BILL HONIG
SUPERINTENDENT OF PUBLIC INSTRUCTION

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LEGAL ADVISORY

DATE: September 10, 1992

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TO : County and District Superintendents of Schools
(Attn: Directors of Special Education)
: Special Education Local Plan Area Administrators
: Special Education Administrators of County Offices
: Local Directors of Pupil Personnel Services
: State Directors of Special Schools and School Superintendents

FROM : Office Of The General Counsel
Legal and Audits Branch

SUBJECT : ANALYSIS OF JUDGE PECKHAM'S AUGUST 31, 1992 DECISION IN LARRY P. v. RILES AND CRAWFORD v.HONIG

On August 31, 1992, the United States Federal District Court for the Northern District of California, Judge Robert F. Peckham, issued a Memorandum and Order concerning the 1986 stipulation and directive which expanded the scope of the original 1979 Order in Larry P. v. Riles. The 1986 stipulation has been vacated (i.e., rescinded) by the Judge.

However, the new Memorandum and Order has not altered the original 1979 Order. The court specifically ruled that the "vacation of the 1986 stipulation leaves the original Larry P. ruling standing." (Mem. & Order, p. 22:24-25.) **All media accounts to the contrary are inaccurate.**

The decision concerning the '86 stipulation was based upon procedural grounds, inasmuch as the court found that the interests of some African-American students and their parents were not adequately represented at the time it was affirmed by the court. The court made no ruling as to whether the prohibition of IQ testing of some African-American students is a violation of their constitutional right to equal protection of the law.

As you may recall, the Judge, in 1979, had concluded that IQ tests were racially and culturally biased, and were responsible for the disproportionate placement of African-

American students in "dead-end"[1] classes for the mentally retarded. Thus, he prohibited their use for placement in E.M.R. classes or their "substantial equivalent".

The court's new Memorandum and Order does not abandon its 1979 ruling in Larry P. Rather, it orders the California Department of Education (CDE) and the Larry P. plaintiffs to assist the court in defining the "substantial equivalent" of an E.M.R. class in the context of the State's current special education program. However, until the court develops a new formulation, the CDE and LEAs are still legally obligated to comply with the 1979 decision banning the use of IQ tests for "identification of black E.M.R. children or their placement into E.M.R. classes. . . . or a substantially equivalent category."

In the new Memorandum and Order, the court has described "dead-end" classes as those in which (a) students typically do not receive the regular curriculum and fall farther and farther behind students in regular classes, (b) fewer than 20% of students are returned to the regular classroom, and (c) African-Americans are disproportionately represented. (Mem. & Order, pp. 2-3.)

Stated in terms of the Court's criteria and concerns: it is the position of the CDE that, in order to comply with the 1979 Order, LEAs should administer alternative (non-IQ based) assessments to African-American students if, as a result of the assessment, the pupil could be enrolled in a program where (a) students typically do not receive the regular curriculum and fall farther and farther behind students in regular classes, (b) fewer than 20% of students in them are returned to the regular classroom, and (c) African-Americans are disproportionately represented.

It is the CDE's belief that these harmful consequences may exist in some special education programs for the mentally retarded (MR), seriously emotionally disturbed (SED), learning disabled (LD), and speech and language impaired (SL). For example, the CDE has conducted demographic and statistical studies which indicate that despite all of our efforts, it appears that very few racial and ethnic minority students assigned to resource specialist classes (classes comprised primarily by students assessed as MR, SED, LD or SL) are ever returned to the regular class. Unfortunately, the majority of these students may end up in special day

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[1] "Dead-end" is the court's metaphor for the original, currently non-existent, educably mentally retarded (E.M.R.) class. It is used in this advisory in its historical context.

classes and ultimately drop out of public education. Thus, it is the CDE's belief that in some situations African-American students--and other racial and ethnic minority students--found to have the above-noted disabilities, may continue to be placed disproportionately in programs which are the substantial equivalent to the Larry P. "dead-end" placement. To the extent such placements exist, they are educationally unsound and unconstitutional.

Until the Court defines the "substantially equivalent" of E.M.R.[2], each LEA is advised to apply the above criteria in evaluating its own individual programs. It may not be useful to assume that the type of services or the nature of the disability is determinative of whether an LEA's programs are impacted by the 1979 IQ ban.

In terms of evaluating its own programs, we recommend that each LEA begin with a review of the diversity of enrollment in each program and within each disabling condition: does the LEA have a disproportionate enrollment in its special education programs?[3] If so, the LEA should then take a critical look at other factors such as: (a) instruction time in the core curriculum; (b) student progress as compared to students in the regular classroom; and (c) the likelihood of transfer back to the regular classroom.

More importantly, as many of you know, the CDE -- in the context of a strategic plan for educational reform -- is leading a broad educational effort to restructure the entire special education assessment process. Our aim is to eliminate the current diagnostic model which essentially determines what is physically, mentally, or emotionally wrong with a student who is not achieving well in school. It is anticipated that parents and educators, after all legally required public input has been considered, will support alternatives to the diagnostic model which have been referred to as "performance based," "portfolio," "dynamic," and "curriculum based" assessments.

These assessment methodologies are not dependent upon standardized, norm referenced tests. They will focus on many, if not all, aspects of how each child learns, their

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[2] In order to further clarify the current application of the '79 Order, the Judge has requested a hearing, in the near future, to determine the "contemporary meaning of 'substantially equivalent' language of the ['79 Order]." (Mem. & Order, p. 23:2-6.)

[3] The court, in Larry P., has used a one standard deviation "E" formula for determining whether disproportionate enrollment exists within a program.

unique approach to reading, writing, listening, and speaking; their home and school based achievements, abilities, developmental background, areas in which they do poorly and in which they do well; and, most critically, the educational contexts which are likely to help them overcome their learning problems.

If these assessment methodologies are approved after extensive field testing and public input, it should be commonly understood and accepted -- if not mandated by law -- that the new models will be effectively implemented without the need to administer standardized intelligence tests. Current law has never mandated the use of IQ tests, despite the fact that they have become a common component of the current diagnostic/medical model.

Given the CDE'S movement away from the diagnostic-medical model, it is also highly recommended that IQ tests not be utilized in special education assessments of other racial and ethnic minority students for these same reasons. Similarly, it is not advisable to administer IQ tests to African-American students and other racial and ethnic minority students who are being considered for the GATE program.

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For further information regarding this Advisory, please contact Barry Zolotar in the Legal Office at the CDE at (916) 657-2453.