

Chapter 2: Evaluation and Assessment

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Introduction

This section contains the requirements for evaluation and assessment of students who are not progressing in the general education program, even though modifications and accommodations have been provided. Staff or parents may request a child be assessed in all areas of suspected disability. Following a signed assessment plan (D/M 66) giving consent, the evaluation process begins. The initial evaluation and reevaluation are broad terms that apply to all individual testing, which may include observation and other data-gathering activities that result in decisions about a student's educational needs. Generally, evaluation may be defined as the process to make an informed choice about a child's eligibility for special education. Assessment is a process through which the child's eligibility, educational needs, and present levels of performance are determined. It provides information that can be used by teachers and other specialists to determine how to develop a program for a student with a disability so that he/she derives educational benefits.

Each Local Education Agency (LEA) shall conduct, on at least an annual basis, a review of all Individualized Education Programs (IEPs). Procedures shall provide for the review of the student's progress and the appropriateness of placement and services, allowing for any necessary revisions. Assessments shall be conducted annually, as necessary, to provide the IEP team sufficient information to review the student's progress and the appropriateness of placement and services. Formal assessments shall require written parent consent.

Evaluation for Determination of Eligibility for Special Education Services

E.C. § 56320. Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted, by qualified persons, in accordance with requirements including, but not limited to, all of the following (a through i requirements are summarized in this section).

The requirements in state and federal statutes and regulations that are related to special education programs include: Part 30 of the Education Code, Chapter 3 of the California Code of Regulations, and Title 5 Education. These document sections serve as a guide to the entire process of individualized diagnostic testing and the IEP team's determination of eligibility.

The tests and materials used are validated for the specific purpose of evaluation and assessment and are free from racial, cultural, or sexual bias. They are administered in the student's primary mode of communication unless otherwise specified. Tests are administered by trained personnel. Tests of intellectual or emotional functioning are given by a credentialed school psychologist. The tests selected ensure that results for students with impaired sensory, manual, or speaking skills reflect the student's aptitude, achievement level, or other factors that the test purports to measure.

Section A – Areas of Suspected Disability

E.C. 56320(f). The pupil is assessed in all areas related to the suspected disability including, where appropriate, health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social emotional status. A developmental history shall obtained when appropriate.

E.C. 56322. The assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency.

E.C. 56327. The personnel who assess the pupil shall prepare a written report, or reports, as appropriate, of the results of each assessment. The report shall include, but not be limited to: ... (h) the need for specialized services, materials, or equipment for pupils with low incidence disabilities, consistent with guidelines established pursuant to § 56136.

No single measure for evaluation will be used as the sole criterion for determining an educational program for a student with exceptional needs. The assessment of the individual, including individuals with suspected low incidence disabilities, is conducted by appropriate personnel who are knowledgeable of that disability. Consideration is given to the need for specialized services, materials, and equipment consistent with students who experience a low incidence disability. See also Guidelines for Individual Evaluation of California Students with Disabilities, birth through age 21, a document produced by the California Department of Education, Sacramento, 1999.

Section B – Assessment Tools

Once a student has been identified for special education, it is mandated that ongoing assessments provide direction for individualized planning. An annual review is conducted to review goals through the IEP process. The student's present level of performance is identified from classroom observation, progress monitoring, checklists, student work, and valid, norm-referenced assessment tools. Additionally, goals are reviewed continually during the year for completion or modification. A variety of ecological and empirical data is reviewed to obtain an appropriate learning environment for each student who receives special services.

Norm-Referenced Tests

Assessments that are produced by publishers include inventories and assessment tools that have been normed for a specific population, developmental age group, and/or grade level expectancies. Norm-referenced assessment gives standardized scores useful in planning the student's instructional program. Initially, the assessment is analyzed to determine eligibility. The development of goals for the IEP depends upon assessment data. Norm-referenced assessments provide baseline data that can be compared to post-test data to determine a student's academic growth and progress towards goals.

Curriculum-Based Assessment

In addition to norm-referenced tests, educators use curriculum-based assessment to conduct ongoing assessment of student progress toward educational goals. Examples of curriculum-based assessment include: unit tests, portfolios, progress monitoring tools, oral interviews, presentations, rubric scoring, informal inventories, written tests, checklists, or student produced product. These measurements are useful to educators for preparing lessons that shape classroom-based instruction. Curriculum-based assessment is used to check and report progress towards IEP goals.

Alternative Assessment

Alternative testing is the utilization of specialized techniques for students with particular needs or disabilities that cannot be met through traditional testing. Students tested by alternative assessment often do not participate in learning through the core curriculum. Their IEP is structured around a life skills or functional curriculum. Examples of alternative assessments include portfolios, community-based observation, accommodations and modifications to assessments that are used with non-disabled peers, problem-based measurement, and charting. As of July 1, 2000, federal regulations require that students with a curriculum that is an alternative to the core curriculum must have a specified plan for alternative assessment. See also Chapter 16 for information about state and LEA assessment programs.

Present Level of Educational Performance (PLOP)

According to the law the IEP must include: a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum; or for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities. *20 USC 1414 (d) (l) (A)*

The present level of educational performance is a summary that describes the student's current achievement in the areas of identified need. It specifically addresses the student's strengths, concerns and other supplementary aides or services that provide student success. It explains the student's educational needs and states how learning and the ability to progress in the core curriculum could be impacted by the student's identified disability. Clear, specific, measurable, objective, baseline information links evaluation results and expectations of the core or alternative curriculum. This information forms the basis for goals for the student. If the student is age 16 or older, the PLOP also addresses the student's transition needs in the areas of training, instruction, employment and post-school adult living, community, and related services.

If the purpose of the present level of educational performance is to identify a student's needs and establish a baseline from which to develop meaningful and measurable goals, then the PLOP should:

- Be stated in terms that are specific, measurable, and objective;
- Describe current performance, not past performance;
- Prioritize and identify needs that will be written as goals; and
- Provide baseline information for each need.

In order to develop meaningful present levels of educational performance and to prioritize student needs, the IEP team considers a variety of factors: interventions and progress on the current IEP goals, evaluation results, and progress in the general curriculum.

Section C – Preschool

17 C.C.R. 52084(a). Assessment for service planning for eligible infants or toddlers shall identify all of the following:

- (1) The infant's or toddler's unique strengths and needs in each of the five areas specified in § 52082(b)(3);*
- (2) Early intervention and other services appropriate to meet the needs identified in (a)(1) of this subsection; and*
- (3) If the family consents to a family assessment, the resources, priorities and concerns of the family and the supports and services necessary to enhance the family's capacity to meet the developmental needs of an infant or toddler with a disability.*

For students at age birth to five, screening and assessment activities go beyond scores, standard deviation, and levels of functioning. Since parents and families may not have previous experience with public and educational service agencies, the process itself can provide the first steps to a collaborative partnership. Time spent with the child and the family helps the examiner to observe the present levels of functioning and need. Since assessment is an on-going process with multiple components, other activities, such as case management, family interactions, and support from public agencies are considered in the development of the Individual Family Service Plan (IFSP).

The service coordinator, between nine and six months before the third birthday of the toddler receiving Early Intervention Services (EIS) shall do the following:

- (1) Notify the parent of a toddler who may be eligible for special education services under Part B of IDEA 2004 that transition planning will occur within the next three to six months.
- (2) Notify the LEA where the toddler resides that there will be an IFSP meeting (transition conference) requiring the attendance of an agency representative, before the toddler is two years nine months, or at the discretion of all parties, up to six months before the toddler turns three years old.

Within 30 days following the notification of the parent and the LEA, the family, service coordinator and the LEA shall agree on the date for the IFSP meeting (transition conference) to specify transition steps necessary for movement into services under Part B of IDEA 2004.

A LEA representative shall attend the IFSP meeting (transition conference) held by the time the child is two years, nine months of age. If the LEA of residence is the preschool operator, it shall be responsible for assessments as necessary to determine eligibility for special education services under Part B. If preschool services are provided by another LEA, the assessments shall be determined and conducted collaboratively by the agencies.

In addition to attending the IFSP meeting (transition conference), a LEA representative shall attend meetings with groups of parents of children in the transition process, as appropriate, in order to provide consultations regarding services available when the child turns three years of age.

At each IFSP meeting (transition conference), transition steps necessary for movement into services under Part B of IDEA 2004 or other appropriate programs shall be outlined. A written Transition Plan, covering each step of the process, shall be developed by the EIS service coordinator.

Parents shall be provided with information about community resources by the service coordinator when the transition plan is reviewed at the transition conference. For a child who may not be eligible for Part B services, information shall be provided by the service coordinator to parents about community resources such as Head Start, State Preschools, and private and public preschools.

The IFSP shall contain the identification of the people responsible for convening the transition conference. Those agencies and individuals responsible are also identified in the transition plan referenced above.

All Part C program providers, with parental consent, shall transmit information about the child to the LEA/preschool program operator. This information shall include evaluation and assessments and a copy of the IFSP, and is sent not later than the time the toddler is two years nine months old. The LEA/preschool program operator shall then offer the parents an assessment plan in order to complete any additional assessments necessary to determine eligibility for special education services under Part B. These steps shall include sending a packet to the parent acknowledging the receipt of the referral and requesting a signed permission to assess.

If the toddler with disabilities may participate in a regular preschool education environment, the LEA shall ensure the attendance of a general education preschool teacher, or a person with early childhood education training who has information regarding preschool instructional programs, at the IEP/IFSP meeting.

The IEP for a child aged three through five shall reflect developmentally appropriate activities, including goals to enhance the child's ability to access the normal activities for a preschool aged child. These activities may include play, self-help skills, language development, social skills, and motor skills. Access to normally developing age peers shall be written into the IEP as is appropriate and required by IDEA 2004.

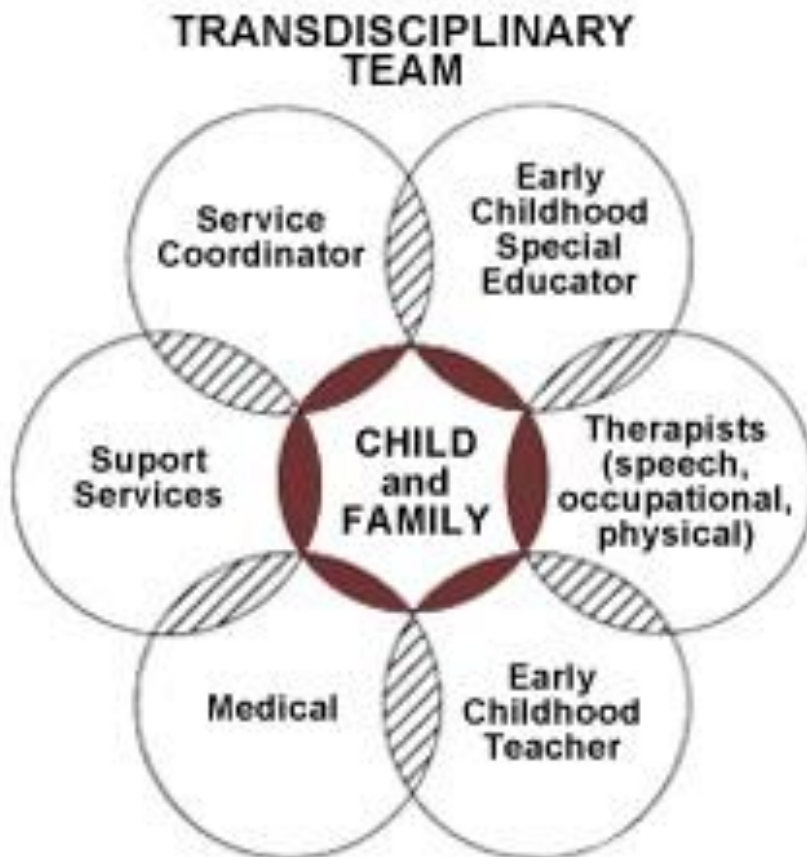
An IEP to determine eligibility under Part B shall be scheduled by the LEA of residence/preschool program operator to take place prior to the child's third birthday so that services under Part B may commence by that date or, if school is not in session, by the date that school is next in session, including extended school year (ESY). If scheduled by the preschool program operator, the LEA shall be invited to the IEP meeting.

Assessment Process

Evaluations and assessments of infants and toddlers are conducted differently from those of older students. According to Meisels and Provence, in the publication Guidelines for Identifying Young Disabled and Developmentally Vulnerable Children and Their Families, during the developmental stages of early childhood, a young child will act differently at different times of the day to the same set of circumstances. Changes in the child's physical state, surrounding environment, and interactions with significant people in his or her life can have an impact upon how the child reacts. To account for these differences, service providers use a multidisciplinary, interdisciplinary, or transdisciplinary team approach. To obtain accurate information various tools may be used, such as standardized assessment measures with alternative approaches, play-based assessments, and clinical observations of the child in different settings. Preferred practices include:

- Parents and family members, as team members, provide information.
- Assessment as a coordinated intervention plan encourages parents/families to learn about procedures, observe the work of professionals, and learn to interpret data.
- The California Code of Regulations requires that evaluations and assessments be conducted in natural environments, whenever possible. This ecological model of assessment allows the child to interact with his/her environment in light of regular daily activities and routines.
- The team of evaluators/assessors designs procedures to obtain information that is appropriate and based upon activities that are reliable and valid.

- The results and recommendations are provided to families in a written report that uses lay terms. Other conditions for the assessment process, such as obtaining a signed consent are also appropriate for students aged birth to five years.



Section D – English Language Learners

E.C. 56320(b). Tests and other assessment materials meet all of the following requirements: (1) are provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer as required by Section 1414(b)(3)(A)(ii) of Title 20 of the United States Code.

5 C.C.R. 3001(y). “Primary Language” means the language other than English, or other mode of communication, the person first learned, or the language which is spoken in the person’s home.

According to the California Department of Education publication, Guidelines for Individual Evaluation of California Students with Disabilities, Birth Through Age Twenty-One, 1999,

changes occurred in IDEA 97 that relate to evaluation requirements for English language learners who are suspected of having a disability. Per that document:

The definition of native language was changed in IDEA 97 to refer to the language normally used by the parents of the English-learning child. If a disability is suspected, school districts should provide and administer tests and other evaluative procedures using the child's native language or other mode of communication, unless it is clearly not feasible to do so.

Procedural safeguards during the evaluation process are the same for all students, with these additional requirements: (1) the plan for evaluation shall be provided in the native language of the parent or other mode of communication used by the parent, unless doing so is clearly not feasible; (2) the plan for evaluation must indicate the student's primary language; and (3) procedures and test materials for use with pupils having limited English proficiency, as defined in Education Code section 52163(m), shall be in the individual's primary language.

To consider whether an English language learner suspected of having a disability is eligible for special education, the IEP team determines whether the learning disability is demonstrated in his or her native language and in English. Test procedures and interpretation of results must cover the student's achievement in the district curriculum and in the district-adopted sheltered or structured English immersion program. In addition, the IEP team must consider whether a lack of instruction in reading or mathematics, temporary physical disabilities, social maladjustment, or environmental, cultural, or economic factors contribute to the student's performance.

Section E – Evaluation of African-American Students

Under the Larry P. v. Riles decision of 1979, assessment of intelligence of African-American students referred for special education is not allowed. The decision identified tests that are prohibited. Additionally, there is no criterion or a process for selecting acceptable instruments. According to the California Department of Education, Special Education Division, African-American students cannot be assured that decisions about their eligibility for special education will be based on technically or educationally adequate instruments. To provide equal treatment and effective educational decisions for African-American students in special education, according to a presentation to the Advisory Commission on Special Education, November 20, 1998:

The California Association of School Psychologists (CASP) in cooperation with the Special Education Division of the California Department of Education asks the Advisory Commission on Special Education to participate in establishing criteria and a committee to select acceptable tests or procedures.

The assessment of intelligence for special education was reaffirmed in IDEA 97 and continues to be required under California education regulations. Intelligence is assessed for education as identification and documentation of an educational disability as required for special education services. However, identification of all educational disabilities does not require the assessment of

intelligence, and several of the educational disabilities include the term intellectual ability or a synonym of the concept. Terms of general or specific intellectual abilities are found as special education service requirements for specific learning disability, intellectual disability, emotional disturbance, and traumatic brain injury.

Implications for California Speech Language Pathologists - Toya Wyatt Article

Although the original ruling applies to the use of standardized IQ tests with African-American children, many standardized speech and language tests also fall under the Larry P. mandate. This is because they directly or indirectly purport to measure IQ and their construct validity is partially or fully determined through correlations with other IQ tests.

A supplement to these SELPA guidelines will address information regarding assessment for intelligence of African-American students as it becomes available.

See Appendix A for an opinion letter regarding the propriety of administering IQ tests to African-American students.

Section F – Emotionally Disturbed

Definition

5 C.C.R. 3030(i). Because of a serious emotional disturbance, a pupil exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance:

- (1) An inability to learn which cannot be explained by intellectual, sensory, or health factors.*
- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.*
- (3) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations.*
- (4) A general pervasive mood of unhappiness or depression.*
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.*

Students with emotional disturbance are assessed in the same way that non-disabled students are assessed. Assessment options include: state and LEA selected assessments, other norm-referenced tests, curriculum-based assessments, and alternative assessments. If modifications or accommodations are needed for classroom work, then those modifications or accommodations are recorded on the IEP and are appropriate for evaluation or assessment processes. If behavior is unpredictable, alternative assessment can be determined by the IEP team and documented on the IEP.

Section G – Triennial Assessments

E.C. 56381(a)(1). A reassessment of the pupil, based upon procedures specified in Section 56302.1 and in Article 2 (commencing with Section 56320), and in accordance with Section 1414(a), (b), and (c) of Title 20 of the United States Code, shall be conducted if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (2) A reassessment shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and shall occur at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary. If the reassessment so indicates, a new individualized education program shall be developed.

Each LEA shall conduct a reassessment of each child with a disability if conditions warrant a reassessment, or if the child's parent or teacher requests a reassessment, but at least once every three years. The determination of whether a child requires a reassessment shall be made in accordance with IDEA 2004.

With the Reauthorization of IDEA in 2004 several provisions that reduce unnecessary paperwork and direct needed resources to teaching and learning were instituted. IDEA 2004 continues the allowance for initial evaluations and reevaluations to be based on existing data and reports. Additionally, IDEA does not require that eligibility be reestablished through additional assessments when a triennial evaluation is conducted, provided a group of qualified professionals and the parents agree that the child continues to be a child with a disability and the parents do not request additional assessments.

As part of determining the need for reassessment, the IEP team shall complete the Triennial Reevaluation Determination form (D/M 119) and conduct a review of the following:

- Existing assessment data, including assessments provided by the parents
- Current classroom-based assessments
- Teacher and related service providers' observations
- Parent/Guardian input

Based upon a review of the above information, the IEP team determines whether additional assessment is needed. If it is determined that a reassessment is warranted, an Assessment Plan (D/M 66) must be completed, identifying the type of assessments that may be given or considered.

Additionally, federal and state law require that a student being assessed for an initial and three-year review shall have had a hearing and vision screening. The LEA is responsible for conducting the hearing and vision screening of the child unless the parent does not consent to such examination by the LEA or elects to provide a privately-obtained hearing or vision assessment. The LEA and the parent may also agree to an existing hearing and vision assessment for the triennial review (no more than a year old).

5 C.C.R. 3027. All pupils being assessed for initial and three-year review for special education services shall have had a hearing and vision screening, unless parental permission was denied.

If the IEP team and other qualified professionals, as appropriate, determine that no additional data is needed to determine whether the student continues to be a child with a disability, and to determine the educational needs of the student, the parent has the right to request an assessment to determine eligibility and/or ineligibility for services at any time, and to determine the educational needs of the student. The LEA is not required to conduct an assessment unless requested by the parents.

On the basis of the review or assessment(s) conducted and input from the student's parents, the IEP team shall meet to determine:

- Whether the student has a particular category of disability and/or continues to meet the eligibility criteria as a child with a disability
- The present level of performance of the student and the student's educational needs
- Whether the student continues to need special education and related services
- Whether any additions or modifications to special education and related services are needed to enable the student to meet the annual goals included in the student's IEP and to participate, as appropriate, in the general curriculum.

APPENDIX A: Lozano Smith Opinion Letter

Lozano Smith Attorneys At Law

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

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

March 18, 2002

OPINION LETTER

XXXX XXXXXXXXXXXX, Director
Special Education
XXXXXX Unified School District
10615 Severan Street
XXXXXXX, CA 90000

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

Dear XXXX:

You have requested our opinion regarding the effect of the Crawford v. Honig¹ 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.

¹ 37 F.3d 485 (9th Cir. 1944).

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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 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.

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.

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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 states that districts will be found out of compliance for using any of the tests

XX. XXXX XXXXXXXXXXXX, Director
March 18, 2002
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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

APPENDIX B: Observation OR Screening v. Assessment

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May 1, 2007

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Re: Consent for Observations of Students

Dear Camille:

You have asked us for a legal opinion explaining the circumstances under which parental consent is required in order to observe a student. We understand that, in light of the changes to the federal regulation regarding observations, questions have arisen regarding the need for parental consent before observing a student.

Informed parental consent generally is required prior to any assessment or evaluation. A school district or local education agency, however, may conduct a "screening" of a student, as that term is defined under federal law, without parental consent. Thus, a school district must determine whether the observation constitutes a "screening" or an "assessment." If and when the observation constitutes an assessment, the school district must obtain informed parental consent before conducting the observation.

Distinction Between Screening and Assessment

It is clear that parental consent is not required before "[a]dministering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children." (34 C.F.R. § 300.300(d)(1); Cal. Educ. Code § 56321, subd. (f).) Beyond this situation, a school district must determine whether an observation constitutes a "screening" or an "assessment." The distinction is significant because a screening may be conducted without parental consent, though federal and state law require parental consent before an assessment may be conducted. (20

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U.S.C. § 1414(a)(1)(D)(i); 34 C.F.R. § 300.300(a)(1); Cal. Educ. Code § 56321(c).¹

Staff should consider the following factors when determine whether an observation is a screening or an assessment: (1) The purpose of the testing; (2) whether the testing is used with an individual student or a group of students; and (3) the complexity of the testing measure.

The first distinction between screening and assessment lies in the purpose for which the student-related data is being gathered. Under Individuals with Disabilities Education Act of 2004 and its implementing regulations, "[t]he screening of a student by a teacher or specialist *to determine appropriate instructional strategies for curriculum implementation* shall not be considered to be an evaluation for eligibility for special education and related services." (20 U.S.C. § 1414(a)(1)(E); 34 C.F.R. § 300.302.) (Emphasis added.) In the comments to the Federal Regulations, the United States Department of Education emphasizes that screening "refers to a process that a teacher or specialist uses to determine appropriate instructional strategies." (Federal Digest, p. 46639.)² In other words, if an observation is used to gather data to help a teacher adjust his or her delivery of instruction in the classroom, that process may be a screening that does not require parental consent. However, if the observation is motivated by a suspicion that a student may have a disability or disability-related need— even if the observation is initiated solely to determine whether such suspicion warrants more formal assessments— that observation likely is an assessment.

In addition to the purpose for gathering the student data, other factors may help distinguish between a screening and an assessment. The Federal Regulations refer to an evaluation as an "*individual* assessment," but the comments to the Federal Regulations describe screening as "typically a relatively *simple and quick* process that can be used with *groups* of children." (Federal Digest, p. 46339.) (Emphases added.) Thus, an observation of an individual student is more likely to be an assessment than an observation of all students in a particular group (e.g. a school, grade or class). Similarly, the more time it takes to conduct the observation, and the more complex or intrusive the observation is, the more likely it is that the observation is an assessment rather than a screening.

This important distinction between a screening and an assessment applies equally to the new federal regulation clarifying the observation requirements relating to a determination of whether

¹ California Education Code section 56302.5 provides that "the term 'assessment' shall have the same meaning as the term 'evaluation' in the Individuals with Disabilities Education Act, as provided in Section 1414 of Title 20 of the United States Code."

² IDEA 2004 requires the United States Department of Education to develop federal regulations to provide administrative interpretation. The federal regulations regarding IDEA 2004 are accompanied in the Federal Register by a section called "Analysis of Comments and Changes" which explains the rationales for recent changes in the regulations. While the comments to the regulations are not technically law, they are issued by the United States Department of Education to help detail how the regulations and IDEA 2004 should be applied.

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a student has a specific learning disability.³ (34 C.F.R. § 300.310.) Specifically, Section 300.310(a) provides that: “The public agency must ensure that the child is observed in the child’s learning environment (including the regular classroom setting) to document the child’s academic performance and behavior in the areas of difficulty.” This provision does not authorize an assessment without parental consent; school district staff still must determine whether the required observation constitutes a screening or an assessment to decide whether parental consent is necessary.

In addition, the group determining whether a child has a specific learning disability must:

- (1) Use information from an *observation in routine classroom instruction and monitoring* of the child’s performance that was done before the child was referred for an evaluation; or
- (2) Have at least one member of the group . . . conduct an observation of the child’s academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with § 300.300(a), is obtained.

(34 C.F.R. § 300.310(b).) (Emphasis added.) This provision merely requires that, as part of an evaluation to determine whether a child has a specific learning disability, the group must use information from an observation of “routine classroom instruction and monitoring” that occurred prior to a referral for assessment or conduct an observation in the regular classroom after the assessment referral has been made and parental consent has been obtained. The observation of routine instruction could be part of a test or other evaluation that is administered to all children in a class or a “screening.” In that case, parental consent would not be required. This provision, however, does not contemplate or authorize an individualized observation motivated by a suspicion that a student may have a disability or to determine disability-related needs.

Informed Parental Consent

As explained above, if an observation constitutes an assessment, a school district must obtain parental consent prior to conducting that observation. Parental consent is required prior to conducting both initial evaluations and reevaluations, however when reevaluation is at issue, such consent need not be obtained if the district can demonstrate it took reasonable measures⁴ to obtain such consent and the child’s parents failed to respond. (20 U.S.C. § 1414(c)(3).) A

³ Section 300.310 of Title 34 of the Code of Federal Regulations modified former Section 300.542.

⁴ Reasonable measures include maintaining a record of the school district’s attempts to obtain consent, such as: Detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parents and any responses received; and detailed records of those visits made to the parent’s home or place of employment and the results of those visits.

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parent's refusal to consent to an assessment does not constitute a failure to respond; therefore, a district cannot proceed with a reevaluation when a parent has refused to consent.

The Federal Regulations state that parental consent must be informed. (34 C.F.R. § 300.300.) In order to obtain informed parental consent, the district must be able to demonstrate that:

- a. The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- b. The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- c. The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time. If a parent revokes consent, that revocation is not retroactive.

(34 C.F.R. § 300.9.) If and when a school district obtains informed parental consent, it may proceed with its proposed assessments.

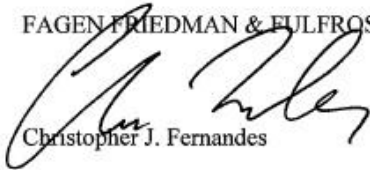
Conclusion

In summary, an observation constitutes an assessment if it is conducted for the purpose of determining eligibility for special education and/or needs relating to a disability, including appropriate accommodations, modifications or other special education support. Conversely, observations likely constitute screenings when they are relatively simple and quick, are administered to a group of students (e.g., an entire class), and are conducted for the purpose of refining instructional strategies for that group. If an observation constitutes an assessment the school district must obtain informed parental consent prior to conducting the observation.

If you have any further questions or concerns regarding this matter, please do not hesitate to contact me.

Sincerely,

FAGEN FRIEDMAN & FULFROST, LLP



Christopher J. Fernandes

CJF

Enclosure

DISTINGUISHING BETWEEN SCREENING AND ASSESSMENT

QUICK REFERENCE GUIDELINES

Staff should consider the following factors when determining whether a test is a screening or an assessment: (1) The purpose of the testing; (2) whether the testing is used with an individual student or a group of students; and (3) the complexity of the testing measure.

Characteristics of Screenings

- Administered to all students in class or school
- Administered to determine appropriate instructional strategies for curriculum implementation (i.e., a process that a teacher or specialist uses to determine appropriate instructional strategies)
- Simple and quick
- Routine part of class

Characteristics of Assessments

- Administered to an individual student
- Administered based on suspicion that a student may have a disability or disability-related need
- More complex and lengthy
- Initiated due to individualized concerns

If staff determines that an observation or test is a screening, parental consent is not required. If staff determines that the observation or test is an assessment, informed parental consent is required.

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APPENDIX C: Form D/M 119 – Triennial Assessment Determination Form

DESERT/MOUNTAIN SPECIAL EDUCATION LOCAL PLAN AREA
 DESERT/MOUNTAIN CHARTER SPECIAL EDUCATION LOCAL PLAN AREA
 17800 HIGHWAY 18 • APPLE VALLEY, CA 92307
 (760) 552-6700 • (760) 242-5363 FAX



Triennial Assessment Determination Form

(To be completed prior to the Triennial due date to determine what assessments, if any, need to be conducted.)

STUDENT INFORMATION			
Student Name:		Date of Birth:	Grade:
School Site:	LEA of Attendance:	LEA of Residence:	
Triennial Due Date:			
Parent/Guardian/Surrogate contacted on: (Date)			
Method of Contact: <input type="checkbox"/> Phone Conference <input type="checkbox"/> IEP Meeting <input type="checkbox"/> Other Meeting <input type="checkbox"/> Written Conference			
As part of determining the need for reassessment the LEA has completed all of the following steps:			
1. Existing assessment data has been reviewed, including assessments provided by the parents			
2. Current classroom-based assessments have been reviewed			
3. Teacher and related service provider(s) observations have been reviewed			
4. Parent Guardian input has been reviewed and considered			
Based upon a review of the information referenced above, the LEA, in collaboration with parent, has determined that <input type="checkbox"/> Yes <input type="checkbox"/> No additional assessment is needed.			
If "YES," it is recommended that assessment be completed in the following areas (D/M 66 must be completed): (Check all that apply)			
<input type="checkbox"/> Academic Pre-Academic Achievement	<input type="checkbox"/> Augmentative/Alternative Communication and/or Assistive Technology		
<input type="checkbox"/> Career and Vocational Development	<input type="checkbox"/> Cognitive/Intellectual Development and Learning Ability		
<input type="checkbox"/> Functional Behavior	<input type="checkbox"/> Health/Developmental/Medical		
<input type="checkbox"/> Perceptual/Motor Development	<input type="checkbox"/> Self-Help/Adaptive		
<input type="checkbox"/> Social/Emotional/Behavioral Development	<input type="checkbox"/> Speech/Language/Communication Development		
<input type="checkbox"/> Other:			
<input type="checkbox"/> Vision and Hearing: (Check all that apply below)			
<input type="checkbox"/> Vision and Hearing assessment (screening) dated		to be used for this evaluation period (within one year)	
<input type="checkbox"/> Parent to provide privately-obtained Vision or Hearing assessment			
<input type="checkbox"/> Parent declined Vision and Hearing screening by the LEA			
<input type="checkbox"/> Alternate means of assessment: (If using alternative means of assessment, explain why and what will be utilized for the assessment.)			
Additional assessment data is needed to determine:			
1. Whether the student has a particular category of disability and/or continues to meet the eligibility criteria as a child with a disability			
2. The present level of performance of the student and the student's educational needs			
3. Whether the student continues to need special education and related services			
4. Whether any additions or modifications to special education and related services are needed to enable the student to meet the annual goals included in the student's IEP and to participate, as appropriate, in the general curriculum			
If "NO," state reason(s) it was determined that further assessment data was not needed:			
NOTE: PARENTS MAY REQUEST FULL ASSESSMENT TO DETERMINE ELIGIBILITY/INELIGIBILITY FOR SERVICES AT ANY TIME, OR MAY AGREE TO FOCUSED DATA COLLECTION IN SPECIFIC AREAS.			
<input type="checkbox"/> I have been advised of and given a copy of the Special Education Procedural Safeguards/Parent Rights			
<input type="checkbox"/> I agree and understand that assessment is needed in the areas marked above (Assessment Plan is required, form D/M 66)			
<input type="checkbox"/> I agree and understand that no new assessment is needed			
Parent/Guardian/Surrogate	Date	Parent/Guardian/Surrogate	Date
LEA Representative	Date	Student	Date
Special Education Teacher	Date	General Education Teacher	Date
School Psychologist	Date	Speech-Language Pathologist	Date
Other Title	Date	Other Title	Date

APPENDIX D: Flowchart of Re-evaluation Cycle – Triennial IEP

