INTRODUCTION

The No Child Left Behind (NCLB) federal law, enacted by Congress and signed by the President in January 2002, is the most comprehensive effort by the federal government to effect change in public education by using the power of the federal purse. NCLB requires that every state receiving federal assistance develop a statewide set of standards for specified curriculum areas and implement a statewide method of measuring compliance by its public schools with those standards.

In the nineteen states (as of 2003) using their high stakes testing as the state assessment, NCLB has resulted in the stakes being raised even further for certain student populations. Students with disabilities who might otherwise have been able to receive a diploma using some alternate form of assessment may now find themselves without a diploma unless they take and pass the state's high stakes test. For states using high stakes testing, the test becomes both the state's exit requirement for students and the state's assessment instrument measuring NCLB's student annual yearly progress.

The approach in Australia to both national accountability and state high stakes assessment has been less direct. Similar to the United States, high stakes assessment for purposes of high school certification and university entrance has been influenced by state, as opposed to federal, standards although, contrary to the United States, school-based teacher judgment of student performance forms part of Australian high stakes assessment.

The NCLB counterpart in Australia has involved recent federal efforts to establish national outcomes with uniformity of standards and accountability. The manner by which these proposed national outcomes interface with existing state high stakes assessment presents a parallel to the United States.

In both countries, students with special needs (disabilities) have been a focus of government attention. Under NCLB, special education students are not excluded from statewide assessments, but schools are permitted to use alternative assessments for up to one percent of the students. The
issues concerning students with disabilities in Australia are more fluid. While the Australian Minister of Education has indicated an intention to establish federal control of education policy and practice in the country, disagreement in the form of different states’ practices currently exists as to whether special needs students should be excluded from state assessments and reported outcomes.

The purpose of this article is to compare and contrast the efforts in both the United States and Australia to address both national standards of accountability and state high stakes assessment. To the extent possible, attention will be directed toward the effect that national accountability and state high stakes testing may have on students with disabilities.

**Comparison of Australia and United States Approaches to Education**

Both the United States and Australia have federal systems of government, each with a strong, central government and with the country divided into various states (50 states in the U.S., as opposed to six states and two territories in Australia, hereafter collectively referred to as “states”). As in the U.S., the Australian federal government and its constituent states each has its own constitution. However, while the United States federal Constitution contains a Bill of Rights providing a floor of substantive and procedural protections that can be asserted against both federal and state governments, the Australia federal constitution contains no such Bill of Rights. Although the Australian high court has implied certain fundamental rights, such as free speech, in the federal constitution, [FN2] individuals and groups generally must look to the federal and state Parliaments for nationwide protective legislation. [FN3] In contrast with the U.S. Constitution's Tenth Amendment that reserves the function of education to the 50 states, federal constitutional interpretation in Australia since 1920 has not upheld a reserve power for the states. [FN4] Federal governments in both Australia and the United States provide funds for K-12 education. However, the legal basis for this funding is influenced by the respective constitutions. In Australia, most funding for education is derived from an income tax collected at the federal level [FN5] and then distributed as financial assistance “to any State on such terms and conditions as the Parliament thinks fit.” [FN6] Grants from the federal government are not considered “grants for the financial assistance of the States but grants *3 to schools and school systems.” [FN7] As such, States, “as conduits for distributing grants to schools and school systems on conditions fixed by the Commonwealth ,” [FN8] become not agents of the Commonwealth, but principals with limited chance of success in challenging Commonwealth priorities in key areas of education. In the United States as a result of the Tenth Amendment, most of funding on schools comes from state and local taxes authorized by state law. The federal government's basis for congressional funding of education is found in constitutional provisions authorizing Congress to act, such as “promoting the general welfare” [FN9] or the interstate commerce clause. [FN10] Most federal funds, as in Australia are distributed through the States to local school districts. States in the U.S. are not required to participate in the federal grants, but once they receive the funds, they must distribute them according to the conditions imposed by Congress.
United States Mandates for Educational Assessment

NCLB enacted in 2002 contained more specific and far-reaching requirements than any federal education law before it. In addition to requiring that students in grades 3 through 8 be tested annually and at least once in grades 10-12, states are required also to develop and administer science assessments beginning in 2007-08 \[FN11\] and to test the English proficiency of Limited English Proficient students. \[FN12\] At least 95% of students in each school district must take annually the state's test measuring academic performance. \[FN13\] Districts have a range of options for determining the success rate on the state test during the first year of results, but the passage rate for all students by the 2013-14 academic year must be 100%. \[FN14\] States must determine whether all schools are making Adequate Yearly Progress (AYP) toward the goal of 100% proficiency for all students by 2014. States must develop both annual objectives and intermediate goals and must monitor whether school districts meet the required AYP thresholds. \[FN15\] School districts are not permitted to design their own assessments or develop their own AYP targets; rather, they must participate in the state assessments and be held accountable to state-developed AYP targets.

Australian Federal Accountability: NCLB by Stealth?

The Australian experience with high stakes assessment and accountability has been less straightforward. High-stakes assessment in Australia for students, that is the assessments that lead to high school certification and university entrance, has been a mix of school-based and external, criteria-referenced assessment. Significant reliance on teacher professionalism to judge students has created a tension with recent state externally-mandated and controlled system-wide assessments. The introduction of state standardized, normative external testing has been exacerbated by the federal government's intervention in state policy using its power of the purse, a situation not unlike what is happening in the United States under NCLB.

The Australian approach to creating national standards and outcomes has involved a combination of national declarations of policy and federal funding statutes. In 1999, the Adelaide Declaration on National Goals for Schooling in the Twenty-First Century established a number of national outcomes for schooling, including common literacy and numeracy goals, with some embedded focus on standards and accountability. \[FN16\] Although high-stakes curriculum and assessment for the final two years of schooling differ, the Australian approach to assessment reporting reflects some unique features of their educational system, namely a focus on reporting what a student is able to demonstrate successfully, rather than success against a fixed standard or grade level.

The current Commonwealth provisions act, the States Grants (Primary and Secondary Education Assistance) Act 2000, introduced specific educational*5 accountability conditions for government schools requiring their participation in preparing a national report on the outcomes of schooling. The States Grants (Primary And Secondary Education
Assistance) Regulations of 2001 established important benchmarks for achieving the goals of the statute. For example, Regulation 4 established reading, writing, spelling and numeracy [mathematics] benchmarks as standards for Years [grades] 3, 5 and 7. Regulation 5 identified performance measures as the percentage of children reaching the benchmarks, while Regulation 6 set performance targets. [FN17]

Therefore, while Australia does not have an Act as specific as No Child Left Behind, funding in principle to all schools is contingent upon participation in assessments in Years 3, 5 and 7 in literacy and numeracy, with further areas of science and technology scheduled to follow, and reporting of performance against standards that are nationally agreed. The states have individual systems for testing which are then nationally equated to report against the standards. Furthermore the stated goals are for all students, apart from a few special cases.

The Australian Minister of Education has indicated an intention to establish federal control of educational policy and practice in Australia in certain areas by the development of a National Educational Framework for Schools. Two areas have been proposed for federal control: “National Consistency in Schooling” and “Intolerance of Poorly Performing Schools.” By the end of the decade (2010), the Minister has indicated that Australian schools should have common starting ages and school structure, consistent curriculum standards, common testing, and a national tertiary entrance system. This goal appears to address four differences that currently exist among the states: the ages at which students are required to start school (compulsory attendance); whether attendance in Kindergarten is required; how literacy and numeracy assessments are performed and reported; and whether students with special needs can be excluded from state assessments and reported outcomes. In addition, if a school is underperforming, then action should be taken. Although the action to be taken is unspecified, the Minister has indicated that he will be “initiating discussion with State and Territory Ministers to see what overseas practices can be usefully adopted here for the benefit of students.”

**NCLB Accountability and Its Implications for Children with Disabilities**

Every state that uses its high stakes test as the measure of accountability for NCLB now must test at least 99% of its students, even though that percentage may include students with disabilities who, prior to NCLB, were able to be tested for high stakes purposes using alternative assessments. Under NCLB, school districts will be permitted to use alternative testing for only 1% of students with severe cognitive disabilities, although an exemption beyond the 1% is possible in limited circumstances. [FN18] For this 1% of students, states will be able to have the flexibility to count the 'proficient' scores of students with the most significant cognitive disabilities who take assessments based on alternate achievement standards. [FN19] Beyond this 1%, with a very limited exception, school districts with high percentages of disadvantaged students who have traditionally not performed well on state tests will be expected to increase performance rates or face the loss of state-administered federal funding.
In Australia, although the regulations and policy informing literacy and numeracy benchmark testing and reporting indicate the standards are to be achieved by all students with the exception of “the very small percentage of students who have severe educational disabilities,” current arrangements allow more exemptions, the choice of “opting out,” or alternative assessments for students. Although the focus of this article is on students with disabilities, these exemptions can also apply to students for whom English is not their first language.

In Queensland, for example, those students with intellectual impairment who have been identified as having educational needs at Levels 5 or 6 through the system ascertainment process (Level 6 is most severe) may be exempted from sitting for the tests. [FN20] Exemption decisions are based at the school level, in consultation among the principal, teachers and parents/careers and can include students for whom undertaking the test may be a “traumatic experience.” Students in Queensland who are exempted are reported as not having reached the benchmarks. Students who do not meet the criteria for exemption but whose parents/careers object to their participation in the tests are marked “absent” not “exempt,” and are not included in the population results reported.

In Victoria, exemptions and accommodations are similar to those for Queensland. In addition a school principal, *7 may grant an exemption to students with disabilities or impairments, and to students who have been learning English in Australia for less than two years, and in other exceptional circumstances. [FN21]

In South Australia, as well, exemptions are at the discretion of school principals.

The end result is that the practices appear to vary considerably. For example, the percentage of students in government schools reported by each state as assessed [FN22] on Year 5 reading benchmarks in 2000 ranged from 85% to 96%, [FN23] while the percentages exempted or absent/withdrawn ranged across states from 0.6% to 3.5%, and 2.4% to 14.9%, respectively. [FN24] Whether such variation in practice will be able to continue in the future is speculation since the practices are not consistent with the federal regulation expectations. However, at present, no penalties accrue for “poor performance” and in general additional funds are provided under state policies to assist students with higher proportions of lower-performing students.

Legal Challenges to Australian Federal Accountability and the NCLB

While the Australian federal legislation creates an incursion into state education policy, the national literacy and numeracy benchmarks have been developed by accord by the states. As most funding for education is derived from the federal government, proportions of the specific literacy and numeracy grants are used to support the state development of literacy and numeracy assessments. The federal government has not directly mandated a common literacy and numeracy test and is conservative in the extent to which it appears to be setting such a national curriculum and assessment agenda. Such direction may develop a response from the states that it is directing the execution of state government and exceeding constitutional power. [FN25] However,*8
state challenges against the Commonwealth on funding issues are generally not successful. [FN26] States resisted 2004 federal funding requirements that may have strengthened the federal accountability agenda, but did so on financial, not immunity grounds. In the United States, Congress has allocated increasing amounts of funds as grants to states to meet the requirements of NCLB, [FN27] in large part because the Act prohibits an officer or employee of the Federal government from “mandat[ing] a State or any subdivision thereof [e.g., school district] to spend any funds or incur any costs not paid under this Act.” [FN28] However, even assuming that states spent their own money, the Supreme Court has been reluctant to permit private enforcement (by individuals, such as parents and students) of federal statutes enacted under the spending power where the statute focuses on “the aggregate services provided by the State,” rather than “the needs of any particular person.” [FN29] Where federal laws do not create rights for individuals or groups, the Supreme Court consistently has refused to permit private causes of action. [FN30] What is not clear is the extent to which a state legislature can prohibit the expenditure of state funds to comply with NCLB, especially if the districts later are unable to meet state AYP expectations. [FN31] *9 Whether states or school districts can sue the U.S. Department of Education because of inadequate funding is equally problematic. Federal courts have permitted suits against federal agencies where the statute at issue allows lawsuits and have permitted recovery where funds have been shown to exist within the control of the agency. [FN32] Although courts have permitted lawsuits against government entities under federal statutes, these lawsuits have involved inappropriate expenditure, [FN33] reversion of funds, [FN34] or cessation of processing pending applications, [FN35] not inadequate allocation of funds. [FN36] How challenges to high stakes testing will work out where the testing is pursuant to NCLB remains to be seen. Early cases under NCLB have yet to address the merits of the Act’s accountability requirements. In Association of Community Organizations for Reform Now v. New York City Bd. of Education (ACORN), [FN37] a federal district court dismissed a section 1983 lawsuit alleging violations by their school district in implementing NCLB because provisions of the NCLB, requiring local educational agencies to notify parents of students enrolled in schools that were identified for “school improvement,” “corrective action,” or “restructuring” and of students’ rights to transfer to different schools, and to offer supplemental educational services (SES) to certain students in schools, did not create individual rights that were enforceable under § 1983. To further complicate the litigation picture for NCLB, one federal district court has questioned whether Congress intended to waive sovereign immunity when it enacted NCLB. [FN38]

Legal Challenges to Accountability and State High Stakes Assessments

Challenges in Australia by students against high stakes testing in Australia for certification purposes have been limited. The absence of a Bill of Rights in Australia has led to different processes for legal actions in education than those in the United States.
In school-based assessments of student achievement, even for high stakes decisions, the student's first recourse is to be within the school. In South Australia, the Senior Secondary Assessment Board of South Australia (SSABSA), the government entity responsible for establishing guidelines to schools regarding special provisions and reasonable curriculum and assessment accommodations, indicated [FN39] that assessment information is the school’s responsibility and SSABSA does not interfere in the result. Therefore any disputed result was to be resolved within the school. A student who believes an administrative injustice has been committed may appeal to the state Ombudsman. An Ombudsman position is established by statute in every state for the major purpose of ensuring due process, natural justice for members of the community in dealings with state and local government agencies. The focus is again on conciliation processes, [FN40] and the powers of the Ombudsman are limited, usually without power to enforce any remedies. Across Australia, few education complaints are recorded in Ombudsman reports.

Challenges by identifiable groups such as students with special needs can occur under state and federal [FN41] Anti-Discrimination or Equal Opportunity Acts that legislate, for example, that “it is unlawful for an educational authority to discriminate against a student on the grounds of impairment” [FN42] or “the ground of age.” [FN43] In two recent cases, State of Victoria v Bacon & Ors (Ors) [FN44] and Bolton v. State of Victoria (Bolton) [FN45], two groups of special needs students successfully challenged age-based legislation that would have required a student to leave school on attaining 18 years “unless the student was formally enrolled in the Victorian Certificate of Education course (the V.C.E.).” Since this course was unsuited to the students with mild intellectual impairment who were participating in an 18+ transition program at the school, the courts granted injunctive relief to the students so that they could continue in the transition program. Bolton and Ors underscored a major feature of Australia law regarding challenges to state and school-based assessment regimes, namely that such challenges can occur only under, and are limited by, statutory law. [FN46]

*11 In the United States, although NCLB does not require high stakes testing in order for states to meet its accountability requirements, the Act clearly does not prohibit or discourage states from using such testing. [FN47] However, as reflected in the recent Ninth Circuit decision, Chapman v. California Department of Education (Chapman), [FN48] high stakes testing presents unique problems for students with disabilities. In Chapman, the Ninth upheld a federal district court's injunction against the California's use of its California High School Exit Examination (CAHSEE) [FN49] to determine issuance of diplomas for students with disabilities where the state's testing policy at the time the lawsuit was filed did not provide for necessary modifications and accommodations. The district court's injunction provided that

The state must permit accommodations necessary for a student to access a state-wide assessment such as the CAHSEE. This way a student's score provides a meaningful measure of achievement. This type of feedback when measured against clearly articulated standards helps hold educators accountable for teaching all students—a key goal of the IDEA. [FN50] However, the Ninth Circuit reversed the part of the district court's
injunction requiring an alternative assessment for students who do not pass the CAHSEE with accommodations, in part “because the IDEA does not encompass restrictions on the state in the exercise of its traditional authority to set diploma requirements.” [FN51] Since students with disabilities would be able to take the test and receive the results the same as typical students, the claim regarding alternative assessment was “insufficiently ripe for adjudication on a statewide basis at the present time.” [FN52]

In a follow-up to these decisions, disabled student plaintiffs again sought injunctive relief challenging the state's requirements for a waiver from the test results in order to obtain a diploma. However, the court dismissed the complaints because, the State Board of Education having voted unanimously to eliminate the exit exam as a graduation requirement for the class of 2004 but to reinstate it for the class of 2006, plaintiffs lacked standing to challenge the waiver requirements. [FN53] Thus, California has postponed but not yet resolved the issue of the use of high stakes testing for graduation purposes for students with disabilities.

*12 Parties in other states have filed lawsuits challenging the application of high stakes testing to students with disabilities. A lawsuit in Oregon resulted in creation of a national panel to devise measures to protect children with disabilities. Those measures were put into place in 2001. The settlement viewed as revolutionary in its scope and approach provides an alternative to the standard assessment for those learning disabled students who are disadvantaged by regular assessment. For example, students who are identified as having conditions such as dyslexia will not have to spell on high-stakes tests without proper accommodations. Similarly, if students use assistive technology like a hand-held device that facilitates their writing and this device is used as an accommodation in the classroom, then they can use it on the test. In addition, the accommodations apply to students with section 504 plans as well as IEPs. [FN54] Most recently, five students and a disability advocacy group have filed suit in Alaska seeking reasonable accommodations and alternative assessments for students who do not do well on reading, math and writing in order to receive a diploma. [FN55]

Earlier federal court decisions, Debra P. v. Turlington (Debra P.) [FN56] and G.I. Forum v. Texas Education Agency (G.I. Forum), [FN57] that have addressed high stakes testing as applied to minorities (African-American and Hispanic students) upheld the use of such testing under a variety of constitutional and statutory challenges. The Texas federal district court in G.I. Forum found that, even if there was a disparate effect on a protected category, there would be no “real negative impact” [FN58] until students had failed the 8 tries to which they are entitled, along with remediation offered them after each failure. Although the court found the variances on the test “large and disconcerting,” [FN59] both as to the individual administrations and cumulative effect, the court agreed that the state had legitimate goals in “hold[ing] schools, students, and teachers accountable for education and assure [ing] that all Texas student receive the same, adequate learning opportunities.” [FN60] As in Debra P., the G.I. Forum court agreed that “the high-stakes use of the [Texas] test as a graduation requirement guarantees that students will be motivated to learn *13 the curriculum tested.” [FN61] Like the Florida test, the Texas court found the state's test content valid in effectively measuring student mastery of skills
and the knowledge that the State of Texas considered necessary for high school students to possess.

Both Debra P. and G.I Forum address arguments as they impact student populations that have made significant improvements in passing high stakes testing. What the cases do not address is a student population with cognitive disabilities beyond the 1% alternate testing exemption that no amount of accommodation may be sufficient to help them pass the state high stakes test. [FN62] The number of students may be difficult to determine and, in fact as in G.I. Forum, may not be fully known until all of the attempts at taking the state test have been exhausted. Whether these students denied high school diplomas because they cannot pass the state high stakes test have a justiciable claim remains to be seen.

Legal theories for stating a claim on behalf of students with disabilities who cannot pass a high stakes test are not easy to find. An equal protection argument is problematic since the Supreme Court has held that a classification involving a disability is entitled only to rational basis protection. [FN63] A court is likely to agree with G.I. Forum and Debra P. that a state has a rational interest in having a consistent level of mastery for all students.

A more likely remedy may lie under IDEA to the extent that administration of the statewide test violates statutory language regarding assessments. Under IDEA, the IEP must include: a statement of any individual modifications in the administration of State or district wide assessments of student achievement that are needed in order for the child to participate in such assessment; and if the IEP team determines that the child will not participate in a particular State or district wide assessment of student achievement (or part of such an assessment), a statement of why that assessment is not appropriate for the child, and how the child will be assessed. [FN64] Thus, the IDEA specifically contemplates that it will not be appropriate for all disabled students to participate in all state or district wide assessments of student achievement. Parents are entitled to administrative due process hearings [FN65] regarding assessment modifications and accommodations. [FN66]

*14 In Chapman, students with disabilities alleged that California, in administering its statewide assessment, had violated IDEA's “appropriate accommodations” and “alternate assessment” provisions. The State of California countered that it had provided a significant number of accommodations as approved by students' IEP or 504 teams. [FN67] However, the accommodations could not “fundamentally alter what the test measures.” [FN68] Thus, for example, if the CAHSEE English language arts portion were administered by reading it aloud to a student, the test would not be a valid measure of that student’s ability to read and comprehend written text. Similarly, if a student were permitted to use a calculator for the CAHSEE math portion, the test would not measure the student's mathematical computation skills, such as the ability to add, subtract, multiply, and divide numbers using standard algorithms. However, even though such changes would be considered “modifications” as opposed to “accommodations” students could still qualify for a diploma if they applied for a waiver from the regular requirements and passed the state test with modifications approved by IEP and 504 teams, or completed a high school curriculum of sufficient rigor to demonstrate the appropriate knowledge and skills.
The issue in California, and presumably in other states with high stakes testing, will be whether state departments of education must grant waivers for alternate assessments to all students with disabilities in order to assure that they can receive a diploma. The State of California in Chapman argued that to prohibit the State the authority to deny waivers for modifications “undermines the very academic standards upon which the State's educational reform efforts are based.” [FN69]

At the heart of the controversy today is that neither the IDEA, nor its implementing regulations, nor any case law, has defined the term “alternate assessment.” At the very least, states and school districts would seem to have a legitimate argument that the IDEA contains no individual entitlement to an alternate assessment or to particular accommodations or modifications without regard to what is intended to be measured by a high school competency test. As a corollary to this lack of entitlement, parents and students should have no private cause of action to enforce an alleged right to an accommodation, a modification, or ultimately a diploma, without first proceeding through the IEP team's FAPE process.

CONCLUSION

In some Australian states, the lack of litigation regarding students with disabilities and high stakes assessment reflects their school-based teacher judgment approaches that emphasize tailoring of curriculum and assessment to meet the needs of students and communities with two main outcomes for students at this level. First, a range of certification levels to suit different student capabilities has developed. [FN70] These alternative certificates do not provide for tertiary entrance rankings. Second, for individual students with special needs, accommodations, and modifications of curriculum and assessment can still be treated as equivalent for certification purposes. For example, in South Australia, schools have the discretion to delay tasks, reduce the number of tasks, change the conditions under which a test or task is to be completed, and/or change the response mode to a test, task or assignment, unless the variation changes the actual outcomes that are to be assessment. [FN71] The implications are that even these may be amended with official approval and still lead to certification.

In the United States, given the legal difficulties in challenging enforcement of NCLB, challenges are more likely to involve state assessments, especially where those assessments are also high stakes. Even if state use of the assessment process for high stakes purposes raises concerns about the fairness of such a requirement, [FN72] challenges to high stakes testing with other disadvantaged groups in the past suggests that courts are not disposed to prevent high stakes testing simply because it works to the disadvantage of certain student populations. Since states are not likely to opt out of receiving Department of Education Title I and NCLB funds administered through ESEA, [FN73] the challenge is how to meet NCLB assessment guidelines and state high stakes exit requirements with the federal resources allocated and according to the timeline specified.

Eventually, the policy question will be the extent to which a court has the authority to tell a state “what a well-educated high school graduate
should demonstrably know at the end of twelve years of education.”

[FN74] The federal government in the United States, by raising the stakes under NCLB for students with disabilities beyond the 1%, has forced the issue as to whether these students have been deprived of some rights because they are being required to pursue a goal that they cannot achieve.

[FNa] The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 188 Ed.Law Rep. [1] (July 30, 2004).

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[FN1]. See e.g., Student No. 9 v. Bd. of Educ., 802 N.E.2d 105 [184 Ed.Law Rep. [553]](Mass. 2004) (upholding state board of education decision to implement state statute, MGLA ch. 69, §§ 1-1I, incrementally requiring that students beginning in tenth grade receive passing score on language arts and math portions of MCAS before being permitted to graduate).


[FN3]. While Australia has few rights established in law, sec. 13(4)(b) of the Commonwealth Schools endorsed the prior right of parents to choose whether their children were educated at a government school or at a non-government school. See Peninsula Anglican School and the Honorable Senator Susan Ryan and Commonwealth Schools Commission (1985) Even 7 FCR 415 No. G415 of 1985 Administrative Law.

[FN4]. Engineer's Case,(1920) 28 CLR 129.

[FN5]. Australia Constitution, sec. 52(i).

[FN6]. Australia Constitution, sec. 96.


grades 3-5, grades 6-9, and grades 10-12.)

[FN12]. See U.S. Dep't of Education, "Press Releases: Secretary Paige Announces New Policies to Help English Language Learners," Feb. 19, 2004. (During their first year of enrollment in U.S. schools, limited English [LEP] students have the option of taking the reading/language arts content assessment in addition to taking the English language proficiency assessment. They can take the mathematics assessment, with accommodations as appropriate. States may, but would not be required to, include results from the mathematics and, if given, the reading/language arts content assessments in AYP calculations as part of the accountability requirements under NCLB. Since LEP students exit the LEP subgroup once they attain English language proficiency, states may have difficulty demonstrating improvements on state assessments for these students. Accordingly, for AYP calculations, states would be allowed up to two years to include in the LEP subgroup students who have attained English proficiency. This is an option for states and would give states the flexibility to allow schools and local education agencies (LEAs) to get credit for improving English language proficiency from year to year.)

[FN13]. The Department of Education permits some flexibility in the 95% provision by allowing states to average participation rates for a school over a two or three-year period and allowing a student to be excluded from a school's calculation in the case of a "serious medical emergency." U.S. Dep't of Education, Extra Credit, "Every Child Deserves to be Counted," March 29, 2004.

[FN14]. For example, Secretary Paige as part of his transition authority to provide states flexibility for the 2002-03 year in dealing with students with disabilities, permitted school districts to include, as proficient, student scores from off-level assessments that reflected proficiency on the tested material. Ohio took advantage of this flexibility, but this flexibility applied only to that one year and thereafter assessments would be subject to the 1% alternate assessment guidelines. See U.S. Dep't of Education, "Press Releases: Charting the Course: States Decide Major Provisions Under No Child Left Behind," Jan. 14, 2004.

[FN15]. States do have flexibility in the naming of their achievement levels (e.g., basic, proficient, advanced) and the number of these levels. For example, Kentucky likely has the most achievement levels, with four general categories-Novice, Apprentice, Proficient and Distinguished-and additional levels within the Novice and Apprentice rankings for a total of eight achievement levels. U.S. Dep't of Education, The Achiever, March 1, 2004, Vol. 3, No. 4.

[FN16]. The overall focus was to promote increased uniformity of provision and to establish eight key learning areas for the years of compulsory schooling: the arts; English; health and physical education; languages other than English; mathematics; science; studies of society and environment; technology.
Regulation 6 requires that:

[a] all students in Year 3 will achieve the national benchmarks for reading, writing and spelling for Year 3; and
[b] all students in Year 3 will achieve the national benchmark for numeracy for Year 3.

However, it is recognised that the performance targets may not be met in respect of the very small percentage of students who have severe educational disabilities.

See U.S. Dep't of Education, “Press Release: Additional Guidance Offered to States to Help Students with Significant Cognitive Disabilities,” March 2, 2004, reflecting policy guidelines published in The Federal Register, Dec. 9, 2003. States can seek an exemption to the 1 percent cap on the number of proficient scores from alternate assessments that may be included in calculations for determining adequate yearly progress (AYP) under the new law. To exceed the exemption cap, states must provide the following information, including: an explanation of circumstances that result in more than 1 percent of all students statewide having the most significant cognitive disabilities and who are achieving a proficient score on alternate assessments based on alternate achievement standards; data showing the incidence rate of students with the most significant cognitive disabilities; and information showing how the state has implemented alternate achievement standards. However, Secretary of Education Ron Paige indicated that only small percentage increases above 1% will be approved and then only in rare situations.


Queensland Studies Authority (2003), 2003 Queensland Years 3, 5 and 7 Tests in Aspects of Literacy and Numeracy. 2003 TEST PREPARATION HANDBOOK. QSA: Brisbane. p.27

VCAA Information for Principals Achievement Improvement Monitor (AIM) Year 3 and 5 Statewide Testing Program 2003 (Melbourne, 2002) p.6

Exempted students, but not students absent or withdrawn by parents/caregivers from the testing and not students attending schools that did not participate in testing at all (assumed to include special education schools) and based as a percentage of the total number of government school students (Footnote (a), Table 5, p. 8) National Report on Schooling 2000 Preliminary Paper National Benchmarks Results Years 3 and 5. Ministerial Council on Education, Employment, Training and Youth Affairs.


While The Engineers' case established a principle of federalism rather than reserve powers, it also provided the basis for ongoing interpretations of implied immunities of state and federal powers. Since Engineers, federal power to legislate has been limited by a two limb test (identified from Melbourne Corporation v. Commonwealth (State Banking Case) (1947) 74 CLR 31) that: “the general overriding constitutional principle that Commonwealth legislative powers cannot be exercised in a way which would involve an indirect amendment to the Constitution or which would be inconsistent with the continued existence of the States and their capacity to function or involve a discriminatory attack upon a State 'in the exercise of its executive authority’ ”, (Deane J, The Commonwealth of Australia v. Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1 (paragraph 10)); or a specific burden upon a state. A principle of federalism is duality of the Commonwealth and states, where the States are to be preserved as independent bodies deciding policy and exercising executive powers, whether the federal action under question is within or outside a specified head of power in s51 of the Australia Constitution.

See, as a main example in education, Attorney-General (Vict.); Ex Rel. Black v. Commonwealth, (1981) 146 CLR 559, 579, where the state challenge to dispersal of federal funds to schools with a religious alliance, under sec. 116 of the Australia Constitution, was unsuccessful.

For FY 2002, NCLB provided increased K-12 funding of about $5 billion or a 1.1% increase in aggregate K-12 funding. The amount of money allocated for NCLB has increased each year since 2002, from $22 billion in 2002, to $23.6 in 2003, $24.3 billion in 2004, to a proposed $24.8 billion for 2005. President Bush's budget request for fiscal year 2005 provides $57.3 billion in discretionary funding for the U.S. Department of Education, of which $24.8 billion is allocated for NCLB. The budget request includes an additional $1.7 billion-the largest dollar increase of any domestic agency-representing a 3 percent increase over 2004 for education programs. In addition, the president's budget request includes funding increases to help states and school districts implement No Child Left Behind by proposing a $1 billion increase in Title I grants to help the neediest local schools and a $1 billion increase for special education grants to states. U.S. Dep't of Education, The Achiever, Feb. 15, 2004, Vol. 3, No. 3; Extra Credit, March 4, 2004.

NCLB § 9527 (emphasis added).

See Blessing v. Firestone, 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (The Court rejected claims by five mothers suing state officials because their state welfare agency had not satisfied Title IV-D of the Social Security Act which required States receiving federal child-welfare funds to “substantially comply” with requirements designed to ensure timely payment of child support, on the ground that the statute
simply set a yardstick to assess the aggregate services provided by the State, not to determine whether the needs of any particular person had been satisfied.)

[FN30]. For the Court's most recent education decision in this area, see Gonzaga University v. Doe, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 [165 Ed.Law Rep. [458]] (2002) where the Court refused to permit a university student, injured by unauthorized disclosure of private information in violation of FERPA, to sue for damages for the violation of FERPA under section 1983. The Court reasoned that Congress in passing FERPA had created no personal rights to enforce the statute under section 1983.

[FN31]. See, NSBA Legal Clips, Thursday, April 15, 2004 (reporting that the Maine Senate has passed a bill that would prohibit the use of state funds to comply with the provisions of NCLB and directs the state's Department of Education to determine the state's cost of complying with NCLB and limits compliance to measures covered by federal funds).


[FN34]. See State of Louisiana v. Weinberger, 369 F.Supp. 856 (E.D.La. 1973) (summary judgment granted for Louisiana on behalf of a class of states ordering the release of funds authorized under the Library Services and Construction Act and National Defense Education Act, but which had been impounded by the Secretary of Health, Education, and Welfare [HED] and had reverted into the general fund during the fiscal year after the states had complied with the acts.)

[FN35]. See also Commonwealth of Mass. v. Lynn, 362 F.Supp. 1363 (D.D.C. 1973) (Commonwealth of Massachusetts and Maine State Housing Authority could proceed in a class action to compel the Secretary of HUD to begin reprocessing pending or new applications for federal financial assistance in low income housing programs which had been suspended by the Secretary.)


[FN38]. Kegerreis v. U.S., 2003 WL 22327188 (D.Kan. 2003). See also, Savage v. Glendale Union High School Dist. 205, 343 F.3d 1036, 1045 [180 Ed.Law Rep. [535]] (9th Cir. 2003) where the Ninth Circuit refused to extend to school districts in Arizona whatever sovereign immunity the State of Arizona might be entitled to under the Americans with Disabilities Act (ADA), observing in dictum that, if prescribing minimum standards were the measure of a "central
government function,” then school districts would doubtless be considered an arm of the federal government, as well, by virtue of such statutes as the No Child Left Behind Act.


[FN40]. See, for example, the New South Wales Ombudsman Act (1974), s13A.

[FN41]. Challenges under the federal Human Rights and Equal Opportunity Commission Act 1986 or Disability Discrimination Act 1992 are heard in the Federal Court. However, the state acts are generally stronger for provisions and more likely to be the basis for challenge.

[FN42]. Equal Opportunity Act 1984 Sec. 74 (2).

[FN43]. Id. Sec. 85I (2)


[FN46]. Few instances of individual challenge against educational assessments under tort law appear to have occurred for any student, including special needs, in contrast to the U.S. According to Tronc, K. 'Educational Malpractice' (1999) Australian Professional Liability-Education 32-000 at 20, 303, students in a secondary school in New South Wales whose English results were in the lowest twenty percent, compared with results for other subjects that were in the top twenty percent, took action but settled out of court, as did students in the Swansea High School case, a case of apparent failure to teach appropriate curriculum and inappropriate instruction and management. Another area where challenges may arise more in the future is under contract law, given more than 30% of Australian students are in non-government fee-paying schools.

[FN47]. States have the flexibility to add student “stakes” to their standards and assessment systems. For example, Massachusetts requires students to pass the high school assessments as a condition of receiving a diploma and Colorado requires students to achieve at certain levels to be promoted to subsequent grades. Student stakes, however, are not a requirement of the law. U.S. Dep’t of Education, The Achiever, March 1, 2004, Vol. 3, No. 4.


[FN49]. Cal. Educ. Code § 60851(a) (beginning with the 2003-04 school year, students are required to demonstrate the skills, knowledge and abilities embodied in the state standards for English, language arts, and math in order to receive a California high school diploma).


[FN52]. Id.


[FN54]. California Special Education Alert, Vol. 7, No. 8 (2001). See also, Today's School Psychologist, Vol. 3, No. 11 (2000) for a list of accommodations permitted by Virginia, as long as the accommodation is identified in a student's IEP or section 504 plan. Timing/scheduling: Time of day; breaks during test; multiple test sessions; order of tests administered. Setting: preferential seating (at front of the room or in study carrel); small group testing; individual testing; special lighting; adaptive or special furniture; test administered in locations with minimal distractions. Presentation: Braille; large print; increase size of answer bubbles; increase spacing between items/reduce items on page; reading directions to students; simplifying directions; reading of test items (except on the English, reading/literature and research tests); magnifying glass. Response: student marks booklet and teacher/proctor transfers answer to answer sheet; student responds verbally and teacher transfers answers to answer sheet; abacus; arithmetic tables (standard accommodation only if subtest allows a calculator); pencil grip; word processor; spell check.


[FN59]. Id.

[FN60]. Id.

[FN61]. Id. at 681.

[FN62]. See, “Special ed. students skew test results, Some schools deemed failing as a result” Dec. 2, 2003 (article comments on significant numbers of special education students not being able to meet the state's testing requirements). www.cnn.com/2003/EDUCATION/12/01/special.ed.testing.ap/index/html (last visited 12/2/03).

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes, classified by the city for zoning purposes as a “hospital for the feeble-minded”. The Court reasoned that mental retardation and how “this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.” *Id.* at 443.


[FN66]. OCR enforces and monitors compliance with Section 504 of the Rehabilitation Act and Title II of the ADA. OSEP enforces and monitors compliance with the IDEA. Examples based on either IDEA and/or Section 504 include: Los Angeles Unified Sch. Dist. 33 IDELR ¶ 207 (SEA CA 2000) [State review officer upheld school district's refusal to allow "spell check" and "grammar check" during senior writing proficiency examination.]; Austin (TX) Indep. Sch. Dist, 25 IDELR 253 (SEA TX 1996) [School district's refusal to allow the use a calculator on the state-wide test upheld]; Board of Education of the Wappingers Central Sch. Dist., 25 IDELR 1144 (SEA NY 1997) [Request for more than 24 hours to complete Regents exam not ordered, as no evidence that student needed that accomodation]; Sierra Vista (AZ) Sch. Dist., 29 IDELR 612 (OCR 1998) [Issue of IEP's inclusion of a reader for an Honors English admissions test]; Prince George's County Pub. Schs, 34 IDELR 95 (OCR 2000) [State permitted use of DYNA VOX, a scribe, and other accommodations on Maryland's Writing Test].

[FN67]. See 5 C.C.R. § 1217 (among the changes are: large print, braille, “masks” or other means to maintain visual attention to the test; reduced numbers of items per page; audio presentation of the math portion); response accommodations (verbal, written, or signed responses; responses with mechanical or electronic assistance which only record the student's response; transcribers; assistive devices and technologies regularly used during testing.) For a full identification of accommodations, see also *Chapman v. State of Cal.,* 2002 WL 32120553 (Appellant's Brief 2002).

[FN68]. 5 C.C.R. § 1218.

[FN69]. *Chapman, 2002 WL 32120553 at *16.*

[FN70]. For example, in Queensland, the Certificate of Post-compulsory School Education is available for students with impairments of difficulties in learning that are not primarily due to socioeconomic, cultural and/or linguistic factors. Results may be recorded for: modified versions of existing Authority (QSA) or Authority-registered subjects (unmodified subjects would lead to a Senior Certificate); school-developed programs of study; and/or external programs of study other than components of
certificate courses, even statements of participation. In New South Wales, students with special education needs have been eligible to receive the School Certificate by entering for a Special Program of Study “designed for individual students who are unable to meet curriculum requirements for the award of the School Certificate using Board Developed Syllabuses and/or Board Endorsed Courses.... Students with special education needs presenting for the School Certificate can access a combination of courses using: Generic Life Skills courses and/or Board Developed Syllabuses and/or Board Endorsed Courses. The Board will not set criteria for schools to define students with special education needs according to a category of disability. The school will enter students for a Special Program of Study by choosing the most appropriate curriculum options for an individual student, based on their educational needs.” (Board of Studies New South Wales (1996) School Certificate Credentialling for Students with Special Education Needs in Stage 5. (Board of Studies, Sydney). p. 1)


[FN72]. See e.g., Today’s School Psychologist, vol. 5, No. 2 (2001) ( “Minnesota has had large-scale graduation standards in place since 1998. Divided into two areas, the basic standards test such skills as reading, math and writing, while the high standards require students to demonstrate what they know, understand and can do. Students with disabilities must meet the benchmarks to graduate, but an Individualized Education Program meeting determines which of the standards they must achieve. The CAPS program sends trainers throughout the state to determine what general education curriculum strategies and accommodations instructors should use to help special needs students meet state standards. Training ranges from help for new teachers on implementing standards to assistance in writing IEPs and adapting tasks and curriculum to fit a unified approach.”)

[FN73]. See letter from Eugene W. Hickok, Acting Deputy Secretary of Education to Dr. Steven O. Laing, Superintendent of Public Instruction, Utah State Office of Education, February 6, 2004 from Eugene W. Hickok, Acting Deputy Secretary, outlining the consequences if Utah were to not participate in ESEA funding and relinquish the $107 million dollars administered to the state through ESEA. If the state elected not to participate, school districts in the state would not be eligible for ESEA funds, and even if a school district refused to receive ESEA funds, it would still be subject to NCLB as long as the state received ESEA funds.

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