Regulation, Interpretation, Assessment and Open Access in California Community Colleges

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This working paper is made available to provide access to a historical accounting of the Matriculation Act MALDEF lawsuit. Comments can be sent directly to cwiseley@outlook.com

REGULATION, INTERPRETATION, AND OPEN ACCESS IN CALIFORNIA COMMUNITY COLLEGES

This is the tale of two perspectives: inclusion and exclusion of particular students in college level courses. Colleges have historically used off the shelf placement tests to place students in appropriate level English and math courses but by the early nineteen eighties, most of those tests were shown to have linguistic and cultural biases that severely reduced their predictive ability in placing students when English was not their first language. When California introduced policy that would help colleges appropriately place students in courses while maintaining the open access it had historically known, a controversy arose over whether the historical practice of placement based on a single assessment test score could continue when even the best test could not predict success with 100% accuracy. When students were inaccurately placed, they were being excluded from courses in which they could have succeeded. And, many times those low placements excluded the students from the college altogether. While the policy implemented in law was inclusionary, it's implementation and the implementing regulations were confronted by exclusionary practice and existing local policies.

As concerns over educational quality and educational opportunity in California Community Colleges (CCC), considered democracy's open door institutions (Griffith & Conner, 1994), emerged in the late 1970s and began to focus on topics of reform in the early 1980s, the two perspectives emerged and focused on the concern through very different lenses. The interpretation of the problem, the solution, the legislative mandates, and the policies created to implement them in regulation, as well as the implementation itself, were very different depending on perspective.

One of the common concerns of those holding these different perspectives was the low rate of student success and retention. Community colleges across the state adopted different interventions to address the problem ranging from assessment testing and mandatory placement, with some colleges developing new prerequisite developmental course sequences to place underprepared students in, to additional services to students. Policy makers began addressing the problem with studies, legislation, and finally implementing regulations and standards.

During the ten years, beginning in the early 1980s, that it took for policies to go from ideas to implementing regulation, those holding the two perspectives found their issue of contention in mandatory versus advisory placement based on assessment test scores. Students testing below college level courses were denied access to college level courses based on test scores alone even after legislation and, eventually, regulation seemed to forbid it. Draft implementing regulations reflected both an advisory interpretation and a mandatory placement interpretation. The Mexican American Legal Defense & Education Fund (MALDEF), a nonprofit organization, filed a discrimination lawsuit on behalf numerous and changing plaintiffs against state and local college defendants in the Superior Court of Sacramento County for declaratory and injunctive relief (*Romero-Frias, et al. v. Mertes, et al.,* 1988/1991). Although the original suit named Christopher Romero-Frias, et al. as plaintiffs and John Randall, in his official capacity as the CCC Interim Chancellor, as the state defendant, by the time the pleadings were given the first named plaintiff was Martin R. Valdez (1988) and the new Chancellor, David Mertes, in his official capacity became the state defendant for the remainder of the proceedings. While the suit was settled out of court after 3 years of pleadings, motions and hearings, the suit was valuable for a number of reasons discussed later in this paper even though it never provided case law.

In transcripts of the proceedings on one of the *Demurrers to Supplemental Complaint, Amended* (March 14, 1991), it became clear that the conflicting interpretations had been set into draft regulations when the judge remarked "…I think this goes in circles…they sort of meet you coming and going. You can be in one place and out another." Those differing interpretations on whether placement based on an assessment test alone could be mandatory or must be advisory as the law required were evident in past practice in the colleges and the regulations drafted in response to the law. They were implied to be evident as late as 1998 in Chancellor's Office publication *Multiple measures and other sorrows: A guide for using student assessment information with or instead of test scores* (1998) when the state argued why colleges should use multiple measures for placement and not use assessment tests alone for mandatory placement. And, although the suit was finally settled out of court on the eve of trial in May of 1991, after numerous motions, amended and supplemental complaints, and demurrers with the agreement to implement regulations for a matriculation process that would maintain open access and provide needed supports for students along with monitoring and sanction for noncompliance, there remains today a question of whether CCC are part of democracy's open door for some segments of the population.

Policy Context

The development and implementation of policy happens in a historical context. New policy introduced must consider both historical practice and existing policy. To best understand that policy context and how it took nearly six years to develop the policy and nearly six more years to adopt implementing regulations some background is in order.

Concerns over educational effectiveness of community colleges emerging in California public policy arenas by the late 1970s intensified with the 1978 passage of Proposition 13 which

shifted costs from local to state budgets. With the subsequent decline in financial support for the colleges, college constituencies focused on systemic reforms that might effect the success and retention problems. The Academic Senate of the California Community Colleges passed a resolution in the Fall of 1982 called the "Matriculated Student" which focused on students with certificate or degree aspirations (California Community Colleges [CCC], 1989, p. 1). The next spring, the Chancellor of the CCC appointed a 24 member task force that would focus on academic quality by looking at the related issues of standards of rigor in credit courses, the role of community colleges in providing remedial education, and model processes to assist students in making appropriate educational choices to reach their educational goals. From the work of this task force emerged a model for matriculation that was adopted by the CCC Board of Governors (BOG) in June 1983. With concurrent work in the Legislature, the Chancellor's Office obtained $50,000 to pilot the model in 16 colleges. During the 1984 legislative session, the BOG sponsored a matriculation bill through Senator John Seymour and Assemblyman Robert Campbell. With funding possible, the Chancellor called for districts to submit implementation plans: Fifty-two colleges submitted plans and twenty were selected but due to other legislative concerns matriculation was not funded (CCC, 1989). During the 1985 legislative session, Seymour and Campbell merged their bills into AB 3 and colleges again prepared plans but the Governor delayed the appropriation. In 1986 the Master Plan Commission endorsed the matriculation concept and nearly all CCC constituent groups supported AB 3 (CCC, 1989).

The Seymour-Campbell Matriculation Act of 1986 was passed the following year. It was written into California law as California Education Code in Sections 78210-78218 with the intent of ensuring "equal educational opportunity for all Californians" (§ 78211[a]). In the law the legislature addressed concerns that community colleges were using placement testing to exclude

certain students from curriculum. The legislature addressed a number of areas in providing for equal educational opportunity by including language that would ensure that students receive the educational services necessary to maximize their opportunities for success. Additionally, the legislature was concerned with, and addressed in the regulations, how colleges provide students with information to establish realistic educational goals and ensure that the materials and processes not exclude students from courses or receiving appropriate educational services at community colleges.

The California Community Colleges Board of Governors implemented the Seymour-Campbell Matriculation Act of 1986 and subsequent regulations in Title 5, Division 6 of the California Code of Regulations. During the late 1980s and early 1990s, the California Community Colleges Chancellor's Office (CCCCO) was drafting the implementing regulations for the Act. In late 1988, after nearly three years of having the law with no implementing regulations, MALDEF filed their discrimination lawsuit.

The Complexity of the Problem

In the early half of the 1980s, educators and policymakers became aware of the linguistic and cultural biases in the existing assessment instruments available and in use by colleges. The Matriculation Act addressed the concerns by requiring the BOG to evaluate the tests for bias and approve only those that did not have bias. The Act further stipulated that even approved tests were to be used as advisory only since no test could be perfectly predictive. The language of the Act is clear in Education Code:

> 78213. (a) No district or college may use any assessment instrument for the purposes of this article without the authorization of the board of governors. The board of governors may adopt a list of authorized assessment instruments pursuant to the policies and

> procedures developed pursuant to this section and the intent of this article. The board of governors may waive this requirement as to any assessment instrument pending evaluation.
>
> (b) The board of governors shall review all assessment instruments to ensure that they meet all of the following requirements:
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> (1) Assessment instruments shall be sensitive to cultural and language differences between students.
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> (2) Assessment instruments shall be used as an advisory tool to assist students in the selection of an educational program.
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> (3) Assessment instruments shall not be used to exclude students from admission to community colleges. (California Education Code, § 78213 [a]-[c]).

However, since the BOG was allowed to waive the requirement for colleges to use only an approved test during the evaluation of the test and the first approved list of tests was not released until May 1991, there was no assurance that tests being used would not be biased for the five years after the Act was signed into law.

The CCCCO had another dilemma that made the use of tests complex. Title 5 § 58106 also required districts to establish prerequisites when necessary based on skill level requirements of courses and in the language of the regulation at the time "All courses shall be open to enrollment by any student who has been admitted to the college except that students may be required to meet necessary and valid prerequisites established pursuant to this section" (Transcripts of proceedings, March 14, 1991, p. 36). The way students were placed in the prerequisites was by using the assessment test as specified in Title 5 § 58106 (b) (3) which read, until 1993, "Prerequisites may be defined in terms of skills measured by relevant assessment

instruments" (Transcript, p. 37) which the court translated as "you can give one of these tests in order to determine whether you have to take your prerequisite" (Transcript, pp.39-40). Education Code § 78212 in the 1980s actually "required the colleges to administer assessment instruments to determine student competency in computational and language skills" (Defendants reply in support of their motions and opposition to Plaintiffs' motions to strike and for sanctions, December 21, 1990, p. 5).

The last complicating factor in this tale of two perspectives, is that the transition from concern to law to implementation took time, expertise, and fiscal resources. In this case, ten years elapsed from the recognition of the problem to implemented regulation and funds flowing from the state were severely limited until the third year of implementation. And, what made the MALDEF lawsuit unwieldy was that, according to MALDEF, students were being denied access in every school term during that period. MALDEF attempted to demonstrate the continuing difficulties students faced by amending complaints with additional plaintiffs a number of times. By the time the suit was settled, the original first named plaintiff Romero-Frias had nearly completed his degree at another college (Plaintiffs' opposition to state defendants motion for summary judgment or judgment on the pleadings, December 21, 1990) and new Plaintiffs were being added (Memorandum in support of demurrers to supplemental complaint, 3/12/91).

Additionally, implementation of the Matriculation Act was occurring during the time of the suit. A number of matriculation resource guides and resources were published beginning in late 1989 such as *Preparing data needed for predicting student success in college courses; Local research options, vols. I & II;* the *Matriculation resource manual; A method for determining valid course placements and prerequisites; Assessment standards, policies and procedures*; and matriculation regulations and standards were being developed and modified through the

consultation process required in the community college system. While the suit began with charges that nothing was being done to implement the law by 1991 the concerns had turned to the implementing policies and procedures. The implementation provided a moving target that MALDEF, the defense, and the courts found frustrating at best. In their submission to the courts on December 21, 1990, plaintiffs acknowledged the complexity of the case when they argued that "In this complex (class III) action of first impression, plaintiffs seek to force the state defendants to implement correctly Seymour-Campbell Matriculation Act of 1986" (Plaintiffs' opposition to state defendants motion for summary judgment or judgment on the pleadings, December 21, 1990).

The Courts Part in Matriculation Implementation

Throughout the motions for summary judgment and judgment on the pleadings is an argument about how the law should be interpreted. MALDEF interpreted the law as restricting the ability of colleges to exclude students and the state defendants argued that it allowed exclusion of students from courses based on certain criteria and even mandated it. Furthermore, MALDEF argued that the implementing regulations misrepresented the intent of the law altogether. They cited numerous instances where colleges were inappropriately excluding students from courses based on scores from a single test alone. Two examples of those included that demonstrate the problems of using a single score are: Monica Zepeda who had completed her freshman coursework including English with the GPA of 3.5 at the University of Houston but based on a single assessment test score at Fullerton college was placed in a remedial reading course and not allowed to enroll in transferable English; and Christina Durazo who had previously attended the University of California at Berkeley and passed the Subject A examination which allowed her into higher level English courses at Berkeley but based on

assessment tests in English at Hartnell college was excluded from transferable English courses (Plaintiffs' opposition to state defendants motion for summary judgment or judgment on the pleadings, December 21, 1990). The plaintiffs provided this evidence to demonstrate that blatant abuses were still occurring statewide despite the Matriculation Act and those abuses were resulting in tracking and exclusion of Hispanic and other minority students in spite of the clear language and intent of the Act. They sought to compel statewide compliance through the State Chancellor's monitoring, oversight, and funding responsibilities and to ensure that the Title 5 regulations being promulgated by the State Chancellor's office mirrored the language and intent of the act. They referenced documents where the state Chancellor acknowledged ongoing violations at most of the colleges statewide and yet, they argued, that he "takes the position in the Matriculation Progress Reports that he will not compel compliance" (p. 9). They also argued that the waiver language allowing tests to be used during the evaluation period did not waive the Chancellor's responsibility to ensure that they are used as an advisory tool and are not used to exclude students. Susan Brown of MALDEF stated that:

> This interpretation is contrary to the Act's intent of increasing educational equity and contrary to the initial implementation policy. At the least, state defendant should enforce the advisory test use proscription of § 78213 in light of their many other deficiencies. (Plaintiffs' opposition to state defendants motion for summary judgment or judgment on the pleadings, December 21, 1990)

Plaintiffs also included numerous citations from assemblyman Campbell such as the May 30, 1984 Sacramento Bee newspaper article where he stated " that the bill does not permit counselors to exclude students from classes" and a letter to a student after the bill was passed where he stated "I was adamant in my opposition to mandatory placement, and you will not find

any authority for mandatory placement in my bill" (Campbell as cited in Plaintiffs' opposition to state defendants motion for summary judgment or judgment on the pleadings, December 21, 1990). Indeed, in a 1989 letter to the Chancellor, Assemblyman Campbell clarified that the legislature's intent was not to allow mandatory placement based on assessment test results alone and again reminded him that the act specified an advisory use only even in those situations where students would be placed in a prerequisite (R. J. Campbell, personal communication, June 19, 1988).

While there is no direct evidence that this lawsuit influenced the development of the Title 5 regulations to implement the Matriculation Act, it was clear in numerous statements in their submissions to the court that MALDEF thought that many of the steps taken in implementation were only in response to their lawsuit. An example of one of those statements by Susan Brown, the MALDEF attorney, where she states "The state Chancellor's own Title 5 regulations — though developed nearly five years after the fact and only in response to this lawsuit…" clearly demonstrates her belief that the suit was the impetus for promulgating the regulations (Plaintiffs' opposition to state defendants motion for summary judgment or judgment on the pleadings, December 21, 1990, p. 12).

Additionally, the press generated by the lawsuit in articles such as The Sacramento Union article "Colleges use tests to impede Hispanics, lawsuit says" (Aase, 1988) where the consequences of the exclusionary practices of Fullerton College on the students named in the suit, Martin R. Valdez and Christopher Romero-Frias, were outlined and The Sacramento Bee article "2-year-college entry tests called unfair to Hispanics" (Tachibana, 1988) that not only talked about the exclusion of the students but added that Romero-Frias after being denied access "took the same courses at another college and succeeded in them." The Bee article went on to

say that “85 percent of all Hispanics in California who enter postsecondary education do so through community colleges,” with the implication that these practices impact a large segment of the society, and cited senator Campbell’s concerns that “assessment should be advisory only and that students have a right to ignore that advice.” In a June, 1991 Chronicle of Higher Education article “ California community colleges agrees to change role of testing” the article starts with “Under pressure from Hispanic groups, the California community colleges system has agreed to change the way it uses placement tests for new students” (Cage, 1991) suggesting that at least the media thought there was influence from the suit.

Where the courts had the most influence, however, was in the resolution of the suit. The Honorable Ronald B. Robie who heard the March 14, 1991 arguments in the “Demurrers to supplemental complaint, amended” disentangled the changing plaintiffs, complaints, arguments, and intents of the two parties to discover that the two parties were working towards the same purpose and with the proper guidance could bring this longstanding suit to an end in an out of court settlement. Through an almost interrogative technique, he focused each of the parties on a single issue of law. When the state defendant’s attorney began helping the plaintiff clarify the first complaint, Robie saw a possible resolution. He suggested that he could obtain the services of a recently retired judge to help them work through each issue of law. He justified the suggestion by making it clear that neither side was ready for trial stating “I think that there’s a tremendous confusion and the trial judge is going to be very unhappy with you folks…The trial judge would be happy if you had some kind of game plan.” (Transcript of proceedings, March 14, 1991, pp. 44-45). He then artfully introduced the idea of a settlement conference to define the issues and, while constantly reiterating they are preparing for trial, convinces them both to sit down and come up with an agreed upon statement of issues. One month later they reached an

out-of-court settlement and had agreed to all the issues and the resolutions that would reflect the intent of the law.

Conclusion

The battle between exclusionary policy and practice and inclusionary policy had ended when inclusionary regulations were adopted a full six years after the law was passed. As late as 1998, however, the Chancellor's office was issuing guidance in an effort to change practice. The time from concern to policy development, from policy development to implementing regulation, and to changes in local practice seems to be extraordinarily long. During those periods, however, great strides were made in both what we know about facilitating student success and practices put into place in local colleges based on that knowledge.

The MALDEF lawsuit certainly put pressures on the Chancellor's Office to implement the Matriculation regulations. Whether it was that pressure or the state finally providing funds for implementation at both the system office and college levels when it finally did occur is not clear from the documents reviewed in this study. The pressures clearly had effects on aligning the legislative intent of the Matriculation Act (1986) and how they were implemented by the CCC Board of Governors in Title 5. The Matriculation regulations implemented as early as 1993 clearly required multiple measures for placing students and clearly prohibited using a single test score, or even multiple test scores when highly correlated, in mandatory placement. The continued monitoring and sanctions promised in the settlement agreement, however, have been influenced more by the availability of funds to do the job than a desire to allow exclusionary practice in any college. It is this funding issue that the state needs to address to this day. The extraordinary work of community colleges must be supported with fiscal resources from the state

and fiscal resources for the state office with oversight responsibilities. Policy without funding is not policy.

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