APPENDIX A

Lozano Smith Attorneys At Law Opinion Letter Entitled: Propriety of Administering I.Q. Tests to African-American Students

Sarah E. Tigerman
Attorney at Law
E-Mail: stigerman@lozanosmith.com

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OPINION LETTER

XXXX XXXXXXXXXX, Director
Special Education
XXXXX Unified School District
10615 Severan Street
XXXXXXX, CA 90000

Re: Propriety of Administering I.Q. Tests to African-American Students

Dear XXXXXX:

You have requested our opinion regarding the effect of the Crawford v. Honig[1] decision on the propriety of using I.Q. testing with African-American students, assuming that the test is not culturally biased and is not used to identify students as "educable mentally retarded" ("EMR"). The short answer is that standardized tests of intelligence should not be used to determine special education eligibility for African-American students, pursuant to the stated policy of the California Department of Education ("CDE"). While the case law establishes that I.Q. testing of African-American students is only prohibited if used to determine placement in EMR classes or their "substantial equivalent," the CDE's policy is to prohibit the use of intelligence tests to assess special education eligibility of African-American students in general. Significantly, the CDE will make a finding of noncompliance if a district has used a prohibited test for assessing special education eligibility of African-American students.

BACKGROUND

The Larry P. Decision

The seminal case on this matter is Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) *aff'd* 79 F.2d 969 (9th Cir. 1986). In Larry P., a group of black students filed a lawsuit challenging the use of I.Q. tests to identify and determine placement in EMR classes. The court found that the use of standardized intelligence tests were racially and culturally biased, and issued a permanent injunction against the use of such tests "for the identification of black EMR children or their

[1] 37 F.3d 485 (9th Cir. 1944).

placement into EMR classes." The court defined an EMR designation to include any "substantially equivalent" category, and defined EMR classes to include "other special classes serving substantially the same functions." The court noted that EMR classes were considered "dead-end classes" that students were "unlikely to escape" to return to regular education classes. Although the EMR designation and classes were abandoned long ago, no published court decision has since interpreted the meaning of a "substantially equivalent" designation or class. Thus, there is limited guidance available regarding what constitutes the types of labels or class placements that should not be determined based on standardized I.Q. tests. The decision included a list of about seventeen (17) prohibited intelligence tests.

The Larry P. Settlement

In 1986, after California had abolished the EMR category, the parties to the Larry P. case entered a settlement agreement to modify the earlier injunction. Specifically, the parties agreed to have the injunction expanded to preclude the use of I.Q. tests to assess African-American students for *any* special education identification or placement. The district court modified its 1979 injunction based upon the settlement agreement and entered a new judgment reflecting the modified injunction.

The Larry P. Task Force

In response to the 1986 modification of the Larry P. injunction, the State Director of Special Education appointed a task force to develop recommendations regarding policies and alternative assessments to comply with the injunction. In 1989, the task force issued a lengthy report that included lists of prohibited intelligence tests. The task force lists included the tests from the Larry P. decision, as well as about twelve additional tests the task force suggested were subject to the injunction.

1992 Legal Advisory from the CDE

Following the district court decision in the Crawford case, but before the appeal to the Ninth Circuit, the CDE issued an analysis of the district court order vacating the 1989 modification to the injunction. In this Advisory, the CDE noted that the original Larry P. decision concluded that I.Q. testes were racially and culturally biased and resulted in disproportionate placement of black students in "dead-end" classes. The CDE adopted criteria for complying with the original Larry P. injunction from the unpublished district court opinion. The CDE determined that all special education designations could result in the placement of African-American students in "dead-end" classes, because research showed that many black students of all designations ended up in special day classes and were seldom returned to regular education. The CDE took the position that alternative assessments should be used to assess African-American students for special education eligibility.

XX. XXX XXXXX, Director

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CURRENT LAW AND POLICY

Federal and State Law

Both federal and state laws prohibit the use of evaluation materials that are racially or culturally biased for assessing special education eligibility. (See 20 U.S.C. § 1412(a)(6)(B); 34 C.F.R. § 300.532(a)(1)(i); Educ. Code § 56320(a).) The laws further require that any standardized tests be validated for the specific purpose used. (See 34 C.F.R § 300.532(C)(1)(i); Educ.Code § 56320(b)(2).)

Crawford v. Honig

In the Crawford case, a group of African-American students challenged the 1986 modification to the 1979 Larry P. injunction. The district court vacated the 1986 modification, leaving the original Larry P. injunction intact. The Ninth Circuit affirmed the district court's decision to vacate the 1986 modification because there were no factual findings to support the expansion of the injunction. The circuit court noted that the original Larry P. injunction was limited to a ban of I.Q. testing for placement of African-American students in EMR classes, and was not a determination of the validity of I.Q. testing for other purposes. The district court had also ordered further proceedings to determine the "substantial equivalent" to EMR classes. However, those proceedings were either not completed or did not result in a published opinion.

CDE Analysis of Crawford v. Honig

Shortly after the Crawford decision was rendered in 1994, the CDE issued a memorandum reaffirming the 1992 Advisory and the CDE's position prohibiting intelligence testing for assessing special education eligibility of African-American students. The CDE confirmed that the original Larry P. injunction remained intact and was unchanged by the Crawford case. The memorandum emphasized that American versions of standard I.Q. tests had been found racially and culturally biased by the Larry P. court and that parental consent could not overcome the inherent bias in the tests. The CDE further asserted that, under state and federal law, it has the authority to prohibit the use of tests not validated for the purpose used, and made clear that no standardized intelligence test has been validated for determining special education eligibility for placement. The CDE views the statutory ban on use of discriminatory testing materials very broadly and not limited by the terms of the Larry P. injunction. Thus, the CDE's position is that I.Q. tests may not be used to identify African-American students as either mentally retarded or learning disabled.

The CDE Clarification

In 1997, the CDE issued its latest memorandum on this topic – Clarification of the Use of Intelligence Tests with African-American Students for Special Education Assessment. In the Clarification, the CDE appears to have entirely ignored the Crawford decision and expressly

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states that districts will be found out of compliance for using any of the tests listed in the Task Force report to assess black students for special education eligibility. The CDE Clarification further states that no standardized intelligence tests, even if not on the task force lists, should be used to assess African-American students' eligibility for special education. The CDE's reasoning remains based on the original Larry P. decision, in which the court found that all the I.Q. tests reviewed were culturally biased, and the statutory prohibition against using discriminatory evaluation materials for special education eligibility.

The 1977 Clarification represents the CDE's current policy regarding intelligence testing of African-American students, and remains the basis for non-compliance findings. Thus, while the case law creates a narrower prohibition regarding I.Q. testing of black students, school districts are cautioned to avoid standardized intelligence tests and use alternative assessments to evaluate special education eligibility and placement of African-American students.

Should you have any questions, or wish to discuss this matter further, please feel free to call.

Sincerely

LOZANO SMITH

Sarah E. Tigerman