Diploma Denial Meets Remedy Denial in California: Tackling the Issue of Remedies in Exit Exam Litigation after the Vacated Valenzuela v. O'Connell Preliminary Injunction

Arturo J. Gonzalez
Johanna Hartwig

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol47/iss4/2

This Symposium is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
I. INTRODUCTION

In contemporary American society, a high school diploma is not just key to success, but key to survival. Individuals who do not have high school diplomas are not eligible for a whole range of low-paying jobs, let alone jobs that pay decently, and are much more likely to be unemployed. A person cannot even join the U.S. Army without a high school diploma or a G.E.D. Moreover, Americans who do not have high school diplomas face significantly higher health and
welfare risks throughout the rest of their lives.\(^4\)

While the tangible value of a high school diploma has soared, states across the country have raised the bar for graduation by introducing high school exit exam requirements.\(^5\) Fifteen years ago, only a handful of states had exit exams. Now, twenty-five states have exit exams or are in the process of introducing them.\(^6\) By 2012, about seven in ten public school students, including about eight in ten minority public school students, will be required to pass an exit exam in order to graduate high school in the United States.\(^7\)

The rise in high school exit exams has paralleled the most significant trend in education policy over the last fifteen years, standards-based reform.\(^8\) In 1983, educators and policymakers across the country were alarmed by a presidential blue-ribbon commission report called “A Nation at Risk.”\(^9\) The report declared that the nation was threatened

---

4. Declaration of Pedro Noguera in Support of Plaintiffs’ Motion for Preliminary Injunction at ¶¶ 16-21, Valenzuela v. O’Connell, No. CPF-06506050 (Super. Ct of Cal., County of San Francisco, Mar. 23, 2006); Declaration of Michelle Fine in Support of Plaintiffs’ Motion for Preliminary Injunction at ¶¶ 31-37, Valenzuela v. O’Connell, No. CPF-06506050 (Super. Ct of Cal., County of San Francisco, Mar. 23, 2006).


6. See KOBER ET AL., supra note 5, at 11-13. For a description of the typical features of exit exam systems nationwide, see CHUDOWSKY ET AL., supra note 2, at 45-52. For a detailed chart of exit exam features according to state, see KOBER ET AL., supra note 5, at 7-10. For a description of the history of high school exit exams and their rise, as well as a description of exit exam legislation in different states, see Jennifer R. Rowe, High School Exit Exams Meet IDEA—An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers, 2004 BYU EDUC. & L.J. 75, 88-118 (2004).

7. See KOBER ET AL., supra note 5, at 11.

8. CHUDOWSKY ET AL., supra note 2, at 23-29. For a helpful description of what standards-based reform is and what it targets, along with an account of its development, see John F. Jennings, School Reform Based on What is Taught and Learned, PHI DELTA KAPPAN, June 1995, at 765.

by "a rising tide of mediocrity" and called for greater investment in education and the implementation of stronger academic expectations. The increasingly popular answer to the challenge posed by "A Nation at Risk" has been to develop statewide academic content standards and to integrate those standards into the curricula. The standards-based trend has allowed states to increase the consistency of instruction across their schools. One important goal of the standards movement has been to improve educational outcomes for children whose performance had traditionally been ignored, namely, poor and minority students.

The skyrocketing popularity of exit exams has paralleled the standards movement as a way to measure and enforce achievement goals. Yet states have neither improved their public schools at the same rate they have taken up exit exams, nor directed new resources to schools for student preparation with the same enthusiasm that they have trumpeted the "get tough" exit exam requirements. While

10. Id. at 5. The report's judgment on the state of American education was harsh:
   If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves. We have even squandered the gains in student achievement made in the wake of the Sputnik challenge. Moreover, we have dismantled essential support systems which helped make those gains possible. We have, in effect, been committing an act of unthinking, unilateral educational disarmament.

Id.

11. See generally Jennings, supra note 8.

12. This goal is captured, for example, in the Adequate Yearly Progress measurements of the standards-based reform-inspired legislation, No Child Left Behind (although not all supporters of standards-based reform support NCLB), which requires that states and schools achieve performance goals for subsets of traditionally underserved students. See MARGARET E. GOERTZ, CTR. ON EDUC. POLY, The Federal Role in an Era of Standards-Based Reform, in THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION, at 51-59 (2001), available at http://www.cep-dc.org/index.cfm?fuseaction=Page.viewPage&pageId=497&parentID=481.

13. See CHUDOWSKY ET AL., supra note 2, at 27-29, for a description of the goals of standards-based reform and how exit exams relate. Note also that, while this Article does not address the issue, the impact of high school exit exams on improving student outcomes is still in question. See KOBER ET AL., supra note 5, at 49-70.

14. For thoughtful data and analysis regarding the challenges states have faced in ensuring that students receive a fair opportunity to learn the material tested on their new exit exams, see CHUDOWSKY ET AL., supra note 2, at 56-59;
support for the standards movement has been generally strong, the concomitant rush to high-stakes testing has sparked fierce debate. A key concern is that, although many states have successfully instituted standards, most states still face struggling education systems in which a significant number of students—particularly poor and minority students—are provided inferior and ineffective schooling.  

Although exit exams have in general been politically popular, this disjunction between stiffer graduation requirements and the still slack quality of schooling has inspired opposition, including through the courts. In the last few years, Massachusetts, Alaska, and Arizona have seen their exit exams challenged in court, and other states, such as Washington, have faced opposition through pressure on the legislature and state boards of education. This Article focuses on one recent exit exam litigation, Valenzuela v. O'Connell, which claims that the California High School Exit Exam (CAHSEE) cannot legally be imposed as a graduation requirement given the current facts of K-12 public education in California. The Valenzuela plaintiffs met initial success, securing a preliminary injunction against the CAHSEE diploma penalty in the spring of 2006, but then saw their victory overturned by the California Court of Appeal. A key reason the Appellate Court vacated the injunction was its determination that the remedy of allowing students to graduate was impermissible, and that the only appropriate remedies would have focused on further educational opportunities.

This Article will focus on the issue of remedies in the context of Valenzuela as the question of remedies is likely to play a central role in future high school exit exam litigation.

15. See, e.g., CHUDOWSKY ET AL., supra note 2, at 59; GAYLER 2004, supra note 5, at 82.


18. Note that a number of lawsuits have focused particularly on students with disabilities. See, e.g., Rene v. Reed, 751 N.E.2d 736 (Ind. Ct. App. 2001). Academic analysis of the legal implications of high-stakes testing of students with disabilities has been substantial. See, e.g., James M. Baron, Note, When Good Intentions Go Bad: The MCAS Requirement and Special Education Children, 40 SUFFOLK U.L. REV. 123 (2006); Paul T. O'Neill, Special Education
Part II will provide a brief background on the CAHSEE system. Part III will identify the key exit exam cases and how they treated the issue of remedies, and Part IV will summarize the Valenzuela case. Part V will examine the Valenzuela rulings, especially the ruling from the Appellate Court. This Part will explore the Appellate Court's faulty reasoning regarding separation of powers and appropriateness of the remedy. It will also discuss the Appellate Court's failure to consider the plaintiffs' solid due process claim. Part VI will then take the opportunity to briefly propose and assess some alternative strategic choices the Valenzuela plaintiffs could have made.

II. THE INTRODUCTION AND IMPLEMENTATION OF THE CALIFORNIA HIGH SCHOOL EXIT EXAM

In 1999, California joined the growing number of states instituting high school exit exams. Introduction of the California High School Exit Exam was initiated by then-Governor Gray Davis and then-State Senator, and current Superintendent of Public Instruction (SPI), Jack O'Connell. The CAHSEE followed legislation requiring development and implementation of "statewide academically rigorous content standards" (Standards) by 1998. While the State cannot mandate curricula, it has tied funding streams for textbooks to curricula aligned with the Standards, and districts therefore have gradually aligned their local curricula to the Standards. The CAHSEE has two parts, English Language Arts (ELA) and Mathematics, and is based on the

and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy, 30 J.L. & EDUC. 185 (2001). This Article will not address the distinct legal issues that arise in exit exam litigation brought by plaintiff students with disabilities.


20. Id.; see also CAL. EDUC. CODE § 60850 et seq. (West 2007). For an early description of the background and structure of the CAHSEE legislation, see Mary Nebgen, California's High School Exit Examination: Passing the Test, 31 MCGEORGE L. REV. 359, 360-364 (2000).


Standards.\textsuperscript{23} The ELA section tests Standards that are supposed to be covered by the end of tenth grade English instruction; the Math section tests Standards that should be covered by the end of instruction in algebra (usually offered in the eighth or ninth grade).\textsuperscript{24} Students first take the CAHSEE in the tenth grade, and are given multiple opportunities during the following years to take it again.\textsuperscript{25} No students are exempted from passing the exam in order to receive a diploma.\textsuperscript{26} However, the State Board of Education, consulting with the Superintendent of Public Instruction, was by statute supposed to study and decide whether an appropriate alternative assessment should be added for those students who had demonstrated in other ways that they had gained proficiency in the Standards.\textsuperscript{27}

The CAHSEE was intended to be part of a new accountability system in California schools introduced in the late 1990s designed to spur academic improvement across the state.\textsuperscript{28} The CAHSEE policy, however, only includes one accountability tool, the diploma penalty. It therefore only holds to account one participant in California's school system, the students.\textsuperscript{29} It introduces no penalty for school districts, schools or teachers based on their students' performance on

\begin{itemize}
\item \textsuperscript{23} \textit{CAL. EDUC. CODE} § 60850(a).
\item \textsuperscript{24} See California Department of Education CAHSEE Program Overview, http://www.cde.ca.gov/ta/tg/h/overview.asp [hereinafter CAHSEE Program Overview].
\item \textsuperscript{25} \textit{CAL. EDUC. CODE} § 60851(b).
\item \textsuperscript{26} \textit{Id.} §§ 60851-60852. Special education students, however, have been granted temporary exemptions based on interim settlements of an ongoing lawsuit. See infra notes 55-59 and accompanying text
\item \textsuperscript{27} \textit{CAL. EDUC. CODE} § 60856.
\item \textsuperscript{28} The California Department of Education website states: The primary purpose of the California High School Exit Examination (CAHSEE) is to significantly improve pupil achievement in public high schools and to ensure that pupils who graduate from public high schools can demonstrate grade level competency in reading, writing, and mathematics. The CAHSEE helps identify students who are not developing skills that are essential for life after high school and encourages districts to give these students the attention and resources needed to help them achieve these skills during their high school years. CAHSEE Program Overview, supra note 24. See also EdSource's "Accountability Overview" for a description of the new educational accountability system California began to introduce in the late 1990s, including the CAHSEE, available at http://www.edsource.org/edu_acc.cfm.
\item \textsuperscript{29} See \textit{CAL. EDUC. CODE} §§ 60850-60856.
\end{itemize}
the exam. While the State\(^{30}\) hired independent evaluators to annually study CAHSEE implementation generally, the CAHSEE program does not include any monitoring mechanism for implementation of the exit exam by individual districts, except in that CAHSEE scores are included in the State's overall rating system for schools.\(^{31}\) There is no mechanism by which teachers are evaluated according to their students' CAHSEE performance. The exit exam program also creates no accountability measures for any state-level entity.

The CAHSEE system sharply contrasts with some other school accountability reforms.\(^{32}\) For example, under the federal No Child Left Behind system, schools and school districts face an array of consequences dependent on student performance, including allowing students to transfer schools and disbanding school staffs.\(^{33}\) States are subject to strict monitoring and reporting requirements, and may find their funding docked for non-compliance. Students themselves, however, are not penalized. Furthermore, other state high school exit exam systems, such as that in Texas, also include accountability measures for districts, schools, and teachers.\(^{34}\)

In addition to introducing no mechanisms to monitor and improve district performance, the State also offered districts negligible support to implement this burdensome new testing and test preparation regime, even though nationwide evidence shows that such costs to districts are substantial.\(^{35}\) The State pays for the development of the test and for its administrations.\(^{36}\) The most significant costs, however, are typically those related to student preparation for the test and

---

30. For purposes of this Article, "State" is used to generally mean state-level entities and officials, particularly the Legislature, the California Department of Education, the Superintendent of Public Instruction, and the State Board of Education.

31. See CAHSEE Program Overview, supra note 24.


36. See CAL. EDUC. CODE § 60851(a)
remediation, and the CAHSEE system left districts to pay for those costs out of their regularly available funds or general remedial funds. Although the legislation mandated that students who fail a section of the CAHSEE be immediately provided remediation, the State allocated no funding for it, and in fact, the statute specifically denies districts' ability to request funding for CAHSEE remediation as an unfunded mandate. The State finally provided some funding for CAHSEE remediation in the fall of 2005, four years after the test was first administered, and not long before the first class subject to the diploma penalty would graduate. But at that point, the Legislature allocated just twenty million dollars, which was only enough money to provide funds to schools that had more than a twenty-eight percent failure rate.

California first administered its exit exam in 2001. The initial students subject to the diploma penalty, however, were not scheduled to graduate until 2004. But by the summer of 2002, less than half of the Class of 2004 had passed, and in May 2003, a study commissioned according to statute by the State Board of Education (Board), and performed by their independent contractor, the Human Resources Research Organization (HumRRO), reported that students in the Class of 2004 were not adequately prepared to pass the exam. The Board then voted unanimously to delay the diploma penalty for two years, until 2006. Four of the nine Board

37. See GAYLER 2004, supra note 5, at 5-8; CAL. EDUC. CODE § 60853 (a).
38. See CAL. EDUC. CODE § 60851(f) (West 2007).
40. Id.
41. CAHSEE Program Overview, supra note 24.
44. CAL. EDUC. CODE § 60855 (West 2007); HumRRO 2003 REPORT, supra note 42, at i-v.
45. See Minutes of July 9, 2003, Meeting of the California State Board of
members supported delaying the penalty until 2007. For example, by the end of the eleventh grade, only sixty-three percent of African American students, sixty-eight percent of Latino students, and fifty-one percent of English Language Learner students in the Class of 2006 were estimated to have passed the CAHSEE, compared to ninety percent of white students and eighty-nine percent of Asian American students.

The disparity in passage rates is foreseeable and unsurprising given the overrepresentation of poor and minority students in California’s worst schools. Earlier litigation highlighted the basis for this rift. In 2000, the ACLU, Morrison & Foerster LLP (the same law firm representing students in Valenzuela), and Public Advocates, Inc., along with other concerned groups, filed Williams v. California on behalf of students in the state’s worst performing schools. Williams documented in extensive detail the maldistribution of resources across schools in the state and the alarming lack of resources in the state’s worst schools. Evidence gathered in Williams demonstrated that the basic ingredients of an education—safe facilities, adequate textbooks, and qualified teachers—were regularly


46. See id.

47. For archived and current information on student performance on the CAHSEE, as well as for program announcements and press releases, see Cal. Dep’t of Educ., California High School Examination (CAHSEE), http://www.cde.ca.gov/ta/tg.hs/index.asp (last visited May 11, 2007).


49. First Amended Complaint for Injunctive and Declaratory Relief at 1, Williams v. California, No. 312236 (Super. Ct of Cal., County of San Francisco, Aug. 14, 2000). For a wealth of information about Williams, including all of the papers filed with the court, see Decent Schools for California Homepage, www.decentschools.org (website maintained by the Williams plaintiffs) (last visited May 11, 2007).
missing from many of California's schools. The students in these neglected schools were much more likely to be poor or minority children.

*Williams* resulted in a very favorable settlement for the plaintiff students in 2004, with legislative enactments that guaranteed significantly improved resources for the state's worst schools. When announcing the settlement of *Williams*, Governor Arnold Schwarzenegger candidly acknowledged California's failure to fairly educate its students, stating, "Today is a landmark day. Today is a great victory that we celebrate here for California's neglected students. And I am here to tell you that we will neglect our children no more." However, improvement due to the important reforms *Williams* introduced has just begun to be felt, and the full effect of *Williams* will take many years to unfold.

Students with disabilities have also passed the CAHSEE at reduced rates. Only thirty-five percent of students with disabilities in the Class of 2006 were estimated to have completed the CAHSEE requirement by the end of the eleventh grade. Unlike many other states, California included no alternative provisions for special education students to fulfill the exit exam requirement. Disability Rights Advocates and co-counsel Chavez & Gertler LLP, are litigating a suit filed in 2002 on behalf of students with Individualized Education Plans against State respondents to

---


51. See, e.g., CORLEY, supra note 50, at 9-11; DARLING-HAMMOND, supra note 50, at 35-51.

52. See generally Notice of Proposed Settlement, Williams v. California, No. 312236 (Super. Ct of Cal., County of San Francisco, Aug. 13, 2004); see also Declaration of Jack W. Londen in Response to Defendants' Opposition to Motion for Preliminary Injunction at ¶¶14-25, Valenzuela v. O'Connell, No. JCCP-4468 (Super. Ct of Cal., County of Alameda, May 3, 2006) [hereinafter Londen Declaration].

53. González Declaration, supra note 39, at ¶ 5.


55. HUMRRO 2005 REPORT, supra note 48, at 85.
enjoin the CAHSEE requirement. That case, Kidd v. California (originally Chapman v. California), which was coordinated with the Valenzuela case, is ongoing and has resulted in consecutive interim legislative settlements allowing special education students to graduate without passing the CAHSEE if they have fulfilled their other requirements and attempted to pass the exam. This exemption expires, however, with the Class of 2007, and negotiations between the Kidd parties continue.

III. KEY EXIT EXAM CASES AND THEIR TREATMENT OF REMEDIES ISSUES

While the popularity of high school exit exams has skyrocketed over the last decade, and California has only recently introduced the CAHSEE, some states have employed exit exams for many years. These tests have inspired legal challenges since the late 1970s. There is not, however, extensive case law related to exit exams, so later litigation, including Valenzuela, concentrates on a relatively small body of precedent. Some of the cases relate particularly to disabled students, but their relevant portions are relied on in cases about non-disabled students. How the main exit exam cases treated the issue of remedies is briefly summarized below.

A. Debra P. v. Turlington

Debra P. v. Turlington is the seminal case addressing high school exit exams. It remains the key precedent courts turn to for guidance when facing constitutional questions regarding the institution of an exit exam. In 1978, Florida students brought Debra P. as a federal class action to challenge the Florida exit examination. Florida began

58. DRA, supra note 56. The case was coordinated against the opposition of both sets of plaintiffs, who believed the issues in the cases were distinct.
59. Id.
60. For a helpful general summary of the key exit exam cases, and a description of the development of high stakes testing, see O'Neill, supra note 32, at 625-27, 634-57.
withholding diplomas just two years after the new requirement was announced, when the exam had only been administered three times. The Debra P. case resulted in two district court opinions and two appellate opinions. In 1979, the district court enjoined Florida from imposing the new diploma penalty for four years, until 1983, after holding that the exam violated due process because of inadequate notice, and violated equal protection because it discriminated against African American students given the recent maintenance of a dual school system. The Fifth Circuit upheld the injunction in 1981, but remanded for further findings about whether the test was invalid because students had not been actually taught the material. The district court then found in 1983 that Florida had successfully demonstrated the use of the exam would not be fundamentally unfair because students were taught the material. The Eleventh Circuit (post-Fifth Circuit split) affirmed the district court’s ruling in 1984.

The Debra P. district court granted a four-year injunction against Florida’s use of the diploma penalty without discussing directly the permissibility of the remedy. The court noted the injunction would be of limited duration, and found the injunction was necessary to ensure proper notice and coverage of the test materials, as well as to purge the taint of segregated schooling. The Fifth Circuit affirmed the injunction without delving into the appropriateness of the remedy. Significantly, the Fifth Circuit held that the students had a property interest in their diplomas protected by both procedural and substantive due process. The court remanded the case to resolve the issue of whether the test could constitutionally be used following the injunction or whether the due process requirement of fundamental fairness

62. See id. at 247-49.
63. Id. at 269.
64. Id. at 265-67.
65. Id. at 268.
68. Debra P. v. Turlington, 730 F.2d 1405, 1406 (11th Cir. 1984).
70. Id.
71. See id. at 400.
72. Debra P., 644 F.2d at 403-04.
would continue to prohibit its use because students had not actually been taught the material on the exam.\textsuperscript{73} On remand, the district court found, after reviewing exhaustive newly collected evidence from the defendants regarding instruction in the materials, that fundamental fairness did not prohibit use of the exam.\textsuperscript{74} This second district court opinion, which issued in 1983, did not discuss the appropriateness of the injunctive relief.\textsuperscript{75} The Eleventh Circuit affirmed the trial court and declined to extend the injunction, but did not question the appropriateness of the original injunctive relief.\textsuperscript{76}

B. Anderson v. Banks

In Anderson v. Banks, students challenged a Georgia county’s introduction of an exit exam in 1978.\textsuperscript{77} A federal district court found that the diploma requirement could not be imposed on students who had attended school when an unconstitutional student tracking system was used and that the exit exam violated due process unless it was demonstrated that students were actually taught the test material.\textsuperscript{78} The court ordered the county school district to issue diplomas to students whose diplomas had been withheld, and did not discuss directly whether this was a permissible remedy.\textsuperscript{79}

C. Board of Education v. Ambach

Two disabled students challenged New York’s exit exam requirement in 1979.\textsuperscript{80} The New York Appellate Court held that the students had protected property and liberty interests in their diplomas, and that the State had failed to provide adequate notice by informing students of the requirement less than two years before it was imposed.\textsuperscript{81} The court enjoined the enforcement of an order by the Commissioner of

\begin{enumerate}
\item \textit{Id.} at 406.
\item Debra P. v. Turlington, 564 F.Supp. 177, 189 (M.D. Fla. 1983).
\item See generally \textit{id.}.
\item \textit{See generally} Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984).
\item \textit{Id.} at 509.
\item \textit{Id.} at 512.
\item \textit{Id.} at 574-75.
\end{enumerate}
Education invalidating the students’ diplomas, but did not discuss the appropriateness of this remedy.  

D. Brookhart v. Illinois State Board of Education

In 1980, a group of disabled students in Illinois challenged the Peoria school district’s new diploma penalty. Peoria started administering its exit exam in 1978 and imposed the diploma penalty just a year and a half later. The Seventh Circuit held that the students had a liberty interest in their diplomas protected by procedural due process, and that the school district violated the students’ right to adequate notice by its accelerated introduction of the requirement. The court ordered that diplomas be issued to the plaintiffs, and directly considered the appropriateness of this remedy. The court found that the remedy required by procedural due process would normally be an extended period of time to prepare for the exam and appropriate remediation to ensure that all of the material was taught. The court found, though, that in this case it would be an undue hardship for the plaintiffs to return to school as they had been away from school for two years and now had jobs.

E. GI Forum v. Texas Education Agency

There is a significant gap in time between Brookhart and the next key exit exam case, GI Forum v. Texas Education Agency. In 1997, Texas students brought suit in federal court challenging the state’s exit exam. Texas had employed an exit exam in some form since 1987. The district court in GI Forum recognized that Texas students have an interest in their diplomas protected by due process. The court found, however, based on the lengthy notice period and the extensive evidence demonstrating students were taught the test

82. Id. at 575.
84. Id.
85. Id. at 185-86.
86. Id. at 188.
87. Id.
88. Id.
90. Id. at 671.
91. Id. at 682.
materials, that the exam was not fundamentally unfair. The court did not discuss the appropriateness of the requested remedy of enjoining the diploma penalty. Perhaps due to the tenure of Texas's exit exam and the sheer size of the state, the GI Forum case was widely followed and is now one of the core exit exam cases.

F. Rene v. Reed

In Rene v. Reed, students with disabilities brought a class action in 1998 challenging Indiana's diploma penalty. The Indiana Appellate Court found that while the students possessed an interest in their diplomas protected by due process, the state did not violate that interest through its three-year notice of the diploma requirement. The court did address the appropriateness of a remedy of issuing diplomas, finding that the State's provision of remediation in addition to the three-to-five year notice was adequate to remedy any potential due process violations, and that issuance of diplomas was not necessary.

IV. BACKGROUND AND PROCEDURAL HISTORY OF VALENZUELA V. O'CONNELL

By the start of the 2005-2006 school year, reports and media coverage on the Class of 2006's performance on the CAHSEE alerted the public that California was headed towards denying diplomas to tens of thousands of students, and that most of those students would be minority, low-income, or English Language Learners. The State's evaluator, HumRRO, estimated that only seventy-eight

92. Id. at 683.
93. See generally id.
96. Id. at 747.
97. Id. at 742-43, 745.
percent of the Class of 2006 had passed the CAHSEE by the end of the eleventh grade, which meant that about 100,000 of the 465,000 students starting twelfth grade had yet to complete the requirement. Almost 75,000 of those students were Latino or African American, 61,000 were economically disadvantaged, and 40,000 were English Language Learners. Concern among students, parents, teachers, and advocacy organizations grew. Arturo González, one of the Authors and a partner at the law firm of Morrison & Foerster, had previously represented students and parents who successfully challenged the premature closure of the public schools in Richmond, California. Mr. González was concerned by this new crisis, and assembled a legal team to investigate what the State had done to ensure that students in the Class of 2006 were given a fair opportunity to pass the exam. The team found the State had done very little, and that students' rights to an equal and adequate opportunity to learn the material tested were in jeopardy. The State had made paltry efforts to make sure that all students were exposed to the CAHSEE material and were provided remediation if they did not pass. The State instead created its politically popular policy, and then left districts to implement it with little supervision or support, and with no accountability. When in the fall of 2005 the State finally made resources available to districts to provide remediation for students in the Class of 2006, the funding was severely inadequate, and many of the eligible students were unable to benefit. Additionally, the SPI and Board had completely ignored a mandate from the Legislature to study the appropriateness of using alternative assessments for students who had not passed, but had demonstrated through other evidence that they may have achieved the Standards.

100. See Butt v. California, 15 Cal. Rptr. 2d 480 (Cal. 1992).
101. The Morrison & Foerster attorney team consisted of partner Arturo J. González and associates Shane Brun, Vanina Sucharitkul, Christopher J. Young and Johanna Hartwig, aided by frequent consultation with partner Jack W. Londen, lead pro bono counsel in the Williams litigation.
103. This failure to study alternatives in a timely fashion was the subject of a
Mr. González wrote a letter in October 2005, reminding Superintendent O’Connell and other defendants of their duty to study alternative assessments. Almost all states that use exit exams include some form of alternative assessments. SPI O’Connell responded by asking for assistance in convening a panel of experts. Mr. González agreed and fielded a panel of nationally-recognized experts. But SPI O’Connell backed away and refused to use the expert panel. Instead, he put together a single public meeting in December of 2005, presided over by lawyers and political appointees, but not attended by himself or any members of the Board. SPI O’Connell then announced by public letter, a mere three weeks later, that he had determined alternatives were not appropriate. In the same letter the SPI identified a potentially appropriate alternative, but stated that it was not viable because it would be too late to implement for the Class of 2006. Two months later the


107. Letter from Jack O’Connell, Superintendent of Pub. Instruction, to “Interested Persons” (Nov. 30, 2005) (on file with authors) (announcing public meeting on December 9, 2005, to provide time for public comment on alternatives to the CAHSEE).


109. Id.
Board confirmed the SPI's recommendation after barely an hour of discussion, including public comment, although it was addressing the issue of alternatives for the first time.  

By February 2006, it was clear that the State was going to take no effective steps to rectify the CAHSEE system's problems for the Class of 2006. While he rejected alternatives in his January letter, SPI O'Connell identified available "options" for students who did not pass by the end of the twelfth grade, such as studying for the test through adult school or re-enrolling for another year of high school. The State, though, had made no effort and devoted no resources to ensure that these options would be available.  

In fact, the most important option, re-enrollment, was left to the discretion of districts, and, because of the overcrowding and fiscal pressures on poor-performing districts, was likely to be an illusory option for many students in the Class of 2006 who did not pass.  

After assessing the State's unwillingness to take any adequate steps on its own to help students in the Class of 2006, Morrison & Foerster filed suit on February 8, 2006.

---

110. Declaration of Chris Young in Support of Plaintiffs' Motion for Preliminary Injunction at ¶¶ 5-9, Valenzuela v. O'Connell, No. CPF-06506050 (Super. Ct of Cal., County of San Francisco, Mar. 23, 2006) [hereinafter Young Declaration].  

111. The "options" the SPI identified in his January 6, 2006, letter were, with comment on state action to ensure availability noted: if still enrolled in school, receiving remedial instruction as required by 60851(f) (no money provided for this option until Fall of 2006, at which time only enough money provided to serve students in schools where more than twenty-eight percent had not passed); enrolling for an additional year of school (left up to discretion of school districts; many of the districts with the most non-passers are already overcrowded); independent study (no money or provision made for CAHSEE preparation through this program); charter school (very few charter schools; left up to their discretion to admit CAHSEE non-passers); adult school (no money or provision made for CAHSEE preparation through this program); receive high school diploma through community college that did not require CAHSEE (no money or provision made for this; only a handful of community colleges provide this option); obtain diploma through county court or juvenile school (applies to very few students); pass the California High School Proficiency Exam to obtain a diploma equivalent (no money or provision made for this program; equivalence certificate much less valuable than diploma); and pass the GED (no money or provision made for this program; GED less valuable than diploma). Jan. 2006 Letter, supra note 108.  

The complaint was filed in state court on behalf of ten named plaintiffs and all students who were similarly situated, meaning all students in the Class of 2006 who were expected to complete their graduation requirements by the end of the school year except for passing the exit exam. The plaintiffs sued the State of California, the California Department of Education, the State Board of Education, and the State Superintendent of Public Instruction, Jack O'Connell (defendants). The complaint asserted claims based on the students' rights to equal protection, due process and the fundamental right to education under the California Constitution, as well as to a good faith study of alternative assessments under California statutory law.

At the end of March 2006, the plaintiffs filed a motion to enjoin the defendants from withholding diplomas from the Class of 2006 based on not passing the CAHSEE. The preliminary injunction motion briefing relied on extensive evidence demonstrating the inequality and inadequacy of students' exposure to the test material, and included over forty fact and expert declarations. Under an order granting expedited discovery, the plaintiffs took over a dozen depositions to prepare the motion. Much of the motion's supporting evidence was drawn from reports produced by HumRRO, the independent contractor engaged by the State

---

113. See id.
114. See id.
115. See id. at 43-44.
116. See id. at 45.
117. See id. at 43.
118. See Complaint, supra note 112, at 44-45.
119. See generally Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, Valenzuela v. O'Connell, No. CPF-06506050 (Super. Ct of Cal., County of San Francisco, Mar. 23, 2006) [hereinafter Motion]. In addition to the preliminary injunction motion, the plaintiffs overcame a demurrer, and also briefed a protracted discovery dispute regarding the defendants' refusal to produce relevant documents based on the "official information privilege."
120. See generally Notice of Motion and Motion for Preliminary Injunction, Valenzuela v. O'Connell, No. CPF-06506050 (Super. Ct of Cal., County of San Francisco, Mar. 23, 2006); González Declaration, supra note 39, at ¶¶ 2-11; Reply Brief in Support of Motion for Preliminary Injunction at 9-11, Valenzuela v. O'Connell, No. JCCP-4468 (Super. Ct. of Cal., County of Alameda, May 3, 2006) [hereinafter Reply]; see generally Supplemental Declaration of Arturo J. González in Response to Defendants' Opposition to Motion for Preliminary Injunction, Valenzuela v. O'Connell, No. JCCP-4468 (Super. Ct. of Cal., County of Alameda, May 3, 2006).
to study the implementation of the CAHSEE.

The trial court record showed that lower passage rates were closely correlated with the type of resource disparities documented in *Williams* and still plaguing California schools.\(^{121}\) Students who were not passing the CAHSEE, mainly poor and minority students, were consistently in schools with underqualified teachers and fewer resources. For example, according to research performed by Dr. John Rogers of UCLA, another Author in this Symposium issue, students in schools with low CAHSEE passage rates were eleven times more likely to experience serious shortages of credentialed teachers than students in schools with high passage rates.\(^{122}\) Furthermore, many schools had still not accomplished the alignment of curriculum, instruction and tested material, or provided the guaranteed remediation, that was necessary to adequately expose students to the CAHSEE material.\(^{123}\) Poor and minority students were much more likely to populate these lagging schools. Particularly for English Language Learners, there was a demonstrated gap between what students were taught and what they were tested on.\(^{124}\)

These CAHSEE disparities tied to low-performing schools should not have surprised the defendants. Indeed, the State of California itself had recently highlighted the dire state of schools. The introduction to the 2003 version of the State's Master Plan for Education declared, "The sobering reality of California's education system is that too few schools can now provide the conditions in which the state can fairly ask students to learn to the highest standards."\(^{125}\) When Governor Schwarzenegger announced the settlement of

\(\text{\ldots}\)

\(^{121}\) See HUMRRO 2005 REPORT, *supra* note 48, at 120-125 (documenting the correlation between underqualified teachers in a school and low passage rates).

\(^{122}\) Declaration of John Rogers in Support of Plaintiffs' Motion for Preliminary Injunction at ¶ 18; Valenzuela v. O'Connell, Case No. CPF 06506050 (Super. Ct of Cal., County of San Francisco, March 23, 2006) [hereinafter Rogers Declaration]; ROGERS ET AL., *supra* note 98, at 3.


\(^{124}\) Declaration of Patricia Gándara, Ph.D., in Support of Plaintiffs' Motion for Preliminary Injunction at ¶¶ 17-18, Valenzuela v. O'Connell, Case No. CPF 06506050 (Super. Ct. of Cal., County of San Francisco, March 23, 2006) [hereinafter Gándara Declaration].

Williams, he echoed this conclusion, "[Our children are] not getting their equal education materials, reading materials, homework materials. They're not getting the same quality teachers. These kids were not getting a fair chance to succeed."  

After reviewing the vigorous briefing and oral argument by both sides, Judge Robert Freedman of the Alameda County Superior Court granted the injunction on May 12, 2006. The defendants immediately appealed the decision directly to the California Supreme Court, which voted four-to-three to grant a stay on May 24, 2006, and ordered the Court of Appeal to decide the appeal on an expedited basis. The four-sentence Supreme Court order questioned the appropriateness of the remedy. After further briefing and oral argument, the Court of Appeal, First Circuit, vacated the injunction on August 11, 2006. The Appellate Court held that the trial court inappropriately balanced the harms in applying the preliminary injunction standard and that the remedy of allowing class members to graduate was beyond the authority of the court. The Appellate Court also, however, "accept[ed] the trial court's conclusion that plaintiffs established a likelihood of success on the merits as to the denial of their fundamental right to equal educational opportunity." The parties started settlement discussions shortly thereafter, and as of the finalization of this Article, the trial court had granted final approval of the settlement, and legislation based on a settlement agreement was progressing rapidly through the California Legislature.

126. González Declaration, supra note 39, at ¶ 5.
127. See generally Order Granting Preliminary Injunction and Case Management Orders, Valenzuela v. O'Connell, Coordinated Judicial Proceeding Case No. JCCP-4468 (Super. Ct. of Cal., County of Alameda, May 12, 2006) [hereinafter Order]. The contents of the preliminary injunction order and the subsequent decisions will be discussed below.
129. Id.
131. Id.
132. Id. at 157.
133. See infra Part V for a description of the settlement talks and resulting agreement.
IV. ANALYSIS OF VALENZUELA'S TREATMENT OF REMEDIES

The Valenzuela preliminary injunction motion resulted in three rulings. This section describes these rulings, and analyzes the Appellate Court's opinion, which was the only ruling to substantively address whether issuing an injunction against the CAHSEE diploma penalty is an appropriate remedy.

A. Alameda County Superior Court Ruling

On May 12, 2006, Judge Freedman of the Alameda County Superior Court issued an eighteen-page order granting a preliminary injunction against the use of the diploma penalty for the Class of 2006. In applying the preliminary injunction standard, Judge Freedman balanced the harms strongly in favor of the plaintiffs, finding that the harm to otherwise qualified students of not receiving their diplomas would be severe, and that little to no harm would result for the defendants from delaying the imposition of the diploma penalty for one year. Judge Freedman found the evidence strongly supported the plaintiffs' equal protection and fundamental right to education claims. Judge Freedman noted that he did not find the due process claim persuasive, but only devoted one short paragraph to considering it. Judge Freedman's minimal due process analysis, however, is at odds with his finding the argument not compelling, given that he acknowledged the defendants' efforts to establish curricular and instructional validity—key to the fundamental fairness question of whether students were actually taught what was tested—were "meaningfully less" than those ultimately accepted by the Debra P. court. The judge also did not give weight to the plaintiffs' statutory claim regarding alternative assessments. Judge Freedman apparently believed that allowing otherwise qualified students to graduate was a remedy within the court's power, as he issued the injunction without discussing its

134. Order, supra note 127, at 18.
135. Id. at 7-9.
136. Id. at 9-12.
137. Id. at 10.
138. Id. at 9-10.
139. Id. at 9.
appropriateness.

B. California Supreme Court Ruling

The defendants asked the trial court to stay the injunction pending appeal, but the request was denied. The defendants then bypassed the Appellate Court and filed a writ of supersedeas to the California Supreme Court, which on May 26, 2006, issued a stay of the injunction while it was appealed on an expedited basis. The court did not decide the appeal itself, but sent it back to the Appellate Court, with a four-sentence ruling that included only one substantive element:

Because at this juncture this court is not persuaded that the relief granted by the trial court's preliminary injunction—which would require school districts to grant high school diplomas to students despite the students' failure to pass the [CAHSEE]—would be an appropriate remedy even if plaintiffs were to prevail in their underlying claims, the injunction issued by the trial court in its order of May 12, 2006, is stayed pending the Court of Appeal's determination of this writ proceeding.

The writ was considered by the Supreme Court en banc. Four of the seven justices voted to grant the stay and to remand to the Appellate Court; one justice would have denied the stay but would have remanded; two of the justices would have denied the stay and upheld the injunction.

C. California Court of Appeal, First District, Ruling

A three judge panel of the Court of Appeal, First District, vacated the preliminary injunction on August 11, 2006, after briefing by the parties and amici curiae and oral argument. The Appellate Court held that the trial court abused its discretion by not taking into account the harms to the State's accountability system and that the remedy of a statewide

141. Id.
142. Id.
143. Id.
injunction allowing students in the Class of 2006 to receive their diplomas was impermissible. The Appellate Court did, however, support the trial court’s finding that the plaintiffs were likely to prevail on their underlying claim that they were denied the right to equal educational opportunity as substantial evidence showed students in the Class of 2006 had not been adequately or equally prepared to pass the exam.

The Appellate Court found the injunction was impermissible because it encroached on the authority of the legislative and executive branches by being unacceptably specific. It also found the remedy was not tailored to the rights asserted. The Appellate Court additionally ruled the injunction was overbroad as it benefited some students who had not been injured. This Article addresses the first two reasons the Appellate Court rejected the trial court’s remedy.

1. Appellate Court’s Treatment of Separation of Powers

The Appellate Court concluded that the trial court trespassed in the territories of the Legislative and Executive branches by ordering a statewide injunction of the CAHSEE diploma penalty. The Appellate Court emphasized that educational policy is the province of the political branches and that the judicial branch must avoid treading on this turf as much as possible. To support its holding, the Appellate Court discussed the two key California cases relied on by both parties regarding plaintiffs’ rights to education under the California Constitution, Serrano v. Priest (Serrano II) and Butt v. California. In Serrano II, the plaintiffs challenged the constitutionality of California’s educational funding scheme, and in Butt, the plaintiffs challenged the

145. Id. at 162, 167-68.
146. Id. at 157.
147. Id. at 162-66.
148. Id. at 167-68.
149. Id. at 168-170.
150. O'Connell, 47 Cal. Rptr. 3d at 162-66.
151. Id. at 155-56, 165-66.
152. Id. at 163-64 (discussing Serrano v. Priest, 135 Cal. Rptr. 345 (Cal. 1976)).
153. Id. at 164 (discussing Butt v. California, 15 Cal. Rptr. 2d 480 (Cal. 1992)).
154. Id. at 163 (discussing Serrano, 135 Cal. Rptr. at 353-55).
constitutionality of the Richmond school district closing its schools six weeks early due to lack of funds. The Appellate Court found that Serrano II did not provide support for the injunction because the California Supreme Court left it up to the Legislature to devise a statewide school funding scheme that would withstand constitutional review, and gave the State six years to do so. The Appellate Court found that Butt also did not support the injunction because the State was not specifically ordered to keep the Richmond schools open for the remainder of the school year, but was simply ordered to take steps to protect students' rights.

The Appellate Court contrasted the Valenzuela diploma penalty injunction to these rulings, finding that the trial court impermissibly limited the political branches' discretion to decide how to make the policy constitutional.

Both the Appellate Court's separation of powers reasoning and its reading of the precedent are flawed. Separation of powers constraints rightly prevent courts from attempting to use their authority to impose policy preferences when not necessary to protect legal rights, and draw the boundaries of necessity tightly in order to keep policymaking in the more democratic branches. But separation of powers is undermined when courts are precluded from playing their constitutional role of protecting legal rights because their orders will operate within the context of contested policy matters. In Valenzuela, the trial court needed to act immediately in order to halt an ongoing constitutional violation and prevent imminent further violations. As discussed below, there was not a selection of remedies that could effect this protection. Indeed, at the time the injunction issued, graduation ceremonies for the Class of 2006 were only a few weeks away. Caps and gowns needed to be ordered; announcements and programs needed to be prepared. Students needed to make decisions about their next steps for education or employment.

In light of these realities, and the finding that many of the state's students had not been adequately prepared to pass

155. Butt, 15 Cal. Rptr. 2d at 483.
156. O'Connell, 47 Cal. Rptr. 3d at 163-64.
157. Id. at 164-65.
158. Id. at 165.
the CAHSEE, the trial court ordered the well-established remedy of enjoining enforcement of an unconstitutional statute. This imposition of a temporary limitation did not impose a forward-looking policy preference, as if, for example, the Serrano II court had decided to select one particular funding scheme proffered by a party.

The deference of the Serrano II court to the Legislature's discretion is also inapposite because of the disparate nature of the problems at issue and their potential solutions. In the Serrano suit, California needed to fix its entire school funding mechanism, traditionally one of the most complicated statutory systems state and local governments have to deal with.159 Students' rights could not be protected until this whole system was fixed, and the whole system could not be fixed rapidly. For the Valenzuela preliminary injunction decision, the problem at issue—the constitutionality of an exit exam graduation requirement as applied to students in one year's graduating class—was much narrower in scope. There was only one appropriate remedy which could adequately protect student rights, and that was to allow otherwise qualified students to graduate, as opposed to multiple policy approaches the Legislature could consider as potential remedies. Students' constitutional rights could thereby be protected in Valenzuela without requiring extra time for the State to conform its behavior, as was necessary in Serrano.

Further, the Valenzuela record highlights how leaving it to the State to devise its own solution for CAHSEE's constitutional infirmity would extend the plaintiffs' injury: the State argued that the appropriate remedy was to allow existing policies and reforms to unfold.160 Whether or not this "remedy" might ultimately rectify the State's unconstitutional conduct is unknown, though unlikely, but the trial court properly rejected this wait-and-see approach, as it could not possibly make the plaintiffs whole in this case. The plaintiff students had participated for up to thirteen years in an education system which provided starkly different levels of opportunity to learn; the improvement the new reforms might

159. See Serrano, 135 Cal. Rptr. at 348-52.
eventually make could not help them in any timely fashion, even if students were allowed to re-enroll. The Legislature and the Executive, on the other hand, had full discretion for seven years from the inception of the policy—and ample warning from exit exam litigations in other states, from criticism from the public, and from the Kidd litigation—to implement an exit exam system that was likely to pass constitutional muster.

The Appellate Court's reading of Butt also does not provide convincing support for its holding that the injunction violated separation of powers limitations. Butt is clear that the only action the defendants could have taken to conform their behavior to the California Constitution was to make sure students in Richmond were not denied their last six weeks of school, but were able to finish the 1990-1991 school year like other students throughout the state. The only discretion the California Supreme Court left to the defendants was to figure out how the State entity was going to manage to keep the schools open, in other words, the mechanism by which they would pay to do so. The Butt Court did not leave it up to the defendants to devise some other remedy they determined would rectify the unconstitutionality, for example, tacking on extra hours of after-school lessons during the following school year.

Likewise, for the Valenzuela defendants, there was only one action which could (at least, temporarily) fix the policy's constitutional infirmity, and that was to delay the imposition of the diploma penalty so that the Class of 2006 was not subject to it. When the injunction motion was filed, the defendants were already violating the California Constitution by maintaining a system which did not provide equivalent preparation for the CAHSEE. The defendants were going to further violate equal protection and the fundamental right

---

161. See O'Connell, 47 Cal. Rptr. 3d at 164-65.
162. See Butt v. California, 15 Cal. Rptr. 2d 480, 491-93 (Cal. 1992).
163. See id. at 500-04.
164. Id. at 492-93.
165. See id. at 496 ("In sum, the California Constitution guarantees 'basic' equality in public education, regardless of district residence. Because education is a fundamental interest in California, denials of basic educational equality on the basis of district residence are subject to strict scrutiny. The State is the entity with ultimate responsibility for equal operation of the common school system.").
to education, and additionally violate due process, by their imminent denial of diplomas. Unlike in Butt, there was no logistical decision which the trial court needed to leave to the defendants' discretion about how to accomplish not imposing the diploma penalty on the Class of 2006.

2. Appellate Court's Analysis of Remedy Being Tailored to Claims Asserted

The Appellate Court also rejected the preliminary injunction on the basis that receipt of a diploma was not an appropriate remedy because a diploma is not a protected part of the fundamental right to education, using harsh language to do so: "A high school diploma is not an education, any more than a birth certificate is a baby." The Appellate Court found that a diploma is only a marker of an education, and therefore the right to education protected under the California Constitution, and underlying the plaintiffs' equal protection claim, includes access to educational opportunities, but not access to the diploma resulting from those opportunities. The Appellate Court went further to declare that giving diplomas to students who had not passed the exit exam would be harmful to the students by indicating that they had completed an education and developed skills they had not.

The unreasonableness of the Appellate Court's interpretation of the relationship between a diploma and learning opportunities themselves, and how they both relate to a student's right to education, is illuminated by the light of current reality. Without question, the fundamental right to education must include the right to the meat of an education,

166. The Court of Appeal faulted the plaintiffs for creating a timing issue by waiting until February to file suit. O'Connell, 47 Cal. Rptr. 3d at 170. Note, however, that this decision was substantially based on the plaintiffs' good faith efforts to work with the defendants to rectify their behavior before filing suit. Moreover, the SBE scheduled alternative assessments for the CAHSEE as an agenda item for January 2006, and then pulled the item without explanation. Alternatives were not considered or voted upon by the Board for the first time until March 8, 2006, just months before graduation ceremonies for the first class subject to the diploma requirement were to commence. See Young Declaration, supra note 110, at ¶ 5-9.

167. O'Connell, 47 Cal. Rptr. 3d. at 167.

168. Id.

169. Id. at 168.
learning opportunities. But the right to learning opportunities, without the right to concretely benefit from them, is hollow. However much a student may have developed as a result of taking classes, and may internally benefit, that student must rely on other people's decisions to succeed and progress after leaving high school. And those other people must have some way of knowing that a student has an education. Our society developed diplomas as the shortcut to that information. While colleges and employers may require additional exams to assess candidates' skills and knowledge, this diploma shortcut is an indispensable efficiency. As a result, without a diploma, students do not qualify for admission to four-year universities, for many scholarships and for many jobs.

California is one of the few states to have established that the right to education is fundamental and deserves the most stringent legal protection. The motivation for that protection is that Californians believe education is crucial to how good a life a person will enjoy and what type of member of society that person will be. When holding that education is a fundamental interest, the first Serrano court described the "indispensable role which education plays in the modern industrial state" as having two aspects: "First, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life." These concerns focus on an individual's post-high school life and opportunities.

In sharp contrast to Serrano's eloquent support for this Californian priority, yet akin to the CAHSEE system itself, the Appellate Court's interpretation of the fundamental right to education places the burden solely on students for the current reality that a high school diploma is a required tool for success in our society. Protecting learning opportunities without protecting the diploma seriously undermines the practical priority our state has placed on education, and especially hurts many poor and minority students for whom a high school diploma may be the only avenue to a more secure

170. Id. at 156.
and successful life than their parents.

3. Appellate Court's Failure to Assess and Credit Due Process Claim

The Appellate Court could have evaluated the plaintiffs' due process claim as an alternative basis for upholding the injunction, but failed to do so. The Appellate Court instead merely mentioned that the trial court found the equal protection and fundamental right arguments compelling, but had not found the due process argument compelling, and so would focus its review on the former.\textsuperscript{172} In a footnote, it then concurred with the trial court that the due process argument was not compelling, and listed the key due process cases the plaintiffs and amici cited, but offered no analysis.\textsuperscript{173} By failing to discuss the due process claim, which was fully argued in the briefing, the Appellate Court sidestepped analyzing key precedent which would have supported the injunction.\textsuperscript{174} Since due process is central to almost all of the prior exit exam cases, the Appellate Court neglecting to review the argument as an alternative basis is troubling.

Although the trial court did not find the due process claim persuasive, its analysis was scant, and actually indicated that if the court had reviewed the issue more closely it would have found merit to the argument. The court found that California's efforts to establish curricular and instructional validity—that the curriculum covered what was tested and that students were taught what was tested—were "meaningfully less" than that accepted in the Debra P. case. This suggests that upon closer analysis the court might have inferred that the defendants had not demonstrated students were actually taught what was tested.\textsuperscript{175} The

\textsuperscript{172} O'Connell, 47 Cal. Rptr. 3d at 156.
\textsuperscript{173} Id. at 167 n.17.
\textsuperscript{174} One of the only academic commentators on possible litigation targeting the CAHSEE addressed the issue in 2000 and thought, as the Authors contend, that the CAHSEE might be vulnerable to due process attacks on the grounds that students were not taught what was tested given that the State had not aligned curriculum or instruction to the Standards. See Nebgen, supra note 20, at 375. Interestingly, the commentator thought an equal protection argument unlikely to succeed, although she framed a different equal protection argument than the one that prevailed in Valenzuela. See id. at 376.
\textsuperscript{175} Order, supra note 127, at 9-10.
plaintiffs in fact submitted very strong evidence demonstrating that the defendants could not meet this fundamental fairness due process test set out in Debra P.176 For example, the fall before the plaintiffs were supposed to graduate, only forty-seven percent of the schools surveyed reported that they had completely covered the CAHSEE Math Standards; forty-nine percent reported complete coverage of the ELA Standards.177 Worse, only three percent of schools surveyed reported that in the years when students in the Class of 2006 were supposed to be taught the Math CAHSEE skills, their schools completely covered the related Math Standards.178 English Language Learners were taught a curriculum that did not fully cover the CAHSEE Standards.179 Many students, especially low-income, minority and English Language Learner students, reported that they faced questions on the exam about topics they had never studied before.180 Only fifty-two percent of schools reported that they were providing the CAHSEE remediation required by statute.181 Moreover, many students, and particularly the students in low-performing schools, were taught the CAHSEE materials by underqualified and inexperienced teachers.182

Debra P. sets a rigorous precedent for how state defendants must demonstrate that students have had an adequate opportunity to learn the material tested before they can impose a diploma penalty without violating due process. The court enjoined Florida's exit exam for four years. Only

177. See HUMRRO 2005 REPORT, supra note 48, at 148. While an additional forty-seven percent reported coverage of most ELA standards, and forty-three percent reported coverage of "most" Math Standards, "most" covers the wide range of sixty-one-to-ninety-five percent of the tested Standards. See id.
178. See id. at 150. Note, though, that forty-one percent of schools surveyed reported "don't know." Still, nineteen percent reported little coverage (less than forty percent) and nine percent reported only partial coverage (forty-to-sixty percent). See id.
179. See Gándara Declaration, supra note 124, at ¶¶ 16-19; HUMRRO 2005 REPORT, supra note 48, at 152; see also Opposition to Motion for Preliminary Injunction at 13, Valenzuela v. O'Connell, Judicial Council Proceeding No. 4468 (Super. Ct. of Cal., County of Alameda, April 27, 2006) ("[E]nglish language learners] require[ ] instruction different from the standard curriculum.").
181. Id. at 175-176.
182. Id. at v, 239; Rogers Declaration, supra note 122, at ¶¶ 17-18.
after Florida submitted evidence of an extraordinarily comprehensive and detailed evaluation of coverage of the test materials did the Debra P. Court rule that the exam was not fundamentally unfair. For example, as part of their evaluation, Florida sent surveys to every single teacher in the state, received responses from about seventy percent, and made an on-site investigation of every single district. California's efforts to establish curricular and instructional validity pales in comparison to Florida's. California only collected data from eleven percent of high schools and from about seven percent of teachers of CAHSEE materials. It made on-site assessments at less than three percent of high schools. This falls well short of what the Debra P. Court would accept as evidence demonstrating the exam is not fundamentally unfair. Although Debra P. is on all fours with this exit exam case, the Valenzuela court neglected to address it.

Likewise, the GI Forum court only denied the plaintiffs' due process claim after acknowledging the substantial and systematic evidence demonstrating students had an opportunity to learn the material. The court reviewed the strict connection between the state-mandated curriculum and the exam and the evidence that students were automatically provided remediation if they did not pass. Again, the Valenzuela evidence showed there was not a tight alignment between curricula and test across the state and that a significant portion of students were not being provided remediation. The GI Forum Court would have been unlikely to dismiss the plaintiffs' due process claim if it were judging the CAHSEE system. The Appellate Court, however, sidestepped the due process claim, even though due process

184. Id. at 1408.
186. Id.; HUMRRO 2005 REPORT, supra note 48, at 102, 104.
187. See HUMRRO 2005 REPORT, supra note 48, at 106 (reporting that site visits were conducted at forty-seven of California's 2208 high schools).
189. Id. at 671-673, 676.
analysis is central to *GI Forum* as well as most other key exit exam cases.

V. EVALUATION OF POTENTIAL ALTERNATIVE STRATEGIES FOR VALENZUELA

The Authors believe that the Appellate Court erred in vacating the injunction, for the reasons explained above as well as for other reasons. Since, based on its earlier four to three opinion, the California Supreme Court was unlikely to reverse, and because of the imminent need to obtain some form of relief for the tens of thousands of class members, we reluctantly decided not to appeal the decision. Instead, the parties immediately started settlement talks to discuss changes the defendants could make to avoid prolonged litigation through, for example, a new preliminary injunction motion requesting a different remedy. For the benefit of other interested parties, either in California or in other states, we take this opportunity to briefly consider whether some alternative strategies might have avoided the Appellate Court’s conclusion that the remedy was inappropriate.\(^{190}\) We will assume for the sake of focusing on the remedies issue that the Appellate Court was satisfied with the application of the preliminary injunction standard in the balancing of harms. This section will conclude with a short update on the state of the settlement negotiations.

A. Seeking Different Relief

Although we believe strongly that the trial court had ample discretion and authority to issue the requested injunction, the most obvious change to the *Valenzuela* litigation strategy would have been to request a remedy other than an injunction against the diploma penalty for the Class of 2006. This is also the alternative that deserves the most consideration. Here are three examples of other relief the plaintiffs could have sought.

First, plaintiffs might have requested guaranteed access

---

\(^{190}\) The *Valenzuela* case appears to have been closely monitored by organizations and entities nationwide interested in exit exam policies. For example, the Center on Education Policy described the case in detail in its last annual report. KÖBER ET AL., *supra* note 5, at 14-15, 20, 22-23. The report observes that the outcome from the case would likely affect policies in other states. *Id.* at 22-23.
to re-enrollment for students who had not passed by the end of the twelfth grade, or guaranteed access to further remediation outside of normal enrollment. Given the Appellate Court's conclusion that further educational opportunities are what constitute the right to education, the court might have granted such an injunction. This choice also might have avoided separation of powers concerns as it would not interfere, according to the Appellate Court's characterization, with the defendants' new accountability system.

Second, the relief could have focused on earlier inputs to student preparation for achieving the standards tested by the CAHSEE. William Koski of Stanford Law School has proposed the approach of exploiting the standards-based reform movement through education litigation to enhance educational equity and opportunity. Professor Koski argues that the standards movement provides litigators and courts a valuable tool: standards are politically-approved measures which a court can use to establish and define the contours of state accountability to students for providing an equal and adequate opportunity to learn material the students are now expected to know. They can be used to support statutory and constitutional claims and can predicate a remedy closely tied to the existing accountability system. So, for instance, in this case, the injunction could have required alignment of curriculum, instruction and the CAHSEE material in order to make certain that students had

Professor Kevin Welner picks up on and supports Koski's suggestion:

[I]nstead of focusing on the "punishment" (the retention or diploma denial), students' legal attacks might challenge the state's failure to fulfill its voluntarily assumed affirmative duty to provide each student with a fair opportunity to learn the material covered by the high-stakes exam.

193. Koski, supra note 192, at 306-315. Professor Maurice Dyson of Columbia also explores this idea by discussing how opportunity to learn due process rights could be used to drive "educational adequacy" cases, in which plaintiffs' claims target the right to a certain standard of education being provided. See Maurice R. Dyson, Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges, 7 TEX. F. ON C.L. & C.R. 1, 33-60 (2002).
an adequate and equal opportunity to learn the Standards tested by the CAHSEE, as required by due process and equal protection. This is, in fact, something that is already mandated by California statute: the enacting legislation requires that the CAHSEE have curricular validity, which means that the curricula cover what is tested, and that it have instructional validity, which means the students are taught what is tested.\footnote{CAL. EDUC. CODE § 60850(e)(3); Geisinger Declaration, supra note 185, at ¶¶ 10, 19-24.}

An injunction requiring alignment of curriculum, instruction and tested material might have gained the Appellate Court's approval, or at least avoided the major issues the court found with the diploma penalty injunction. It might have assuaged the separation of powers concerns, as it would have tracked politically-developed education policy choices. Professor Kevin Welner of the University of Colorado observes that such a "shift in [remedial] focus . . . puts the court in the position of enforcing, rather than overturning, state policy. . . ."\footnote{Welner, supra note 192, at 734.} And Professor Koski encourages that, "Armed with specific, clear, and meaningful standards that are the product of such an extensive political process, courts are better positioned to overcome their self-imposed obstacles to policy reform."\footnote{Koski, supra note 192, at 307.} A standards-based remedy would also have given the defendants discretion about how to achieve alignment, and likely allotted time in which to do so, which were key concerns of the Appellate Court.\footnote{See O'Connell v. Super. Ct., 47 Cal. Rptr. 3d 147, 169-70 (Ct. App. 2006).}

Third, the plaintiffs could have requested that the trial court grant an injunction that merely ordered the defendants to make the CAHSEE system constitutional, thus placing all discretion in the defendants' hands, and sidestepping the Appellate Court's concerns. Even if the unthinkable happened, and the defendants themselves came up with delaying the diploma penalty as their solution, the Appellate Court would have been unlikely to intervene to assert its interpretation that access to a diploma is not included in the fundamental right to education, given the Appellate Court's position regarding the discretion of the defendants to make
education policy choices.\textsuperscript{198}

Starting the litigation with any of these alternative remedies as the initial target, however, would not have been a good strategic choice for the Valenzuela plaintiffs, and may present disadvantages for other exit exam opponents even with the benefit of the Valenzuela opinions to consider. There are general reasons why these remedies were inappropriate Valenzuela starting targets. The only remedy adequate to effectively protect these plaintiffs' rights was to enjoin the diploma penalty immediately. That is the remedy the plaintiffs sought and that is the remedy we were retained to pursue. The plaintiffs wanted to walk the stage for graduation and obtain their diplomas at the end of the twelfth grade. One named plaintiff, for example, had already been admitted to a four-year university.

Remedies focused on further educational opportunities, or fundamentally improving the preparation of students to pass the exam, might be adequate for later classes, but would have taken effect too slowly for the Class of 2006. Additionally, it was good strategy in Valenzuela, where there was extensive existing evidence that students in the Class of 2006 were not being given an equal or adequate opportunity to learn the materials on the test, to try to leverage the strong protection that California traditionally gives students' rights. The hesitation by the Appellate Court to protect students' rights was not a foregone conclusion for the plaintiffs as, candidly, a differently-composed appellate panel could easily have affirmed the trial court's judgment. Parties in states with less legal protection—almost all—may choose to adjust their strategic choices,\textsuperscript{199} although plaintiffs have successfully secured students' diplomas in these states as well.\textsuperscript{200}

There are also specific reasons for not choosing each of these three remedies as an initial goal. Seeking further remedial opportunities after the twelfth grade could not

\textsuperscript{198} See id. at 170-71.

\textsuperscript{199} For example, in Massachusetts, a state where the exit exam has been under attack, plaintiffs will find their state constitutional challenges reviewed under the rational basis test, as education is not a fundamental right under the Massachusetts Constitution. See Baron, supra note 18, at 139-140, 144-47.

\textsuperscript{200} For instance, the Debra P. plaintiffs were successful even though the court used a rational basis test. See Debra P. v. Turlington, 474 F. Supp. 244, 263, 268-69 (M.D. Fla. 1979).
prevent the imminent constitutional harm to students of being denied their diplomas without an adequate or equal opportunity to learn the material. Furthermore, it would delay students being able to take the next steps in their lives, whether to employment or more education. For many students this would be a real hardship.

Pursuing the enforcement of an opportunity to learn standard through an injunction requiring alignment of curriculum, instruction and tested material is a promising approach to improving educational equity and opportunity vis-à-vis an exit exam requirement. However, it envisions a different lawsuit with different plaintiffs than *Valenzuela*. In order to protect students' rights, this approach would need plaintiffs whose constitutional injury of diploma denial was not imminent. This itself might raise ripeness issues. And the remedy, once secured, might be tricky to monitor and burdensome to enforce, although if it were tied to measures of particular educational inputs (for example, percentage of certified teachers), it could be workable and have real value.

Targeting a remedy that gives total discretion to the defendants to devise a constitutional fix is rife with dangers. First, given the defendants' record over the last eight years of implementing the CAHSEE with such little and belated effort to promote student performance or ensure equitable opportunity, it is likely the defendants would delay coming up with a solution, and that the ultimate solution would be half-hearted. This is, in fact, evidenced by the *Valenzuela* record in which the defendants suggested the proper remedy was simply to allow the *Williams* reforms to take their course, even though there was substantial evidence that it will take years for these reforms to be fully implemented. But the only way the *Valenzuela* plaintiffs could avoid constitutional injury was through an immediately effective solution. Second, given the defendants' demonstrated unwillingness to pressure, or support, districts in their manners of implementing the CAHSEE, it is likely a defendant-designed solution would avoid making districts take specific measures to improve, even though it is at the district and school level that meaningful opportunities to learn the test material must

increase. And third, given the defendants' articulated, narrow focus on the CAHSEE as a tool for creating student accountability, with little to no acknowledgement of the need for the CAHSEE to require accountability from school districts, schools, teachers and the State, it is likely their remedy would have continued to place the main burden of the State's failure to provide equal and adequate preparation on the students themselves.

B. Filing Earlier

One strategic change might have been to file the complaint and move for the preliminary injunction earlier. In Valenzuela, the plaintiffs informed the defendants of their belief that students' rights were being violated, and made good faith efforts to encourage the defendants to rectify the problem. This pre-litigation effort lasted about four months leading up to the February 2006 filing. If the plaintiffs had filed instead in the fall of 2005, or even in the spring of 2005, perhaps the Appellate Court would have modified the injunction instead of vacating it, for example, such that the defendants must demonstrate constitutionality before the spring of 2006 or the injunction would issue. This would have been an unlikely step by the Appellate Court given its interpretation of the right to education, but allowing for such a modified injunction might have mitigated some separation of powers concerns. This approach would have created other problems, though, including potential ripeness issues. It additionally would have limited the facts the plaintiffs could have presented specific to the Class of 2006's performance and how many students were likely to be affected by the diploma penalty's introduction.

C. Moving for a More Tailored Injunction by Limiting Class of Plaintiffs

Another possibility would have been to move for an injunction against the diploma penalty for a more tailored class than all students in the Class of 2006 who had completed their graduation requirements except for passing the CAHSEE. For example, the plaintiffs could have been limited to only those students at schools where they were not given an equal or adequate opportunity to learn the material.
This might have lessened, if not eliminated, the Appellate Court’s separation of powers concerns as it would narrow the injunction’s scope, although it still would not provide the defendants discretion to devise their own solution. This approach would not, however, have avoided the Appellate Court’s judgment that the right to education only includes educational opportunities, not receipt of a diploma. Furthermore, it would have created additional complex evidentiary challenges. The plaintiffs would have needed to supply a way of demonstrating which schools were not providing an equal or adequate opportunity to learn the material. Since there are hundreds of school districts in California, this would have been a difficult and time-consuming proposition, even though the plaintiffs likely could have developed an effective proxy with the help of their experts. Judge Freedman seemed to contemplate such a proxy when he noted, acknowledging that some students who were uninjured might benefit from the injunction, that “no suggestion . . . of a workable mechanism” had been offered for tracing causation of students’ not passing the CAHSEE to State failures. If the plaintiffs had developed such a proxy, it assuredly would have been hotly contested, and, despite Judge Freedman’s aside, the court might have been hesitant to rely on it to make distinctions between students given the critical value of the remedy.

D. Current State of Case After Successful Settlement Negotiations

The parties started settlement discussions directly after the Appellate Court vacated the injunction. Following about seven months of vigorous negotiations, the parties agreed on final draft settlement legislation, which was then introduced to the Legislature. Negotiations continued in the following months to develop the settlement agreement between the parties. The trial court granted final approval of the settlement on August 13, 2007. As the Authors finalized this Article, the settlement legislation had been passed by the

202. It also would have addressed the court’s concern about a benefit being provided to uninjured plaintiffs, an issue which is not addressed by this Article.
204. Order Granting Final Approval of Settlement, Valenzuela v. O’Connell, JCCP-4468 (Super. Ct. of Cal., County of Alameda, Aug. 13, 2007).
State Assembly and was under consideration by the State Senate on an urgency basis.

The settlement legislation secures for the plaintiffs two main benefits as well as some subsidiary benefits. First, students who have not passed the CAHSEE by the end of the twelfth grade gain the right to two years of further preparation for the CAHSEE provided free by their school district. Second, if the student is an English Language Learner, the district must provide two more years of English proficiency development in order to prepare for the CAHSEE. Additionally, notification about these new rights is required, as is counseling regarding the options for students not passing the CAHSEE by the end of the twelfth grade. The new rights are included under California's Uniform Complaint Process, so that students and families can seek enforcement if their school district is deficient in providing the additional instruction. County Superintendents will monitor and assess districts' implementation of the remediation rights, like they do for the Williams reforms, as part of the state's overall Academic Performance Index (API) system.

The core of the settlement agreement is passage of the settlement legislation, or legislation that contains substantially the same benefits. The settlement class has been defined more expansively than the plaintiff class was defined in the complaint. It includes past, present and future students who do not pass the CAHSEE by the end of the twelfth grade, instead of just students in the Class of 2006. In exchange for the benefits detailed above, the entire settlement class will release its claims related to options for continuing to study for the CAHSEE after the twelfth grade. Only settlement class members who were in the Class of 2006, however, released their broader constitutional and statutory claims regarding other aspects of the CAHSEE graduation requirement, such as the adequacy of in-school preparation to pass the exam.

We believe that the settlement negotiated is a good result

for the plaintiffs given the Appellate Court's decision. The agreement was the result of wide-ranging discussions exploring the extent of the defendants' willingness to make changes to CAHSEE policies and to provide meaningful additional services to plaintiff students. It provides a significant new benefit which should facilitate the ultimate, if delayed, graduation of many students. Grassroots monitoring of the districts' implementation, continued funding and widespread encouragement of students to access the new remediation will be essential to the meaningfulness of these new rights.

VI. CONCLUSION

The rulings in Valenzuela suggest that future class action challenges to the California exit exam graduation requirement seeking the remedy of allowing students to graduate will meet a cold reception given the current composition of the California Supreme Court. Nonetheless, the Valenzuela opinion shows that California courts recognize how the State jeopardizes students' equal protection and fundamental right to education guarantees by unequally preparing students for the exit exam.

Californians can rightly be proud that their Constitution has historically provided strong protection for education rights. Students, families, and any other groups interested in promoting equality and opportunity for California students should creatively explore how to hold the state, school districts and schools—and other citizens—responsible for living up to this constitutional protection vis-à-vis the new exit exam system. The attention generated by the Valenzuela lawsuit and other public criticism of the CAHSEE system has already had a positive effect. Since the commencement of the suit, the State increased the amount of funding provided for CAHSEE remediation, first allocated in 2005, from twenty million dollars to seventy million dollars, and also made it available for remediation for students who had completed the twelfth grade. The Legislature created a substantial new funding stream for middle school and high school counseling, and included CAHSEE counseling in the funding conditions. As part of the Valenzuela settlement negotiations, the defendants agreed to survey districts to assess the availability of remediation for students who had not passed
by the end of the twelfth grade. Additionally, the SPI agreed to reach out, twice, to school districts to encourage them to invite students in the Class of 2006 back for further remediation.

Given the State’s track record of inaction on the state level until 2005, these positive developments should hearten California citizens who want to instigate further reforms of the CAHSEE system by continuing to publicly scrutinize and challenge the implementation of the exam. Such citizens, and similarly-concerned citizens of other states, should, however, consider this lesson from Valenzuela: While the Appellate Court’s opinion focused heavily on the danger of the judicial branch encroaching on the political branches’ authority, the Valenzuela story is potentially instructive about the influence of politics on the judiciary. The California Supreme Court voted only four to three to stay the diploma penalty injunction, and the fourth vote was from a justice appointed by the new governor, Arnold Schwarzenegger, who was elected after a recall of the former governor. The exit exam is supported by powerful and ambitious political players, such as SPI O’Connell, and, whatever the actual merits of the separation of powers concerns, the Appellate Court’s affirmation of the injunction might have been perceived as a slap at the political branches. While political influence on legal decisions is difficult to assess, it is critical that advocates for equal opportunity take this factor into account—and try to address it politically as well as legally—when planning their long- and short-term strategies for challenging troubling governmental policies.

As exit exams have spread, citizens in many states besides California have become fiercely interested in how well their states are implementing the exams and preparing students to pass them. We look forward to seeing how students in those states are able to contest and improve their exit exam systems, and how courts elsewhere approach the issue of remedies, which became so central in Valenzuela.

The Valenzuela case is likely approaching its conclusion, but the challenges that California will face as a result of its exit exam policy have just begun. Tens of thousands of students continue to not pass the CAHSEE before the end of the twelfth grade, and enter post-high school life without the benefit of a high school diploma; at last count, the California
Department of Education estimated that 34,000 students in the Class of 2006 and 37,000 in the Class of 2007 had not yet passed the exit exam. The negative consequences for students of not having diplomas are immediate and long-term: the lack of a diploma will slam the doors of opportunity, despite the Appellate Court’s insistence that the diploma itself is of nominal importance. The negative consequences for our state of welcoming into adulthood substantially more citizens without diplomas will be far-reaching. The fact that the majority of these citizens, who often admirably persisted through difficult schools, are from communities already burdened by poverty and lack of opportunity means the damage will be even deeper.

California must accept the real consequences of its decision to deny diplomas based on the results of a test administered to students provided an unequal and inadequate education, and must respond effectively. If—as evidenced through this case—the State is unwilling to modify its exit exam requirement, then it must genuinely commit to fixing the systemic problems that allow tens of thousands of students to make it through the twelfth grade without being able to pass a tenth grade exam. The reforms introduced by the Williams settlement will help rectify the deficiencies in our public school system. These improvements, however, must be buttressed and extended for the State to be able to claim, in good conscience, that it is fairly denying diplomas to students who are the products of the education system for which it is ultimately responsible. Otherwise, Liliana Valenzuela, and other students like her who bore the initial brunt of the State’s cart-before-the horse approach to education reform, will be followed by a continuous flood of hard-working students who complete high school but do not receive diplomas.
