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No. 92-16726

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMOND CRAWFORD, et al.,

Plaintiffs- Appellees,

v.

BILL HONIG, et al.,

Defendants-Appellants;

LARRY P., by his Guardian ad Litem,
Lucille P., et al.,

Defendants-Appellants,

v.

WILSON RILES, et al.,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT OF JURISDICTION

The district court had continuing jurisdiction over Larry P. v. Riles, a civil rights action, under 28 U.S.C. 1331 and 1343. The Crawford parties, as members of the Larry P. class, made a motion under Rule 60, Fed. R. Civ. P., and it was granted, thereby finally disposing of their claim. This Court has jurisdiction of the appeal from that final judgment under 28 U.S.C. 1291. As for the Larry P. appellants, the district court's

action constituted the dissolution of an injunction, subject to immediate appeal under 28 U.S.C. 1292(a)(1).

INTEREST OF THE UNITED STATES

This case involves the uses and abuses of IQ testing for purposes of special education of black children. The United States has substantial interest in these issues. The United States has an interest in assuring that funds distributed under the Education For All Handicapped Children Act of 1975, 20 U.S.C. 1400, et seq. (now renamed the Individuals With Disabilities Education Act) are administered in a manner consistent with the terms of the Act. The United States is also charged with the responsibility of coordinating enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See Executive Order 12250 (Nov. 2, 1980). Finally, the United States has enforcement responsibilities under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131, et seq. The United States participated as amicus curiae in the original Larry P. litigation, both in the district court and in this Court,[1/] and has requested the district court for permission to resume its participation in the next phase of the case.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court correctly held that its 1986 injunction totally prohibiting the state's schools from admin-

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1/ Larry P. v. Riles, 495 F. Supp. 926, 935 (N.D. Cal. 1979), aff'd in part and rev'd in part, 793 F.2d 969 (9th Cir. 1984), as amended on petition for rehearing (1986).

istering IQ tests to black children went beyond the findings and legal conclusions made in the Larry P. case.

2. Whether the district court correctly held that the Crawford plaintiffs, African-American children whose parents believed that they might be "learning disabled," were denied due process when the parties to Larry P. v. Riles agreed to an order, in 1986, totally prohibiting the public schools from administering IQ tests to black children.

3. Whether the case is justiciable.

STANDARD OF REVIEW

This matter was decided on summary judgment and is subject to de novo review by this Court.

STATEMENT OF THE CASE

1. The original suit

As of 1969, the State of California recognized four state-reimbursable categories of special education. Two of the categories assumed potential for average or above-average achievement in school, but that the children in question were either "culturally disadvantaged" or "educationally handicapped." The latter term encompassed emotional and neurological disturbances, and specific learning disabilities such as dyslexia. The other two categories assumed that the children could never master the normal school curriculum because they were either profoundly retarded (Trainable Mentally Retarded (TMR)) or mildly retarded (Educable Mentally Retarded (EMR)). EMR classes were geared to basic living skills, with reading and other academic disciplines

deemphasized (Larry P. v. Riles, 495 F. Supp. 926, 937-939, 941-942 (N.D. Cal. 1979). As of 1970, state law prohibited placement in EMR of any child whose full-scale IQ score was 70 or above (id. at 948).2/ On the other hand, state law also mandated that placement decisions be made on the basis of thorough, professional assessment of a child's developmental history and adaptive behavior as well as IQ score (ibid.).

In November 1971, suit was filed on behalf of six black elementary school children, representing "all black San Francisco school children who have been classified as mentally retarded on the bases of I.Q. test results" (Larry P. v. Riles, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972). The class defined, in the end, was a statewide class of "black children in California who have been

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2/ The most popular IQ tests, the Stanford-Binet and the Wechsler tests (in this case, usually the Wechsler Intelligence Scale for Children-revised, or WISC-R), are comprised of a large number of subtests which measure different facets of cognitive functioning such as picture assembly, memory, sequencing, vocabulary, general information, etc. Scores may be obtained for each subtest, for the verbal alone, for the performance side alone, or for the entire test (see 495 F. Supp. at 958). The raw score on the full test can be converted into a score based on a normal curve defining the norm as 100 and one standard deviation from the norm as 15. This is the "full-scale score" that is popularly known as IQ. Thus, an IQ of 70 represents two standard deviations below the norm (495 F. Supp. at 952-954).

The history of IQ testing, which was proffered at trial to show it was racially biased, was generally the history of the Binet test as developed at Stanford University by Professor Lewis Terman (id. at 935). The data cited by the district court showing blacks to have a lower norm as a group were from the Stanford-Binet and the WISC-R (id. at 954 & n.59). Although the evidence presented at trial was generally about these two tests, all the tests considered by the SDE to test "intelligence" ended up on the list of tests prohibited for EMR placement (see id. at 931 n.3).

or in the future will be wrongly placed and maintained in special classes for the 'educable mentally retarded' ('E.M.R.')" (495 F. Supp. at 931).

The Larry P. plaintiffs began with two undisputed premises: (1) blacks as a group score one standard deviation below whites on standardized IQ tests (id. at 934, 954); and (2) black children comprised a far greater proportion of EMR students than their proportion in the general school population (id. at 942-945). The plaintiffs sought to prove that, by defining EMR in terms of IQ test results, the State had knowingly and intentionally designed a system that would relegate a disproportionate number of black children to "dead end" classes, in violation of the Fourteenth Amendment (id. at 942-951). In addition, they alleged that the practices in question violated the two federal statutes, Section 504 of the Rehabilitation Act and the Education For All Handicapped Children Act, that require tests to be validated for the purposes for which they are used. Using unvalidated tests, they said, causes or risks causing children to be perceived as handicapped (i.e., retarded) when they are not. Similarly, they argued, such tests violate Title VI and/or its implementing regulations, when, in addition to being unvalidated, they have a racially disproportionate impact. See, generally, 495 F. Supp. at 960-961).

Trial was held from October 11, 1977, to March 15, 1978. A substantial portion of the trial was devoted to the debate regarding the built-in bias in IQ testing (495 F. Supp. at 953-

960). The district court found that the IQ tests in question were in fact "racially and culturally biased" in the sense that they have a disparate impact, i.e., that blacks as a group have a lower mean full-scale score than do whites as a group, and no one has been able to give an adequate explanation why this should be so (id. at 955-957). Nor had anyone adequately shown that, for blacks, the full-scale IQ scores below 70 (but above the TMR level)[3/] actually represent true, irremediable retardation (id. at 959-960). Accordingly, IQ scores constituted an "unvalidated" basis for assigning black children to EMR classes (id. at 968-973). The district court found, as well, that -- state law notwithstanding -- the school districts were placing black children in EMR classes in reliance entirely on IQ scores, rather than on multidimensional assessments (id. at 948-950).

The district court entered judgment for the Larry P. plaintiffs with respect to all their constitutional and statutory claims. The court enjoined the defendants "from utilizing, permitting the use of, or approving the use of any standardized intelligence tests, including those now approved pursuant to Cal. Admin. Code [section] 3401, for the identification of black E.M.R. children or their placement into E.M.R. classes, without securing prior approval by this court" (495 F. Supp. at 989).

3/ Neither plaintiffs nor anyone else apparently disputes that IQ tests can detect, in both blacks and whites, true severe or profound retardation, the type that the State called "trainable mentally retarded" (TMR). Blacks are not overrepresented among TMR students. Nor did anyone question the accuracy of full-scale IQ scores below 70 as defining retardation in white children, though that remains an open question.

"E.M.R." was defined as the category then created by the California Code "or a substantially equivalent category," and the term "E.M.R. classes" was defined to include the existing EMR classes or any others to be created later to serve "substantially the same functions" (ibid.). Thus, the decree anticipated that there would be major changes in the near future in the special education program and the categories it created.

2. The appeal

In January 1984, this Court affirmed the district court's judgment on statutory grounds alone, not reaching the constitutional issue. Defendant Riles, the State Superintendent and sole appellant, sought rehearing, and the court issued an amended opinion upon the denial of rehearing on June 25, 1986. In the amended opinion, the court of appeals affirmed the district court's finding of statutory violations, but reversed the finding of intentional discrimination, in violation of the Fourteenth Amendment, by Wilson Riles (Larry P. v. Riles, 793 F.2d 969, 984 (9th Cir. 1984).

3. The second stage

By 1986, when the decision became final, California had -- or claimed to have -- abolished EMR classes. It is not entirely clear what was happening between 1979 and 1986, except that the State apparently permitted the school districts to administer IQ tests to black children. Answers to interrogatories served by the Larry P. plaintiffs revealed that the SDE had interpreted the Larry P. order, not to prohibit administration of IQ tests, but

to eliminate "'the placement and retention of children in isolated special day classes on the basis of only an IQ score'" (CR 159 at 11).[4/] Whether there still were such classes or not, the State instructed, when a black child scored in the "EMR range, other forms of assessment [should] be used to determine the child's placement" (ibid.). (In this context, placement denotes, simply, the formulation of the child's Individualized Educational Plan (IEP)). Where test results were above the EMR range, however, the directive presumably permitted psychologists to apply the same interpretive techniques with respect to black children as they would for white children.

The Larry P. plaintiffs believed that EMR classes had continued in all but name (Br. 3). In fact, they were prepared to argue that the State's school districts had simply made it more difficult to locate the children relegated to dead-end tracks. Thus, the only way to prevent IQ testing "for EMR" was to prevent IQ testing for all special education. Second, they did not believe that there was any way to prevent reliance on IQ scores other than to ban administration of the tests. Moreover, they believed the original injunction had prohibited administration of IQ tests to black children, at least as long as there was any risk that those children would end up identified as educable

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4/ "CR __" refers to the docket entries in the district court clerk's record for Crawford v. Honig, Civil Action 89-CV-14 (RFP), after it was transferred to the Northern District of California. The first entry includes the transfer order, the complaint, and other papers filed in the Central District. "Br. __" refers to page numbers in the appellants' opening brief.

mentally retarded and assigned to the equivalent of EMR classes. See generally Transcript, September 16, 1986, at 4-6. It followed that, from the Larry P. plaintiffs' point of view, the State was violating the original Larry P. injunction with its directive permitting IQ tests to be administered to black children. Accordingly, on threat of moving for contempt, the Larry P. plaintiffs induced the SDE to enter into a stipulated revision of the 1979 injunction.

Under the new injunction, entered September 25, 1986, and modified on November 19, 1986, all school districts in the State were ordered not to administer any "intelligence" test to any black child referred for special education assessment, even if the parents asked for it. If such testing was done privately or in another school system, the schools must send the protocols back and not place them in the child's file. See CR 159 at 5-6. This injunction was embodied in SDE directives dated December 3, 1986, and February 8, 1988 (Appendices A and B to Complaint, CR 1).

Meanwhile, in May 1987, a black school child in Fontana, California, was referred for testing as a possible candidate for special education. In the notification to his mother (Mrs. Amaya), there was a note saying that "[b]ecause Demond [Crawford] is Black, we will be unable to give him an intelligence test per Peckham decision" (emphasis in the original) (Exhibit A to Plaintiffs' Supplemental Memorandum Regarding the Question of Mootness, CR 59). This and several instances like it provoked

the filing of the new action, originally in the Central District of California.

4. The new suit: Crawford, et al. v. Honig

On May 10, 1988, suit was filed in the Central District of California on behalf of eight black school children, mostly from San Bernardino and San Diego Counties, against the State Superintendent and the California State Board of Education (CV 88-02668 AWT (Kx) (C.D. Cal.), incorporated in CR 1; see also CR 159 at 5.) They alleged generally that each is or may be learning disabled, neurologically impaired, or behaviorally or emotionally disturbed. All had been referred for testing, but were notified that they would not be permitted to take an intelligence test (CR 1 (complaint) at 3-6, 9).

The complaint recognized that the prohibition in the December 3, 1986, directive was a product of the Larry P. case, but the new plaintiffs apparently did not know about the September 1986 order. They alleged that the Superintendent and Board had issued directives that "exceed[ed] the scope of the federal courts' decision in Larry P. v. Riles" (CR 1 (complaint, par. 32) at 10). Those directives, they alleged, denied the Crawford plaintiffs due process by enlarging the prohibition on IQ testing, in a manner that affected their interests, without a hearing (id. at 10-11). In addition, they claimed, the directives denied them (or their children) equal protection and rights under Title VI by denying them access to the same tests available to white, Hispanic, Oriental, and other children (CR 1

(complaint) at 7, 10-14). The complaint also alleged that the prohibition violated 20 U.S.C. 1415(e)(4)(A) (of the Education For All Handicapped Children Act) because it was "racially and culturally discriminatory" to refuse to let the plaintiffs take the same tests as were available to all non-black children (CR 1 (complaint) at 14-16).

The Crawford plaintiffs asked the court to enjoin the December 3, 1986 directive (CR 1 (complaint) at 20), to order the defendants to administer appropriate intelligence tests to the plaintiff children (id. at 21-23), and to enjoin implementation of the directive to purge black children's records of IQ scores (ibid.).

The suit was transferred to the Northern District of California on January 4, 1989, and assigned to Judge Peckham as a "related case" (CR 1 and 3). In March 1989, the Crawford plaintiffs moved to have the case consolidated with Larry P. (CR 8, 9, and 13). On June 14, 1990, the district court denied the State defendants' motion to dismiss (CR 63 (teleconference); CR 159 at 5-6). In July 1991, the district court granted the motion to consolidate the two cases and granted the Crawford plaintiffs' motion for a preliminary injunction (CR 126; CR 159 at 7). On August 31, 1992, the district court entered summary judgment for the Crawford plaintiffs and vacated the 1986 modification to the Larry P. injunction.5/

5/ The court "directed" the SDE to rescind the directive that, in December 1986, implemented the 1986 injunction (docket no. 159 (continued...)

5. The district court's 1992 opinion

First, the court looked at its own 1979 findings of fact, and held that the "1986 modification expanded the 1979 order beyond the findings of the court" (CR 159 at 7). The court reasoned that the original case concerned the use of IQ test scores in the context of EMR placement, and did not purport to limit access to testing for learning disabilities (id. at 14-15). Indeed, the court expressed the view that the SDE directives that went out between 1979 and 1986 -- indicating that it was legitimate to administer IQ tests, but not to rely on the full-scale score to place blacks in EMR -- was probably a fair interpretation of the 1979 order, not contempt (id. at 19). "Despite the Defendants' attempts to characterize the court's 1979 order as a referendum on the discriminatory nature of IQ testing," the court noted (id. at 23), "this court's review of the decision reveals that the decision was largely concerned with the harm to African-American children resulting from improper placement in dead-end educational programs."

Second, the district court reviewed the 1986 modification "hearing." The court noted that the parties to that hearing

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5/ (...continued)
at 22). The actual injunction, however, does not contain that language. As discussed below, we assume this permits the State to reinstitute its ban on IQ testing, either across the board or for blacks only. The latter would, of course, open the State up to a renewed equal protection challenge. Meanwhile, the court declared the Crawford litigation at an end, and indicated that the Crawford parties would have to seek to intervene in the district court if they want to participate in the next round of hearings (id. at 24-25).

"provided no evidence to support the conclusion that the substantial equivalent of EMR meant all special educational programs" (CR 159 at 20) (emphasis in the original). "Nor was an attempt made to identify current 'dead end' programs substantially equivalent to the old EMR program" (ibid.). This determination would have to be made at some later date (id. at 22-23).

Third, the court found that the Crawford plaintiffs were in fact part of the original Larry P. class. If tested, any child might score below 70 and might be diagnosed as educable mentally retarded (CR 159 at 10). The interests of children who might score above the EMR range were not prejudiced by the 1979 injunction or by SDE's interpretation of it (ibid.); they could take the test, but not be placed in EMR on the basis of the IQ score alone (id. at 10-12). The order completely banning administration of IQ tests to black children was merely an "enforcement" or "clarification" of the 1979 order as applied to children who, if tested, would score below 70; however, it also impinged on the interests of those who would score above 70, and whose parents thought the test might be useful for diagnosis of learning disabilities (id. at 12). No one, however, represented the interest of potentially learning disabled black children (i.e., their interest in being tested) at the time of the 1986 hearing and injunction. On the contrary, the order was entered by stipulation, "crafted through private negotiation * * * and not through extensive public discussion and debate" (id. at 21). This quasi-settlement incurred the "same risks for compromise to

class interests as are present in any class settlement or voluntary dismissal under Rule 23(e) of the Federal Rules of Civil Procedure," the court pointed out (ibid.).

As members of the Larry P. class, the court held, the Crawford plaintiffs could move under Rule 60(b)(4), Fed. R. Civ. P., to be relieved of the 1986 decree (CR 159 at 16-17). Once having made that motion, the court ruled, it was up to the court to decide whether they were barred by res judicata. The court concluded that, because their particular subclass interests had not been adequately represented in 1986, due process prevented their being bound by the 1986 judgment as members of the Larry P. class (id. at 12-17), and they were free to make a collateral equal protection attack on the 1986 injunction. But due process required, in any event, that the 1986 injunction be vacated (id. at 21). Thus, the court declined to reach the equal protection issue raised by the Crawford plaintiffs (id. at 22, 26). The court (1) granted summary judgment for the Crawford plaintiffs on due process grounds; and (2) ordered the 1986 injunction rescinded (id. at 26). In addition, the court noted that "[b]ecause the EMR program is no longer operative, * * * further action is required to give meaning to the 1979 ruling in the current educational system" (id. at 23). The court also offered the Larry P. plaintiffs an opportunity to show, at that hearing, that IQ tests prejudiced the interests of all black children, not

just those whose full-scale IQ scores turned out to be below 70 (id. at 22-24).[6/]

SUMMARY OF ARGUMENT

The 1986 injunction entered in Larry P. had far-ranging implications. Under that injunction, the school systems in California were prohibited from administering all tests denominated "intelligence" tests to African-American children. Thus, if a teacher referred a black child with learning problems for evaluation, the psychologists were absolutely barred from administering such tests to that child.

Neither the findings nor the injunction in the original Larry P. case justified the entry of the 1986 injunction without a thorough "fairness" hearing and opportunity for all subclasses to be heard. The district court in Larry P. did not adjudicate the usefulness to black children of IQ tests or subtests for all purposes. It found only that the full-scale IQ scores -- at least on certain tests -- when they are below 70, cannot be counted on to diagnose the sort of retardation that is compatible with EMR placement as it then existed.

Any injunction that exceeded the scope of that finding necessarily impinged on the interests of children whose IQs would turn out to be above 70. Indeed, the 1986 injunction potentially denied psychologists access to procedures that would be useful for identifying the difficulties suffered by learning disabled

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6/ The United States has already asked the district court for permission to resume its participation as amicus curiae in these further hearings.

black children. The district court did not, in all events, purport in 1992 to decide the merits of using the Stanford-Binet, Wechsler, or other "IQ" tests to identify learning disabilities. It decided only that the court's own 1986 order prohibiting their use violated the due process rights of the Crawford plaintiffs, for it impinged on their interests without their being heard.

By declaring the ban on all IQ testing to be beyond the scope of the Larry P. findings and injunction, the district court simply opened this area for further voluntary state action and, perhaps, for later litigation. The court has not vacated its 1979 injunction protecting African-American children from placement in EMR classes on the basis of IQ scores. On the contrary, the court has indicated it will hold further hearings to determine what constitutes the equivalent of EMR placement in the California educational system of today. Requiring the district court to reinstate the 1986 injunction, however, would close down the inquiry permanently. Accordingly, this Court should affirm.

ARGUMENT

I

THE 1986 INJUNCTION EXCEEDED THE FINDINGS IN LARRY P.

Appellants sought to justify the 1986 injunction by claiming that it merely implemented the findings in the original Larry P. case, and was necessitated by the State's disobedience to the 1979 injunction. The district court held to the contrary. In so doing, the district court merely construed its own 1979 opinion

and order. This required the resolution of no disputed facts and therefore could be done in the context of a summary judgment motion.

The district court's 1992 decision is faithful to its original findings and injunction. According to the district court, the central issue of Larry P. was always EMR classes -- their isolation from the rest of the school population (495 F. Supp. at 979), the startlingly disproportionate number of black children who ended up in these classes (id. at 942-945, 951-955, 979), and the stigma of being identified as retarded, especially in a society in which many people regarded black people as intellectually inferior (id. at 979).

The court correctly found that the EMR curriculum was justifiable only for children who have been properly diagnosed as "retarded" (495 F. Supp. at 937-942), and that EMR classes are so designed that they reduce the likelihood of a child's being able to move out and be exposed again to the normal curriculum (id. at 942, 970). The court's findings about the history of IQ testing and its racist-xenophobic overtones support the finding that the label "EMR" and placement in special day classes is stigmatizing. Thus, the use of isolated, dead-end EMR classes greatly exacerbated the consequences of a misdiagnosis of retardation.

Second, the district court correctly reaffirmed that its 1979 finding regarding the alleged bias of IQ tests was very limited. Indeed, in 1979, the district court warned that (495 F. Supp. at 989) "our decision * * * should not be construed as a

final judgment on the scientific validity of intelligence tests." The court found in 1979 that the tests had disparate results and, in the context of EMR placement, adverse impact. Given the disparate impact, the law requires that those responsible for educating children be sure the test is validated for the purpose for which it is used. The court held in 1979 that "the state has acted contrary to the law by requiring the use of tests that are racially and culturally discriminatory and have not been validated for labeling black E.M.R. children and placing them into special classes for the mentally retarded" (ibid.).7/ Further, the court found as fact that, although the schools claimed to rely on a multidimensional assessment for EMR placement, a study showed this not to be the case, and, in fact, an IQ score below the cutoff generally destined children for EMR classes (495 F. Supp. at 950).

So viewed, the findings in 1979 demanded only an injunction prohibiting reliance on IQ scores to identify children as educable retarded. In particular, the findings required prohibition

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7/ The type of validity generally claimed for IQ tests is criterion-related validity. This term refers only to statistical correlations between success on the test and success on the task to be performed, which in this case was the general school curriculum. But the district court noted that prediction is not the issue. Obviously, the children referred for testing have a relatively poor educational prognosis absent the right kind of intervention. That is why they were referred for special education in the first place. The issue is not "prediction" but, rather, the determination of what kind of intervention should be prescribed. The court decided that a test, even if a valid predictor of success or lack of it, could not be used as if it were construct valid, that is, as if it actually diagnosed "low intelligence." See 495 F. Supp. at 969.

of such reliance when the consequence was placement of black children in dead-end classes that were isolating and stigmatizing. Under this interpretation, the injunction did not preclude the continued use of IQ tests to rule out retardation (especially to rule out severe retardation), or to identify specific learning disabilities. This is the construction of the district court opinion that the United States urged in this Court in 1981. It is also a fair description of what this Court held. See, e.g., 793 F.2d at 979-980 (Rehabilitation Act and EHA), and at 981 (Title VI).

Admittedly, it was difficult to determine what constituted compliance with the 1979 injunction. The 1986 injunction, moreover, assuredly prevented reliance on IQ scores -- by prohibiting IQ testing entirely. To that extent, the 1986 injunction was consistent with the original findings. On the other hand, it eliminated use of certain tests where their usefulness is at least still open to debate.

Appellants are incorrect in suggesting that the debate was concluded in 1979. They mischaracterize the district court's 1979 opinion by asserting that the district court found IQ tests "cannot identify why a child is not learning nor assist in the development of an educational program for a child" (Br. 7). At the cited pages, the court actually said that an IQ score is simply a statistical description of how the child performed -- on that test -- relative to his or her age peers, and does not tell

us why that was the case (495 F. Supp. at 953, 973-974).[8] It said nothing about the way in which IQ tests may (or may not) identify specific learning disabilities. Contrary to the appellants' contention (Br. 7), the district court did not find assessments without IQ tests "better tools" than assessments that included such tests. What the court actually found was that using alternative means of assessment for EMR had worked "reasonably well" (495 F. Supp. at 973), that alternative tests "may be useful" (id. at 973-974), and that, when denied the use of IQ testing, many psychologists went to more trouble to do the multidimensional assessments they were supposed to do in the first place (ibid.). Moreover, the appellants ignore the district court's disclaimer of having made a judgment as to the scientific worth of IQ tests for all purposes (id. at 989) and its 1992 disclaimer of having considered the usefulness of IQ tests to identify learning disabilities (CR 159 at 15). Thus, while the 1986 injunction was consistent with the original findings, it went beyond it in à way that potentially prejudiced the interests of many black children.

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[8] For example, a child could have a low score because he or she had the flu, or was emotionally upset, or was exposed to a great deal of lead in early childhood; a low score, by hypothesis, tells us less than a high score.

II

THE DISTRICT COURT CORRECTLY HELD THAT THE 1986 INJUNCTION WAS ENTERED WITHOUT ADEQUATE REPRESENTATION OF THE INTERESTS OF THE CRAWFORD PLAINTIFFS

The Larry P. class was certified under Rule 23(b)(2), Fed. R. Civ. P. This form of class certification does not offer anyone the opportunity to "opt out." Actions prosecuted pursuant to this rule are therefore particularly vulnerable to being directed by a single plaintiff (or a single attorney) genuinely convinced of the justice of the cause he or she is pursuing. This is why it is crucial that the representation of all members of the class be adequate at every stage of the proceedings. Rule 23(a)(3) and (4), Fed. R. Civ. P.; Hansberry v. Lee, 311 U.S. 32, 40-43 (1940).

"Adequate representation as required by the Federal Rules of Civil Procedure Rule 23(a)(4) 'depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive'" (Brown v. Ticor Ins. Co., No. 91-15474 (9th Cir. Dec. 28, 1992) at 14813, quoting In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 855 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983). In the present case, there was surely a potential antagonism among members of the class which the representatives did not acknowledge and, indeed, continue to deny. It is crucial in such cases that no relief be entered by agreement or stipulation without the kind of hearing that allows for the active

presence of those class members who have interests that may conflict with those of the class representative (Rule 23(e), Fed. R. Civ. P.; Simer v. Rios, 661 F.2d 655, 664-665 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982)). No such hearing was held in this case. Thus, as the district court pointed out (CR 159 at 13), the fact that some plaintiffs will later be able to "'extricate themselves from class action judgments if subsequent courts find them to [have been] inadequately represented is integral to the constitutionality of the class action procedure' [citation omitted]."

It is clear that the Crawford plaintiffs are members of the Larry P. class, though the district court's ultimate definition of the Larry P. class was awkward. Pursuant to Rule 23(c)(3), the court described in the judgment those whom the court found to be members of the class (emphasis added): "black children in California who have been or in the future will be wrongly placed and maintained in special classes for the 'educable mentally retarded'" (495 F. Supp. at 931). Although the term "IQ tests" does not appear, we know from the later context that to be "wrongly placed" is to be placed simply on the basis of an IQ full-scale score.

The court's class description cannot be taken literally. A class of persons protected cannot be the people who "will be" wronged. One way to read the class definition is that it includes only those black children who have been or will in the future be tested and will receive a full-scale score of less than

70 on an IQ test. Such children, then, are protected by the Larry P. injunction from being placed in EMR classes (or identified as EMR for substantially equivalent purposes) on the basis, alone, of that score. If this is the correct description of the class, then the Crawford plaintiffs are not members of the class (or were not, when they were refused IQ tests). Indeed, in order to be a member of the protected class, one must be black, and take an IQ test, and score below 70. If these plaintiffs are not members of the class, there is no res judicata problem. The Larry P. judgment does not bind them and they were free to bring their equal protection case for being denied the opportunity to take tests that are available to white children.

It might have been simpler if the district court had decided to analyze the res judicata issue this way in 1992. But it was not the way that the district court chose, perhaps because the court did not wish, at this stage, to entertain the equal protection issue. In all events, it was legitimate for the district court to characterize the class it certified in Larry P. as "all black children in the school systems of California, including but not limited to all black children who have been given IQ tests." The 1979 injunction protected this class from being "wrongly identified and placed." The emphasis is not on test administration, but on identification and placement. If identification of a child as EMR, and his or her placement in an EMR class (or its substantial equivalent) is not based upon a score, then the child has not been "wrongly identified" or "wrongly placed."

The Crawford plaintiffs, as members of the Larry P. class, were protected by the 1979 injunction from wrongful placement in EMR classes in reliance on IQ scores. See Sam Fox Publishing Co. v. United States, 366 U.S. 683, 692-693 (1961) (plaintiffs were bound by prior class action to the extent, and only to the extent, that they were adequately represented there). Of course, they were also protected from such wrongful placement by the 1986 injunction. But the latter injunction also blocked their access to tests they believed would be useful to identification, if not diagnosis, of their specific learning problems.9/

In the present phase of the case, the district court found that no one had represented the interests of those members of the broad Larry P. class (all black children in the State's public schools) who believed IQ testing to be useful for some, if not all, purposes. The court could equally well have found in 1992 that the 1986 injunction, entered as it was by stipulation, was entered without adequate notice to the broader class. Whether reasoning from Rule 23(a)(3) and (4) or Rule 23(e), the district court was correct in finding entry of the 1986 injunction to have violated the due process rights of the Crawford plaintiffs.

Appellants (including the State, apparently), in supporting the 1986 injunction, continue to maintain that the State cannot be trusted not to make placements in reliance on IQ scores, if

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9/ When the district court held that the IQ tests were not "diagnostic," it meant only that they did not "diagnose" within the medical model -- and specifically, did not diagnose a physical condition known as retardation. See Br. 7.

psychologists and educators are allowed to obtain that information at all. Accordingly, even if the Larry P. injunction only protects children from improper EMR placements, they would prefer that all tests be suspended until the district court finishes adjudicating the question of what constitutes the "substantial equivalent" of EMR classes (see Br. 21). In short, they would like the 1986 injunction reinstated to serve in the nature of preliminary relief pending completion of the "substantial equivalency" hearing.

The Larry P. plaintiffs may be right that any use leads to reliance, and that the danger is great particularly if the current system of special education is no improvement on the previous one (see Br. 18). We do not read the district court's most recent decision to reject the appellants' view entirely. All the court has decided is that the subclass of people who believe their children might benefit from IQ testing were not given an opportunity to be heard when the court and the parties jumped to the conclusion that a total ban was the only way to prevent misuse of the tests. This denial of due process weighs heavily against the reinstitution of the 1986 injunction before, rather than after, the "substantial equivalence" issue is resolved.

Significantly, the district court, in 1992, made no finding that the WISC-R tests or their Stanford-Binet equivalents are in fact useful to the identification of specific learning disabilities. The district court has not written off the possibility

that the original plaintiffs may yet introduce new or additional evidence showing that IQ tests necessarily distort the identification of learning disabilities in black children, and that this has an "adverse" effect as serious as the effect of misplacement in EMR classes. When the district court takes up the question of the present status of EMR classes (the substantial equivalence issue), it will undoubtedly hear more about what effect IQ testing may have on black children.

Nor has the court ordered the resumption of IQ testing for anyone, black or white, pending further action by the court. See Br. 41-42. The court has simply declared that (1) the 1979 order did not forbid use of those tests for the purposes proposed by the Crawford plaintiffs; (2) the court would not now forbid it on the basis, alone, of its own findings in Larry P.; and (3) had the court been aware of who was affected and how they were affected, it would never have entered the 1986 order at all. The effect of lifting the 1986 injunction is temporarily to give the State the entire responsibility for deciding whether to administer (or refuse to administer) IQ tests to black children, and to risk being faced with an equal protection claim if they refuse to do so on the basis of race.

III

THE CASE IS JUSTICIABLE

Appellants devote large portions of their brief to arguing that the Crawford plaintiffs presented no justiciable issue, and that the district court held to the contrary without making the

necessary subordinate findings (Br. 23-38). One branch of this argument is that the Crawford plaintiffs were in fact given the forbidden IQ tests, and therefore have no redressable grievance (Br. 23-33). The second branch of this contention is that -- with or without IQ tests -- the Crawford plaintiffs have been assigned to the proper form of special education, and therefore they have no remediable grievance.

As amicus, we do not address these issues in detail. It would appear that there are four plaintiff children still in the case: Demond Crawford, Barbara Florence, James Florence, and Terence Pina (see dismissals at CR 75). Each of these children was tested for special education during the 1980s, but with one exception, they were not given the tests that were on the "forbidden" list. See Declaration of Devena Reed, CR 52, at 9, 11, 17, 22. The only one to receive a WISC-R was James Florence, and that was in April 1986, prior to the September 1986 injunction. James Florence, moreover, is still of school age (see attachment to CR 52 showing Florence to have been born in 1977) and presumably will need to be retested during his school career, especially since he is in a special day class (Br. 26). Moreover, it is clear that the district court would have certified the subclass had the court not been able to end the case on due process grounds immediately.[10/] Thus, he is one

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10/ The district court, when it denied subclass certification, certainly was not influenced by the small number of named plaintiffs. Numerosity has nothing to do with it (Br. 40-41). There is no rule that class representatives must be numerous -- only that they represent a class too numerous for ordinary joinder.

plaintiff who apparently had standing when he sued, and as to whom the case is not moot, which the appellants concede (Br. 26, 31).

The argument that no educational harm was shown misses the point. The plaintiffs' standing was based on a claim of having suffered a constitutional injury, i.e., being denied an IQ test solely because of an order that was entered without their being heard.[11/] A merits question remains to be decided: assuming black children cannot be placed in EMR on the basis of IQ scores, is it protective to deny them IQ testing, or is it a deprivation? This merits question has never been decided. Appellants, by stating what they believe to be the answer (Br. 27-31), are again taking as decided that which they thought should have been settled in Larry P. but which clearly was not.

11/ Because plaintiffs presented a constitutional question, they clearly did not have to exhaust administrative remedies associated with the Education For All Handicapped Children Act. In addition, the form their action took was a Rule 60(b) motion. If one is already a party to a suit and wishes to make a post-judgment motion, there are no administrative remedies to exhaust.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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