

LORENZO P. v. RILES?



SHOULD THE LARRY P. PROHIBITIONS BE EXTENDED TO ENGLISH LANGUAGE LEARNERS?

Introduction

Other than being African American little is known of Larry, the lead plaintiff in the legal case known as *Larry P. v. Riles* which banned the use of standardized intelligence testing on African-American students in the State of California. As a result of such intelligence testing Larry was diagnosed as being mild mentally retarded and placed in a special education class for the educable mentally retarded (*Larry P. v. Riles*). This placement was for students who were considered not on an academic track but rather in classes to learn social and job skills.

Larry and with five other similarly-placed African-American students were the plaintiffs in *Larry P. v. Riles* that was filed against the San Francisco Unified School District and the California Department of Education in 1971. This case ultimately led to the current state of affairs in which it is impermissible to use any standardized intelligence tests in California schools for any purpose on African-American students (*Larry P. v. Riles*, Hiramoto, 2013; Riverside County, 2012).

However such intelligence tests can be used on “Lorenzo” (the Spanish word for Lawrence). “Lorenzo” may be the son of migrant farmworkers who don’t speak a word of English, yet he can be tested

with a standard intelligence test and as a result of such testing be categorized as intellectually disabled (mentally retarded) or as having a specific learning disability.

When “Larry” enrolled in school if his mother checked the box stating that he is African American his school is then prohibited from testing him with any sort of standardized test that purports to measure intelligence (Hiramoto, 2013). Larry may have one or two parents that are White, be of upper or middle class, and be fully enmeshed in the dominant White culture. The fact that upon enrollment he was designated as being of African-American descent automatically triggers the testing prohibitions.

“Lorenzo,” on the other hand, has no such prohibition, other than to be tested in his native language if he is not fluent in English (*Dianna v. State Board of Education*; P.L. 108-446 §614(b) (3) (A) (ii-iv)). His intelligence can still be tested with standard intelligent tests as long as they are interpreted for him in his native language. However just because a word is translated into Lorenzo’s native language does not mean that he will be familiar with that object or concept. He, like Larry, may not have had exposure to that object or concept and thus his unfamiliarity with the culture may be what is deficient, not his intelligence.

Larry P. v. Riles

Larry and five other African-Americans students were the plaintiffs in *Larry P. v. Wilson Riles*. It is because of this case,

along with subsequent rulings by the California Department of Education, that Larry along with all African-American students in the state of California cannot have their intelligence tested by standardized intelligent tests. In 1971 the *Larry P. v. Wilson Riles* case was filed in the San Francisco Federal District Court State on behalf of those six African-American students who attended school in the San Francisco Unified School District.

The plaintiff’s argument was that the administration of culturally-biased standardized IQ tests resulted in disproportional numbers of African-American children being identified and inappropriately placed in special education classes for the educable mentally retarded (EMR). At that time, within the San Francisco school district, 66% of the students in the EMR programs were African American, while they only accounted for 28.5% of the students within the school district (*Larry P. v. Riles*).

The case was assigned to Judge Robert Peckham who had just the prior year presided over the case of *Dianna v. State Board of Education*, a case which resulted in many changes in special education law, one of which was that students should be tested in their strongest language. Judge Peckham granted the plaintiff’s motion for a preliminary injunction that enjoined the use of any standardized IQ tests for the identification of Black EMR children or their placement into EMR classes without receiving prior approval of the court. (*Larry P. v. Wilson Riles*, 1986).

In 1974 the preliminary injunction

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was upheld in the appellate court and shortly after that the plaintiffs returned to the District Court of Judge Peckham with a motion to expand the injunction to include all Black children in the State of California. The judge granted the motion to prohibit the administration of individual intelligence tests to all such children (Prasse & Reschly, 1986).

After a lengthy trial in 1979 Judge Peckham permanently prohibited the use of IQ testing for placing African-American students in classes for EMR or “their substantial equivalent” after concluding that IQ tests were racially and culturally biased, and thus were responsible for the disproportionate placement of African-American students in dead-end classes (*Larry P. v. Wilson Riles*, 1986).

In 1986, Judge Peckham expanded his 1979 order to prohibit the use of IQ tests for African-American students for any special education program. He further stated that even with parental consent, IQ tests may not be given to African-American students, nor may IQ scores from any other source become part of the pupil’s school record (*Larry P. V. Riles*; Hiromoto, 2013).

Also in 1986, the State of California Department of Education (CDE) issued a directive stating that there are no special education related purposes for which IQ tests shall be administered to African-American pupils (Riverside County, 2012).

Then in 1992 Judge Peckham ruled in *Crawford v. Honig* that a group of African-American parents could have their students

IQ tested. The parents bringing this case believed that the results of IQ testing would help clarify the kind of help and services their children needed. Judge Peckham indicated that his 1986 ruling violated the rights of African-American parents who want the option of having their children tested due to suspected learning disabilities that are not “substantially equivalent” to EMR programs (*Crawford v. Honig*, 1992; Powers et. al., 2004).

Shortly after the *Crawford* decision was rendered, the CDE issued a legal advisory (LO: 1-92) analyzing Judge Peckham’s 1992 decision in *Crawford v. Honig*. The advisory stated that the ruling did not alter the 1979 *Larry P.* restraining order. They thus confirmed that school districts in the State of California cannot use IQ tests on African-American students for any reason (Hiromoto, 2013).

There are several critics of Judge Peckham’s decision. One of the major criticisms is articulated by MacMillan and Forness (1998) who found that Peckham’s reliance on the plaintiff’s expert witness’s data was misplaced. The witness had stated that there were no disproportionate numbers in referrals for testing, but that there were disproportionate results in placement in special education. The Judge concluded that the disproportionate numbers were therefore a result of the assessment process.

However, the witness included in her calculations the referrals for gifted programs, students that were overwhelmingly White. Once the students that were referred to gifted programs were elimi-

nated from the calculations, the percentage of African-American students referred increased. Thus, part of the overrepresentation problem can be traced to the referral process and not the assessment process (MacMillan & Reschly, 1998).

Another criticism is that Judge Peckham’s heavy reliance on academic achievement tests to document that the students in special education classes were not improving academically. But, “how could Judge Peckham have relied so heavily on achievement test data to conclude anything regarding the efficacy of special day classes for student identified as MMR if IQ is biased and IQ and achievement are one and the same thing?” (MacMillan & Forness, 1998).

Also, as noted above, the EMR classification had been abandoned in the State of California. Instead, students were being classified as having a learning disability (SLD). Thus, the identification practices employed to categorize special education students at the time of the initial *Larry P.* hearing and the current nature of special education has changed dramatically. These changes are not reflected in the subsequent *Larry P.* modifications nor are they reflected in the California Department of Education’s advisory rulings (MacMillan & Forness, 1998).

Lambert wrote in 1981, shortly after the initial phrase of the case, that

... it is surprising that the myth continues to prevail that scores on IQ tests are the primary source of information used in the process of being placed in an EMR class.

In California and elsewhere, the child must first fail in a regular school program and be referred for evaluation before a test is administered. It is failure in school, rather than test scores, that initiates action for special education. (Lambert, 1981, p. 940)

Lambert further stated that

... to eliminate IQ tests as a remedy to overrepresentation will solve nothing. Without aptitude measures, many failing children would be considered retarded, and expectations for them would be based solely on school performance rather than on a combination of their measured abilities and classroom achievement. (p. 941)

Despite the criticisms, Judge Peckham's ruling still stands. Currently the CDE continues to support the ban against intelligence testing of African-American students (Hiromoto, 2013). However, at the time of this writing the CDE has formed a *Larry P.* taskforce which is taking the matter under consideration. The task force was formed in 2010 and should have a report ready in the near future (California Department of Education, 2012).

Over Representation of Minority Students in Special Education

Over representation of minority students in special education programs has been recognized as an issue for over 40 years. In 1968 Dunn first identified the issue of overrepresentation of minority students in special education as a major issue (Dunn, 1968). The disproportionate representation of minority students in special education remains a critical and enduring problem among educators and among society as a whole (Skiba et al., 2008). To date, such overrepresentation of minority children in special education and the quality of their educational experience continues to be one of the most significant issues faced by the U.S. public education system (Hosp & Reschly, 2004; Coutinho & Oswald, 2000).

What is overrepresentation or disproportionality? "Disproportionality may be defined as the representation of a group or category that exceeds our expectations for that group, or differs substantially from the representation of others in that category" (Skiba et al., 2008, p. 266).

There are several ways that such disproportionality or overrepresentation may be labeled. One is the "compositional index" which compares the proportion of those served in special education represented by a given ethnic group with the proportion that group represents in the overall population or in school enrollment

(Skiba et. al., 2008; Redfield & Kraft, 2012).

Another way is the "risk index" which measures a group's representation in special education compared to the representation of other groups. Normally a group's numbers are compared to that of White students (Skiba et. al., 2008). This risk index is often referred to as the "odds ratio" (Hosp & Reschly, 2004).

According to Ford (2012) the terms disproportionality and overrepresentation do not mean the same thing. She defines disproportionality as being broader, comparing the various minority groups in special education and among the various categories. She views the term overrepresentation as being more clear, direct, and specific. By her definition, "over" simply means "too many." She contends that the conclusion of there being too many Black, Hispanic, or ELL students can depend on the method of calculation and that the method selected must be proactive for such minority students and "address the actual numbers, percentages, issues, and needs—and inequities" (p. 400).

For the purpose of this article the terms will be used interchangeably and the precise method of measurement is not considered crucial since all terminology and methods of measurement basically means that there are more of a particular class of students than should be expected in a specific category of special education.

English Language Learners Over Representation in Special Education

Not only are minority students overrepresented in special education, but English language learners (ELLs) are also overrepresented. Recently Ford stated, citing the 2011 U.S. Department of Education annual report on *The Condition of Education*, that the report

... explored the degree of disproportionality in the identification and placement of ELL students in special education. Results indicated that these students were very likely to be identified as having learning disabilities (LD) and mental retardation or intellectual disabilities. (Ford, 2012, p. 392; Aud et al., 2011)

Being bilingual or an ELL increases a student's chance of being labeled as a student who should receive special education services.

There is, in effect, a high likelihood of being diagnosed as LD (learning disabled) as a result of being bilingual. (Figueroa, 2005, p. 164)

In an in-depth analysis of an unnamed southwestern state, Sullivan found that ELLs are increasingly overrepresented in special education (2011). It was further found that ELL students were very likely to be identified as having learning disabilities and mental retardation or intellectual disabilities (Ford, 2012).

Since being in special education means that a student would receive extra help and attention, it might be argued that the overrepresentation of any one group would not necessarily be a bad thing. In fact, the resources typically provided for each student in a special class program are one and half to two times the amount of money spent per student in a general education class. Also, students in special education have an individualized education plan, a lower pupil-to-student ratio, and are taught by teachers with specialized training (Prasse & Reschly, 1986).

However, Artiles, Harry, Reschly, and Chinn (2002) argue that not only is misplacement of students in special education stigmatizing, but such misplacement can also deny those students the "high quality and life-enhancing education to which they are entitled" (p. 4). Besides being stigmatizing, the over-identification of minority students in special education results in subsequent isolation and inferior educational treatment, all of which confirms the notion that education in America falls short of offering a level playing field for all (Fletcher & Navarrete, 2003).

According to Valles (2009), when a student is labeled as being a special education student there is a

...stigma that accompanies the disability label, signifying lesser ability or even value. This stigma effect has been linked to negative social outcomes, such as teasing and other differential treatment by fellow students, as well as to lowered self-esteem and expectations on the part of the identified student that outlast completion of school. (Redford & Kraft, 2012, p. 191)

In the case of *Larry P. v. Riles*, an underlying assumption was that the classification of mild mental retardation was stigmatizing and humiliating with probable permanent effects on the student so classified (Prasse & Reschly, 1986). Judge Peckham sought to avoid such stigmatization and humiliation by banning the use of intelligence testing on African-American students.

The Role of IQ Tests

IQ tests play an important role in the identification and placement of students within special education. Although IEP

decisions are team decisions, intelligence tests remain an integral part of educational diagnosing. Whereas the eligibility and placement decision is made by multidisciplinary team consisting of a minimum of a school psychologist as well as a general education teacher, a special education teacher, a school administrator, and a parent of the concerned student, the school psychologists are often the most influential team members because they select the tests to administer, generate the reports from which decisions are made, and are perceived as the professional with the most assessment expertise (Edwards, 2007).

According to Berk, Bridges, and Shih (1981), "IQ scores cannot help but play a significant role in the placement process" (p. 59). Those authors believe that IQ tests play a huge role due in large part to school officials being pressed by increasing demands for accountability and therefore looking to what they believe is the best diagnostic tool.

Judge Peckham in the *Larry P. v. Riles* case made a finding that "the entire placement process revolves around the IQ determination." He concluded that the IQ scores were very pervasive in the placement process (*Larry P. v. Riles*).

The most frequent or largest category in which students are placed in special education is that of learning disability. According to the CDE for the school year 2011-2012, out of the 686,352 individual students who received special education services, 278,697 of them received services that were classified in the category of specific learning disability (SLD) (California Department of Education, 2012). The definition of a SLD is that due to some form of processing defect a student is not processing academics at the level his mental, cognitive ability would indicate.

Although there are alternative ways to identify students with a learning disability, most schools use what is known as the "discrepancy model." Using this method, when a student experiences academic failure in class, he or she is referred for examination and assessment regarding eligibility for special education services. The student's IQ is then tested and his or her academic achievement reviewed. If the results of the academic test are 1.5 standard deviation points from the academic scores, it is presumed the difference is due to a processing delay (California Code of Regulations, Title 5 Section 3030j; Hiramoto, 2012). Thus, for those students identified as having a learning disorder, there is a heavy reliance on IQ testing.

Bias in IQ Testing

There is some disagreement among experts as to whether or not IQ tests are biased in testing minority groups. According to Brown, Reynolds, and Whitaker (1999), "the overwhelming body of research confirms the equivalent validity of those tests with culturally diverse groups" (p. 230). Those authors further state that it

... can be stated confidently: Empirical evidence overwhelmingly supports the conclusion that well-developed, currently-used mental tests are of equivalent predictive validity for American-born, English-speaking individuals regardless of their subgroup membership. (p. 231)

Gordon and Rudert (1979) also state that after reviewing the major kinds of evidence concerning cultural bias in IQ tests they found no sign that they are in any meaningful sense unfair to Blacks or lower class Whites (p. 187).

According to Powers, Hagans-Murillo, and Restori (2004),

Although criticism regarding the construct validity of intelligence tests has been raised with respect to their use with African Americans, empirical students of the construct validity of intelligence tests provides consistent results for both European Americans and African Americans. (p. 151)

However, there are several authors who believe that IQ tests are in fact biased. Contrary to Gordon and Rudert, Fletcher and Navarrete (2010) identified numerous studies which have found that problems inherent in the assessment process result in the misdiagnoses and placement of students from diverse backgrounds in special education programs (p. 32). According to Agbenyega and Jiggetts (1999) "one of the most important causes of inappropriate placements is the relationship between special education placement and IQ tests scores and results" (p. 627).

As far back as 1997, Canter stated that "intelligence testing as we practice it today seems increasingly out-of-step with the needs of tomorrow's schools." Furthermore, he believes that other states will join California in restricting the use of traditional intelligence tests with ethnic minorities as our non-White and non-English speaking populations grow.

Making decisions regarding placement into special education based upon IQ tests presume that the tests are a fair sample of cultural, social, linguistic, and cognitive styles based on a normal sampling of the population at large. They presume that children who do very well in these tests are intrinsically more competent relative

to their peers who don't do well. This presumption is made whether the "do-wells" have been prepared or coached at better resource-endowed schools for such tests or not (Agbenyega & Jiggetts, 1999, p. 627; Phillips, 2006).

When IQ tests are given, they are done so assuming that environmental, ecological settings, school resourcefulness and reinforcers, abundance of professional staff, and other extraneous independent variables, which may likely affect tests outcomes, are constants. Since such factors are not equal between various school settings, "this makes test results irrelevant, very suspect, and a tool for biased decision-making and placement" (Agbenyega & Jiggetts, 1999, p. 628).

According to Fletcher and Navarrete (2003), after they reviewed the U.S. General Accounting Office 1993 report they found that when compared to non-Hispanic students, Latino students are more often incorrectly assessed as being mentally retarded or learning disabled.

During the *Larry P. v. Riles* case, in reply to Judge Peckham's question of what he meant by "cultural bias," Leon Kamin, an expert witness for the plaintiffs, replied:

The very fact that the tests must depend upon particular information that a child has acquired in his past means that they are bound to be culturally biased. In different social classes in our society, in different ethnic groups in our society, in different racial groups in our society, the experiences which a child has vary. Now, the tests, for the most part, have been designed by White middle class psychologists who are familiar with White middle class environment, White middle class culture and understand what it is that one learns and acquired in that environment. And quite naturally, I believe, they have drifted into taking the sorts of bits of information and knowledge that their own children acquire, often from their parents, as an indication of "ah ha, this is what an intelligent child ought to know." And when it is applied mechanically to children from very different backgrounds, either ethnically or racially or in terms of social class, it seems to me that a great bias is involved. Obviously, the children from other backgrounds will not have had the same access to, and the same experience with, the bits of knowledge tested on these tests as the modal white middle class child. (Gordon & Rudert, 1979, p. 180)

ELLs and Testing

Students who are learning English as a second language have difficulty in taking IQ tests. A very typical profile of a student acquiring a second language reveals a high

nonverbal score with performance in the language-based areas of reading, writing, speaking, or listening. The profile of this student and other similar students whose test results indicate an average to above average nonverbal aptitude score and a low verbal ability score on achievement tests, is indicative of a discrepancy between scholastic aptitude and achievement, thereby ensuring placement and instruction in an educational program for learning disabilities based on federal eligibility criteria (Fletcher & Navarrete, 2003, p. 36; Abedi & Dietl, 2004).

According to Sullivan (2011), "tests designed for native English speakers may lack reliability and validity with students identified as ELLs" (p. 320). She concluded that:

This study coupled with emerging research that indicates that many ELLS may be inappropriately identified for special education without adequate consideration of disability eligibility criteria or the influence of cultural, linguistic, and experiential factors. (p. 328)

Other researchers argue that since test makers face technical and financial difficulties in norming ability tests on large samples of bilingual populations, then "tests should not be used in educational decision-making with such populations" (Brown, Reynolds & Whitaker, 1999, p. 216; Figueroa & Newsome, 2006).

For many educators and school psychologists it is difficult to distinguish between poor school achievement due to limited English proficiency and academic struggles due to a disability. Language acquisition is often confused with learning problems (Artiles, Sullivan, Waitoller & Neal, 2010; Artiles & Trent, 1994).

Alternatives to IQ Tests

If IQ tests are not to be used, what are the alternatives? It is argued that if IEP teams would look into assessing educationally-relevant differences, and assessing in natural classroom settings, preferably on multiple occasions, no IQ tests would be required (Figueroa, 2005).

Within special education, reform efforts reflect an evolving philosophy of measurement, valuing assessments that inform, foster, and document program effectiveness, thereby devaluing traditional intelligence tests that fail to index learning rate or inform treatment planning. Canter believes that there is a push for norm-referenced intelligence testing (Canter, 1997) Elliot also believes that schools should look to alternatives in assessing students for special education. Curriculum-based

measurement and performance assessments should replace IQ testing (Elliott & Fuchs, 1997).

Recent studies share the common finding that IQ testing is ineffective in the identification of students with learning disabilities. These researchers suggest alternatives that do not involve the use of the IQ-discrepancy model.

There are many other reasons why use of IQ-discrepancy should be abandoned. The main concern is that the IQ-discrepancy criterion is potentially harmful to students since it often results in delaying intervention until the student's achievement is sufficiently low in order that a discrepancy can be identified (Fletcher, Coulter, Reschly, & Vaughn, 2004).

An alternative method for placing a student in a learning disability program is called Response to Intervention (RTI), which basically means that a student is identified as not achieving at the same level as his or peers and is offered extra help in order to assist that student reach the level of his or her peers. When the student fails to respond after receiving the extra help, then that student is then considered for special education treatment.

A major advantage of shifting the focus in learning disabled identification from IQ status to that of RTI is that it more appropriately and immediately addresses the instructional needs of students who are difficult to teach as opposed to the current model of waiting until they have failed in school (Fletcher, Coulter, Reschly, & Vaughn, 2004).

Conclusion

The same rationale that applied to Larry should also apply to Lorenzo. IQ tests are culturally biased against both of them. The CDE felt the same when, after the appellate court in *Larry P.* upheld extending the injunction against IQ test for all Black students in the State of California, the Department issued a memorandum order halting the use of any intelligence tests for purposes of placing any child, regardless of race, in EMR classes, reasoning that the same criteria should be used for all students (Prasse, 1986).

Powers (2004) would most likely agree. She states the

... public policy applied to one race and not another, such as banning intelligence testing of African American students, suggests that members of that race unilaterally share one or more characteristics that are absent among members of other races. This reasoning fails to recognize the incredible diversity within a racial group and minimalizes the experiences

and characteristics that are shared across groups. (p. 154)

Another issue is that school psychologists rarely follow any of the nondiscriminatory rubrics and checklists for evaluating ELLs. Figueroa surveyed 19 reports school psychologist prepared for IEP meetings that involved ELLs. In 15 of those reports the students had California English Language Development Test (CELT) scores in the 1 to 3 range, which means they were in the beginning to intermediate levels of English proficiency. In this sample more than two thirds (68%) were not tested in the student's primary language. According to Figueroa and Mewsome (2006):

... the quantitative results of this study present a fairly compelling profile of how school psychologists do not assess or investigate the possible confounding effects of bilingualism on tests, testing, and diagnoses. (p. 2110)

Thus since psychologists are assessing and diagnosing children who are in the process of learning English in a manner inconsistent with what the state of California and professional rubrics call for, then perhaps they should not be allowed to do so.

To a large extent Judge Peckham ruled against IQ tests due to expert testimony that, on the average, African Americans tested more than one standard deviation less than White Americans. Unfortunately it is unknown as to whether or not Hispanics' IQ test results are different than those of the average population. Test makers do not reveal the mean tests score by ethnicity (Edwards, 2006). There has also been no test-related record keeping of the population of ELLs in special education.

The CDE is currently in the process of reviewing activities and methods that might reduce instances of disproportionality in special education. One component of that process is the reconvening of the *Larry P.* task force (California Department of Education, 2012). The last time the *Larry P.* task force met, in an effort to help protect Larry, it was recommended that IQ tests not to be used for any educational purposes on African-American students. Perhaps this time the task force will also help protect Lorenzo.

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