at 960.
430. Id.
431. Id.
433. Id. at 504 n.13.
434. Id. at 505 n.17
435. Goldstein & Patterson, supra note 283, at 750, 762.
436. Id. at 762.
measures of skills rather than knowledge, [assessment centers] are better predictors of job performance than other forms of promotional testing.\^437

Assessment centers have been recognized as an alternative to written tests for police and firefighter positions.\^438 The test developer for the employer in Ricci testified that "assessment centers would 'probably be better' than the procedures used by New Haven in assessing 'command presence.'"\^439 In line with this testimony, psychologists have recognized that simulations of actual work duties can help employers select highly-qualified candidates, and the use of simulations may inspire positive reactions in examinees.\^440 One study found that while elimination of a test for cognitive ability reduced the predictability of performance, it also significantly reduced the disparate impact of a combination of selection criteria (personality, bio-data, and structured interview).\^441

Job tryouts,\^442 job coaches,\^443 and other on-the-job training opportunities are other alternatives to relying on a diploma to select qualified applicants. These opportunities to observe persons with disabilities in the workplace would allow employers to assess both cognitive skills as applied to a job, as well as employability skills such as following directions and working in a group. Other noncognitive measures of performance potential include tests of personality, motivation, interpersonal skills and other traits that can contribute to employee performance.\^444

Analysis of diploma requirements establishes that the hiring criterion must be directly related to the duties of the position for which it is required. To show this relationship, an employer must perform a thorough job analysis and then compare necessary duties to the skills and abilities demonstrated by the possession of a new and improved high school diploma. Even if a diploma would predict successful job performance, the

\^437. Brodin, \textit{supra} note 327, at 227.

\^438. Goldstein & Patterson, \textit{supra} note 283, at 762.

\^439. \textit{Id.} at 778.


\^444. West-Faulcon, \textit{supra} note 309, at 1069.
employer should not screen applicants based on the lack of a diploma if other assessment tools with less disparate impact would also predict such success. Courts have not addressed high school diploma requirements directly under ADA disparate impact analysis. Yet other ADA decisions demonstrate that, as under Title VII, employers must demonstrate the job-relatedness of a hiring criterion with disparate impact. This requires proof that the specific job includes duties, which can only be performed by someone who meets the employer’s criteria that excludes applicants with disabilities. In addition, the employer must establish that the particular applicant cannot perform those essential duties; general assumptions about those who lack that criterion are insufficient. A criterion should not be used if it is based only on speculation or some other alternative measure could be used to meet the employer’s purposes.

IV. JOB-RELATEDNESS AND NECESSITY OF A HIGH SCHOOL DIPLOMA

Employers have complained that workers lack the skills that employers seek, such as the literacy needed to enroll in job training. As early as the mid-1990s, a majority of the jobs in the labor market required literacy skills of at least an eighth-grade level, and students with such academic skills experienced better employment outcomes. A survey published in 2001 indicated that just under 40% of employers in four major cities believed the skills needed for their respective jobs were increasing. Basic reading, writing and numeric skills were becoming necessary requirements for an increasing number of jobs. Perhaps this is why business communities in many states have been strong proponents for the adoption of exit examinations.

This employer support raises the question of whether graduation requirements are advancing student learning and making a diploma more “meaningful” and therefore more job-related and necessary as a hiring criteria. Employers’ reliance on a diploma as a selection criterion can be supported by human capital theory, which suggests that workers with more knowledge and skills will be more productive. More stringent graduation requirements should increase human capital by pushing improvements in
the quality of instruction and student ambition.\textsuperscript{451} However, this assumes that employers attach value to the attributes measured by exit examinations.\textsuperscript{452} Similarly, signaling theory predicts that employers would use passage of an exit examination as an indication of an applicant’s value in the workplace.\textsuperscript{453} Passage of an exit examination would signal that a graduate has mastered certain skills.\textsuperscript{454}

Regardless of which theory applies, the relevant question for determining job-relatedness and business necessity is whether the enhanced high school graduation requirements, such as course requirements and exit testing, are directly related to increases in productivity in the workplace. This validity depends on which attributes are important for employers offering positions that require a diploma. Employers have cited a lack of skills and experience as one of the most common reasons for not hiring persons with disabilities.\textsuperscript{455} Research has shown an increase in demand for cognitive skills among employers,\textsuperscript{456} such as English language and mathematics skills. At the same time, employers also value noncognitive attributes, such as conscientiousness,\textsuperscript{457} which may not be measured by the new and improved high school diploma.

A. Diploma as Indicator of Qualification

The lack of a new and improved diploma indicates an inability to score well on exit examinations or pass required courses.\textsuperscript{458} Historically, employers have not considered specific indicators of high school achievement, such as grades, when hiring or assigning young workers.\textsuperscript{459}

\begin{itemize}
  \item \textsuperscript{451} Id. at 79-80.
  \item \textsuperscript{452} Id. at 79-81.
  \item \textsuperscript{453} Id. at 80; see also Bishop et al., The Role of End-of-Course Exams, supra note 91, at 52-58.
  \item \textsuperscript{454} Dee & Jacob, supra note 108, at 6-7. Note that the examination requirement may also raise the level of abilities seen among non-graduates, compared to prior to the implementation of the examination requirement. Id. at 7.
  \item \textsuperscript{456} Warren et al., supra note 450, at 81.
  \item \textsuperscript{457} Id. at 82; see also George Farkas, Cognitive Skills and Noncognitive Traits and Behaviors in Stratification Processes, 29 ANN. REV. SOC. 541, 555-56 (2003) (summarizing studies showing that employers reward employees for energy, reliability, trustworthiness, motivation & politeness).
  \item \textsuperscript{458} See Warren et al., supra note 450, at 79-82.
  \item \textsuperscript{459} See ROBERT L. CRAIN, CTR. FOR SOC. ORG. OF SCHOOLS, THE QUALITY OF AMERICAN HIGH SCHOOL GRADUATES: WHAT PERSONNEL OFFICERS SAY AND DO ABOUT IT 11, 23 (1984), available at http://files.eric.ed.gov/fulltext/ED244069.pdf (only 12% of employers said that grades were important factor in hiring high school graduates); James E. Rosenbaum & Takahiko Kariya, Do School Achievements Affect the Early Jobs of High School Graduates in the United States and Japan?, 64 SOC.
This lack of consideration of achievement led the Commission on Workforce Quality and Labor Market Efficiency to conclude in 1989 that employers should “show through their hiring and promotion decisions that academic achievements will be rewarded” and that “[n]ational educational and employer associations should work together to develop easily understood transcripts, based on voluntary achievement testing programs, that assess student proficiency in a wide variety of academic and vocational areas.”

Similarly, the Competitiveness Policy Council advocated that “external assessments be given to individual students at the secondary level and that the results should be a major but not exclusive factor qualifying for college and better jobs at better wages.”

Employers’ lack of attention to achievement is reflected in the mixed results in research on the effects of high school achievement on labor market performance. Researchers have found no effect of high school academic grades on graduates’ early earnings, although there may be some connection between high school grades or standardized test scores and long-term labor market earnings. This research shows that even though many employers require a diploma in the hiring process, any higher achievement associated with a diploma does not necessarily predict success on the job.

Interestingly, achievement in high school may be more important to the success of persons with disabilities in the labor market. A 1997 study found that academic achievement of students with disabilities was significantly related to post-high school competitive employment. Students with disabilities who also had high reading, writing, or math skills were two to three times more likely to be employed than students with low skills in these areas. These early studies raise questions as to whether

\begin{footnotesize}


461. COMPETITIVENESS POL’Y COUNCIL, supra note 76, at 30.


464. Michael R. Benz et al., School to Work Components that Predict Postschool Success for Students With and Without Disabilities, 63 Exceptional Children 151, 158 (1997); see also Rabren et al., supra note 61, at 27.

465. Benz et al., supra note 464, at 158.
\end{footnotesize}
passage of the enhanced graduation requirements accurately predicts performance at work.

1. Diploma as Measure of Cognitive Skills

Rather than focusing on high school achievement, employers may be screening based on a diploma to find employees with the basic reading and computation skills they need. In 2011, manufacturers were reporting workforce shortages or skill deficiencies in several employee segments, with 28% indicating a current moderate or serious shortage in unskilled production and 24% expecting an increased shortage in that segment in the next three to five years. Those same employers reported that 29% of their current employees were not prepared in reading, writing, and communication skills—a decrease from 38% in 2005—and 30% reported a deficiency in math skills. In 2005, 81% of these employers opined that schools were not successfully preparing students for the workplace, compared to 78% with that opinion in 2001.

The new and improved high school diploma may require more cognitive skills than employers need. Most language and math examinations are based on at least tenth-grade standards, with at least ten states requiring passage of examinations based on Algebra I content, and three states testing on geometry. In addition to reading and math skills, numerous states with exit examinations are requiring passage of examinations in other subjects, including at least five states requiring passage of at least one science examination, and seven states testing in biology. At least nine states now require passage of a social studies or history examination.

466. See COMM’N ON WORKFORCE QUALITY, supra note 460, at 2; MOSS & TILLY, supra note 447, at 67. These criteria had a greater negative effect on male applicants. MOSS & TILLY, supra note 447, at 81.


468. Id. at 10; THE MFG. INST., NAT’L ASS’N OF MFRS, 2005 SKILLS GAP REPORT—A SURVEY OF THE AMERICAN MANUFACTURING WORKFORCE 17 (2005); see also CTR. FOR WORKFORCE SUCCESS (2005), supra note 123, at 17.

469. CTR. FOR WORKFORCE SUCCESS (2005), supra note 123, at 16.

470. See CTR. ON EDUC. POL’Y, supra note 161 (observing that ten states require Algebra I: Arkansas, California, Florida, Indiana, Maryland, Mississippi, Missouri, Oklahoma, Virginia, Washington).

471. See id. (observing that the following states include science on exit examinations: Alabama, Arizona, Georgia, Idaho, Louisiana Massachusetts, Mississippi, Nevada, New York, Ohio, Oklahoma, Texas).

472. See id. (observing that the following states include social studies on exit examinations: Alabama, Georgia, Louisiana, Maryland, Mississippi, New York, Ohio, Oklahoma, Texas).
Any lack of subject-specific knowledge indicated by a failure to pass exit examinations may not be an accurate indicator of failure to succeed in the labor market. The cognitive skills demonstrated by possession of a diploma may account for no more than 10 to 20% of the variance in earnings across high school graduates. The remaining differential reflects differences in attitudes, behaviors, and personality characteristics. This means that employers’ increasing demands for the ability to perform job-related tasks such as arithmetic, computer use, and reading and writing of paragraph-length material may not be rewarded with higher wages.

Given the high standards inherent in a new and improved high school diploma, the possession of a diploma may not be an accurate measure of the cognitive ability needed for much entry-level work. For eleven of fifteen occupations requiring no more than a high school diploma, the quantitative literacy required no more than the ability to calculate postage fees for certified mail or total the cost of a purchase from an order form. This finding is consistent with studies indicating that entry-level jobs typically require no more than eighth-grade reading and math skills. In addition to the level of knowledge required for many jobs, the reading, writing, and analytical tasks required of employees “are different from those students are taught in schools . . .” Schools teach students to remember for later use, whereas reading at work satisfies “more immediate and specific goals.”

In addition to basic cognitive skills, employers are looking for skills such as critical thinking, problem solving, and the ability to communicate. In 2011, the largest deficiency noted by manufacturing

477. See id. at 1-7 (service areas for the Job Training Partnership Act screen for a seventh-grade reading level, and technical training programs may require an eighth- or ninth-grade literacy score; ADAM GAMORAN, THE IMPACT OF ACADEMIC COURSE WORK ON LABOR MARKET OUTCOMES FOR YOUTH WHO DO NOT ATTEND COLLEGE: A RESEARCH REVIEW (1998), available at http://www2.ed.gov/pubs/VolEd/Chapter4/Part3.html; see also CRAIN, supra note 459, at 24 (ability to read newspaper rated almost as important as employability skills but ability to handle complex numerical calculations and read complex materials rarely rated as important).
479. Id.
480. Id. (employers consider skills including computation, communication and problem solving as well as habits self-discipline and accepting responsibility); P’SHIP FOR 21ST CENTURY SKILLS, ASSESSMENT: A 21ST CENTURY SKILLS IMPLEMENTATION GUIDE 4 (2009), available at
Employers was “inadequate problem-solving skills.”\textsuperscript{481} Cognitive abilities such as problem solving and critical thinking may support promotion and productivity as workers advance beyond the entry level.\textsuperscript{482} Employers are using a diploma as a rough predictor of such skills.

According to testimony on the potential for disparate impact claims based on high school diploma requirements, the Small Business Administration contends that small employers already “carefully consider what qualifications are necessary for a job and the individual characteristics of each applicant.”\textsuperscript{483} With that being said, a blanket diploma requirement for many positions was justified as follows:

Most jobs in a modern economy require the ability to do arithmetic, to read and understand instructions and to solve problems. This is usually true even of jobs that a highly educated person might regard as being that of a laborer. Workers, nonetheless, often have to use math to calculate proper fits or the proper equipment, material or part to use. They often have to read and understand instructions to properly and safely use equipment or chemicals. They have to be able to solve problems in the field without management input. A high school diploma is a reasonable indicator that a person possesses these qualities. Usually, a person who has earned a high school diploma will perform these tasks better than a person without one. A high school diploma is also an indicator of the person’s ability to stay on task, complete projects and accept instructions.\textsuperscript{484}

Even this advocate recognizes that a diploma is being used to measure something beyond cognitive skills, related more to an applicant’s employability.

2. Diploma as Measure of Employability

Many employers are most concerned with employability, as demonstrated by “softer” skills such as timeliness, motivation, perseverance, and self-control.\textsuperscript{485} As early as 1983, employers reported that they were placing more importance on positive attitudes towards work than

\begin{thebibliography}{99}
\bibitem{481} \textsc{The Mfg. Inst.} (2011), \textit{supra} note 467, at 2, 8.
\bibitem{482} \textsc{Gamoran}, \textit{supra} note 477.
\bibitem{483} David Burton, General Counsel, Nat’l Small Bus. Ass’n, Written Testimony for Public Input into the Development of EEOC’s Strategic Enforcement Plan (July 18, 2012), \textit{available at} http://www.eeoc.gov/eeoc/meetings/7-18-12/burton.cfm.
\bibitem{484} \textit{Id.}
\bibitem{485} \textsc{Ctr. For Workforce Success} (2001), \textit{supra} note 121, at 2, 8.
\end{thebibliography}
on specific job-related skills. This emphasis on employability and soft skills may be based on increasing reliance on on-the-job training, which was the most significant source of education and training for each of the occupations with the highest hiring rate between 2001 and 2012 for workers with a high school diploma or less education.

Several employer surveys dating back to 1983 show that attitude, communication skills, and work experience are the most important hiring criteria, outranking other factors like years of completed schooling and academic performance. In 2001 and 2005 National Association of Manufacturers (NAM) surveys, employers identified the lack of basic employability skills as the top deficiency among applicants for hourly positions. Employers in 2001 reported that 69% of applicants were rejected because of a lack of basic employability skills, compared to inadequate reading and writing skills, which only accounted for 32% of the rejections, and inadequate math skills, which accounted for 21% of the rejections. Similarly, when asked in a 2001 survey which skills they thought demanded greater emphasis in schools, half of the manufacturing employers responded general employability skills, while only 42% responded math and science and only 38% emphasized reading and comprehension. A multi-city sampling of employers also indicated the importance of soft skills, flagged by 84% of the respondents, whereas only 54% of the employers mentioned hard skills.

Soft skills continue to be important for employers. By 2011, 40% of manufacturing employers indicated that inadequacy in basic employability skills was the most serious skill deficiency among current employees, a more common concern than inadequate computer, math or communication skills. The National Association of Manufacturers found that the most significant skills deficit among current employees was a lack of problem solving skills (52%), followed by a lack of technical training (43%), and a
lack of basic employability skills (40%), compared to a lower concern regarding inadequate math skills (30%) and inadequate communication skills (29%).

None of the soft skills sought by employers are directly measured by high school exit examinations. Ironically, only those students who participate in vocational courses and work experience during high school have focused on such skills, but these students are the least likely to obtain a new and improved diploma. The most successful school-to-work programs for students with disabilities include "work skills training, vocational guidance, and an individualized approach that takes into consideration the physical and social environmental accommodations necessary for student success."

Assessment of applicants’ soft skills can be very subjective and rely on the context. Soft skills may be particularly important for the employment of persons with disabilities, especially those with emotional and behavioral difficulties. A 2002 survey of Ohio employers who hired persons with disabilities showed that these employees were valued for their cooperation and generally good work habits. These attributes were also particularly important for earnings of males who had not completed high school.

Unfortunately, the lack of a high school diploma does not necessarily indicate a lack of these skills, at least in the twenty-five states that limit diplomas to those who pass exit examinations that focus solely on certain cognitive skills.

B. Job-Relatedness of New and Improved Diploma

Labor market success is one way to determine the job relatedness and necessity of a high school diploma dependent on meeting enhanced graduation requirements. In 2001, 39% of employers surveyed by the

495. Id. at 8.
496. See RICHARD J. MURNANE & FRANK LEVY, TEACHING THE NEW BASIC SKILLS 78 (1996) (tests ignore many of the new basic skills); Karen J. Pittman, Blurring the Lines for Learning: The Role of Out-of School Programs as Complements to Formal Learning, 101 NEW DIRECTIONS FOR YOUTH DEVELOPMENT 19, 23 (2004) (academic achievement is critical, but broader range of skills and content knowledge needed to contribute in 21st century).
498. MOSS & TILLY, supra note 447, at 44-45, 100-03, 122-23.
National Association of Manufacturers believed that standardized testing would make a difference in preparing students for work, while 28% believed testing would not do so.\textsuperscript{502} The results are similarly mixed in research focused on whether the implementation of graduation requirements has been associated with improvements in learning.\textsuperscript{503}

The correlation between standardization of education and labor market success is also weak. No clear improvement in labor market performance has been seen in states with minimum competency examinations.\textsuperscript{504} One study showed that students' failure of a last opportunity to pass an exit examination required for graduation was associated with lower earnings for Texas students.\textsuperscript{505} This differential reduced over time, suggesting that any value of a diploma may decrease with longer labor market participation.\textsuperscript{506}

Research has failed to definitively establish a positive effect of exit examinations on labor market performance. Test scores have not been proven to have significant correlation with the length of subsequent employment or earnings of all students who complete a minimum competency examination, beyond some positive effect on wages of students with an “A” or “B” GPA.\textsuperscript{507} One study, controlling for college attendance, showed no effect of exit examinations on men’s wages in the early 1980s, but examinations had large positive effects on women’s wages in three out of five years following graduation.\textsuperscript{508} This same study found that for the class of 1992, hourly wage rates were 3.4% to 3.6% higher for graduates who were required to pass a minimum competency examination.\textsuperscript{509}

Other research shows that exit examination requirements are not necessarily positively associated with higher earnings. For example, state exit examinations had a negative effect on earnings of white and Hispanic
students but a positive effect on earnings for black students in one study.\textsuperscript{510} Another study found that the requirement of participating in an exit examination neither increases nor decreases wage disparities between high school graduates and dropouts, leaving the conductor of the study to wonder “whether academic skills have any bearing on employees’ productivity or employers’ hiring and compensation decisions.”\textsuperscript{511} Indeed, the analysis showed that there were fewer differences in employment prospects of high school completers and non-completers in states with higher-competency exit examinations.\textsuperscript{512}

This research fails to establish clearly that exit examination requirements provide workers with value for which employers are willing to pay a higher wage.\textsuperscript{513} An alternative explanation may be that employers do not know or consider whether students in their state are required to pass an exit examination, or employers do not value the level of cognitive and academic skills assessed in exit examinations, perhaps due to high pass rates.\textsuperscript{514} Additionally, students who perform poorly on exit examinations may be discouraged from seeking higher paying jobs, particularly if those jobs require a diploma.

In contrast to participation in exit examinations, the curriculum followed by high school students has been shown to improve their labor market success. Several studies have found that taking higher-level courses in high school was associated with higher labor market earnings.\textsuperscript{515} Controlling for student characteristics and high school level variables, one study found that an increase in earnings of 3.1\% was associated with upper-level courses in math, science, and foreign language and vocational course work raised wages by 5 to 10.3\%.\textsuperscript{516} Comparatively, each additional high school course taken in English, social studies, commercial arts, and industrial arts resulted in only a minimal value in earned wages earned.\textsuperscript{517} However, the association between courses taken and subsequent earnings has not been significant in most studies that controlled for test scores.\textsuperscript{518} In

\begin{footnotes}
\item[510] Dee & Jacob, supra note 108, at 24.
\item[511] Warren et al., supra note 450, at 78, 91-92.
\item[512] Id. at 92, 97.
\item[513] Id. at 97, 99.
\item[514] Id. at 100-101.
\item[517] Id.
\item[518] GAMORAN, supra note 477.
\end{footnotes}
contrast to these findings, which provide some support for more academic course requirements, a subsequent study found that students who took some vocational courses in high school enjoyed significantly higher wages than other high school graduates in the labor market.519

Given the ever-increasing standards of exit examinations, the student who fails to earn a diploma may not lack the cognitive skills necessary for many entry-level jobs. Additionally, exit examinations and an enhanced curriculum which focus on cognitive skills may not produce workers who possess the employability skills often needed for entry-level work. Indeed, enhanced graduation requirements have not been shown to significantly improve labor market performance in the states that have adopted them.

V. CONCLUSIONS REGARDING EMPLOYERS’ RELIANCE ON THE NEW AND IMPROVED HIGH SCHOOL DIPLOMA

Employers often screen out applicants who lack a diploma, using the diploma as some indication that an applicant would be a “good” employee. For entry-level jobs, employers seek some mix of cognitive skills and employability, but generally find a great deficit in employability traits.520 Employers have relied on the diploma as an accurate indicator of these qualities.521 But now that exit examinations and curriculum requirements have made a diploma less available, particularly for applicants with disabilities, employers can no longer assume that a diploma is job-related and consistent with business necessity.

Education experts, politicians, and parents disagree as to the value of the standardization of high school graduation requirements. Rather than taking a position in this debate, this Article suggests that employers must recognize the current reality, which includes the impact of enhanced graduation requirements on persons with disabilities. To allow the continued use of a diploma as a screening criterion, employers may want to advocate for stronger correlation between graduation requirements and entry-level positions in the labor market.

While enhanced graduation requirements continue to have a disparate impact on students with disabilities, this impact requires that employers demonstrate both job-relatedness and business necessity to justify screening based on a diploma, particularly in states with enhanced requirements which make it difficult for those applicants to obtain a diploma. To do so,


520. See supra notes 450-466 and accompanying text for discussion of desired employee traits.

521. See supra notes 14-25 and accompanying text for discussion of employer screening based on diplomas.
Employers need to first consider the specific duties of the position, and the skills, abilities and knowledge required to complete them. For at least some positions, employability skills may be more important than cognitive skills. Employers then need to understand what their state or states require to obtain a diploma. Employers will need to assure that a diploma does indeed indicate an applicant’s likely success in a particular job, given their states’ enhanced graduation requirements. Employers must keep in mind that stronger validation is required for criteria with a greater impact and for positions that carry little risk from hiring less-qualified candidates.

The EEOC has provided limited guidance on the job-relatedness of a high school diploma requirement that screens out applicants with disabilities. In a 2011 informal discussion letter, the EEOC explained that if an employer’s adoption of a high school diploma as a job requirement has a disparate impact:

\[ \text{[T]he employer may not apply the standard unless it can demonstrate that the diploma requirement is job related and consistent with business necessity. The employer will not be able to make this showing, for example, if the functions in question can easily be performed by someone who does not have a diploma.}\]

Under the ADA, the lack of a diploma needs to be an accurate indication that the applicant with a disability lacks the ability to perform the essential duties of the position, with or without reasonable accommodation. Like the direct threat and credential cases outlined above, individual analysis of the applicant is required. To abandon such individualized analysis, expert testimony would be required to demonstrate that anyone lacking a high school diploma would be unqualified. Employers may also need to assure that their state or states provide students with sufficient special education services, accommodations, and alternative paths to a diploma to have a chance to meet the enhanced requirements for graduation.

Determination of the relatedness and necessity of a diploma for applicants with disabilities can be guided by the analysis of Title VII claims concerning high school diploma requirements and other screening tests. Under Title VII, if a diploma requirement has a disparate impact, then the employer must conduct a thorough job analysis to determine the essential duties of the position and the skills and qualities needed to perform those duties. Then the employer must also show that the possession of a diploma sufficiently demonstrates those skills and qualities, whereas the
lack of a diploma validly indicates that those skills and qualities are absent. For employers valuing employability skills over cognitive skills, a diploma may not be the best criterion to select candidates.

Disparate impact analysis has important implications for the review of a diploma requirement that disparately impacts applicants with disabilities. First, employers must be clear regarding the job requirements. An employer should consider whether the position calls for applicants who exhibit the employability skills, such as reliability, that may be evidenced by high school completion rather than possession of a diploma. If so, then recruitment materials and applications should carefully describe education requirements so as to include potential applicants who may hold a completion certificate rather than a diploma.

Second, rather than requiring a diploma for entry into any applicant pool, employers must examine the requirements for obtaining a diploma in the states where they operate and make a determination as to whether the lack of a diploma truly indicates that an applicant with a disability cannot perform the duties of a particular position. Employers must recognize that the lack of a diploma means different things in different states, especially for applicants with disabilities. As states increase curriculum requirements, expand the subjects being tested, and raise the academic achievement level required to pass standardized exit examinations, a diploma may be a less valid indication of even the cognitive abilities required. Employers must also keep in mind that different states offer varying alternative routes to a diploma for students with disabilities, with some states offering little more than a second attempt or some accommodations in testing. This means that the lack of a traditional diploma may not establish that an applicant with a disability is not qualified for the position in question.

A requirement to show the job-relatedness and business necessity of a diploma has been criticized because it is “patently unclear what would constitute legal proof that a high school diploma ‘requirement is job related and consistent with business necessity.’” The Small Business Administration argues that “businesses that need people who can do math, read and solve problems” should not be “forced to try to figure this out” using some criteria other than a high school diploma. But this lack of clarity is exactly why employers need to consider alternative ways to measure both the cognitive skills and the employability of their applicants.

528. See supra notes 326-335 and accompanying text.
529. See supra notes 143-154 and accompanying text for discussion of alternative routes to a diploma.
530. BURTON, supra note 483.
531. Id.
Some employers allow applicants to demonstrate their qualifications in alternative ways. Instead of relying on standardized assessments and completion of curriculum requirements, these employers consider assessments designed to measure workforce skills in addition to, or instead of, formative and curriculum-based assessments that measure students’ progress and mastery of skills.532 The Center of Workforce Preparation, part of the U.S. Chamber of Commerce, has developed its Equipped for the Future Content Standards to measure “what adults need to know and be able to do to meet the demands of life in the 21st century” beyond the skills measured by standardized academic tests.533 This assessment focuses on communication skills, decision-making skills, interpersonal skills, and lifelong learning skills.534

In addition to these alternative measures, employers can use assessment centers as well as job tryouts, job coaches, and on-the-job training to assess the potential of persons with disabilities for a particular job. These assessments may fulfill an employer’s need to find some less discriminatory alternative than relying on a high school diploma in screening applicants.535

Rather than assuming that passage of an exit examination makes one a better employee, successful job performance depends on matching workers to a job that utilizes his or her skills so that the worker can perform satisfactorily.536 Employers should ensure that hiring staff are prepared to “assess worker skills, analyze job demands, to modify a job to match worker skills, and to train other staff in the work area in the special skills needed to support a particular worker.”537 By doing so, employers provide applicants with disabilities an opportunity to demonstrate their qualifications. At the same time, applicants with disabilities need to highlight both their cognitive and employability skills during the application process. Employers can only recognize the value of applicants who lack a diploma if that information is provided to them.

Even if a diploma can be shown to be job-related and a business necessity, employers should also consider alternatives for screening that

535. See discussion of alternatives at supra notes 410-444 and accompanying text.
536. Lysaght et al., supra note 497, at 418.
537. Id.
would have less of a disparate impact. At least in states with new and improved graduation requirements, employers should only continue to screen applicants based on their possession of a diploma if there is no alternative measure that would have less of a disparate impact on applicants with disabilities.\footnote{538} To this end, employers should consider adopting other criteria to screen applicants for positions that have traditionally required a high school diploma. The EEOC has explained that the ADA’s accommodation requirements may mean that an employer should consider relevant work history, or allow:

\begin{quote}
(T)he applicant to demonstrate an ability to do the job’s essential functions during the application process. If the individual can perform the job’s essential functions, with or without a reasonable accommodation, despite the inability to meet the standard, the employer may not use the high school diploma requirement to exclude the applicant.\footnote{539}
\end{quote}

The EEOC suggests in a short question-and-answer guide that if an applicant cannot meet a high school diploma requirement because of a disability, “an employer may have to allow her to demonstrate the ability to do the job in some other way,” including consideration of “work experience in the same or similar jobs, or allowing her to demonstrate performance of the job’s essential functions.”\footnote{540}

State practices and research already provide suggestions of alternative methods of assessment. Federal courts interpreting the ADA and Title VII have recognized the need to consider alternative criteria such as portfolio review and assessment centers as part of the right to a free and appropriate education.\footnote{541} Some states allow students with disabilities to be assessed based on academic portfolios rather than standardized tests; in the same way, employers can assess applicants based on vocational training as well as work and volunteer experiences. These experiences can be more accurate indicators of the soft skills that employers find valuable. Applicants can demonstrate curriculum requirements with different levels of the same course, and employers can “count” an applicant’s completion of high school coursework even if it did not lead to receipt of a diploma. As an accommodation, employers can also provide on-the-job training to enable employees with disabilities to perform the work duties, particularly where the applicant possesses the ability to participate fully in such training.

Psychological experts have recognized other skills-based alternatives to an educational requirement as valid. These include standardized ratings

\footnote{538} See discussion of alternative assessments at supra notes 410-444 and accompanying text.
\footnote{539} EEOC, OFFICE OF LEGAL COUNSEL, supra note 416.
\footnote{540} EEOC, supra note 418.
\footnote{541} See discussion at supra notes 268-278 and accompanying text and discussion of alternatives at supra notes 410-444 and accompanying text.
of training and experience, weighted application blanks, biographical information about job applicants, job knowledge tests, personality tests, interest inventories, and assessment centers where applicants produce work samples and undergo job-relevant simulations of real-world work scenarios. Employers can also utilize traditional hiring processes to screen applicants for positions that have traditionally required a diploma. For example, structured interviews can predict job performance.

Employers have also used measures of personality traits and bio-data measures to predict job-relevant outcomes, including the effects of measurable aberrant personality traits on work performance.

For these reasons, employers should not reject applicants merely because they do not possess a diploma. Instead, applicants should be provided with an opportunity to explain their educational, background and work history, which could demonstrate both the knowledge required of the job and the soft skills valued by employers. Even where a position requires some higher level of cognitive abilities, applicants should be allowed to demonstrate those abilities by explaining how their achievements were measured in school, even if passage of an exit examination or completion of all curriculum requirements were not achieved.

Rather than relying on a diploma to identify the best applicants, employers should consider using more closely job-related tests and other demonstrations of ability that match the specific job duties of the position being filled. By doing so, employers need not fear claims of disparate impact by applicants with disabilities because their screening criteria will not result in such a significant disparate impact on applicants with disabilities. Even if some impact results, the criteria will be job-related and therefore will not provide the basis for a discrimination claim. Moreover, the use of such criteria will provide the most qualified employees for employers.

542. West-Faulcon, supra note 309, at 1050.
543. Schmitt et al., Adverse Impact, supra note 441, at 719-20.