

Chapter

Eight

The Special Education Process: Evaluations

Understanding special education evaluations is a challenge that counsel must tackle successfully in order to provide competent special education representation.

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Under the Individuals with Disabilities Act (IDEA), a “full and individual evaluation of the child’s educational needs” must occur before placing the child who is disabled in an educational program and before providing services. 34 C.F.R. §300.531 (1997).¹ The Rehabilitation Act regulations (§504) contain the same requirement. *See* 34 C.F.R. §104.35(a).

Understanding special education evaluations is a challenge that counsel must tackle successfully in order to provide competent special education representation. Although an in-depth analysis of diagnostic criteria and test interpretation is beyond the scope of this chapter, the material that follows contains an overview of some of the diagnoses and tests that commonly arise in the context of evaluating for special education purposes children who are involved in the delinquency system. In addition to educating themselves on matters of special education diagnoses and testing, advocates who are incorporating special education advocacy into their delinquency practice should seek out professionals with expertise in the areas of special education testing to explain evaluation results in each case.²

¹In addition to the initial evaluation, the student must have a comprehensive re-evaluation every three years, or more frequently if conditions warrant reevaluation or if the parent or teacher requests it. 20 U.S.C. §1414(a)(2); 34 C.F.R. § 300.534 (b)(1997). Schools must also reevaluate a child before determining that he or she is no longer in need of, or eligible for, special education and related services. 20 U.S.C. §1414(c)(5). Under the Rehabilitation Act regulations, a reevaluation is required before any significant change in educational placement. 34 C.F.R. §104.35(a).

²Moreover, several good texts on psychological testing are available; they provide brief descriptions of individual tests commonly used for diagnostic purposes. *See, e.g.,* Anastasi, *Psychological Testing*, (MacMillan Publishing, N.Y.)(6th Ed. 1988); Sattler, *Assessment of Children*, (Jerome Sattler Pub., Cal.)(3rd Ed. 1988); and

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Counsel also should discuss each evaluation with the person who conducted it. These evaluators are themselves experts and usually provide in-valuable information about the child and about the relevant diagnostic instruments and disability categories. Furthermore, these evaluators likely will participate with the parent, the child, counsel, and the child’s teacher in developing the child’s Individualized Educational Program (IEP). Hence, counsel is well-advised to understand the perspectives that these evaluators bring to the IEP, and counsel is well-advised to develop constructive relationships, whenever possible, with these evaluators. These evaluators are also potential witnesses, either for or against the child and the parent, if the special education case goes to a hearing. In an appropriate case, counsel may decide to call an evaluator as a witness for the child in a delinquency hearing, as well. An evaluator could testify, for example, that a child could not read or understand the Miranda warnings. An evaluator could testify at a disposition hearing that, for example, a child’s prognosis for improved behavior is good, assuming school personnel work in accordance with the IEP to institute a behavior management program.

Counsel’s learning to comprehend the intricacies of special education testing is a necessary but, of course, not a sufficient capability by itself to elevate the practitioner to the status of competency. Counsel must also be familiar with the

Salvia/Ysseldyke, *Assessment*, (Houghton Mifflin Co., Boston)(5th Ed. 1991).

manifold procedures established by regulation concerning the proper administration and use of test data. Failure to comply with these procedures may invalidate the resulting IEP, and ultimately, any proposed educational placement. A common goal of special education advocacy is to invalidate a program developed by or a placement proposed by school system personnel. Consequently, counsel might wish to challenge the evaluations in order to demonstrate deficiencies in the development of the program and in the designation of the placement.

Before turning to the diagnoses and tests that commonly arise in the context of special education evaluations for children involved in the delinquency system, it is important to understand the multiple purposes of these evaluations. Evaluations and reevaluations under the Individuals with Disabilities Education Act and the Rehabilitation Act regulations are intended to determine the existence, nature and scope of a child's disability, to provide insight into the educational consequences of the disability, AND to provide information about the kinds of services, supports and instruction the child needs to address those consequences and learn effectively. All too often, however, a review of a child's records will reveal years of evaluations and reevaluations that simply confirm the existence of a disability, without producing instructionally-relevant information and recommendations.

In order to address this pervasive problem, Congress in the IDEA Amendments of 1997 made more explicit schools' obligations to align evaluations with students' learning needs. The statute specifies that in conducting evaluations, schools must use "a variety of assessment tools and strategies" to gather relevant information for "determining whether the child is a child with a disability and the content of the child's individualized educational program, including information related to enabling the child to be involved in and progress in the general curriculum. . . ." 20 U.S.C. §1414(b)(2). Schools must employ

"assessment tools and strategies that provide relevant information that assists persons in determining the educational needs of the child. . ." 20 U.S.C. §1414(b)(3)(D). Reevaluations must focus not only on whether the child continues to have a disability, but also on whether current services need to be modified in order to enable the child to attain IEP goals and learn in the general curriculum. 20 U.S.C. §1414(c)(1)(B). Evaluations or reevaluations that do not meet all of these requirements should be challenged as legally insufficient.

I. Understanding diagnosis and educational testing

To understand educational testing, counsel first must read the regulations that define the various educational disabilities; and counsel must become familiar with the elements (in the regulations) of each relevant disability. A brief description of all of the tests used by a local school system should be available from that school system. Ensuring that evaluators and school personnel diagnose the actual nature of the child's disabling condition and its educational and instructional implications is critical to developing an appropriate educational program. In the case of children who are involved in the delinquency system, the most common forms of disability are: serious emotional disturbance (SED); specific learning disability (LD); and mental retardation (MR). A child may also have a combination of disabilities, such as serious emotional disturbance and a learning disability, justifying a dual diagnosis or a multiply-handicapped diagnosis.

A. Serious Emotional Disturbance (SED)

1. Diagnostic criteria for SED

The term "serious emotional disturbance" (SED) means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be

explained by intellectual, sensory, or health factors;³

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. §300.7(a)(9)(I) (1997) (emphasis added). The term does include schizophrenic children, but the term does not include “socially maladjusted” children (unless the child is also seriously emotionally disturbed). 34 C.F.R. § 300.7(a)(9)(ii). Note that the diagnosis requires that the emotional difficulties persist over time. A single act, however offensive it may be, is not by itself a justification for an SED diagnosis.

School system personnel often designate children with disabilities who are involved in the juvenile justice system as SED, regardless of whether the child’s emotional issues are the sole, or even primary, source of the child’s learning difficulties.⁴

Generally, the SED diagnosis is based on one of the mental disorders described in the Diagnostic and Statistical Manual of Mental Disorders (the DSM-IV).⁵

³The State of New York requires that a child receive a physical examination as a pre-condition of an SED diagnosis in order to rule out any potential physical causes of emotional problems.

⁴Counsel likely will encounter the inverse problem, as well. School and delinquency personnel will resist applying the SED label to a child who is actually emotionally disturbed precisely because the child has committed an offense.

⁵American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, (4th ed. 1994).

Familiarity with the specific criteria for diagnosis is essential to understanding whether an SED diagnosis is warranted. Common bases for an SED coding among children in the juvenile justice system are “disruptive behavior disorders” such as a “conduct disorder” or “oppositional defiant disorder.” Like the designation of SED itself, each of these disorders requires that the negative behaviors must persist over time.

2. Educational testing for SED

In order to diagnose a child as seriously emotionally disturbed, school system personnel will administer “projective” tests designed to assess characteristics of the student’s personality. Projective tests generally involve presenting the student with a relatively unstructured task, permitting an infinite variety of answers. These tests are designed to assess the test taker’s entire personality, rather than individual traits, and are touted as effective instruments for revealing unconscious or hidden aspects of personality.⁶

Attorneys should be cautious in reviewing projective testing results. Data regarding the validity of projective testing are inconclusive.

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Attorneys, generally speaking, should not allow school system personnel to adopt projective testing done by evaluators from other agencies connected to the child’s delinquency case. The testing generated by mental health professionals associated in preparation for delinquency proceedings is generally designed to assess danger-

⁶Anastasi, *supra* note 2.

ousness,⁷ competency,⁸ or some other issue peculiar to the delinquency process. This kind of testing is not only irrelevant to whether the child has an emotional condition that impairs the child's ability to learn, it is often highly prejudicial. People easily misconstrue the results of psychological testing done for delinquency system purposes. For example, if the delinquency system finds that the child is competent to stand trial, some observers might understand that the child is not seriously emotionally disturbed. Delinquency system evaluators rarely understand, on the other hand, the legal and functional definitions of disabilities relevant to eligibility under the IDEA. A person performing psychological evaluations for the delinquency system, for example, may conclude, based on no relevant criteria, that a child with a conduct disorder is – by virtue of that diagnosis – not eligible for special education services.⁹

Projective testing techniques include inkblot, thematic apperception tests, verbal techniques, and expressive techniques.¹⁰ The inkblot technique, usually the Rorschach Inkblot Test, involves presenting the test taker with ten bilaterally symmetrical inkblots and asking the

⁷“Dangerousness” suggests an inquiry into whether the child is a danger to self or to the community.

⁸“Competency” is an inquiry into whether the child can understand the charges and participate in the defense.

⁹See generally, Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools*, Ohio University Press 1991, pp. 229-39; Dr. Miller demonstrates that, rather than diagnosing children based upon their actual needs, experts who provide evaluations in the delinquency system generally speaking fashion their findings and recommendations based upon the limited options – usually placement for presumptively “dangerous” youth in incarceration facilities – that are available in the delinquency system.

¹⁰Anastasi, *supra* note 2 at 594-624.

test taker what each blot represents.¹¹

Another frequently used testing technique is the Thematic Apperception Test (TAT) or one of its variants, the Children's Apperception Test (CAT) or the Roberts Apperception Test for Children. In these tests, the evaluator presents to the test taker a series of cards with different pictures, and the evaluator asks the test taker to tell a story to fit the picture.¹² Verbal techniques include word association and sentence completion. A commonly used test is the Rotter Incomplete Sentence Test in which the test taker is asked to complete forty sentence stems to express their feelings.¹³ Expressive techniques, such as the House-Tree-Person and Human Figure Drawing tests, involve measuring personality through an individual's drawings of figures directed by the test.¹⁴

B. Specific Learning Disabled (LD)

1. Diagnostic criteria for LD

The term “ ‘[s]pecific learning disability’ means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations.” 34 C.F.R. §300.7(a)(10) (1997). The term does not apply to children whose learning problems are primarily the result of another disability, such as mental retardation, nor does it apply to children whose learning problems are primarily the result of “environmental, cultural, or economic disadvantage.” 34 C.F.R. §300.7(a) (10) (1997).

In addition, in order for a school to classify a student as “learning disabled,” the school must

¹¹Anastasi, *supra* note 2 at 596.

¹²Anastasi, *supra* note 2 at 602.

¹³Anastasi, *supra* note 2 at 608.

¹⁴Anastasi, *supra* note 2 at 610.

find that the child is not achieving commensurate with his age and ability “when provided with learning experiences appropriate for the child’s age and ability levels” and that there is a “severe discrepancy between achievement and intellectual ability” in one or more of seven basic areas related to oral and written expression, aural and reading comprehension, and reading and math skills. 34 C.F.R. §300.541(a) (1997)¹⁵

The term “severe discrepancy” is not defined by federal regulation. Local regulations and case law, however, may provide guidance for determining how significant a discrepancy must be in order to qualify as “severe.” See *Hiller v. Board of Educ.*, 743 F. Supp. 958 (N.D.N.Y. 1990) (student’s achievement was not severely discrepant from his ability where IQ tests revealed student had average to above average intelligence, and achievement tests revealed student was functioning at or above grade level).¹⁶

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2. Educational Testing for LD

Educational testing for learning disabilities in-

volves measurement of both intelligence and achievement. A child of average intelligence may be expected to function on grade level in academic work. A child who is functioning significantly below grade level, despite average intelligence, may be learning disabled.

To measure intelligence for older children, evaluators generally use the Wechsler Intelligence Scale for Children - III (WISC-III). This test measures intelligence on performance and verbal scales, and those two scales together comprise the full-scale IQ. Both the performance and the verbal scales include subtests. The subtests for verbal performance are information, similarities, arithmetic, vocabulary, comprehension, and digit span. The subtests for the performance scale include picture completion, picture arrangement, block design, object assembly, coding, and mazes.¹⁷ A child whose scores reflect a significant difference between verbal and performance IQ scores, or between subtests scores, may have a learning disability.¹⁸

Although intelligence testing is generally accepted as reliable, advocates should recognize that these tests have been criticized as racially biased for, in particular, underestimating the intelligence of minority test takers.¹⁹ Moreover, counsel for a special education client should be aware that a child may score poorly on intelligence testing for other reasons. For example, a child may be affected by drug use at the time of testing. A child may be inattentive

¹⁵The DSM-IV now recognizes four separate forms of learning disorders: reading disorder, math disorder, disorder of written expression, and learning disorder not otherwise specified.

¹⁶The DSM-IV provides that “A variety of statistical approaches can be used to establish that a discrepancy is significant. Substantially below is usually defined as a discrepancy of more than two standard deviations between achievement and IQ. See DSM-IV at 46.

¹⁷See Kaufmann, *Intelligent Testing with the WISC III*, (Wiley and Sons, N.Y.) (1994) for an excellent description of the appropriate diagnostic uses of the WISC III.

¹⁸Anastasi, *supra* note 2 at 482 (fifteen or more point difference is “clinically suspect”); *but see*, Sattler, *supra* note 2 (discrepancy in scores is not, in itself, sufficient to support a diagnosis of learning disability).

¹⁹As notes below, the regulations prohibit racially- and culturally-discriminatory tests. 34 C.F.R. §300.530(b).

and unfocused at the time of testing based upon emotional issues (e.g., grief, post-traumatic stress, distress over conditions of incarceration). The person administering the testing to a child should be aware of emotional issues and other factors that may distort the child's ability to perform adequately on the test;²⁰ counsel can not assume, however, that the test administrator has exercised that kind of oversight, and, therefore, counsel should investigate the circumstances surrounding the testing and investigate also the child's frame of mind at the time of the testing. Counsel also should check for consistency of intelligence test results for a particular child over time. Consistent scores over time do not establish necessarily that the testing has produced accurate results. Inconsistent results, on the other hand, do suggest strongly that some or all of the testing has produced invalid results.²¹

In addition to intelligence testing, achievement testing is also required to diagnose a learning disability. Achievement tests measure the grade level at which the child is functioning in a variety of basic academic areas, such as reading, writing, spelling, and math. Commonly-used achievement tests include the Wide Range Achievement Test (WRAT), the Kaufman Test of Educational Achievement (K-TEA) and the Woodcock Johnson Psychoeducational Battery. The WRAT is a quick and easily-administered test. It measures achievement in reading, spelling and math, but it does not test reading comprehension or relatively complicated math skills.²² The K-TEA is an untimed test designed to measure reading decoding and comprehension, math application and computation, and spelling. Research suggests that the K-TEA pro-

vides reliable and valid scores.²³ One of the most comprehensive achievement tests is the Woodcock-Johnson Psycho-Educational Battery which measures twenty-seven areas of cognitive ability, achievement and interest.²⁴ Some school administrators limit their use of this test to the subtests measuring achievement, excluding the subtests measuring ability and interest.

C. Mental Retardation (MR) 1 Diagnostic criteria for MR

The term “ ‘[m]ental retardation’ means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. . .” 34 C.F.R. §300.7(a)(5) (1997). By definition, to be mentally retarded, a student must have both significantly subaverage intelligence and deficits in adaptive behavior. A low IQ score alone does not justify a diagnosis of mental retardation. The DSM-IV subdivides this category into four separate diagnoses: mild mental retardation (IQ of 50/55 - 70); moderate mental retardation (IQ of 35/40 - 50/55); severe mental retardation (IQ of 20/25 - 35/40); and profound mental retardation (IQ below 20/25).²⁵ The vast majority of individuals with mental retardation, approximately eighty-five percent, function in the mild range of retardation and, in practically all cases, can learn to live in the community independently.²⁶

2. Educational testing for MR

Consistent with the two-pronged definition for mental retardation, testing for mental retardation requires measuring both intelligence and adap-

²⁰See 34 C.F.R. §300.532(a)(3).

²¹Lower results on intelligence testing following significant head trauma or other similar, intervening occurrence could be reflecting an accurate picture of intellectual functioning.

²²Sattler, *supra* note 2 at 332.

²³Sattler, *supra* note 2 at 334.

²⁴Sattler, *supra* note 2 at 336.

²⁵Commonly, educators and other refer to people with IQs between 70 and 85 as having “borderline intelligence”, while people with IQs between 85 and 99 are of “low-average intelligence.”

²⁶DSM-IV at 41.

tive functioning. As defined by the U.S. Department of Education, adaptive behavior is “the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.” 34 C.F.R. part 104, App. A. para. 25 (emphasis added). Thus, the assessment of adaptive behavior includes “(a) the degree to which individuals are able to function and maintain themselves independently and (b) the degree to which they meet satisfactorily the culturally imposed demands of personal and social responsibility.”²⁷

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Some people score in the MR range on standardized intelligence tests (perhaps due to racial biases in the intelligence test), but are capable of independently caring for themselves and otherwise conducting themselves appropriately.
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In other words, to measure adaptive behavior, one elicits information about how well the individual functions in society, regardless of IQ. Some people score in the MR range on standardized intelligence tests (perhaps due to racial biases in the intelligence test), but are capable of independently caring for themselves and otherwise conducting themselves appropriately. Such a person would not meet the criteria for mental retardation.

A commonly-used test to measure adaptive behavior for diagnosing mental retardation is the Vineland Scales of Adaptive Behavior (Vineland). In the Vineland, the test giver asks a respondent familiar with the child questions concerning the following five areas of adaptive functioning: communication, daily living skills, socialization, motor skills, and maladaptive be-

havior.²⁸ Each area of functioning is assessed based on comparison with standards of behavior appropriate for the child’s age range. Generally, a parent or guardian is the person who possesses the most information about the child and is, therefore, the preferred respondent for the Vineland. A child’s teacher can be the respondent in an appropriate case; a classroom edition of the Vineland is available for that purpose.

Advocates should keep in mind the fact that adaptive behavior refers to behavior expected in light of a child’s particular cultural group. Standard instruments for assessing adaptive behavior may be culturally inappropriate for some children, and thus may lead to their being labeled as having mental retardation when in fact they do not.

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School systems generally have a standard battery of tests used in all special education assessments, such as a combination of intelligence, aptitude, and language tests.
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D. Other tests

The following tests are commonly administered as part of a comprehensive special education evaluation;²⁹ visual motor integration testing; speech and language testing; a physical (medical) examination; hearing and vision screening; occupational and physical therapy; and vocational testing and assessments. Many

²⁸Sattler, *supra* note 2 at 384.

²⁹As noted above, each child is entitled to a “full and individual evaluation”. 34 C.F.R. §300.531 (1997); *see also* 20 U.S.C. §1414(b)(3)(C) (requirement to “assess [] in all areas related to the suspected disability. . .”); 34 C.F.R. §300.532(f) (1997)(same).

²⁷Sattler, *supra* note 2 at 376.

disabilities go undetected because school personnel do not provide a neurological evaluation. In appropriate cases, counsel should request neurological and psycho-neurological evaluations.

E. Other reading

It is beyond the scope of this manual to exhaustively describe the intricacies of special education evaluations and interpretation. For further information on evaluations, counsel should consult any of the standard resources on assessment of children. Some well recognized professional resources are: Anastasi, *Psychological Testing*, (Macmillan Pub., New York) (6th Ed. 1988); Sattler, *Assessment of Children*, (Jerome Sattler Pub., Cal.) (3rd Ed. 1988); and Salvia/Ysseldyke, *Assessment*, (Houghton Mifflin Co., Boston) (5th Ed. 1991).

The professional texts tend to be fairly dense, but valuable and informative reading. Counsel may also wish to consult with a text which is oriented more towards the non-professional such as David Woodrich's easily readable book, *Children's Psychological Testing*, (Brooks Publishing, Baltimore) (3rd Ed. 1997).

In addition to the psychological testing, counsel may wish to consult texts which deal with various types of non-psychological testing. Books for non-professionals, such as Patricia hamaguchi's *Childhood Speech, Language and Listening Problems*, (Wiley and Sons, New York) (1995), regarding speech issues, or Carol Kranowitz's *The Out of Sync Child*, (Skylight Press, New York) (1998), can provide a basic understanding of some commonly used non-psychological tests as well as further readings.

II. Procedures related to testing

The 1997 amendments to the IDEA changed significantly the way in which evaluations (and reevaluations) must be designed and conducted. The evaluation/reevaluation process now begins with a review of existing evaluation data con-

cerning the child, including information provided by the parents, current classroom-based assessments and observations, and teacher and other service provider observations. 20 U.S.C. § 1414(c)(1)(A). This review is performed by the child's IEP team (which, by definition, includes the parent) and other appropriate qualified professionals. *Id.* Based upon its review, this group then identifies the additional data that are needed to determine whether the child has (or continues to have) a particular disability; the child's present levels of educational performance; whether the child needs (or continues to need) special education and related services; and whether current services need to be changed in order to enable the child to meet IEP goals and learn in the general curriculum. 20 U.S.C. § 1414(c)(1)(B). The school system must then arrange for the tests and other evaluation methods necessary to obtain the required information. 20 U.S.C. §1414(c)(2).

In addition to understanding the nature of the disability, the substantive character of the educational testing, and the evaluation planning process, an advocate must be familiar with the procedural protections relating to the evaluation process. The IDEA provides that all testing and evaluation materials must not be racially or culturally discriminatory. 20 U.S.C. §1414(b)(3)(A) (i). Evaluations must be validated for the specific purpose for which they are being used, 20 U.S.C. §1414(b)(3)(B)(i), and must be conducted in the child's native language. 20 U.S.C. § 1414 (b)(3)(A)(ii). The testing must be administered by a person trained to give the test and in accordance with relevant instructions. 20 U.S.C. §1414(b)(3)(B)(ii), (iii).³⁰ Tests must be tailored to assess specific areas of educational need. 34 C.F.R. §300.352(b) (1997). Tests must be administered in a way that accurately reflects the child's aptitude. 34 C.F.R. §300.532(c)

³⁰The requirements of 20 U.S.C. §1414(b)(3)(A) and (B) have been part of the IDEA regulations for many years, see C.F.R. §300.532 (1997), and were incorporated into the statute of 1997.

(1997). No single test score can be the sole criterion for determining whether a child has a disability or determining an appropriate education program. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.532(d) (1997).³¹ The Rehabilitation Act regulations contain some, but not all of these requirements: tests and other evaluation materials must have been validated for the specific purpose for which they are being used, must be administered by trained persons in conformity with the instructions of the producer, must assess specific areas of educational need (rather than simple producing a single general intelligence quotient), and must accurately reflect the child's aptitude. 34 C.F.R. §104.34(b).

Allegations that testing materials are discriminatory has resulted in a profusion of litigation. In the Ninth Circuit, for example, litigation challenging as racially discriminatory the use of IQ tests that resulted in a disproportionate identification of black children has spanned over twenty years. *See Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972) (granting preliminary injunction prohibiting use of IQ tests to classify black students as educable mentally retarded (EMR)), *affirmed*, *Larry P. v. Riles*, 502 F.2d 963 (9th Cir. 1974); *Larry P. v. Riles*, 495 F. Supp. 296 (N.D. Cal. 1979) (holding that use of IQ tests for placement of black children in EMT classes violated, inter alia, the EHA, now the IDEA); *affirmed as modified* in *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

In the 1984 *Larry P.* Circuit Court decision, the Court held that IQ tests which had the effect of disproportionately labeling black students as EMR were invalid because (1) the tests were not validated for the purpose for which they were used and (2) the placement decision was based primarily on IQ testing, without other information. Most recently, the Ninth Circuit ruled that

³¹Advocates should be aware that additional procedural safeguards attach when a child is being evaluated for suspected specific learning disabilities. *See* 34 C.F.R. §§ 300.540 - 300.543.

the original injunction against the use of IQ tests to place black children in EMR classes would not be expanded to prevent the use of IQ tests in any special education assessments of black children. *Larry P. v. Riles*, 37 F.3d 485 (9th Cir. 1994).

In contrast, a District Court in Illinois concluded that the use of IQ testing for the purpose of placing black children in EMR classes was not unlawfully discriminatory and was not impermissible under the EHA (now the IDEA) and its educational and instructional implications. *Parents in Action on Special Educ. v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980). Noting that "the exact issue of racial bias" in the testing was addressed in the *Larry P.* litigation, the court held "the witnesses and the arguments that persuaded [the California court] have not persuaded me." *Id.* at 882. To the contrary, the judge in Illinois held that while a few items on standardized intelligence tests were culturally biased, "these few items do not render the tests unfair and would not significantly affect the score of an individual taking the test." *Id.* at 883. In addition, the court held that when IQ tests are used in conjunction with other criteria as required by statute, the resulting decisions were not discriminatory. *Id.* at 883.

Once tests and other evaluation materials have been administered, a team of qualified professionals and the child's parent consider the evaluation data in order to determine whether the child has a disability, and, if so, to decide the nature of the disabling condition. 20 U.S.C. § 1414(b)(4)(A).³² A copy of the evaluation report

³²The requirement that a team of "qualified professionals" and the child's parent review evaluation results and determine disability was added to the IDEA in 1997. The IDEA regulations promulgated prior to the 1997 amendments require a "multi-disciplinary team" that includes at least one teacher or other specialist with knowledge in the area of suspected disability. 34 C.F.R. §300.532(e). Proposed IDEA regulations implementing the law as amended in 1997, published at 62 Fed. Reg. 55025 *et*

and the documentation of the determination of whether or not the child is eligible for services under IDEA must be given to the parent. 20 U.S.C. §1414(b)(4)(B). In addition, the Rehabilitation Act regulations require that in interpreting evaluation results, the school must “draw upon information from a variety of sources” and must ensure that information from all sources is “documented and carefully considered.” 34 C.F.R. §104.35(c). Case law establishes that school personnel, rather than the parent, carry the burden of obtaining all of the necessary information. *See Smith v. Union School*, 15 F.3d 1519 (9th Cir. 1994) *cert. denied*, 513 U.S. 965 (1994) (failure of parents to provide school with parents’ expert’s report does not excuse school from duty to secure its own evaluation of student.) *See also, Holland v. D.C.*, 71 F.3d 417 (D.C. Cir. 1995).

Finally (as suggested in section I (D) above), the child must be assessed in all areas related to suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. §300.532 (f) (1997). School systems often have a standard battery of tests used in all special education assessments, such as a combination of intelligence, aptitude, and language tests. The IDEA provisions described above, however, make it clear that evaluation plans and strategies must be individually designed to assess and meet student needs. A standard battery of tests may not cover every area of potential disability and educational need. For example, if a child is exhibiting significant emotional issues, a test a battery that does not include projective testing will not provide a complete assessment of the child’s needs. *See Babb v. Knox County Sch. Sys.*, 965 F.2d 104 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 380 (1992) (holding that school failed to assess student in all areas of suspected disability when school psychologist failed to examine student’s

complete academic, psychological, and behavioral history, and failed to consult student’s treating psychologist and parents before making recommendation). In addition, the 1997 amendments to IDEA explicitly require IEPs to address through positive strategies and educational interventions the behavioral needs of students whose behavior impedes learning; the language needs of students who are limited English proficient; the communication needs of children with hearing impairments and other disabilities that effect their ability to communicate; and the child’s needs for assistive technology devices and services. 20 U.S.C. § 1414(d)(3). Doing so requires evaluations beyond a standard test battery. *See also* 20 U.S.C. § 1414(k)(1)(B) (requiring functional behavioral assessments for students suspended from school).

seq., would delete this requirement and incorporate instead the new statutory language.