

## COMPARATIVE APPROACHES TO EDUCATION LAW

# High Stakes Testing and the Demand for School District Accountability: A Dilemma for Special Education Students in the United States and Australia

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### Abstract

Legal challenges to certification of achievement and testing are not unknown in the U.S. but have been rare in Australian education. Many of the U.S. challenges have been in regard to special education students or discrimination. Recent federal legislation in the U.S., the *No Child Left Behind Act* (NCLB), and comparable in Australia, raise the possibility of increased legal challenges in both nations and incompatibility with existing legislation. This paper considers the nature of the federal legislation on standards and testing in both countries, previous grounds for legal challenge and cases, and possible grounds for new challenges. The paper considers legislative accountability requirements at different stages of schooling in the two nations, and high stakes accountability for high school graduation. The overall focus of the analyses is for special education students.

### Introduction

In January 2002, the President of the United States signed the *No Child Left Behind Act* (NCLB), an amendment to Title I of the Elementary and Secondary Education Act<sup>1</sup> and the most comprehensive effort by the U.S. 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.<sup>2</sup>

In the nineteen states (as of 2003) using their high stakes testing as the state assessment,<sup>3</sup> 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 alternative form of assessment may now find themselves without a diploma unless they take and pass the state's high stakes test.<sup>4</sup> 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 and ongoing 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.<sup>5</sup> The issues concerning students with disabilities in Australia are more fluid. While the Federal Minister of Education has indicated an intention to establish federal control of education policy and practice in the country, there is no uniformity amongst the practices of states concerning how special needs students should be excluded from state assessments and outcomes reported.

The purpose of this article is to compare and contrast what impact the efforts in the United States and Australia to address national standards of accountability and state high stakes assessment have upon students with disabilities. In both countries, the pressure for school accountability is a dynamic, on-going process and, to the extent possible, this article will focus on the current state and legal implications of that change.

## **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 limited fundamental rights, such as freedom of political communication in the federal Constitution,<sup>6</sup> individuals and groups generally must look to the federal and state Parliaments for nationwide protective legislation.<sup>7</sup> While the U.S. Constitution’s Tenth Amendment reserves the function of education to the 50 states, federal constitutional interpretation in Australia since 1920 has not upheld reserve powers for the states,<sup>8</sup> although the general principle is still that federal laws should not restrict the states’ right to develop and implement its own policy or to unfairly burden a state.<sup>9</sup>

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<sup>10</sup> and then distributed as financial assistance ‘to any State on such terms and conditions as the Parliament thinks fit’.<sup>11</sup> While grants from the federal government are for the financial assistance of the States they are also directly grants to schools and school systems.<sup>12</sup> As such, States have unsuccessfully challenged their role ‘as conduits for distributing the money from the Commonwealth to designated recipients ... on conditions fixed by the Commonwealth,’<sup>13</sup> becoming not agents of the Commonwealth, but principals with limited chance of success in challenging Commonwealth priorities in key areas of education. While states are not required to accept the grants funding, fiscal reliance to date has ensured that they do, and hence bound by funding conditions.

In the United States as a result of the Tenth Amendment, most of funding on schools comes from state and local taxes authorised by state law. The federal government’s basis for congressional funding of education is found in constitutional provisions authorising Congress to

act, such as ‘promoting the general welfare’<sup>14</sup> or the interstate commerce clause.<sup>15</sup> Most federal funds, as in Australia are distributed through the States to local school districts. As in Australia, 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 U.S. 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<sup>16</sup> and to test the English proficiency of Limited English Proficient students.<sup>17</sup> At least 95% of students in each school district must take annually the state’s test measuring academic performance.<sup>18</sup> Districts have a range of options for determining the success rate on the state test during the first year of results,<sup>19</sup> but the passage rate for all students by the 2013-14 academic year must be 100%.<sup>20</sup>

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.<sup>21</sup> 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. Achievement levels apply to the student population as a whole and to each of four subgroups for which results are disaggregated and reported separately,<sup>22</sup> provided that each subgroups exceeds an ‘N’ number determined by each state.<sup>23</sup> Failure of schools to meet AYP for two years results in placement on a warning list and continued failure means outside corrective measures such as reopening the school as a public charter, replacing school staff, privatisation, or state control.<sup>24</sup>

## **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 assessment that leads to high school certification and university entrance, is a mix of school-based and external, criteria-referenced assessment. While syllabus-based state-level public examinations are common, standardised, and multiple-choice format, tests to determine student school achievement are not. Significant reliance is placed on teacher professionalism to judge student achievement standards. This has created a tension with recent state externally-mandated and controlled system-wide assessments at less high stakes levels of schooling. The introduction of state standardised, normative external testing has generally been in response to and 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. These tests, in much earlier years of schooling, are developing more high stakes status than in the past.

Australia’s 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.<sup>25</sup> Although high-stakes curriculum and assessment for the final two years of schooling differ, recent state developments in curriculum to outcomes-

based level frameworks have meant focus on reporting the level a student is able to demonstrate successfully, rather than success against a fixed standard or grade level for an age cohort.

Australian federal funding to school systems occurs through quadrennial bills that traditionally have clauses relating to conditions for financial assistance. The *States Grants (Primary and Secondary Education Assistance) Act* of 1996 introduced specific *educational* accountability conditions for schools requiring their participation in preparing a national report on the outcomes of schooling.<sup>26</sup> This outcome had been agreed to by the state Ministers for Education in 1989, providing information that would ‘monitor schools’ achievements and their progress towards meeting the agreed national goals ... report on the school curriculum, participation and retention rates, student achievements and the application of financial resources in schools’.<sup>27</sup>

The 2000 *State Grants Act* introduced specific requirements for *financial* assistance relating to educational focus and targeted achievement, including achievement of specific performance measures based on performance targets, and further requirements for educational accountability.<sup>28</sup> The corresponding *States Grants (Primary And Secondary Education Assistance) Regulations* of 2001 established the targets, or benchmarks, for achieving the goals of the statute. Regulation 4 established reading, writing, spelling and numeracy [mathematics] benchmarks as expected minimum standards for Years [grades] 3, 5 and 7. Regulation 5 identified performance measures as the percentage of children reaching the benchmarks. Regulation 6(1) set the performance targets that ‘all students in Year 3 will achieve the national benchmarks’,<sup>29</sup> with the proviso ‘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’ (Reg.6(2)).<sup>30</sup>

Therefore, while Australia does not have an Act as specific as *No Child Left Behind*, funding in principle to all schools has been contingent upon state reporting of performance against standards that are nationally agreed. At present, the states have individual systems for testing<sup>31</sup> which are then nationally equated to report against the standards.

The Act for funding for the 2005-2008 quadrennium, to which the states are still to respond, represents the strongest federal intrusion into education in Australia, akin to NCLB. First, the Act no longer refers to State Grants, and hence the direct role of the states, but is titled *Schools Assistance (Learning Together – Achievement through Choice and Opportunity) Act 2004*. Second, it introduces 12 new conditions for *financial* assistance related to educational, not fiscal, matters in addition to the previous 3, a new section on student reporting requirements and a further 9 conditions for *educational* accountability. The new requirements include development of common national curriculum statements in English, mathematics, science, civics and citizenship education; common national testing standards in these areas; matters relating to school governance; and manner of reporting to parents including ‘an accurate and objective assessment of the child’s progress and achievement ... relative to the performance of the child’s peer group at the school’.<sup>32</sup> These reports are to be confidential and to address ‘academic and non-academic learning’.<sup>33</sup> Finally, the requirements include issues of public reporting of school performance information according to regulation specifications, and, before 1 January, 2008, states are to implement common testing standards, and common national tests, in English, mathematics, science, and civics and citizenship education, according to regulations.<sup>34</sup>

The consequences for not meeting performance targets are still ambiguous, and the general trend to date has been to provide additional funding for schools with low performing students for intervention. The Act requirements since 2000 have been the provision of a report on State actions in response to a Ministerial directive regarding non-achievement of targets.<sup>35</sup> The scope

exists, therefore, for such directives to be punitive. The federal Minister has indicated that he would be 'initiating discussion with State and Territory Ministers to see what overseas practices can be usefully adopted here for the benefit of students'. The potential to follow further U.S. directions, in general, exists.

## **Legislative 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.<sup>36</sup> 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 alternative achievement standards.<sup>37</sup> 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 state 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, or, in at least one state, students for whom the school believes participation in the test would be detrimental.

In some states, students identified with a severe intellectual impairment or recorded on a disability register may be exempted from sitting for the tests.<sup>38</sup> In other states, prima facie evidence that a student could not attempt the test or high support needs *is* are a basis for exemption. 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 some states who are exempted are reported as not having reached the benchmarks. In other states, the status of reporting exempted students is not clear. 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.

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<sup>39</sup> on Year 3 reading benchmarks in 2001 ranged from 82% to 96%,<sup>40</sup> while the percentages exempted or absent/withdrawn ranged across states from 0.7% to 2.5%, and 3.2% to 11.7%, respectively.<sup>41</sup> 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. A major difference, therefore, between Australian legislation and NCLB is that students with special learning needs are in general expected to achieve standards set at national, not state, levels but are not being considered as a separate subgroup in monitoring performance levels. A further initiative of the Australian Federal government is the provision of \$700 for 'tutorial credit' not to schools but to the families of

students identified as not achieving the benchmarks. Processes for this provision are currently being developed.

## **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 current federal Act proposes common literacy and numeracy tests, but whether this is to be for all students, or for sampling research such as the National Assessment of Education Progress testing program of the USA, is not yet clear. Mandating common national tests, displacing current state legislation, and possibly directing state expenditure, may develop a response from the states that the Federal government is directing the execution of state government and exceeding constitutional power.<sup>42</sup> However, state challenges against the Commonwealth on funding issues are generally not successful.<sup>43</sup> States resisted initial 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,<sup>44</sup> 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’.<sup>45</sup> 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’.<sup>46</sup> Where federal laws do not create rights for individuals or groups, the Supreme Court consistently has refused to permit private causes of action.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> Although courts have permitted lawsuits against government entities under federal statutes, these lawsuits have involved inappropriate expenditure,<sup>50</sup> reversion of funds,<sup>51</sup> or cessation of processing pending applications,<sup>52</sup> not inadequate allocation of funds.<sup>53</sup>

In an interesting non-disability and non-high stakes testing state case, *Reading School District v. Department of Education (Reading)*,<sup>54</sup> a school district that had 13 schools designated as failing to achieve AYP sued the Department of Education (DOE), alleging that the DOE had failed to provide technical assistance authorised under NCLB for its native language speaking students.<sup>55</sup> However, the court determined that NCLB did not require such assistance prior to identifying a school as failing and DOE was not obligated to provide native language testing. Regarding the technical assistance, the court referred to \$6,000,000 in Title I that the district had received and noted that nothing in NCLB ‘requires or directs the Department [of Education] to pay for the District’s improvement measures’.<sup>56</sup> Presumably, the same reasoning would apply to providing assistance for special education students.

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)*,<sup>57</sup> 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.<sup>58</sup>

## **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.<sup>59</sup> 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 issue of a Senior Certificate has similar characteristics to several U.S. states, being dependent on achievement of minimum literacy standards, as well as satisfactory student achievement. 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<sup>60</sup> that assessment information is the school's responsibility and SSABSA does not interfere in the result. Therefore, a student denied a Certificate on the basis of the literacy standard would need to resolve any disputed result with the school.<sup>61</sup> 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,<sup>62</sup> 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.

One court-level challenge by an individual student has occurred. In *BI v Board of Studies*,<sup>63</sup> a student with mild attention deficit disorder challenged the decision of a Board of Studies not to grant extra time to the student in a Higher School Certificate examination, rather than rest breaks that were allowed. The medical opinion for the plaintiff was that rest breaks were inappropriate for his condition as he would have difficulty getting started again. However, the plaintiff had participated in a trial timed test showing that he wrote at 'normal speed and of good quality'. The plaintiff was unsuccessful.

Challenges by identifiable groups such as students with special needs can occur under state and federal<sup>64</sup> *Anti-Discrimination* or *Equal Opportunity Acts* that provide, for example, that 'it is unlawful for an educational authority to discriminate against a student on the grounds of impairment'<sup>65</sup> or 'the ground of age'.<sup>66</sup> In two cases, *State of Victoria v Bacon & Ors (Ors)*<sup>67</sup> and *Bolton v. State of Victoria (Bolton)*<sup>68</sup>, 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.

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.<sup>69</sup> However, as reflected in the recent Ninth Circuit decision, *Chapman v. California Department of Education (Chapman)*,<sup>70</sup> 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)<sup>71</sup> 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.<sup>72</sup>

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'.<sup>73</sup> 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'.<sup>74</sup>

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.<sup>75</sup> Thus, California has postponed but not yet resolved the issue of the use of high stakes testing for graduation purposes for students with disabilities.

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.<sup>76</sup> 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.<sup>77</sup>

Earlier federal court decisions, *Debra P. v. Turlington (Debra P.)*<sup>78</sup> and *G.I. Forum v. Texas Education Agency (G.I. Forum)*,<sup>79</sup> 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’<sup>80</sup> 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,’<sup>81</sup> 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 assur[ing] that all Texas students receive the same, adequate learning opportunities’.<sup>82</sup> 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 the curriculum tested’.<sup>83</sup> 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 upon 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% alternative testing exemption that no amount of accommodation may be sufficient to help them pass the state high stakes test.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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<sup>87</sup> regarding assessment modifications and accommodations.<sup>88</sup>

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.<sup>89</sup> However, the accommodations could not ‘fundamentally alter what the test measures’.<sup>90</sup> 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 alternative 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'.<sup>91</sup>

Very few recent cases involving students with disabilities have been litigated. In a pre-NCLB case, *Rene v. Reed*,<sup>92</sup> an Indiana appeals court upheld against a due process challenge the administration of a state high-stakes test to all students, including those with cognitive disabilities, even though the effect of the testing might be denial of diplomas to some students. The court observed that denial of a diploma to a student with a cognitive disability would not violate IDEA as long as the exam was not the sole criterion for graduation. The state provided a testing waiver for students with disabilities, but in order to receive a diploma the students had to take the state test and, if they failed, they had to provide documentation that they had satisfied the state academic standards and participated in remediation in test areas that they had not passed.<sup>93</sup> Not all students, presumably, would meet these waiver requirements to earn a diploma. The court further decided that a state permitting some, but not all, accommodations found in student IEPs when taking the state exam would not violate IDEA,<sup>94</sup> reasoning that the purposes of an IEP and state exam are different; an IEP sets forth a plan for student educational performance while the state exam is an assessment of the outcome of that educational plan.<sup>95</sup> As a result, the court refused to hold that accommodations identified in the IEP of a student with cognitive disabilities must necessarily be observed during a state test, or that prohibition of such accommodations during the state test is inconsistent with the IEP.<sup>96</sup>

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 alternative 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 has reflected the recent introduction of legislative protection, as well as their state-developed and school-based teacher judgment approaches that emphasise 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.<sup>97</sup> 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 assessed.<sup>98</sup> The implications are that even these may be amended with official approval and still lead to certification.<sup>99</sup> Similar accommodations are well-accepted and documented in state policies for student completion of the nationally-mandated state literacy and numeracy benchmark assessments at Years 3, 5 and 7. The more the Federal government acts specify a national ‘test’ for all, and national performance standards for all, the more the possibility of class actions in Australia under the discrimination acts arises.

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,<sup>100</sup> 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,<sup>101</sup> 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, in the U.S., 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’.<sup>102</sup> 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.

In Australia, the policy question will be the extent to which national standards can become meaningful for all students, across increasing areas of study, intrusion on state policy, and discrimination against students with disability or special needs. In the major case challenging federal funding grants to non-government schools in Australia, Barwick CJ noted:

... conditions of the grant in this case relate to a subject matter of State power. Education is within the State legislative area: and its furtherance is undoubtedly a concern of the State. The operation of the conditions depends on the State’s acceptance of the grant. It is no answer to the consequence of this fact that economically speaking a State may have little choice ... The State’s acceptance must involve the conclusion that the provision of funds to the recipients indicated by the conditions of the grant was, at least in general, in line with State policy.<sup>103</sup>

A further issue may also arise. The curriculum directions to allow positive reporting of student achievement, and implicit facilitation of inclusive practices in school, already noted may not be compatible with the proposed legislation on reporting to parents. Achievement of students in a year level are to be reported to parents against peers for both academic and *non-academic* outcomes. Students with learning disabilities but in mainstream classrooms will inevitably be reported in highly negative terms, or excluded, perhaps prompting further discrimination challenges. Moreover, a recent U.S. decision highlights the issue of state or federal mandates, parental and student rights.

In *Circle Schools v. Pappert*,<sup>104</sup> students, parents and private schools successfully challenged the constitutionality of a Pennsylvania statute requiring schools to provide for the recitation of Pledge of Allegiance or national anthem each morning, and requiring school officials to notify parents of students who declined to recite the Pledge or refrained from saluting the flag. Confirmed on appeal, the court held ‘that the parental notification provision of the Act violates the school students’ First Amendment right to free speech and is therefore unconstitutional’. Students in Australia may also seek grounds for challenging the proposed federal legislation, particularly in non-academic areas of reporting.

## Endnotes

1. 20 U.S.C. § 6301 *et seq.*
2. 20 U.S.C. § 6311(b)(3).
3. Examples of state statutes imposing high-stakes testing as a requirement for a graduation diploma can be found at Cal. Educ. Code, § 60851; Mass. Gen. Laws, ch. 69, § 1D; Ohio Rev. Code, § 3301.0710. *See e.g.*, *Student No. 9 v. Bd. of Educ.*, 802 N.E.2d 105 (Mass. 2004) (upholding state board of education decision to implement state statute, MGLA ch. 69, §§ 1-II, incrementally requiring that students beginning in tenth grade receive passing score on language arts and math portions of the state test before being permitted to graduate).
4. *See e.g.*, *Rene v. Reed*, 751 N.E.2d 736 (Ind.Ct.App. 2001) where the court upheld a state high stakes test statute even though not all of student accommodations in their IEPs could be used on the state test.
5. 34 C.F.R. 200.13(c)(ii).
6. *Australian Capital Television Pty. Ltd. V. Commonwealth* (1992) 177 CLR 106; *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520
7. While Australia has few rights established in law, Sec. 13(4)(b) of the *Commonwealth Schools Commission Act 1973* endorsed the prior right of parents to choose whether their children were educated at a government school or at a non-government school. *See Re: Peninsula Anglican School and the Honorable Senator Susan Ryan and Commonwealth Schools Commission (1985)* 7 FCR 415
8. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920)* 28 CLR 129 (the *Engineers’ Case*)
9. *Melbourne Corporation v. The Commonwealth* (1947) 74 CLR 3, *The Commonwealth of Australia v. Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1
10. Australia Constitution, Sec. 51(ii).
11. Australia Constitution, Sec. 96.
12. *Attorney-General (Vict.); Ex Rel. Black v. Commonwealth* (1981) 146 CLR 559, 648.
13. *Attorney-General (Vict.); Ex Rel. Black v. Commonwealth* (1981) 146 CLR 559, 584
14. U.S. Const., Art. I, Sec. 8.
15. U.S. Const., Art. I, Sec. 8.
16. U.S. Dep’t of Education, *The Achiever*, March 1, 2004, Vol. 3, No. 4. (States must develop science standards by 2005-06, and by 2007-08 develop and administer annual science assessments at least once in grades 3-5, grades 6-9, and grades 10-12.)
17. 34 C.F.R. § 200.2. *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.)

18. 34 C.F.R. § 200.20(c)(1)(i). 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.
19. See 34 C.F.R. §§ 200.15-19.
20. 34 C.F.R. § 200.15. 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.
21. 34 C.F.R. § 200.19-20. 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.
22. 20 U.S.C. § 6211(b)(2)(C)(v)(II)(aa-dd). The four subgroups are: economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.
23. 34 C.F.R. § 200.7(a)(2). Each state can determine its own 'N' number using sound statistical methodology, but the number must also be approved by the U.S. Department of Education. See *Reading Sch. Dist. v. Dep't of Educ.*, 855 A.2d 166, 344 (Pa.Comm. Ct. 2004) for a discussion of the approval of Pennsylvania's 'N' number of 45.
24. See 20 U.S.C. §§ 6316(b)(4)(B), 6316(b)(1)(E)(i), 6316(b)(8).
25. The Adelaide Declaration superceded an 1989 Hobart Declaration. In both, the states agreed to support common national goals of schooling and to provide state performance information to an Annual National Report of Schooling. One major 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.
26. *State Grants (Primary and Secondary Schools Assistance) Act 1996* Sec.12(1)(b), sec.16(5)(a)
27. <http://www.mceetya.edu.au/hobdec.htm> (accessed November 12 2004)
28. *State Grants (Primary and Secondary Schools Assistance) Act 2000* Sec.12(b), sec.19(b)
29. Reg. 6(1)(a), (b)
30. As in the U.S., the performance targets apply to the whole population with results also analysed for gender, indigenous and NESB subgroups. In some states, location (urban, rural) is also used for comparison of performance. Students with learning disabilities are assumed either to have participated with some accommodations, or to have been exempted and hence recorded as not achieving the benchmarks.
31. Processes for assessing students can differ in principle between government and non-government schools but both are required to report performance against the standards. In Queensland, for example, the State Minister for Education can direct government schools to participate in tests (*Queensland Education (General Provisions) Act 1989 s.19(c)*) but not non-government schools. In principle, most non-government schools participate in the state testing systems for convenience.
32. Sec.13(c)(2)
33. Sec.13(d)

34. Sec.17(1)(d). Specific sections cited are for government schools. Similar requirements are stated for non-government schools in Ss. 21, 22 and 26.
35. Sec. 17(2)(f)
36. 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.
37. See Dep't of Education, 'Press Release: New No Child Left Behind Provision Gives Schools Increased Flexibility While Ensuring All Children Count, Including Those with Disabilities,' Dec. 9. 2003.
38. *National Report on Schooling 2001 Preliminary Paper National Benchmarks Results Years 3 and 5*. Ministerial Council on Education, Employment, Training and Youth Affairs, p.30
39. 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 2001 Preliminary Paper National Benchmarks Results Years 3 and 5*. Ministerial Council on Education, Employment, Training and Youth Affairs.
40. *National Report on Schooling 2001 Preliminary Paper National Benchmarks Results Years 3 and 5*. Ministerial Council on Education, Employment, Training and Youth Affairs.
41. Table 4, p.6, *National Report on Schooling 2001 Preliminary Paper National Benchmarks Results Years 3 and 5*. Ministerial Council on Education, Employment, Training and Youth Affairs. Exempted and absent/withdrawn statistics are based on students from all government schools and participating nongovernment schools.
42. 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.
43. 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.
44. 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.

45. NCLB § 9527 (emphasis added).
46. *See Blessing v. Firestone*, 520 U.S. 329, 340 (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.)
47. For the Court’s most recent education decision in this area, *see Gonzaga University v. Doe* 536 U.S. 273 (2002) where the Court refused to permit a university student, injured by unauthorised 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.
48. *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).
49. *See Far West Fed. Bank, S.B. v. Director, Office of Thrift Supervision* 930 F.2d 883 (Fed. Cir. (Or.) 1991); *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co.* 595 F.2d 1126 (9th Cir. 1979).
50. 31 U.S.C. § 3730.
51. *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 authorised 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.)
52. *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.)
53. *See U.S. ex re. Settlemire v. District of Columbia* 198 F.3d 913 (D.C.Cir. 1999).
54. 855 A.2d 166 (Pa.Comm.w.Ct. 2004).
55. See 20 U.S.C. § 6316(b)(4)(A) and (B). Among the technical assistance provided is ‘assistance in analyzing data’ and ‘assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research and that have proved effective in addressing the specific instructional issues that caused the school to be identified for school improvement’.
56. *Reading*, 855 A.2d at 172.
57. 269 F.Supp.2d 338 (S.D.N.Y. 2003).
58. *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 (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.
59. 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 US. 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.
60. Personal communication, March 27 2004.
  61. In the U.S., a High School Certificate has been found to be a property right. Therefore, denial of a certificate is possibly also amenable to challenge in Australia under property law.
  62. See, for example, the *New South Wales Ombudsman Act (1974)*, s13A.
  63. [2000] NSWSC 921
  64. 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.
  65. *Equal Opportunity Act 1984* Sec. 74 (2).
  66. *Id.* Sec. 85I (2)
  67. [1998] VICSC 58 (30 April 1998).
  68. [1997] VADT 12 (31 December 1997).
  69. 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.
  70. 53 Fed.Appx. 474, 2002 WL 31856343 (9th Cir. 2002) (unpublished decision). The case name is also identified as *Smiley v. Cal. Dep't of Educ.*
  71. 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).
  72. *Chapman v. California Department of Education* 229 Fed.Supp.2d 981, 989 (N.D.Cal. 2002).
  73. *Chapman*, 2002 WL 31856343 at \*1.
  74. *Id.*
  75. *Chapman v. California Dept. of Educ.* 2003 WL 22114264 (N.D.Cal. 2003).
  76. *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.
  77. See [usatoday.com/news/education/2004-03-17-alaska-exams\\_x.htm](http://usatoday.com/news/education/2004-03-17-alaska-exams_x.htm) (last visited 26 March 04).
  78. 730 F.2d 1305 (11th Cir. 1984).
  79. 87 F.Supp.2d 667 (W.D.Tex. 2000).
  80. *G.I. Forum*, 87 F.Supp.2d at 679.
  81. *Id.*
  82. *Id.*
  83. *Id.* at 681.

84. 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](http://www.cnn.com/2003/EDUCATION/12/01/special.ed.testing.ap/index/html) (last visited Dec. 2, 03).
85. See *City of Cleburne v. Cleburne Living Center* 473 U.S. 432 (1985) 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.
86. 20 U.S.C. §1414 (d)(1)(a)(v)(I),(II); 34 C.F.R. §300.347 (a)(5).
87. 20 U.S.C. §1415(d)(2).
88. 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. District* 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 accommodation]; *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].
89. 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)
90. 5 C.C.R. § 1218.
91. *Chapman*, 2002 WL 32120553 at \* 16.
92. 751 N.E.2d 736 (Ind. Ct. App. 2001).
93. *Id.* at 743, note 8.
94. For example, the State permitted accommodations such as oral or sign language responses to test questions, questions in Braille, special lighting or furniture, enlarged answer sheets, and individual or small group testing. By contrast, it prohibited accommodations in the form of reading to the student test questions that were meant to measure reading comprehension, allowing unlimited time to complete test sections, allowing the student to respond to questions in a language other than English, and using language in the directions or in certain test questions that is reduced in complexity. *Id.* at 736.
95. See *Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 88-89 (2d Cir. 2003) (even though a TI-92 calculator with a qwerty keyboard was an acceptable testing modification on a state examination, the Second Circuit upheld the school district's refusal to permit it in a student's IEP for his math class).
96. *Rene*, 751 N.E.2d at 747.
97. 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)
98. Senior Secondary Assessment Board of South Australia (SSABSA) (2004). South Australian Certificate in Education. SACE Operations Manual: Special Provisions in Curriculum and Assessment. Adelaide: SSABSA. p.117.
  99. Although not in the current Act before Parliament, the Federal Minister for Education has indicated interest in mandating a single form of high school certificate examination in Australia. It is timely to look to the U.S. for challenges that might eventuate in the future.
  100. *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'.)
  101. *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.
  102. *G.I. Forum*, 87 F.Supp.2d at 668.
  103. *Attorney-General (Vict.)*; *Ex Rel. Black v. The Commonwealth* [1981] HCA 2; (1981) 146 CLR 559 (2 February 1981) 585
  104. 381 F.3d 172 (3d Cir. 2004).