Riverside County Special Education Local Plan Area
Assessing African-Americans for Special Education

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For purposes of evaluating a student for special education eligibility, a local education agency (LEA) must ensure that the student is assessed in all areas of a suspected disability. The evaluation must also be sufficiently comprehensive to identify all of the student's needs. These guidelines for assessing African-American Students for special education contain the following sections: (1) a summary of Larry P. litigation and (2) how to purge information from a pupil record.

Summary of *Larry P.* Litigation

The following points summarize the *Larry P.* litigation to date regarding the use of IQ tests with African-American students. Information for this summary is taken from California Association of School Psychologists (CASP, 1993, 1996), California Department of Education (1994, 1997, 2012), Wenkart (1994), and Zolotar (1994).

In the late 1970s, the *Larry P. v. Riles* case was filed against the state of California on behalf of African-American parents who argued that the administration of culturally biased standardized IQ tests resulted in disproportionate numbers of African-American children identified and inappropriately placed in special education classes for the Educable Mentally Retarded (EMR). An additional concern was that, once placed in such classrooms, the children did not have access to the core curriculum taught in regular classes. In 1979, Judge Peckham prohibited the use of IQ tests for placing African-American students in classes for EMR or "their substantial equivalent" after concluding that IQ tests were racially and culturally biased, and were responsible for the disproportionate placement of African-American students in "dead-end" classes.

In 1986, Judge Peckham expanded his 1979 order and prohibited the use of IQ tests for African-American students for any special education program. He further stated that even with parental consent, IQ tests may not be given to African-American students, nor may IQ scores from any other source become part of the pupil's school record.

In 1986, the CDE issued a directive to state special educators regarding the *Larry P.* litigation. It reconfirmed that school districts are not to use intelligence tests in the assessment of African-American students who have been referred for special education services. In lieu of IQ tests, districts should use alternative means of assessment to determine identification and placement. Such techniques should include, and would not be limited to, assessments of the pupil's personal history and development, adaptive behavior, classroom performance, academic achievement, and evaluative instruments designed to point out specific information relative to a pupil's abilities and inabilities in specific skill areas. There are no special education related purposes for which IQ tests shall be administered to African-American pupils. Further, IQ tests shall not be used to determine whether an African-American student is learning disabled, because it is possible that the resulting score could subsequently result in the pupil being identified as mentally retarded. Therefore, the prohibition on IQ testing prohibits any use of an IQ test as part of an assessment, which could lead to special education placement or services, even if the test is only part of a comprehensive assessment plan.

In 1988, a group of African-American parents whose children had learning problems requested a reexamination of Peckham's 1979 ruling which banned the use of standardized IQ tests for their children. They believed the results of IQ testing would help clarify the kind of help and services their children needed. The families asserted that the ban on standardized intelligence testing for African-American children, solely on the basis of racial differences, was discriminatory. This case became known as *Crawford v. Honig*. Judge Peckham granted the parents' request for an injunction, thereby allowing their children to take IQ tests despite the ban by the CDE.

In the 1992 ruling on *Crawford v. Honig* Judge Peckham issued a Memorandum and Order which rescinded his 1986 ban on preventing the administration of IQ tests to African-American children as part of an assessment for all special education programs. Peckham indicated his 1986 ruling violated the rights of African-American parents who want the option of having their children tested due to suspected learning disabilities and not "substantially equivalent" to EMR programs. He called for a follow-up court hearing to determine the current meaning of "substantial equivalent". This ruling did not reverse the 1979 *Larry P. v. Riles* decision.

In 1994, the CDE issued a legal advisory analyzing Judge Peckham's 1992 decision in *Crawford v. Honig*. The legal advisory indicated the new Memorandum and Order from this lawsuit did not alter the original 1979 ruling in *Larry P.* Rather, it ordered two actions:

1. The CDE and the *Larry P.* plaintiffs to assist the court in defining the "substantial equivalent" of an EMR class in the context of the state's current special education programs. The court described "dead-end" classes as those which:
    a. students typically do not receive the regular curriculum and fall farther and farther behind students in regular classes,
    b. fewer than 2O% of students are returned to the regular classroom, and
    c. African-Americans are disproportionately represented.

    The legal advisory concluded that current special education programs may meet the court's criteria of "dead-end" classes. Therefore, the ban on IQ testing of African-American students should continue for all special education placements.
2. CDE stated that regardless of the *Crawford v. Honig* decision, districts should, in lieu of IQ tests, use alternate means of assessment to determine identification and placement. Such techniques should include, and would not be limited to assessments of the pupil's:
    a. Personal history and development
    b. Adaptive behavior
    c. Classroom performance
    d. Academic achievement
    e. Evaluative instruments designed to point out specific information relative to a pupil's abilities and inabilities in specific skill areas.

The California Association of School Psychologists (CASP) challenged the CDE arguing that the legal advisory and compliance report were incorrect as a matter of law; and that school psychologists had the sole right to determine to whom IQ tests must be given or not given. The federal district court dismissed CASP's case without leave to amend, the basis of which being that the court did not have jurisdiction over CASP's allegations.

In 1993, when a district attempted to use IQ tests with informed parental consent the CDE found them out of legal compliance, concluding harm occurs whenever African-American children are removed from the mainstream and segregated into special education classes.

A 1994 ruling by the U.S. Court of Appeals for the Ninth Circuit, despite media reports to the contrary, continues the prohibition of IQ testing on California's African-American school children. The court narrowly affirmed the late Judge Peckham's 1992 ruling in *Crawford v. Honig* rescinding his 1986 modification order that expanded the original ban. Judge Peckham's 1979 permanent injunction against IQ testing on African-American students, in *Larry P.* has not been altered either by his 1992 ruling or by the Ninth Circuit's recent ruling. The Ninth Circuit also affirmed Judge Peckham's decision to order additional district court hearings to determine the contemporary meaning of the 1979 permanent injunction (which includes defining special education programs that are "substantially equivalent" to EMR "dead-end" placements).

In 1994 Barry A. Zolotar, Deputy General Counsel, CDE, sent a letter to the field advising school districts to review the CDE legal advisory, dated September 10, 1992, which analyzes the relationship between *Larry P.*, and *Crawford*, and its Fairfield - Suisun Compliance Report which:

1. Provides an overview of the 1979 permanent injunction;
2. Emphasizes Judge Peckham's findings in 1979, which have never been refuted, that the Americanized version of IQ tests are inherently biased against African-American children;
3. Reiterates the court's finding that parental consent can never overcome inherent testing bias; and
4. States that the CDE has independent statutory authority under both federal and state law to prohibit school districts from administering standardized tests that have not been validated for the purposes for which they are being used.
5. The CDE knows of no standardized test that has ever been validated for the purpose of either identifying children as educationally disabled, or removing and isolating them from the general school population and the core curriculum.

Contrary to popular belief there has not been an updated list of banned tests! The 1997 CDE Legal Memorandum states:

- No other tests has been recognized by the Department of Education for the purpose of finding school districts out of compliance in testing African-American students for special education
- The original Larry P. decision was not limited to a specific set or sets of standardized intelligence tests.
- Any standardized measure of intelligence should not be used with African-American students until such time as they are validated as unbiased by the State Board of Education and approved by the court.

In summary, it is important to emphasize that the *Larry P.* court found IQ tests to be racially and culturally biased against African-American students. The Individuals with Disabilities Education Act (IDEA) and California Education Code prohibit the use of discriminatory testing and evaluation materials. This comprehensive statutory prohibition is not limited either by the narrow scope of the permanent injunction in *Larry P.* or the *Crawford* decision. It applies to all members of the *Larry P.* plaintiff class: "all black California school children who have been or may in the future be classified as mentally retarded on the basis of IQ tests." Judge Peckham,

in *Crawford*, stated that the *Larry P.* plaintiff class includes black children "who have learning disabilities that may affect their academic performance." Thus, the statutory prohibition applies to all African-American school children who are already in special education and identified as having leaning disabilities and those who have been referred for assessment and are at risk of being identified as "disabled" on the basis of racially and culturally standardized tests (Zolotar, 1994; cited by CDE, 2012).

In 2012, CDE stated that there is an ongoing prohibition on the use of any assessment that could yield an intelligence score for African-American students. In 2014, CDE reemphasized that, since no standardized tests have been authorized by the State Board of Education, any standardized assessment that generates cognitive, mental ability or aptitude scores are prohibited. In the literature, these three terms are used interchangeably. No means that any such test cannot be administered, period. "Nothing" from these tests means no age equivalents, grade equivalents, percentile ranks, standard score, including subtest scores.

How to Purge Information from A Pupil Record

In Judge Peckham's 1986 *Larry P.* decision regarding prohibition of IQ testing of African-American students, he also declared IQ scores from any other source cannot become part of the pupil's school record. The CDE issued a directive (Campbell, 1987) on how to dispose of *Larry P.* records generated prior to September, 1986. It reads as follows:

> *Before a black special education student is re-evaluated for special education or transfers to a new district all prior records of IQ scores, or references to information from IQ tests, should be permanently sealed. The records are to be opened only for litigation purposes, official state or federal audits, or upon parent request. The parent shall be given copies of the sealed records upon request. The sealed records shall be maintained for a period of five years.*
>
> *Prior to sealing the records of these students, the parents shall be notified that the records will be sealed because of a court decision, which prohibits the use of intelligence tests for black students for any purpose related to special education. Additionally, prior to sealing the records, a qualified professional should identify appropriate data to be copied and purged of all IQ scores or references to information from IQ tests. The remaining data should then be transferred to the student's current record. In no case shall the IQ test information be made available to the IEP team for any purpose.*

As California school districts are the only agencies prohibited from using IQ tests with African-American students, it is often the case that African-American pupil records received from out-of-state and/or another agency contain cognitive, mental ability or aptitude test information. Therefore, the following steps are recommended when it becomes necessary to purge information from a pupil record.

1. A qualified professional should review the case file to determine if prohibited information is contained therein.
2. Remove any prohibited protocols and all assessment reports which contain cognitive, mental ability or aptitude information.
3. Duplicate the original report.
4. "Purge all IQ scores or references to information from IQ tests" This has been interpreted as a means of "redacting" by use a black tip marker or "white-out" to remove the following information on the duplicated copy.

a. Any reference to a test instrument which yields a cognitive, mental ability or aptitude score or standard score that is an indication of cognitive functioning.

b. Any test data summary scores from the test instruments(s).

c. Commentary in the report, which discusses the pupil's performance on the test instrument(s).

5. Make a duplicate copy of the purged report. File this in the pupil record.
6. Destroy the copy with the black tip marker or "white-out."
7. Notify the parent/guardian that the pupil's records are being sealed. (Sample letter enclosed)
8. Seal the original report, any relevant protocols, and a copy of the letter sent to the parent/guardian in a manila envelope. Indicate the Pupil's name and destruction date of five years hence on the outside of the envelope. Also attach a label indicating the envelope is only to be opened for purpose of litigation, official state or federal audits, or upon parent request.
9. Add the pupil's name to a district level master list of pupils whose files have been purged and reports sealed due to the ***Larry P.*** ruling.

A sample letter to send to parents/guardians regarding this process is enclosed herein.

Revisions Approved June 12, 2015

(District Letterhead)

Sample *Larry P.* Letter to Parent/Guardian

Date: _____

Name: _____

Address: _____

_____

RE: _____(pupils name)_____ DOB: _____

Dear Parent/Guardian:

This letter is to inform you that the _____ District has sealed and purged the assessment report for the above named child due to a ruling by Judge Robert F. Peckham of the United States District Court; San Francisco, in 1986 that school districts may not use Intelligence Quotient (IQ) tests in the assessment of African-American pupils who have been referred for special education. This has been upheld by the U.S. Court of Appeals for the Ninth District and is enforced by the California State Department of Education.

California school districts are required to remove from the pupil record any IQ scores, or references to information from tests that provide a cognitive, mental ability or aptitude score or standard score, for African-American students who were tested prior to this ruling or by another state/agency. The district is also required to notify the parent/guardian of such pupils who previously received IQ testing, that we are now permanently sealing these records. The sealed record may only be opened for purposes of litigation, official state or federal audits, or upon parent/guardian request. A copy of the revised report is enclosed for your information. It will or has replaced the previous report in your child's file.

If you have any questions or concerns, please call me at (__) _____.

Sincerely,

_____

(Special Education Administrator)