Defending Students in Expulsion Proceedings

A Manual for Pro Bono Attorneys in CA

Talia Kraemer & Zabrina Aleguire

12/21/2015

This manual is intended to provide comprehensive guidance for attorneys defending students facing suspension and expulsion in California, including discussion of protections for students with disabilities. Special thanks to Cory Isaacson of East Bay Community Law Center's Youth Defender Clinic and attorneys from Nixon Peabody LLP for their detailed edits. Thanks also to Oakland Unified School District for authorizing distribution of its disciplinary hearing script, to the Disability Rights Education and Defense Fund for use of sample materials, and to Disability Rights California and CASE for access to their Special Education Rights and Responsibilities manual.

Defending Students in Expulsion Proceedings

Table of Contents

INTRODUCTION

This manual is intended to instruct attorneys and other advocates in the practice of defending students in expulsion proceedings.[1] By taking a case with Legal Services for Children (LSC) you are providing your client with a critical service that will have a major impact on his or her education. We focus on expulsion over other disciplinary proceedings because there is greater need for attorney representation in expulsion cases, which often involve a hearing. Although this manual provides a detailed overview of the relevant laws, attorneys should always consult the Education Code, caselaw, and other relevant statutes directly in order to address specific questions or issues.

When you volunteer to take a case as a pro bono attorney with LSC, it is your case but we still play an active role in supporting you. We provide training, background materials, and mentoring. It is very important to check in with LSC attorneys to develop a plan for the case, as questions or issues arise, and at the close of the case to report the outcomes. You are responsible for gathering information, interviewing the client and all relevant people involved, and developing a strategy to resolve the case according to your client's stated interests. Although litigating a hearing may turn out to be your client's best option, it is vital to fully explore alternative options that may be better for the student. This will be discussed in Section VI.E.

Representing Students: The Attorney's Role

Child Is Your Client

You represent the child, not the parents – although you ideally will have a collaborative relationship with them. Our representation is client-directed so long as the child has the capacity to make decisions. Generally, we only substitute judgment if the child is younger than seven years old. From the very beginning, you should make clear to all parties that the student, not the parent, directs your representation. It is wise to discuss your role with the student and parent separately. You should also explain that, although you ultimately answer to the child, it may be important to involve the parents extensively. For younger clients, most of your contact may be with the parents. In addition, under both state and federal law, parents have certain rights to be involved in and to direct their children's education. Thus, while your advocacy is directed by the student, some decisions about the child's school placement and educational services will ultimately be up to the parents.

Communication and Confidentiality

It is important to explain your role to your client in age-appropriate terms. Younger children, in particular, often assume that the adult is the decision-maker and may have trouble understanding their power to direct the goals of their case. Take time to ensure that your client understands that she is the "boss" in this adult-child relationship. When you first meet with your client and her parent(s), have a joint conversation with them where you explain who is your client, what that means in terms of decision-making, and that you will keep information confidential that the student

[1] This manual is for informational purposes only. It is not legal advice and does not create an attorney-client relationship. The manual should not replace an individualized legal assessment of a particular case.

does not wish to be shared (even if that means not sharing it with the parent). Additional step-by-step guidance is provided in Section VI.B on how to conduct this first meeting with your client.

At every stage of the case, explain the process to your client in age-appropriate terms, including what the expulsion hearing will be like, what possible outcomes may occur, your strategy, and what conversations you are having with third parties. Educate your client about the possible consequences of different courses of action, as well as your assessment of the likelihood of various outcomes. If possible, build in plenty of time for your client to make big decisions that will be required of her. Youth may not have experience making the kinds of choices that will be demanded of them in expulsion cases and will need time to develop their understanding of the issues and to reach their decisions.

Overview of Suspension and Expulsion

California law provides protections and rights to due process for students who are excluded from school. Students may only be suspended or expelled for certain acts enumerated in the Education Code that are related to school activities or attendance. A small number of these offenses, known as "zero tolerance" offenses, require mandatory expulsion by the school district. However, for most offenses, school officials have significant discretion over whether to expel the student. The **grounds for suspension and expulsion** are discussed in Part One, Section I of this manual.

Students who are referred for expulsion are initially suspended for their behavior. Although typical suspensions may only last for a period of up to five (5) days, the suspension may be extended pending an expulsion hearing if the student poses a danger or threat of disruption to the instructional process. Suspension procedures are governed by law, and violations of those procedures may be grounds for challenging an expulsion order later on. It is therefore important that attorneys representing youth in expulsion proceedings also understand the laws governing suspension. **Suspension laws and procedures** are addressed in Part One, Section II.

Suspension: Temporary removal of a student from school for no longer than five days.

Extended Suspension: Suspension of a student pending an expulsion hearing (longer than five day limit).

Expulsion: Removal of a student from all comprehensive District schools by the Governing Board for a term up to one calendar year. However, the student may still attend an alternative school!

Section III of Part One describes **the expulsion process in California**. Students who are recommended for expulsion must receive a fair hearing before they are expelled. Students have a number of **procedural rights** in these proceedings, including a right to notice, the right to bring an attorney or other advocate to the hearing, the right to inspect the school's evidence, and a right to present oral and documentary evidence. The Education Code dictates the **evidentiary rules and standards of proof** that apply at the hearing. (See Section III. D and E.) At the hearing, **the school must prove** that (1) the student committed an expellable offense; (2) the offense was related to school attendance or a school activity; (3) all procedures required by law were followed; and (4) other means of correction are not feasible or have repeatedly failed, **or** the student's presence at school would cause a danger to the physical safety of the student or others (not required in zero-tolerance cases). (See Section III. C.)

Generally, there are three **possible outcomes after an expulsion hearing**. These outcomes are discussed in Part One, Section III. F. If the student is not expelled, she immediately will be returned

to her school of origin or she may request a transfer to another school. Alternatively, the expulsion order may be suspended by the governing board, in which case the student will be allowed to return to school on probationary status. If the student is expelled, she may not attend any regular district school during the term of expulsion, which may last up to one calendar year, depending on the student's offense. However, the student will be placed in an alternative education program (usually a county or community day school) during the expulsion and given a rehabilitation plan.

Students who are expelled have an automatic **right to appeal**. The appeals process is described in Part One, Section IV. If you believe the expulsion appeal has not led to an appropriate resolution, you may also consider bringing a writ in county or superior court. However, the writ process, as well as other mechanisms for challenging school discipline (e.g., filing a complaint against the district with the California Department of Education or with the U.S. Department of Education's Office of Civil Rights) are not covered in this manual. Instead, we direct you toward outside resources that will further explain those options.

Students with disabilities are afforded special protections in disciplinary proceedings. These protections are discussed in Part One, Section V. Note that these protections also apply when the school is deemed to "have knowledge" of a student's disability, even if the student's disability has not been formally identified and the student is not currently receiving special education services. Thus, it is important for all attorneys to be familiar with the disciplinary rules for students with disabilities, because a client may have unacknowledged special education needs.

Part Two of this manual provides practical **guidance on representing students in expulsion cases**. When you receive an expulsion case, your first step will be to review the referral packet and consult with LSC. Next, you will meet with the client, explain your role and what the client can expect from the proceedings, obtain releases, and sign a retainer. You will then make contact with the school district and obtain your client's school records. Note that once you are involved in an expulsion case, all communications with school officials regarding the disciplinary proceedings and your client's school placement should go through you. As you prepare for the expulsion hearing, you will interview your client, her family, and potential witnesses; gather letters of support addressing positive equities in your client's favor; and collect documentary evidence. These tasks are addressed in Part Two, Sections VI.A-D. While **preparing for the hearing**, you might also be **seeking an alternative resolution** through negotiations with the school district. (See Sections VI.E-F.)

Section II of Part Two describes **what to expect at an expulsion hearing**, including an overview of the participants and the different stages of a hearing. Section II also discusses strategies for defending against expulsion at the hearing. Section III provides tips for **advocacy after the expulsion hearing**, both before the governing board makes its final expulsion decision and in the event that your client is expelled.

PART ONE: SCHOOL DISCIPLINE LAW AND PROCEDURE

Expulsion proceedings in California are governed primarily by Sections 48900 to 48927 of the California Education Code, the set of laws that regulate California's public education system.[2] In addition, federal law provides extra protections for students with disabilities who are subject to school disciplinary proceedings. In every case, you will also want to consult the school district's policies and procedures to identify rules and practices specific to your client's school district.

I. Offenses for Which Students Can Be Suspended or Expelled

A. Grounds for Suspension and Expulsion

The Education Code limits the acts for which students can be suspended or expelled to certain delineated offenses. These include, among others:

- Causing physical injury
- Possession of a weapon or other dangerous object
- Possession or sale of a controlled substance or intoxicant
- Theft or robbery
- Damage to school property
- Possession of drug paraphernalia
- Sexual assault or battery, or attempted sexual assault or battery
- Hazing or bullying
- Terroristic threats

A complete list of the lawful grounds for suspension or expulsion is provided in Appendix A. When a student is suspended or referred for expulsion, the school must identify the alleged ground(s) for discipline in written notices to the family. Cal. Educ. Code § 48900.8. When you receive an expulsion case, you should examine the written expulsion notice to determine which sections of the Education Code constitute the alleged basis for the expulsion referral. The type of allegation will determine what the district must prove, as discussed in Section III.B.

B. Limits on Offenses that Can Be Grounds for Discipline

Certain offenses *cannot* be grounds for suspension or expulsion under the Education Code.

- A student cannot be suspended or expelled for absences or lateness. Cal. Educ. Code § 48900(w). Alternative district-level processes are available to address truancy problems.
- A pupil who "aids or abets" in the infliction or attempt to inflict physical injury may be suspended, but *not expelled*. Cal. Educ. Code § 48900(t).[3]
- Some offenses are only grounds for suspension or expulsion if the student is in grades 4 through 12. These include sexual harassment, hate violence, and intimidation of others.

[2] Throughout this manual, citations to the "Education Code" refer to the California Education Code.
[3] However, a student may be expelled if she or he is adjudicated in a juvenile court to have aided and abetted in a crime of physical violence that caused great bodily injury or serious bodily harm. Cal. Educ. Code § 48900(t).

Cal. Educ. Code §§ 48900.2-48900.4. Suspension may only be imposed for "willful defiance" if the student is in 4th grade or higher, effective January 1, 2015. Cal. Educ. Code § 48900(k)(2).

- A recent revision to the Education Code has eliminated "willful defiance" as a ground for *expulsion*. Education Code § 48900(k), disrupting school activities or willfully defying the valid authority of school personnel, may now only be used for suspension as described above. This law went into effect on January 1, 2015.

In addition, for a first offense, the school must generally discipline the student in ways that are less severe than suspension, such as warnings, parent conferences, or detention. Cal. Educ. Code § 48900.5. These alternative forms of discipline should generally be used for offenses like willful defiance or disruption, or dress code violations.

C. Discretionary versus Mandatory Suspension and Expulsion

Even if a student has committed a qualifying offense, school officials have significant discretion in deciding whether to suspend or to recommend expelling the student. Cal. Educ. Code § 48900(v). It is critical to explore alternatives to suspension and expulsion that are age-appropriate and designed to address and correct the student's behavior. However, there are some limits to schools' ability to opt for alternatives to suspension and expulsion.

Education Code section 48915 creates three categories of expellable offenses: 1) Discretionary offenses, 2) Medium-discretion offenses, and 3) Mandatory Expulsion ("Zero Tolerance") offenses. These categories differ in the amount of discretion a school principal or superintendent has in deciding whether to suspend a student or to recommend expulsion for a student. These categories also determine the legal standard that must be applied at an expulsion hearing, so it is essential that you determine which level(s) of offenses your client is accused of committing. *See* http://www.cde.ca.gov/ls/ss/se/expulsionrecomm.asp for a chart from the California Department of Education illustrating the different levels of offenses, which we have condensed and recreated in Section III.A. Also see Appendix A for a complete list of all offenses listed under Education Code § 48900 et al.

1. Discretionary Offenses (§ 48915(e), § 48900(v))

For most offenses, it is completely within the principal or superintendent's discretion whether to suspend a student or to recommend a student for expulsion. Instead, the principal/superintendent is free to provide alternatives "that are age-appropriate and designed to address and correct the pupil's [specified] misbehavior." Cal. Educ. Code § 48900(v). These fully discretionary offenses include stealing or damaging property, possessing tobacco, vulgarity, and possessing an imitation firearm. Cal. Educ. Code §§ 48915(e), 48900(f)-(m).

2. Medium-Discretion Offenses (§ 48915(a))

If a principal/superintendent determines that a student has committed one of the following acts, she has discretion to *not* recommend expulsion if she determines that it would be *inappropriate under the circumstances* **or** that "*an alternative means of correction would address the conduct":*

a) Causing serious physical injury, except in self-defense;
b) Possession of a knife or other dangerous object;

c) Possession of a controlled substance that has not been prescribed to the student, except for the first offense for possession of less than one ounce of marijuana;[4]
d) Robbery or extortion;
e) Assault or battery upon a school employee.

Cal. Educ. Code § 48915(a). Principals and superintendents are to make the determination whether to recommend expulsion "as quickly as possible to ensure that the pupil does not lose instructional time." Cal. Educ. Code § 48915(a)(2). The statute does not require that the principal *suspend* the student in these circumstances either, so arguably the principal/superintendent retains discretion not to do so if suspension is inappropriate or an alternative approach would address the issue.

3. Mandatory Expulsion ("Zero Tolerance") Offenses (§ 48915(c))

A principal/superintendent ***must*** *immediately suspend a student and is required to recommend expulsion* if she determines that a student has committed one of the following acts:

a) Possessing, selling, or furnishing a firearm[5];
b) Brandishing a knife at another person;
c) Selling a controlled substance;
d) Committing or attempting to commit sexual assault or committing sexual battery; or
e) Possession of an explosive.

Cal. Educ. Code §48915(c). These are "zero tolerance" offenses which are subject to a more strict legal standard, as discussed in Section III.B. The California Attorney General has clarified that a school district may not adopt its own "zero tolerance" policy that would automatically require suspension and expulsion of students for offenses other than the mandatory expulsion offenses contained in the Education Code. Cal. Atty. Gen. Opinion No. 97-903, 80 Ops. Cal. Atty. Gen. 347, 1997 Cal. AG LEXIS 79, 1997 WL 751668 (full text included in Appendix B).

D. Offense "Related to School Activity or School Attendance"

For a student's actions to warrant suspension or expulsion under the Education Code, the actions must be "related to school activity or school attendance occurring within a school." Cal. Educ. Code § 48900(s). As defined in the statute, this includes, but is not limited to, offenses committed:

(1) On school grounds;
(2) While going to or coming from school;
(3) During lunch period (whether on or off campus); and
(4) During, or while going to or from, a school-sponsored activity.

Cal. Educ. Code § 48900(s). The more serious offenses, discussed above as "mandatory" and "medium-discretion" offenses must actually be "committed *at school* or *at a school activity* off school grounds" to be the basis for an expulsion recommendation. Cal. Educ. Code § 48915(a) & (c) (emphasis added).

---

[4] Under recent revisions to the Education Code, the first offense for possession of less than one ounce of marijuana, *other than concentrated cannabis*, is expressly exempt from this category and should be treated as a fully discretionary offense.

[5] Note that possession of an imitation firearm is expressly exempt from the zero tolerance category and should be treated as a fully discretionary offense. Cal. Educ. Code § 48915(c)(1).

A recent addition to the education code clarifies that cyber-bullying, through "electronic acts" created or transmitted "on or off the schoolsite" may be the basis for suspension or expulsion. Cal. Educ. Code § 48900(r)(2)(A). However, the requirement that the offense relate to school activity or attendance still applies. Cal. Educ. Code § 48900(s). So, the district must still show that the behaviors were closely linked enough to school attendance. Ultimately, it will be up to advocates to ensure that this limitation is still applied in cases of cyber-bullying.

II. Suspension Process

Because every student who is recommended for expulsion is first suspended, this Section provides a brief overview of procedures for, and limits on, a schools' use of suspensions. A suspension is the temporary removal of a student from the regular classroom setting. A suspended student may be sent home or may be placed temporarily in a supervised suspension classroom (described in Cal. Educ. Code § 48911.1). Unlike expulsion, suspension does not entail a hearing. Schools are merely required to hold a conference with the student, caregiver, and relevant school staff in order to properly suspend a student. However, there are several protections that may be invoked in order to advocate for a student who has been suspended to be reinstated. Additionally, if the school fails to follow the Education Code during the suspension stage, these violations may be raised in an expulsion hearing if the cumulative effect of those violations prejudiced the student.

A. Limits on Use of Suspension

A student may be suspended for a *first* offense if the principal or superintendent determines that (1) the student committed a zero tolerance offense (for which suspension is mandatory), (2) the student committed one of the previously described medium-discretion offenses listed in California Education Code section 48900(a)-(e), or (3) the student's presence at school causes a danger to others. Cal. Educ. Code §§ 48900.5(a); 48915(c).

In all other cases, suspension may be imposed "only when other means of correction fail to bring about proper conduct." Cal. Educ. Code § 48900.5(a). These other means of correction may include, but are not limited to, the following:[6]

1) A conference between school personnel, the pupil's parent or guardian, and the pupil.
2) Referrals to the school counselor, psychologist, social worker, child welfare attendance personnel, or other school support services personnel for case management and counseling.
3) Study teams, guidance teams, resource panel teams, or other intervention-related teams that assess the behavior, and develop and implement individualized plans to address the behavior in partnership with the pupil and his or her parents.
4) Referral for a comprehensive psychosocial or psychoeducational assessment, including for purposes of creating an individualized education

[6] This language is copied from the Education Code and can be found in Appendix A.

program ("IEP"), or a plan adopted pursuant to Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. § 794(a)).[7]

5) Enrollment in a program for teaching prosocial behavior or anger management.
6) Participation in a restorative justice program.
7) A positive behavior support approach with tiered interventions that occur during the school day on campus.
8) After-school programs that address specific behavioral issues or expose pupils to positive activities and behaviors, including, but not limited to, those operated in collaboration with local parent and community groups.

Cal. Educ. Code § 48900.5(b). If alternatives such as these have not been attempted, it is important to meet with the principal, district superintendent, or attorney for the district (depending on if the district is represented) to advocate that the student be reinstated with a plan to address the student's behavior.

B. Procedures the School Must Follow

When a student is suspended, the student may be suspended either *from a specific class* or *from the school*. Students facing temporary suspension from public school are protected by the Due Process Clause, and the U.S. Supreme Court has spelled out minimum procedures that must be followed before a student can be suspended from public school. *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss v. Lopez*, the Supreme Court established that Due Process requires notice of the charges and an opportunity for the student to present his version of the story, preferably prior to removal from school.[8] *Id.* Those procedural requirements have been codified and elaborated upon in the California Education Code and have been independently affirmed by the California Court of Appeals. In *Charles S. v. San Francisco Unified School District*, the California Court of Appeals held that due process for suspensions requires: (1) notice by telephone, mail, or other appropriate method, to the parents or guardian within a reasonable time after the suspension, advising of the fact of such suspension, its duration, and the reasons therefor, and further stating that, if desired, a prompt meeting or hearing will be held at which the suspension may be discussed with school officials; and (2) if requested, a meeting or hearing within a reasonable time, at which the suspended student may also be present, where the student shall be afforded an opportunity to present informal proof of his side of the case. *Charles S. v. San Francisco Unified School District*, 20 Cal. App. 3d 83 (1971).

Any teacher may suspend a student from the teacher's class, for the day of the suspension and the following day. The teacher must immediately report the suspension to the principal for appropriate action. In addition, the teacher must invite the student's parent or guardian to a parent-teacher conference regarding the suspension "as soon as possible." During the suspension, the student may not be placed in another regular class that meets at the time of the class from which the student was suspended. Cal. Educ. Code § 48910.

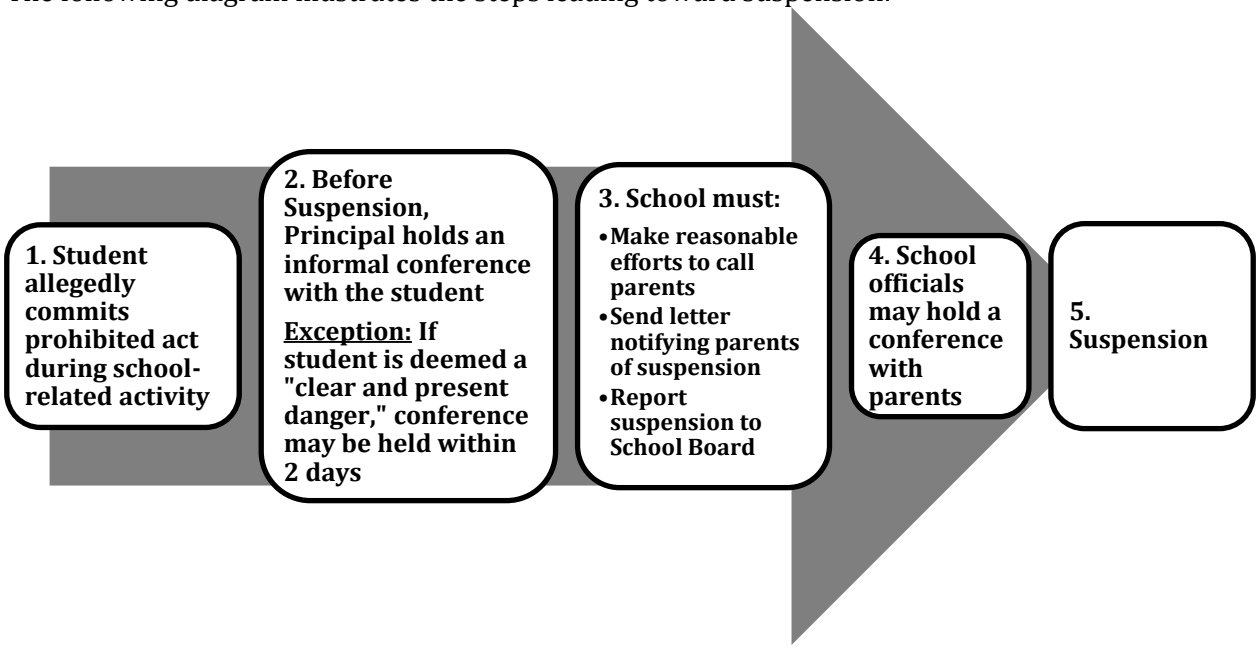
---

[7] Students with special education needs or other disabilities that interfere with their ability to engage successfully at school have certain rights that may be invoked during the suspension and expulsion process. These are discussed in Section V.

[8] *Goss* acknowledged that in some instances, notice and hearing would not be feasible prior to suspension and instead should be granted as soon as practicable. *Goss v. Lopez*, 419 U.S. 565 (1975).

Only the superintendent, the school principal, or the principal's designee can suspend a student from the school. Cal. Educ. Code § 48911(a). Before the student can be suspended, there must be an informal conference with the student and parents/guardians conducted by the principal or other school administrator to inform the student why he is being suspended and to allow the student to defend himself by presenting his version of the events and any supporting evidence. Cal. Educ. Code § 48911(b). However, a student may be suspended before the school holds a conference if an "emergency situation" exists. An "emergency situation" entails a "clear and present danger to the life, safety, or health" of students or school personnel. Cal. Educ. Code § 48911(c). To meet the "clear and present danger" test, the danger that the school seeks to prevent must be both extremely serious and extremely imminent. *Thompson v. Sacramento City Unified School District*, 107 Cal. App. 4th 1352 (2003). In these cases, the school must hold the required conference within two school days unless the student is unable to attend due to incarceration or hospitalization or the student waives his right to a conference. Cal. Educ. Code § 48911(c).

The following diagram illustrates the steps leading toward suspension:



At the time of suspension, the school is required to make a "reasonable effort" to contact the student's parent or guardian in person or over the phone. Cal. Educ. Code § 48911(d). This should enable the parent or guardian to attend the pre-suspension conference. Once the student is suspended from school, the school must notify the parent or guardian in writing. *Id.* The code directs parents to respond "without delay" to any request from school officials to attend a conference regarding their child's behavior. Cal. Educ. Code § 48911(f). However, the code prohibits schools from making the student's reinstatement *contingent upon* parent's or guardian's compliance with a request for a conference. *Id*. In short, students should not be penalized for a parent's or caregiver's failure to respond or participate in the process.

C. Time Limits

Generally, suspensions may last for no more than five (5) consecutive school days, unless the student's suspension is extended by the school pending an expulsion hearing (see below). Cal. Educ. Code § 48911(a). Suspension from class by a teacher, however, may last only through the day

following the suspension. Cal. Educ. Code § 48910(a). Start counting the number of suspension days on the day that the student was prevented from attending class.

Unless the student is on an extended suspension, schools are expressly prohibited from suspending a student for more than 20 schooldays per school year. Cal. Educ. Code § 48903(a).[9] However, if a student is transferred to another regular school, an opportunity school or class,[10] or a continuation school, the maximum number of schooldays for which the student may be suspended is 30 schooldays per year. Cal. Educ. Code § 48903(a). If a student has been improperly suspended for an excess number of days, this may be addressed through a complaint to the school district. Also, you may use this violation to contest an expulsion, e.g., by arguing that the school's use of excessive suspensions constitutes a procedural violation, or that this is evidence of the school's failure to employ appropriate alternative means of correction.

> *Practice tip:* Always ask your client about previous suspensions from that school year, to determine whether the school has already suspended the student for the maximum number of allowable days.

D. Extension-of-suspension

If the student has been recommended for expulsion, then the principal (or other designee by the district superintendent)[11] may extend the student's suspension pending the expulsion hearing if she determines that the student's presence "would cause a danger to persons or property or a threat of disrupting the instructional process." Cal. Educ. Code § 48911(g). An extension of suspension is deemed a separate, or additional, suspension; thus, due process requirements must be complied with anew. *Montoya v. Sanger Unified School District,* 502 F. Supp. 209 (C.D. Cal. 1980). The principal's decision must be preceded by a meeting, scheduled *before* the end of the initial five-day suspension period, at which the student and her parent are invited to participate. Cal. Educ. Code § 48911(g).

This conference is an opportunity to advocate for the student, but is not typically attended by attorneys. However, if the student is already under the jurisdiction of the dependency or delinquency court, the Education Code requires the district to invite the student's court-appointed attorney and an appropriate child welfare agency representative to this meeting. Cal. Educ. Code § 48911(g).

Generally, there is no right to educational instruction while a student is out of school on an extended suspension. However, many schools will provide homework for the student, and some school districts have local policies providing for instruction during extended suspensions.

---

[9] For the purposes of calculating the total number of days, a district may, but is not required to, count suspension days from when the student was in another district in the same school year. Cal. Educ. Code § 48903(b).

[10] "Opportunity Education schools, classes, and programs are established to provide additional support for students who are habitually truant from instruction, irregular in attendance, insubordinate, disorderly while in attendance, or unsuccessful academically." *Available, as of Oct. 17, 2014, at* http://www.cde.ca.gov/sp/eo/oe/guide.asp.

[11] This is the one meeting during the suspension process that the principal cannot delegate to a lower-level staff person. If you discover that the principal (or another high-level administrator designated by the superintendent) did not attend the extension-of-suspension meeting, this is a procedural violation that you may raise at an expulsion hearing. *See* Cal. Educ. Code § 48911(g).

Additionally, if a student receives special education services under the federal Individuals with Disabilities Education Act (IDEA), then the student must continue to receive educational services during suspensions lasting more than 10 schooldays. Protections for special education students are discussed further in Section V.

E. Redress for Suspension

The Education Code provides no appeal right for suspensions. However, some districts have policies in place that allow families to challenge suspension decisions. Additionally, the student's parent may request that edits be made to student records that the parent believes to be misleading or inaccurate. If the district declines to revise the student's records upon request, the parent is entitled to insert comments into the student's file explaining the parent's concerns. 34 C.F.R. §§ 99.20(a), 99.21(b); Cal. Educ. Code § 49070. Where appropriate, the family may also pursue a uniform complaint within the district or with the Federal Department of Education's Office of Civil Rights (discussed further in Section IV).

III. Expulsion Process

Expulsion is defined in the Education Code as the "removal of a pupil from (1) the immediate supervision and control, or (2) the general supervision, of school personnel." Cal. Educ. Code § 48925. In practice, expulsion involves the removal of a student from all comprehensive schools within the school district, for a period lasting generally no longer than one calendar year. Before a student can be expelled, the student has the right to a fair hearing, at which the student may be represented by an attorney or other advocate. This Section discusses the substantive law and procedures governing expulsion in California.

A. Authority to Expel

Only the governing board of a school district may expel a student from the district. Teachers and school administrators do not have the power to order a student's expulsion. As such, expulsion proceedings begin with an "expulsion referral" from the student's school principal (the district superintendent's designee) to the governing board, alleging that the student has committed an expellable offense.

A governing board's decision to expel a student must be preceded by a hearing, at which the school presents evidence in support of expulsion and the student may present evidence in defense. The governing board may conduct the expulsion hearing itself, or it may appoint a hearing officer or panel to oversee the hearing. Cal. Educ. Code § 48918(d). Bay Area school districts tend to have hearing panels conduct hearings. If a hearing officer or panel conducts the hearing, the officer/panel will submit written findings to the governing board, who will then convene to vote on whether to expel the student.

As discussed in Section I.C, depending on the student's alleged offense, school and district officials may have significant discretion in deciding whether to recommend expulsion. This provides several openings for advocacy on the student's behalf before an expulsion hearing. Advocacy strategies are discussed further in Part Two. The table below summarizes the level of discretion afforded to school administrators and to the governing board for each offense category.

Offense category	Principal/Superintendent's discretion to recommend expulsion	Governing Board's discretion to order expulsion
Discretionary offenses	Complete discretion whether to recommend expulsion	Complete discretion whether to order expulsion, even if the student could lawfully be expelled
Medium-discretion offenses	Must recommend expulsion, unless the principal (or superintendent) determines that expulsion should not be recommended given the circumstances or that alternative means of correction are justified	Complete discretion whether to order expulsion, even if the student could lawfully be expelled
Mandatory expulsion (zero tolerance) offenses	Principal (or superintendent) must immediately suspend and recommend expulsion	Governing board must order expulsion if the student can lawfully be expelled (however, this may be a *suspended expulsion*[12])

B. What the School Must Prove

At the expulsion hearing, the ***school*** **must prove four elements** before a student can lawfully be expelled for most offenses:

1) The student actually committed the offense charged, which must be a lawful grounds for expulsion (see Section I.A.);
2) The offense was related to school attendance or a school activity (see Section I.D);
3) All procedural and time requirements have been met (discussed further in Section II.B and C.); AND
4) "Secondary findings" for discretionary and medium-discretion offenses:
   a) Other means of correction are not feasible or have repeatedly failed to bring about proper conduct, OR
   b) Due to the nature of the student's actions, the student's presence causes a continuing danger to the physical safety of the student or others.

This last prong, often referred to as "**secondary findings**," is crucial for advocacy in expulsion proceedings. For all offenses other than zero tolerance offenses, *it is not enough* for the school to prove that the student has committed an expellable offense related to school attendance or activity. Rather, the governing board must also make **one** of either secondary findings: that other means of addressing the student's behavior are not possible (or have failed multiple times in the past), **or** that the student's behavior was so severe that the student's continued presence at school would

[12] A suspended expulsion, explained further in Section III.E.3, is similar to a suspended judgment. It allows the student to return to her school (or another agreed-upon comprehensive school) on probationary status, so that if the student violates the terms of the suspended expulsion, she will then be expelled without another hearing (i.e., the expulsion held in abeyance will go into effect). Cal. Educ. Code § 48917(a), (c).

pose a danger to somebody's physical safety. Cal. Educ. Code §§ 48915(b), (e). For mandatory expulsion offenses, no secondary findings are required. Cal. Educ. Code § 48915(d).

For more detailed discussion of how to develop your legal defenses, see Section VII.B (Defending Against Expulsion) in Part II of this manual.

C. Procedural Requirements for Expulsion Cases

The California Education Code guarantees students basic due process rights in school expulsion proceedings. In addition to the procedural requirements laid out in the Education Code, the governing board of each school district is required to establish rules and regulations governing expulsion proceedings in that district. Keep an eye out for any procedural violations that occur during your expulsion case, as these may be used to defend against expulsion at the hearing and may constitute grounds for appeal of an expulsion order.

1. Right to a Timely Hearing

When a student is referred for expulsion, an expulsion hearing must be held **within 30 schooldays**[13] from the initial suspension, unless the student requests a postponement. Cal. Educ. Code § 48918(a) ("An expulsion hearing shall be held within 30 schooldays after the date the principal or the superintendent of schools determines that the pupil has committed any of the acts enumerated in Section 48900"). If it is "impracticable" for the governing board to comply with the 30 day timeframe, the superintendent may, for good cause, extend the time period for holding the expulsion hearing by an additional five schooldays. *Id.*[14] If the hearing is not held within that proscribed timeframe, the board loses jurisdiction to expel the student and any action taken at the hearing is invalid under *Garcia v. Los Angeles County Board of Ed.*, 123 Cal. App. 3d 807 (Cal. Ct. App. 1981).

Procedural Rights Checklist:

- ❑ *Timely Hearing?*
- ❑ *Postponement Granted?*
- ❑ *Timely Written Notice of the Hearing? Including All Required Content?*
- ❑ *Translation / Interpreter?*
- ❑ *Impartial Decision-Maker?*
- ❑ *Representation Allowed?*
- ❑ *Able to Inspect and Present Evidence?*
- ❑ *Timely Resolution?*
- ❑ *Written Notice of Expulsion Order? Including Notice of Right to Appeal?*
- ❑ *A Record of the Hearing?*
- ❑ *Provisions for Appeal?*

2. Right to a Postponement

The student is entitled to at least one postponement of the hearing, which must be requested in writing, for a period of not more than 30 calendar days. Any additional postponement is within the governing board's discretion. Cal. Educ. Code § 48918(a). Note that if the student's requested postponement delays the case beyond the prescribed 30-day timeframe, this cannot be used against the district to dismiss the case under *Garcia*.

[13] Cal. Educ. Code § 48925(c) defines "schoolday" as "a day upon which the schools of the district are in session or weekdays during the summer recess."
[14] Special rules apply when the timeframe for holding the expulsion hearing overlaps with summer recess. *See* Cal. Educ. Code § 48918(a).

3. Right to Notice of the Hearing[15]

Written notice of the hearing must be sent to the student at least **10 calendar days** before the hearing. Cal. Educ. Code § 48918(b). Note that the student is not entitled to *receive* notice 10 days before the hearing, so in practice, the student may have relatively little advance notice of the hearing date. The written hearing notice must include, pursuant to § 48918(b):

- The date and location of the hearing;
- The specific facts and charges that are the grounds for the expulsion referral;
- A copy of the district's disciplinary rules relating to the alleged offense;
- Notice that the student and her parent/guardian have the right to:
  - Appear in person at the hearing,
  - Be represented by legal counsel or a "nonattorney adviser,"
  - Inspect and obtain copies of all documents that the school will use at the hearing,
  - Confront and question any witnesses who appear at the hearing, and
  - Present oral and documentary evidence, including witnesses, on the student's behalf; and
- Notice of the parent's obligation under Education Code section 48915.1(b) to notify any new school district in which the student is subsequently enrolled of the pupil's expulsion from the student's prior school district, if the student is expelled.

4. Right to Translation / Interpreter

For students and parents who are not fluent in English, all documents pertaining to a student's suspension and recommendation for expulsion should be translated properly by the school district. Education Code §§ 51101.1 and 48985 require translation of all documents into a family's primary language when at least 15% of the student population's primary language is one other than English according to census data. Although the Education Code does not speak to translation of documents outside of that context, or to a right to an interpreter at suspension meetings or expulsion hearings, there are strong Constitutional arguments indicating that such language access is required as part of students' due process and equal protection guarantees before they may be deprived of their fundamental right to education.[16] Additionally, local school districts may have policies or administrative regulations that require and provide a system for the provision of translation and interpreter access. See, for example, Oakland Unified School District's Administrative Regulation and Board Policy 5124, available at http://www.ousd.k12.ca.us/domain/68, providing a process

---

[15] If the student is under the jurisdiction of the juvenile dependency or delinquency court, the school must also provide notice of the hearing to the child's attorney and an appropriate representative of the county child welfare agency at least 10 calendar days before the hearing. Cal. Educ. Code §§ 48918.1(a), 48853.5 (defining "foster child" to include children under jurisdiction of W&I Code §§ 300 or 602). Notice may be provided using "the most cost-effective method possible," including by e-mail or telephone. § 48918.1(a). This notice requirement does not apply to zero tolerance offenses. *Id.*

[16] *See Goss v. Lopez*, 419 U.S. 565 (1975) (mandating due process, i.e., notice and a meaningful opportunity to be heard before students may be deprived of education on disciplinary grounds); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down, on equal protection grounds, facially neutral policy that in effect discriminated against non-English speaking business owners). *See also* Settlement Agreement between U.S. Department of Justice and Palm Beach County School District, available at http://www.justice.gov/opa/pr/justice-department-reaches-settlement-school-district-palm-beach-county-fla-prevent-and (requiring that "ELL students and parents who are limited English proficient receive translation and interpretation services throughout the discipline process").

for translation and interpretation services for communications with parents and education rights holders, including throughout the disciplinary hearing process.

5. Right to an Impartial Decision-Maker

As noted above, the school district's governing board may conduct the expulsion hearing itself, or it may appoint a hearing officer or administrative panel to conduct the hearing. If an administrative panel oversees the hearing, the panel must be "impartial," and none of its members can be employed on the staff or a member of the board at the school in which the student is currently enrolled. Cal. Educ. Code § 48918(d).

6. Right to Representation at the Hearing

At the hearing, the student or parent is entitled to be represented by an attorney or a "nonattorney adviser." A "nonattorney adviser" is defined as an individual who is not an attorney or a lawyer but has been chosen by the student or parent to assist at the hearing and is familiar with the facts of the case. There is no right to have representation provided if the family does not bring its own representation. Cal. Educ. Code § 48918(b).

7. Right to Inspect and Present Evidence

In advance of the hearing, the student is entitled to obtain and inspect copies of all documents that the school will use at the hearing. Cal. Educ. Code § 48918(b)(5). Although some districts will automatically send this information to the student and caregiver, in the form of an "expulsion packet," it may be necessary for you to request this information from the district. See Appendix C for a sample records request letter. The district must provide these records within five business days following the date of the request. Cal. Educ. Code § 49069. At the hearing, the student then has the right to question the school's witnesses and challenge the school's evidence. Cal. Educ. Code § 48918(b)(5). If the district fails to provide the documents in a timely manner before the hearing or otherwise prevents the student from challenging the evidence against him, be sure to challenge this before or during the expulsion hearing as a procedural violation warranting dismissal of the case.

The student has the right to bring witnesses to the hearing and to present oral and/or documentary evidence on her behalf. Remember that hearsay is admissible in these proceedings, so letters from witnesses or supportive people in the student's life should be accepted into evidence if relevant. The student may also request that the governing board issue a subpoena for desired witnesses, although it is within to the board's discretion whether to honor this request. Cal. Educ. Code § 48918(i). However, a governing board is prohibited from adopting a blanket policy of never issuing subpoenas when they are requested. *Woodbury v. Brown-Dempsey*, 108 Cal. App. 4th 421 (2006).

8. Right to a Timely Resolution

If the hearing was conducted by a hearing officer or panel, the officer/panel has three days to decide whether to recommend expulsion to the governing board. Cal. Educ. Code § 48918(e). If the governing board conducts the expulsion hearing itself, the board must make its final decision whether to expel the student within 10 schooldays after the hearing concludes. Cal. Educ. Code § 48918(a). In either situation, the governing board must make its decision within 40 schooldays after the student was removed from school (i.e., suspended) for the incident that was the basis for the expulsion recommendation.[17] *Id.*

[17] The California Court of Appeals has stated that this 40-day deadline is a directive but that failure to comply does not defeat jurisdiction. *Board of Ed. of the Sacramento City Unified School District v. Sacramento County Board of Ed.*, 85 Cal. App. 4th 1321 (2001). If the board delays its decision past 40 days, the remedy is to petition for a writ of mandamus. Nonetheless, the board must proceed "promptly and with reasonable

9. Right to Notice of Expulsion Order

If the governing board decides to expel the student, the school superintendent must send written notice of the expulsion order to the student or her parent/guardian, along with information about the alternative educational placement that will be provided to the student during the term of expulsion. The notice must also inform the family of the student's right to appeal the expulsion order. Cal. Educ. Code § 48918(j).

10. Right to a Record

Expulsion proceedings must be recorded. This record can be made by any means, so long as they produce a "reasonably accurate and complete written transcription of the proceedings." Cal. Educ. Code § 48918(g). If the hearing is not fully or properly recorded, this may be grounds for setting aside an expulsion order and rehearing the case.

11. Right to Appeal

If a student is expelled, the student has the right to file an appeal with the county board of education within 30 days following the expulsion decision. Cal. Educ. Code § 48919. Expulsion appeals are discussed in Section IV of this manual.

D. Evidentiary Rules in Expulsion Proceedings

A governing board's decision to expel a student must be based upon "***substantial evidence*** showing that the pupil committed" the offense. Cal. Educ. Code § 48918(f) & (h). The governing board is not permitted to consider evidence outside of the record presented at the expulsion hearing, unless there is an additional hearing conducted pursuant to the guidelines in the Education Code (which are rare). Cal. Educ. Code § 48918(f).

1. Rules of Evidence

The technical rules of evidence applied in a court of law ***do not apply at expulsion hearings***. However, the Education Code does provide some guidance limiting the kinds of evidence that are admissible. Under Cal. Educ. Code § 48918(h), in order to be admitted and given probative effect, evidence must be:

a) *Relevant*, and
b) The type of evidence "upon which *reasonable* persons are accustomed to rely in the conduct of *serious affairs*."

2. Hearsay

Although hearsay evidence is admissible at expulsion hearings, a final expulsion order may not be based *solely* on hearsay evidence. Cal. Educ. Code § 48918(f). Therefore, if the school brings no live direct witnesses to the hearing and your client is not admitting to the alleged offense, *the student cannot be expelled, because the only evidence supporting the expulsion is hearsay evidence*.

However, there is a narrow exception to this rule, which is significantly overused by school districts in practice. An expulsion order *can* be based solely on hearsay evidence if:

---

diligence." *Id*. A student whose claim languishes for an extended period of time would have a credible civil or appellate claim for a due process violation. *Id.*

a) The governing board or hearing panel makes a good cause determination that disclosure of a witness's *identity* or *testimony* at a hearing would subject the witness to an *unreasonable risk of psychological or physical harm*, and
b) The witness's testimony is instead presented at the hearing in the form of a *sworn declaration*.

Cal. Educ. Code § 48918(f); *Cf. John A. v. San Bernardino City Unified School District*, 33 Cal. 3d 301 (1982) (reversing expulsion because of improper use of declarations where live witnesses were available and should have testified) *with J.T. v. San Luis Obispo County Board of Education*, 2d Civil No. B241026, *available at* 2013 WL 660134 (2013 unreported) (upholding expulsion where complaining witness to sexual assault submitted sworn declaration in lieu of testimony and J.T. made admissions). The appellate court in *John A.* was clear that although there may sometimes be real risks of retaliation or psychological harm to witnesses, those unusual instances do not warrant reliance on declarations instead of testimony in all cases. 33 Cal. 3d at 308. The court indicated that districts must make a showing of a "significant and specific risk of harm" before the submission of sworn declarations in lieu of testimony. *Id.* When districts attempt to use this exception, they must provide the accused student access to a copy of the sworn declaration, although the name and identity of the witness may be redacted. Cal. Educ. Code § 48918(f).

3. Evidence in Specific Circumstances

There are particular evidentiary rules and procedures that apply to cases involving sexual assault and searches by school staff. The former was created by statute and the latter by caselaw.

a) Sexual Assault or Battery:

In hearings involving alleged sexual assault or battery, reputation or opinion evidence about the complaining witness's sexual behavior is never admissible. Cal. Educ. Code § 48918(h). Evidence of specific instances of the complaining witness's prior sexual conduct is presumed to be inadmissible. Such evidence can only be heard if the hearing officer/panel determines that there are extraordinary circumstances requiring that such evidence be heard. Before the hearing officer/panel makes this determination, the complaining witness must be given notice and an opportunity to oppose the introduction of the evidence at an initial hearing to address whether the evidence in question should be admitted. In these situations, the complaining witness has the right to be represented by a parent/guardian, attorney, or other support person. *Id.*

b) Searches by School Employees:

The Fourth Amendment's prohibition against "unreasonable" searches and seizures does extend to searches conducted by public school officials of students and their belongings, however a lower standard of "reasonable suspicion" is applied to warrantless searches of students in public school (as opposed to the "probable cause" standard for adults). *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Both the U.S. Supreme Court and the California courts have elaborated on what constitutes a "reasonable" search in the public school context.[18] Additionally, the Education Code prohibits

[18] For caselaw on Fourth Amendment protection against searches of students by school employees, see: *New Jersey v. T.L.O.*, 469 U.S. 325 (1985): The Fourth Amendment's prohibition on unreasonable searches and seizures extends to searches carried out by public school officials. Because of the need to balance students' legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place, school officials need not obtain a warrant before searching a student. The legality of a search turns on the reasonableness of the search, measured by the totality of the circumstances. *In re William G.*, 40 Cal. 3d 550 (1985): Public school officials are governmental agents and must therefore respect the constitutional rights of students in their charge against unreasonable searches and seizures. As

school employees from conducting a cavity search of a student's body or rearranging or removing any of a student's clothing to allow visual inspection of the student's underclothes, breasts, buttocks, or genitalia. Cal. Educ. Code § 49050.

Unfortunately, the exclusionary rule does not apply to school disciplinary proceedings in California, although the rule does apply to delinquency and criminal proceedings where evidence might be used from an unreasonable search or seizure that occurred in school. *Gordon J. v. Santa Ana Unified School District,* 162 Cal. App. 3d 530 (1984); *see also In re William G.*, 709 P.2d 1287, 1298 (Cal. 1985). Nonetheless, it may be important in your case to raise Fourth Amendment violations, e.g., to question the reliability of the school's evidence or to illustrate how the school staff proceeded in a manner that was unreasonable under the circumstances. Although this may only be tangentially relevant to your case, most school boards should be interested to hear about unconstitutional behavior by their school staff.

E. Potential Outcomes in Expulsion Proceedings

At the conclusion of expulsion proceedings, three outcomes are possible: (1) the student is not expelled; (2) the student is expelled; or (3) the student is ordered expelled, but the expulsion order is "suspended" and the student is allowed to return to school on probationary status. Throughout an expulsion case, you should also pursue opportunities to negotiate an alternative resolution that advances your client's goals. For example, alternative resolutions may include a voluntary transfer in exchange for termination of the expulsion proceedings, or an agreement that the school will assess your client for special education and apply the disciplinary protections available under federal and state law for students with disabilities. Alternative resolutions in expulsion cases are addressed further in Part Two, Section VI.E of this manual.

1. No Expulsion Recommendation

If the governing board decides *not* to recommend expulsion, the expulsion proceedings end immediately. The school cannot seek an alternate decision from the governing board and has no right to appeal. Rather, the student must be immediately reinstated in her school of origin and permitted to return to school without conditions. Cal. Educ. Code § 48918(e).[19] However, if the

---

such, searches of students by public school officials must be based on reasonable suspicion that the student to be searched has engaged, or is engaging, in a proscribed activity.
In re Randy G., 26 Cal. 4th 556 (2001): Detention of a minor at school does not implicate the Fourth Amendment so long as the detention is not arbitrary, capricious or used for the purposes of harassment. The school's interest in student behavior, school safety, and the learning environment is paramount to the minor's interest in liberty. Moreover, school security officers are considered school officials, not law enforcement officers, and have the same broad power to detain a student as any other school official. The court leaves open the question of an appropriate test for school searches conducted by school officials acting in concert with law enforcement.
In re Joseph G., 32 Cal. App. 4th 1735 (1995): Following a call from a concerned parent regarding a student in possession of a gun at school, multiple searches of a juvenile's locker six days after the precipitating incident were reasonable.

[19] Prior to 2015, students who won their expulsion hearings could be barred from returning to their original school and involuntarily transferred to an alternative school indefinitely without any process to return to their original school. SB 1111 closed this loophole in the discipline code and now provides that students who win their expulsion hearings, except those found to have committed a mandatory expulsion offense, have the

student wishes to transfer to another school at that point, her parent, guardian or education rights holder may submit a written request to voluntarily transfer and the district must meet with them to discuss all placement options.

Note that there is a limited circumstance in which students may be involuntarily transferred (to another comprehensive school or a continuation school) even if not expelled: if the board determines that the student committed a mandatory zero tolerance offense but does not wish to expel (e.g., due to procedural violations or because expulsion is not appropriate in the circumstances). Cal. Educ. Code §§ 48918(e) and 48432.5.

2. Expulsion

If the school has proven all four elements required to support an expulsion, the governing board may expel the student. If the student is expelled, the student will not be permitted to attend any of the comprehensive schools within the school district for the term of the expulsion. If the student is expelled for a mandatory or medium-discretion offense,[20] the student is also barred from enrolling in any other district's school during the term of expulsion. Cal. Educ. Code § 48915.2. Expelled students are placed in county-run programs as discussed below in Section VIII.B. The governing board must set a date by which the board will review whether the student should be readmitted to the district. Students expelled for mandatory/zero tolerance offenses may be expelled for a full year from the board's decision, while expulsions for lesser offenses may only last through the next semester. Note, however, that readmission is not automatic. See Section VIII.B.2 for more details.

3. Suspended Expulsion

If the governing board expels the student, the board may choose to suspend the enforcement of the expulsion order for a period of up to one calendar year, during which time the student is deemed to be on "probationary status." Cal. Educ. Code § 48917(a), (c). If the student commits any expellable offense *or violates any of the district's rules or regulations regarding student conduct* during the probationary period, the governing board can revoke the suspension of the expulsion and immediately expel the student under the terms of the original expulsion order, *without a hearing*. Cal. Educ. Code § 48917(d). During the suspended expulsion, the student might return to her original school, or she may be assigned by the governing board to another educational placement. Cal. Educ. Code § 48917(a). If the student completes the suspended expulsion to the board's satisfaction, the board must reinstate the student in a district school and may order that the expulsion proceedings be expunged from the student's records. Cal. Educ. Code § 48917(e). It is wise to have the board proactively state in the original suspended expulsion notice that the student's record will be expunged if she complies with the terms, so as to avoid confusion or difficulty when the student later requests the expungement.

Note that even if the student meets all the criteria for a mandatory expulsion, she may still receive a suspended expulsion. *See* Section III.A above.

---

right to return to their original school and cannot be involuntarily placed in the same county community school as expelled students. Cal. Educ. Code § 48918(e).

[20] Students expelled for discretionary offenses who wish to enroll in another district while during the term of expulsion must inform the receiving district of their status with the previous district and the board of the new district must hold a hearing to determine whether the student "poses a continuing danger either to the pupils or employees of the school district" before admitting the student. Cal. Educ. Code § 48915.1.

IV. Expulsion Appeals

If the result of the hearing is an expulsion or a suspended expulsion, the student or her parent may file an appeal with the county board of education. Note that the school district may not appeal the decision if the hearing panel declines to recommend expulsion or the governing board declines to order expulsion. Procedures and rules for appeals are dictated both by the Education Code and local county board policy. Cal. Educ. Code § 48919 *et al*. Be sure to check both sources for the guidelines for your particular appeal. *See, e.g., Alameda County Board of Education: Policy Manual, available at* http://www.acoe.org/acoe/files/Board/Appeals/ExpAppealHndbk2004.pdf.

A. Timeline for appeals

An appeal must be filed within 30 calendar days after the governing board votes to expel (or orders a suspended expulsion). Cal. Educ. Code § 48919. Sometimes a board will notify the family immediately of its decision, however in practice there is often delay from the time that the board orders an expulsion and the delivery of this news to the student and parents. Therefore, be vigilant to ensure you have filed a notice of appeal within 30 days in order to preserve your right, even if you will then need more time to submit a full appellate brief.

The county board must hold a hearing on the appeal within 20 schooldays after the appeal is filed. If the county board holds the hearing itself, then it must issue a decision within three schooldays of the date of the hearing, unless the student requests that the decision be postponed. *Id.* If the county board instead uses a hearing officer or administrative panel to conduct the hearing (permissible only in certain counties), then the hearing officer/panel must make a recommendation to the county board within three schooldays of the hearing, and the county board must issue a final order within 10 schooldays of receiving the recommendation. Cal. Educ. Code § 48919.5.

The county board appeal is the final administrative determination of an expulsion appeal. Beyond that, any further challenge to the appellate decision must be filed as a writ with county or superior court.

B. Grounds for appeal

On appeal, the questions for review are limited to the following:

1. Whether the governing board acted without or in excess of jurisdiction;
2. Whether there was a fair hearing before the governing board;
3. Whether there was a prejudicial abuse of discretion in the hearing; and
4. Whether there is relevant and material evidence that could not have been produced at the hearing through reasonable diligence or was improperly excluded from the hearing.

Cal. Educ. Code § 48922(a).

1. Lack of Jurisdiction

"Without or in excess of jurisdiction" is defined to include, *but is not limited to*, the following circumstances:

- The hearing was not conducted within the timeframes required by the Code;
- The expulsion order was not based on a finding that the student committed one of the expellable acts listed in the Code; or
- The student's conduct was not related to school activity or school attendance.

Cal. Educ. Code § 48922(b).

2. Fair Hearing

If the hearing officer(s) or panel lacked the impartiality required by statute or there was bias in the hearing this may be raised as a denial of a fair hearing. For example, in *Gonzales v. McEuen*, 435 F. Supp. 460 (C.D.Cal. 1977) the mere presence of a school superintendent during the school board's deliberation violated students' due process rights and was considered by the federal court "fundamentally unfair." Although the district argued that the superintendent did nothing more than "serve cookies and coffee," his presence raised a presumption of bias. *Id*. at 465 ("Whether he did or did not participate, his presence to some extent might operate as an inhibiting restraint upon the freedom of action and expression of the Board.") The Court pointed out, "The fact remains … that he is also the chief of the 'prosecution' team, to wit, the District." Upon appeal, it is therefore important to decipher who was involved in deliberations and whether they were impartial decision-makers.

3. Abuse of Discretion

An "abuse of discretion" is defined to include the following circumstances:

- The school officials failed to meet the procedural requirements in the Education Code;
- The governing board failed to make the findings required to support expulsion (including the required secondary findings for non-mandatory expulsion offenses); or
- The governing board's findings are not supported by the evidence.

Cal. Educ. Code § 48922(c). Note that in order to reverse an expulsion order for abuse of discretion, the county board must also find that the abuse of discretion was *prejudicial*. *Id.* If the county board determines that the governing board abused its discretion by failing to make the findings required for expulsion, but there is sufficient evidence in the record to support such findings, then the county board must remand the matter to the governing board to make the required findings. Cal. Educ. Code § 48923(b).

4. Relevant and Material Evidence

If the county board determines that there is relevant and material evidence that could not have been produced at the hearing through reasonable diligence or was improperly excluded, it may either remand the matter to the school district governing board for reconsideration, or it may hold a *de novo* hearing after providing "reasonable notice" to the student and to the governing board. The new hearing will be guided by the county board procedures for appellate hearings. Cal. Educ. Code § 48923(a).

C. Appellate procedures

As mentioned earlier, county boards of education must establish their own policies and procedures governing expulsion appeals. The county rules must address:

- Requirements for filing a notice of appeal;
- Setting a hearing date;
- Giving notice to the student and to the governing board about the appeal;
- Providing a copy of the expulsion hearing record to the county board;
- Procedures for how the hearing will be conducted; and
- Preserving a record from the appeal.

Cal. Educ. Code § 48919. Generally, the county board cannot consider any new evidence during the appeal. The county board's ruling must be based on the expulsion hearing record, along with "such applicable documentation or regulations as may be ordered." Cal. Educ. Code § 48921.

Unless the county board remands the matter to the governing board or holds a *de novo* hearing as described above, the county board must either affirm or reverse the governing board's expulsion order. If the county board reverses the expulsion order, it may direct the governing board to expunge the student's and the district's records of the expulsion. Cal. Educ. Code § 48923(c). The county board must notify the student and the governing board of its final decision in writing by either personal service or certified mail. Cal. Educ. Code § 48924.

D. Submission to the County Board

If you are filing an appeal, you will first need to submit a notice of appeal and a written request for a transcript which should accord with any county-specific forms required by the county board of education. The transcript request is typically to be made directly to the district, while the notice of appeal is sent to the county office of education with carbon copy to the district. The school district must provide the student with the hearing transcript and any supporting documents within 10 schooldays of the student's written request. The student must immediately file copies with the county board when they are received. Cal. Educ. Code § 48919. The student's family must pay the cost associated with obtaining the hearing transcript, unless they certify to the school district that they cannot afford the cost. *Id.* If the county board ultimately rules in the student's favor on appeal, then the expelling school district's governing board must reimburse the student for any cost paid by the family for the hearing transcript. *Id.*

County board appellate procedure or practice will typically allow counsel time to submit a full appellate brief after the transcript has been produced. In order to determine the filing schedule, communicate with the contact person for appeals within the county office of education. Sample appellate briefs can be found on the LSC pro bono website or provided upon request by your LSC mentor attorney.

E. Filing a Complaint / Suing the District

Sometimes there will be justification for filing an administrative complaint against the district in addition to any pending appeal. For example, a complaint would be justified if an expelled student is assigned to an improper school placement like independent study. Additional grounds typically include discrimination, harassment, bullying, intimidation, or other violations of students' rights in the suspension and expulsion process. Where a lawsuit against the district is warranted, there must usually be a complaint filed initially against the district through its own administrative process of review. This complaint process is completely separate from the appellate process, and may be filed contemporaneously with an appeal. However, it is not uncommon for a district to settle an appeal and a complaint/lawsuit all at once if the issues are aligned.

Every school district, county office of education, and charter school governing board is required to have local complaint policies that describe the procedures for filing and resolving complaints. These complaint policies and procedures are often published on their websites and are always available upon request at district offices, county offices of education, or charter school offices. *See, e.g.,* SFUSD's procedures and complaint form. Most school discipline issues are encompassed in the Uniform Complaint Process, described on the California Department of Education's website at

http://www.cde.ca.gov/re/cp/uc/, which includes an explanatory brochure and standard forms. LSC provides sample complaints upon request.

The student, parent/caregiver or advocate has six months from the underlying incident, or from learning about the incident, to submit a Uniform Complaint. *See* Uniform Complaint Procedures brochure, available at http://www.cde.ca.gov/re/cp/uc/ (June 2015). This should be filed with the local educational agency (LEA), meaning school district or county office of education, by using the standard forms provided or through a letter. The LEA then must resolve the complaint and produce a written report within 60 days of receipt of the complaint unless this timeframe is extended by written agreement of the complainant. If the resolution is unfavorable, the complainant may file an appeal with the California Department of Education.

F. Office for Civil Rights Complaint

If your client has experienced discrimination on the basis of race, national origin, sex, disability, or age in her educational program or activities, this may be cause for a complaint to the federal Office for Civil Rights (OCR) in the U.S. Department of Education. This complaint may be filed under Title VI of the Civil Rights Act of 1964 (discrimination based on race, color, national origin); Title IX of the Education Amendments of 1972 (sex discrimination); or federal laws prohibiting discrimination on the basis of disability or age. These federal protections extend to all state educational agencies, including elementary and secondary school systems, vocational schools, and any educational program receiving federal financial assistance from the Department of Education. The requirement to provide educational services/benefits/aid in a nondiscriminatory manner encompasses school discipline, counseling and guidance, academic programs, student treatment and services, and much more.

The deadline for a student to file a complaint with the OCR is within 180 calendar days "after the discrimination." *See* http://www2.ed.gov/about/offices/list/ocr/qa-complaints.html. This complaint may, and should, be filed even if the student has another complaint pending within the district. However, the OCR complaint may be put on hold if that collateral complaint could result in a comparable resolution to the OCR process. In that event, the student then must refile the OCR complaint within 60 days after the collateral process is completed. *Id.* Information about filing an OCR complaint is detailed on the OCR website. *See*
http://www2.ed.gov/about/offices/list/ocr/complaintprocess.html;
http://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf; and
http://www2.ed.gov/about/offices/list/ocr/qa-complaints.html.

V. Protections for Students with Special Education Needs

Students with special education needs are guaranteed additional protections in school disciplinary matters. It is important to ask early on whether your client has an individualized education plan (IEP) under the IDEA or disability accommodations under Section 504 of the Rehabilitation Act of 1973. If so, laws governing discipline of students with disabilities will apply. However, *even if your client does not have a currently identified special education need*, you should be familiar with these rules. That is because special protections also apply when the school "had knowledge" that the student had an undiagnosed disability and was in need of special education services.

Special education is a complex area of law, and this manual only provides a general overview of the key points relevant to school discipline proceedings. You are encouraged to consult additional resources, including the federal and state statutes and regulations, for additional information.

There are several very helpful publications for advocates working on special education matters, including the *Special Education Rights and Responsibilities* manual issued by CASE & Disability Rights California (available at http://www.disabilityrightsca.org/pubs/PublicationsSERREnglish.htm) and materials provided by Disability Rights and Education Defense Fund (available at http://dredf.org/special_education/).

Finally, children's attorneys have a somewhat constrained role in special education proceedings because parents (or caregivers who hold educational rights) are the rights-holders of the extensive protections and decision-making authority afforded under special education law. Thus, while your advocacy must continue to be child-directed, the child's parent will ultimately be making many of the decisions relating to the child's special education needs and services.

A. Student with an Individualized Education Plan (IEP)

1. Special Education under the IDEA

The federal Individuals with Disabilities Education Act (IDEA) provides certain educational rights and protections to a student with a qualifying disability. 20 U.S.C. § 1400 et seq. The California Legislature has implemented the IDEA in Sections 56000 et seq. of the Education Code, along with some additional state-specific protections for students with disabilities. The disabling conditions that might qualify a student for special education services under the IDEA include mental retardation, hearing or language impairments, specific learning disabilities, serious emotional disturbance, and "other health impairments."[21]

Students covered by the IDEA are entitled to receive a "free appropriate public education" (FAPE), including "special education and related services" designed to meet their individual needs. 20 U.S.C. §§ 1400(d)(1)(A), 1401(9), 1412(a)(1). Educational services must be provided in the "least restrictive environment" (LRE) appropriate to the student's needs, meaning that the student must be educated with other students who are not disabled to the maximum extent possible. 20 U.S.C. § 1412(a)(5)(A). California law implements the IDEA's FAPE and LRE requirements and adds some additional guidelines in these areas. Cal. Educ. Code §§ 56000, 56040, 56040.1.

School districts are required to affirmatively "identify, locate and evaluate" all children with disabilities who might qualify for special education (known as the "child find" obligation). 34 C.F.R. 300.111; Cal. Educ. Code §§ 56300-01. If a parent, guardian, teacher, or other service provider makes a written request for assessment, the school district is obligated to assess a child for special education needs within certain enumerated timelines. If the child is found to qualify for special education, an Individualized Education Program (IEP) will be created for the child, describing the child's current performance, future educational goals, and the services to be provided to help the child reach the identified goals. The IEP must be revisited at least yearly at meetings with a team of individuals whose presence is required by law. Cal. Educ. Code §§ 56340-41. Parents (or another adult designated as the "education rights holder" for the child) are guaranteed a variety of participation rights throughout the IEP process.[22]

---

[21] For further information on qualifying disabilities, see Chapter 3 of the *Special Education Rights and Responsibilities* manual at http://www.disabilityrightsca.org/pubs/504001Ch03.pdf and a list available at http://www.guhsd.net/index.php/forms/assessment/doc_view/2665-disability-categories-casemis.

[22] For more on parents' rights in the special education process, see 34 C.F.R. § 300.504 and the CASE/DRC publication *Special Education Rights and Responsibilities*, referenced above.

As part of providing a "free appropriate public education," schools are obligated to provide "related services" that are necessary to enable a student to make progress toward her IEP goals. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Cal. Educ. Code § 56363. In addition to special education instruction, this may include psychological and counseling services targeting behavior that might otherwise lead to disciplinary action. 34 C.F.R. § 300.34(c)(2), (10); Cal. Educ. Code § 56363(b)(9)-(10). If a child's behavior is impeding learning, the IEP team must consider including services in the IEP to address the behavior, including the use of positive behavior supports and interventions. 20 U.S.C. § 1414(d)(3)(B)(i); Cal. Educ. Code § 56521.2(b).

2. Special Protections for Students with IEPs

A student may not be expelled, put on an extended suspension, or subjected to a pattern of removals from school because of behavior that is a manifestation of the student's disability. 20 U.S.C. § 1415(k). This protection applies to removals from school that amount to "changes of placement." A "change of placement" is generally defined as the student's removal from school for more than 10 consecutive school days. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.536. Removal from school for less than 10 days could also constitute a change of placement if it demonstrates a "pattern" of removal. Whether there has been a "pattern" of removal is a case-by-case determination, with relevant factors including the total number of days of removal, the length of each removal, substantial similarity among the incidents resulting in removal, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a)(2).

a) Manifestation Determination Review

To determine whether behavior is a manifestation of the student's disability, the school must hold a meeting called a "manifestation determination review" (MDR) within 10 days of the school's decision to seek a change in the student's placement. Parents must receive notice of the meeting, the disciplinary action that triggered it, and all relevant procedural protections. 20 U.S.C. §§ 1415(d), 1415(k)(1)(H); 34 C.F.R. §§ 300.504(a)(3), 300.530(h). The MDR must include the parent, the school district, and relevant members of the child's IEP team. 20 U.S.C. § 1415(k)(1)(E). Additionally, just as in the extension of suspension context, if the student is the subject of an open dependency or delinquency case, the California Education Code requires the district to invite the student's court-appointed attorney and an appropriate child welfare agency representative to this meeting. Cal. Educ. Code § 48911(g).

At the MDR, the participants must address two questions:

1) Was the student's behavior caused by, or did it have a "direct and substantial relationship" to, the student's disability?
2) Was the behavior a direct result of the district's failure to implement the student's IEP?

Id. If the team answers either of these questions in the affirmative, then the behavior is considered a manifestation of the child's disability. In that case, the school cannot discipline the child for the behavior and must return the child to her original school placement, unless the parent and school agree on a new placement. In addition, the IEP team must conduct a "functional behavioral assessment" and implement a behavior intervention plan to address the behavior that led to the discipline referral. 20 U.S.C. § 1415(k)(1)(F). If the team answers "no" to both of the above questions, then the school can take disciplinary action as it would for students without special education needs. 20 U.S.C. § 1415(k)(1)(C).

b) Exception for Zero Tolerance Offenses

Under limited circumstances, the school can immediately remove a student from school and place her in an "interim alternative education setting" for up to 45 days, regardless of whether the behavior is a manifestation of the student's disability. However, the school must still hold an MDR. 20 U.S.C. § 1415(k)(1)(E). The school may place a child in an interim alternative education setting if the student is alleged to have (1) carried or possessed a weapon; (2) knowingly possessed, used, sold, or solicited the sale of illegal drugs; or (3) inflicted serious bodily injury on another person. 20 U.S.C. § 1415(k)(1)(G). Note that these "zero tolerance" offenses are defined by the IDEA and do not match up with the five "zero tolerance" offenses under the California Education Code, which considers possession of a weapon or drugs, or serious bodily injury, to be medium-discretion offenses.

c) Due Process Hearings and the "Stay Put" Requirement

If the student's parent disagrees with the outcome of an MDR, the parent can file for a "due process hearing" before a hearing officer to challenge the team's finding. As the student's attorney, you may also file for due process on behalf of the student and parent. Due process hearings are administrative proceedings used to resolve disputes between a family and a school district in special education matters. Either the parent or the school district may initiate a due process hearing. 20 U.S.C. § 1415(b), (f). While the proceedings are pending, the student has a right to remain in her current school placement (known as the "stay put" requirement). 20 U.S.C. § 1415(j). A parent may also file for due process to contest a student's placement in an interim alternative education setting. Pending the completion of those proceedings, the child will remain in the interim educational setting where she was placed by the school. 20 U.S.C. § 1415(k)(3)-(4). For more information on filing for due process, consult Chapter 6 of CASE & Disability Rights California's *Special Education Rights and Responsibilities* manual, available at http://www.disabilityrightsca.org/pubs/PublicationsSERREnglish.htm.

3. Suspensions of 10 Days or Less

Unless it is part of a pattern of removal (and therefore a "change of placement"), a suspension lasting 10 days or less does not trigger any special protections under the IDEA. Recall that in California, suspensions are generally limited to five days unless there is an extension of suspension pending an expulsion hearing. Thus, in practice, suspension alone generally does not trigger any additional process for students covered by the IDEA.

4. Educational Services during Disciplinary Proceedings

During any change of placement or any interim placement, students with disabilities must continue to receive a free appropriate public education. This requirement applies regardless of whether the student's behavior was determined to be a manifestation of her disability. Thus, unlike general education students, special education students must continue to receive education services during an expulsion and during any period of suspension lasting longer than 10 days. 20 U.S.C. § 1415(k)(1)(D). The services must enable students to participate in the general curriculum and to progress toward meeting their IEP goals, but may be provided in an alternative setting. *Id.*

B. Students with Unidentified Special Education Needs

1. School District "Has Knowledge" of the Student's Needs

Even if there has been no formal determination that a student has a disability, the IDEA's disciplinary protections will apply if the school "has knowledge" of the student's disability prior to the behavior leading to the disciplinary referral. 20 U.S.C. § 1415(k)(5)(A). The school district will be deemed to have knowledge of the disability if, before the behavior in question occurred:

a) A parent expressed concern in writing to a school administrator or teacher that the student might need special education services;
b) The parent requested that the child be assessed for special education needs, but no evaluation was completed; or
c) A teacher or other school personnel expressed specific concern to the school's special education director or to other supervisory personnel about a pattern of behavior demonstrated by the student.

20 U.S.C. § 1415(k)(5)(B). The school will *not* be deemed to have knowledge if:

a) The parent has not allowed the student to be assessed for special education;
b) The parent has refused special education services; or
c) An evaluation was conducted, and the school district determined that the child did not qualify for services under the IDEA.[23]

20 U.S.C. § 1415(k)(5)(C).

If the school district *is* deemed to have prior knowledge of the child's disability, all procedures and protections discussed above in Section V.A will apply. If you believe that the school had prior knowledge of a student's disability, you should communicate the basis for that assertion to the school and request that the school hold an MDR and comply with the IDEA's stay-put rule and other applicable requirements. If the school disagrees and refuses to apply the IDEA's protections, you may file for due process to seek a resolution of the matter.

2. School District Lacked Knowledge of the Student's Needs

If the school district had no prior knowledge of a student's disability, the school may discipline the student in the same manner that it disciplines students without special education needs. 20 U.S.C. § 1415(k)(5)(D). However, if a request is made for a special education assessment while the child is in disciplinary proceedings, then the assessment must be "expedited." The law does not specify a timeframe for the expedited assessment; however, advocates should argue that the timeframe must

[23] Note, however, that if the student had previously been found eligible for special education services and was only deemed ineligible upon later reassessment, the school is deemed to have "had knowledge" of the student's disability. *Parent on Behalf of Student v. Fairfield Suisun Unified School District*, OAH case no. 2012030917 (May 25, 2012), *available at* http://www.documents.dgs.ca.gov/oah/seho_decisions/2012030917%20%28Amended%20Expedited%29.pdf

be meaningfully shorter than the standard assessment timeframe.[24] While the assessment is being conducted, the student must remain in the school placement where she was placed by school authorities. *Id.*

C. Students with a 504 Plan

1. Section 504 of the Rehabilitation Act of 1973

Students with a disability who do not qualify for special education services under the IDEA may instead be protected under Section 504 of the Rehabilitation Act of 1973. A broad federal antidiscrimination law that is not specific to the education context, Section 504 protects individuals who have a physical or mental impairment that substantially limits a major life activity, which includes learning. 34 C.F.R. §§ 104.3-104.4. Students who are covered by the law are given a "504 plan" laying out accommodations that must be made for the student to enable her to benefit from her education to the same extent as nondisabled students. *See* U.S. Department of Education publication *Free Appropriate Public Education for Students With Disabilities, available at* http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html. Section 504 protects a broader group of students than those who qualify for special education under the IDEA. However, Section 504 has fewer protections for students in discipline proceedings than the IDEA.

2. Discipline that is a "Significant Change in Placement"

Like the IDEA, Section 504's disciplinary protections for students depend on the severity of the disciplinary proceedings. If the disciplinary action constitutes a "significant change in placement" for the student, then the school must follow certain procedures. The U.S. Department of Education's Office of Civil Rights has indicated that the following disciplinary actions may count as significant changes in placement in the 504 context: (1) removal of a student for more than 10 days; (2) removal of the student for an indefinite period of time; (3) expulsion; and (4) a series of shorter suspensions that creates a pattern of exclusions from school. CASE & Disability Rights California, *Special Education Rights and Responsibilities* manual, Ch. 8, available at http://www.disabilityrightsca.org/pubs/504001Ch08.pdf (citing Office of Civil Rights, Letter re: Akron City School Dist., 19 IDELR 542 (Nov. 18, 1992)).

Before subjecting a Section 504 student to a significant change in placement, the school must conduct a reevaluation of the student's needs and school placement. As part of this reevaluation, the district must convene a team with expertise and personal knowledge of the student to determine whether the misconduct that led to the disciplinary referral was caused by the student's disability – similar to a manifestation determination. If they determine that the behavior was caused by the disability, then the team must evaluate whether the student's current educational placement is still appropriate for the student. Note that this review may lead to a determination that the current placement is no longer appropriate. Thus, even if the behavior was a caused by the student's disability, the review process can still lead to a change in the student's school placement without the student's consent.

---

[24] Normally, the school district has 15 days to provide an assessment plan to the parent after receiving a written request for assessment. The parent has 15 days to respond to or approve the plan. Cal. Ed. Code § 56321(a). Once the school receives the parent's signed approval to the assessment plan, the district has 60 calendar days (excluding certain school vacation periods) to complete the assessment and to develop an IEP if the student is found eligible. Cal. Ed. Code § 56344(a).

If it is determined that the student's behavior was not caused by her disability, then the student may be disciplined like any other student.

3. Appeal Process

The student may challenge a Section 504 team's placement decision and determination about whether the student's behavior was related to her disability by seeking a Section 504 hearing. Section 504 hearing procedures are established at the school district level. Note that unlike the IDEA, Section 504 has no "stay put" requirement. Thus, while a contested hearing is pending, the student's placement may be changed or the student may be disciplined.

4. Educational Services during Disciplinary Proceedings

Unlike students with special education needs under the IDEA, students who have only a 504 plan do not have a right to continued educational services during disciplinary proceedings.

PART TWO: REPRESENTING STUDENTS IN EXPLUSION CASES

Part Two of this manual provides concrete guidance for representing students in expulsion proceedings. Section I discusses how to prepare for an expulsion hearing while also pursuing alternative resolutions that might avoid a hearing. This involves interviewing your client and other relevant parties, collecting documentary evidence, preparing witness testimony, and negotiating with the school district. Section II reviews the stages of an expulsion hearing and explores strategies for defending against expulsion at the hearing. Section III addresses advocacy after the hearing, once a hearing panel has decided whether to recommend your client for expulsion to the governing board.

VI. Preparing an Expulsion Case

A. Assessing Case Status at Beginning of Representation

At the time you begin representing your client, the case may be at any one of a variety of stages. Because students are not guaranteed legal representation, when the attorney enters the case will depend on when the family seeks legal assistance and how quickly they find an attorney. In rare cases, when you receive a case, your client will have just been suspended for the behavior in question, and the school may not yet have determined whether to extend her suspension. Or, your client may be facing an expulsion hearing shortly after you begin working on her case. Because of this variation, you will need to ask a number of questions at the outset to determine the status of the case and figure out your next steps.

1. Has a Hearing Date Been Set?

Some schools will notify a family that the student has been referred for expulsion without setting a formal hearing date. If you become involved before a hearing is scheduled, you might want to work with the school district to find a date that is mutually convenient for the district and the family. Even if the hearing hasn't been scheduled, be sure to keep an eye on the calendar, because the hearing must happen within 30 school days from the incident and the school must only provide 10 calendar days' notice by mail.

2. Has the Family Requested a Postponement?

By law, the student is entitled to one postponement of the expulsion hearing, for a period of not more than 30 calendar days. Cal. Educ. Code § 48918(a). Any additional postponement is at the Board's discretion. *Id.* The postponement request must be in writing. *Id.*

Before requesting a postponement, carefully consider whether it would be to your client's advantage to delay the hearing. Remember that there is generally no right to educational services pending the expulsion hearing (outside of what is required by an IEP for a special education student), so your client will likely be out of school on an extended suspension during any period of postponement and may not even be provided with homework to keep up with her studies. As a result, a postponement should only be requested if it is absolutely necessary. In some cases, however, this loss of instructional time may be outweighed by other advantages, such as the possibility of building a significantly stronger case or negotiating a desired alternate resolution during the extended pre-hearing period.

3. Has the Family Received Written Notice of the Hearing in Compliance with the Education Code?

One of the first documents you should review is a copy of the expulsion hearing notice. Once you obtain the notice, review it to ensure compliance with the Education Code's requirements (discussed in Section I.A above). At the expulsion hearing, you will want to use any notice deficiencies to argue that the district cannot expel your client because it has failed to meet the Code's procedural requirements. The expulsion notice will also contain the school's version of the facts of the incident and will be your formal source on which Education Code offenses are alleged as the grounds for expulsion.

4. Is the Student In or Out of School?

As discussed in Part One, the school is permitted to extend a student's suspension beyond five days under certain circumstances. If the student is out of school on an extended suspension, this is an opportunity to advocate for some kind of educational services for your client. Under state law, there is no right to receive educational services pending an expulsion hearing (except for Special Education students, as discussed in Part One, Section V). However, some districts are required by local policy or rule to provide certain educational services (e.g., homework assignments), and you can certainly advocate for the school, in its discretion, to provide some form of instruction.[25]

First Questions/Red Flags:

1. *Has a hearing date been set?*
2. *Has the family requested a postponement?*
3. *Is there proper written notice?*
4. *Is student in school?*
5. *Has suspension been extended properly?*
6. *Did family sign a stipulated expulsion agreement?*
7. Has family "waived" procedural rights?
8. Is/should client be in Special Education?
9. Does student/parent need translation?

If the student is in school, try to minimize the likelihood that your client will have further disciplinary involvement before the hearing. Check in with your client about how things are going at school and what supports might be helpful during the upcoming weeks. This might include identifying adults or safe spaces, such as the school Wellness Center, that the student can rely on during the school day. Have frank conversations with your client about how her behavior during this time can help or hurt her chances of winning her expulsion hearing.

5. Has There Been a Meeting About Extending Suspension?

On rare occasions, your involvement in the case will begin early enough that the school has not yet determined whether to extend your client's suspension past the standard five-day maximum. If this is the case, you may consider contacting the school and asking to be present at the extension of suspension meeting. This meeting is another informal but critical advocacy opportunity for you to minimize your client's lost educational time during the expulsion process. During the meeting, you will want to argue why your client would not "cause a danger to persons or property or a threat of disrupting the instructional process" if she is allowed to return to school. Cal. Educ. Code § 48911(g). For example, you might argue that the alleged offense is not one involving danger to others, or you might identify supports that are being put in place for the student to minimize the likelihood of future problems. Note that, for strategic reasons, you may

[25] If the district's policy and procedures are not available on its website, you may request a copy of the district's discipline policies by letter as part of your records request or afterward.

choose not to attend this meeting and instead prepare the student, parent, and support people (e.g., therapist, social worker, or case manager) with arguments they can make at the meeting.

If you succeed in returning the student to school pending the hearing, you may use that in your favor at the hearing to undermine the school's proof of secondary findings. As discussed in Part One, in order to expel the student for any offense other than a "zero tolerance" offense, the school must prove that other means of correction have failed or are not possible, or that the student is a continuing danger to herself or others. The district will have a hard time proving that the student is a "continuing danger" if it has allowed the student to return to school pending the hearing (assuming that there are no further incidents during that time).

6. Did the Family Sign a Stipulated Expulsion Agreement?

Often, districts try to convince families to sign stipulated expulsion agreements immediately after the student has been referred for expulsion. A stipulated expulsion agreement is generally a written document stipulating that the parent consents to her child being expelled and waiving all due process rights provided in the Education Code. These agreements may be presented to families without adequate explanation of their consequences, of the student's rights under the Education Code, or of what is being waived. Sometimes, families are told that signing the agreement is necessary so that the student can begin receiving rehabilitation services to facilitate an eventual return to school.

If the family has signed a stipulated expulsion agreement, find out everything you can about the circumstances under which it was signed and assess the family's understanding of the agreement when it was signed. If it seems that the family was misled or coerced, you can advocate that the agreement should be set aside and the district should move forward with a hearing.

7. Has the Family "Waived" any Procedural Rights?

Sometimes, the district convinces the family to waive particular procedural rights—such as the right to 10-days' notice of the hearing—without fully explaining those rights or the consequences of waiving them. (A common provision encourages families to exercise their "right" to waive 10 days' notice so that the expulsion matter can be resolved as quickly as possible.) At times, families sign waivers believing that they are signing something else entirely.

Find out whether any such waivers have been signed. Again, if the circumstances of the waiver were misleading, you can advocate that the agreement is null and for the hearing to proceed with all procedural protections provided by the Education Code. The family should still be able to invoke their right to a postponement of the hearing regardless.

8. Does Your Client Have Identified or Unidentified Special Education Needs?

If your client has an IEP or a 504 plan, the disciplinary protections in the IDEA or in Section 504 will apply, respectively. Find out immediately whether your client has identified special education needs and, if so, ensure that the school is following the proper procedures. If your client is not currently receiving special education services, talk to the student and her parent(s) about whether they suspect the student might have an unidentified disability. Find out whether the parent has previously expressed concern about a possible disability to the school in writing or requested a special education evaluation. Recall that if the school is deemed to have "had knowledge" of a disability prior to the behavior in question, the IDEA's disciplinary protections will apply. Once you obtain copies of the student's complete education records, you can assess (or seek further evidence of) whether a teacher or other school personnel has expressed concern about a pattern of behavior

demonstrated by the student, which is the third avenue by which the school might be deemed to "have knowledge" of a disability.

Even if the student is not currently receiving special education services and the school cannot be deemed to have had knowledge of a disability, you can discuss with the family whether it might be appropriate to refer the student for a special education assessment at this time. Recall that if an assessment is initiated during disciplinary proceedings, the school district must complete the assessment in an expedited manner.

9. Does Your Client or the Parent Need Translation?

Parents or students with language barriers should receive written notice in their own language if they are not literate in English. If the notice is not in the primary language of the student/parent, notify the district about the insufficiency of their notice and ask for a proper translation. Education Code section 48985 requires bilingual notice to parents if 15% or more of the pupils in a public school speak a primary language other than English. Additionally, there should be an interpreter, provided by the district, at any parent conferences or expulsion hearings. Be sure to notify the district of any need for an interpreter in advance of the hearing. The district's failure to provide such language access may provide due process grounds for challenging the district's actions or the expulsion, especially if it results in denial of a fair hearing and/or deprives the family of a meaningful opportunity to participate.

B. Assessing Your Client's Goals

In your first meeting with your client, you should explore which outcome your client wants from the expulsion process. Your client may want to stay at her current school or she may be interested in transferring to a different school placement. Remember that although the student is your client, the parent or caregiver with educational rights retains ultimate authority to decide where to send the student to school and whether to accept a settlement offer from the district on the student's behalf. Thus, you will have a collaborative decision-making process with the education-rights-holder about any alternative resolution, and that adult maintains the ultimate authority to decide. It is important to explain this to your client and let her know you will be advocating for her stated interest and will have a collaborative decision-making process with her education rights holder.

Early on, keep an eye out for possible resolutions other than moving forward with an expulsion hearing. This will be particularly important if your client has a weak case. Alternatives include: 1) voluntary transfer to another school in return for dropping the expulsion proceedings; 2) participation in another district problem-solving process in lieu of expulsion proceedings, such as the Counseling Conferences held by the San Francisco Unified School District or Restorative Justice; and 3) evaluating the student for special education needs of which the district should have been aware, as required by federal law. All of these alternatives are discussed at greater length below.

If your client has also been charged in a criminal or delinquency case for the same underlying incident, it is vital to coordinate immediately with his public defender or retained attorney. This may also give you extra incentive to settle the expulsion case. A dismissal of the expulsion case, or a suspended expulsion agreement, may positively influence the outcome of the delinquency matter. Keep in mind that if you go forward with the hearing, it may be inadvisable for your client to testify because his testimony would be admissible in court.

1. First Client Meeting

Expulsion cases happen within a relatively short timeframe. You should therefore meet with the student as soon as possible once you are assigned an expulsion case. Keep in mind that representing children requires a different set of skill and care than representing adults. Please read LSC's guidelines for representing children in Appendix D, which also includes interviewing tips for teenagers and younger children. It is important to take the time with your young clients to ensure that they understand everything and build enough rapport with you to feel like they are heard and respected.

a) Explain Your Role

At your first meeting, it is wise to begin your discussion with both the student and caregiver(s), so that everyone is on the same page about your role and the collaborative relationship with the caregiver. Be sure to explain your role and obligations as an attorney in age-appropriate terms. Make clear that if you commence representation, you will be representing the student, not the parent, so the student will be directing your advocacy. You should also explain the expulsion hearing process and possible outcomes, so that the student and family can make an informed decision about whether to proceed with an attorney. If the student confirms that she does want to be represented by you, sign a retainer, or engagement letter, with the student (and parent/legal guardian if your firm requires that). You must also have the student and parent/legal guardian sign a release form so that you can obtain copies of the student's school records and other needed confidential documents. You will be sent a sample release form in the "Referral Packet" from LSC.

b) Discuss Confidentiality and Honesty

Be sure to discuss confidentiality in age-appropriate terms privately with the student. Have the child reflect back to you what you have said to ensure her comprehension. As part of that conversation, emphasize that honesty is very important in your relationship so that you can help the student decide how to handle the situation. It is vital to discuss these expectations before the student begins to explain the incident, in case the student begins to tell you an untruth and then feels like she has to stick to her story. In the event that the student has already wedded herself to a lie, be careful not to challenge her directly about it, but remind her of the importance of honesty in your relationship and give her opportunities to tell you more about what really happened. It also helps to remind your client that you will be on her side no matter what she does or says.

c) Location of Meetings

At your first meeting, you will need to interview your client alone to learn her version of the incident that led to the expulsion referral. You should also separately interview your client's parent or guardian, who is likely to have additional information and a slightly different perspective on the case. Because of this need for private conversations, it is best to meet with the family in a neutral and confidential setting. If you meet at your office, make sure it is accessible for the family and be sure to put them at ease if they feel intimidated by the law firm setting. It is a good idea to conduct at least one of your next meetings at your client's home so you can observe collateral information about your client's home life that may help you better understand your client's circumstances and develop your theory of the case.

d) Listen, Listen, Listen

The family is likely to be stressed and angry at the school district at this stage. They may need to unburden themselves to you about the distress they are experiencing, in addition to providing you with the information that you deem relevant to the legal case. As such, you should budget in at least a couple of hours for these early meetings. Be sure to provide plenty of time just listening.

e) Interviewing Your Client

As mentioned, be sure to meet with your client in private (without her parent/guardian present) to ensure that your communications remain confidential and the parent/guardian cannot be cross-examined about your client's statements if the parent testifies at the expulsion hearing. Additionally, the child may be more honest with you individually than if her parent is present.

You should discuss the following questions with your client, which will be relevant to the school's ability to meet its burden of proof in the expulsion hearing:

- What happened during the alleged incident? When and where did it happen?
- Who else was there? Did anyone else see what happened?
- Did any meetings take place with the school afterwards? When? Who participated? Were the client's parents there?
- Did the client talk to anyone about what happened? Who and when?
- Did the client write a statement about the incident?
- Was anyone injured or arrested?
- What is the client's discipline history?
- Has the school tried any alternative means of addressing the alleged conduct (e.g. conferences, peer mediation, work with a school counselor)?

In addition, you should explore your client's general academic and extracurricular history. Although these questions may not be directly relevant to whether the school has met its burden for expulsion, positive evidence about your client's school and community participation may be helpful in persuading a hearing panel that expulsion would not be appropriate for your client, even if the panel finds that expulsion would be permissible under the law. You should ask your client and the parent:

- What is the student's attendance record?
- What is the student's academic record?
- Does the student participate in extracurricular activities or programs, in or out of school?
- Are there any students or staff at school who might be willing to support the client in a hearing?
- Are there any non-school persons who might be willing to support the client in a hearing or submit a letter of support?

Once you have received the expulsion packet, you should also walk through the packet with your client to allow her to comment on the evidence in the packet. Unless you already received the expulsion packet from the district, this may require an additional interview with your client.

After your first meeting with your client, we suggest drafting a memo that summarizes the evidence weighing in favor or against your client, her positive equities to highlight, and the legal issues and defenses you have identified. A sample Client Interview Memo is in Appendix E to this manual. Sending a copy of this Memo to your mentor attorney is useful as you strategize together.

2. Contacting the District and Obtaining Documents

After meeting with your client to sign a retainer and commence your representation, you should contact the school district in writing. A sample letter is in Appendix C. In this letter, you should:

a) Notify the District That Your Client is Represented by Counsel

Once you begin representing the student, all communications between the family and school district about the disciplinary proceedings and your client's school placement should go through you. It is **crucial** to also discuss this with your client's parent or guardian so that they do not engage in communication without your presence or consent.

If the school district retains counsel, you must be sure to direct your communication through that attorney so as to avoid unethical contact with a represented party. When there is no attorney for the district, there is no prohibition on your direct communication with school administrators or teachers, however, it is important to tread lightly so as not to generate a hostile response from these individuals. School districts handle representation in different ways. While districts tend to retain attorneys in Contra Costa, San Mateo and Marin counties, Oakland and San Francisco Unified do not typically retain counsel. That said, in some districts, such as Oakland Unified School District, you may still contact the in-house counsel for the district even though that attorney will not be representing the district at the hearing. This may lead to a more productive result than trying to negotiate directly with the school administrators.

b) Request Copies of Your Client's Expulsion Packet and Cumulative Education File

Students have the right to inspect and obtain copies of all documents to be used at the expulsion hearing. Cal. Educ. Code § 48918(b). The materials that the school submits to the hearing panel in support of the expulsion referral are often referred to as the "expulsion packet." The packet may include official notices about the incident (such as the suspension/expulsion notices), any witness statements from school staff or students, your client's discipline record, your client's attendance and grade history, and any other relevant information. You should request a copy of the expulsion packet in your letter, even if your client's parent has given you a packet of documents that they received from the school, as the parent may not have received or turned over all relevant materials. You will need to provide the district with a signed release from your client's parent or guardian to obtain copies of the records.

If there are any potential special education issues involved, it is wise to request the relevant documents to determine whether the school has properly complied with the protections and procedures described above in Section V. Additionally, under Education Code section 49069, parents have the right to obtain copies of their children's complete education files from the school district. The district must provide these records within five business days following the date of the request. Cal. Educ. Code § 49069. You may wish to obtain the cumulative education file to identify additional evidence to help build your defense. For example, a review of the student's cumulative file might reveal that the district has never attempted alternative means of addressing the conduct that led to the expulsion referral (which disproves one of the required secondary findings).

c) Request a Postponement, If Applicable

As discussed above, your client has the right to one hearing postponement of no more than 30 days. If your client has decided to request a postponement, you can request one in your first letter, if the parent/guardian has not already done so in writing.

C. Interviewing Witnesses and Obtaining Letters of Support

1. Identifying Witnesses and Documentary Evidence

Your client has the right to present oral and documentary evidence at the hearing and to bring witnesses to testify on her behalf. Cal. Educ. Code § 48918(b). Work with your client to identify possible witnesses for the hearing. You might consider requesting that your client's family make the initial contacts with potential witnesses to see whether they'd be willing to support your client at a hearing. If a witness is not available or is not willing to testify in person, you can submit a letter to the hearing panel from the witness in support of your client.

In addition to identifying witnesses who can support your client's version of the alleged offense, you might want to bring or submit letters from witnesses who can testify to your client's overall good character and commitment to her education. If your client is accused of a non-mandatory offense, the witnesses (or authors of supporting letters) should be asked to speak to whether your client presents a danger to the school community or would be amenable to alternative means of discipline. These witnesses can be helpful in tipping the equities in your client's favor.

> *Practice tip:* Gather supporting letters from people who can speak to your client's character, behavior, and ability to take responsibility for his actions. Read the best letters out loud during the hearing if, for whatever reason, bringing in these witnesses is not advisable.

2. Subpoenas

The governing board has the power to subpoena witnesses at the student's request to testify at the expulsion hearing. (The superintendent may also request witness subpoenas from the governing board.) Cal. Educ. Code § 48918(i). However, you should consider whether, as a strategic matter, it is in your client's interest to subpoena an unwilling witness whose testimony at the hearing may not ultimately match your client's expectations. The process governing subpoenas is laid out in Education Code section 48918(i), which directs the student to request that the board issue a subpoena. Note that the subpoena power is discretionary, not mandatory. However, a governing board is prohibited from adopting a blanket policy of never issuing subpoenas when they are requested. *Woodbury v. Brown-Dempsey*, 108 Cal. App. 4th 421 (2006).

> *Practice tip:* If you want to have a teacher or school staff member testify but they fear retribution from their employer, offer to subpoena them so that they won't be blamed for testifying on the student's behalf.

D. Negotiating Alternatives to Expulsion

While you are preparing for the expulsion hearing, you should also be exploring alternate resolutions for your client. In some districts, this will require negotiating with counsel for the school district; in other districts, such as San Francisco, you can communicate with district officials directly. Once you submit your initial letter notifying the district of your engagement, you will be notified whether the district has an attorney. This section discusses some alternative resolutions to consider, though the list is by no means exhaustive. In all cases, you should discuss these alternatives with your client and his education-rights-holder and weigh your chances of winning at

a hearing. Keep in mind that negotiating an alternative is still possible for mandatory expulsion offenses, even though the principal or superintendent has been required to recommend expulsion.

1. Voluntary transfer

In certain cases, the district may be willing to transfer your client to another comprehensive school and drop the expulsion recommendation altogether. This option is more likely to be available if the alleged offense involves interpersonal conflict between your client and particular students or staff members at the school (especially if the conflict is one that has resurfaced over time). When weighing this option, be aware that school transfers, especially in the middle of the year, can be very disruptive for your client and her academic progress. However, if your client wishes to move to another school and she risks losing at her hearing, this option may be appropriate.

When discussing transfer with the district, make sure to fully investigate the new school placement proposed for your client. Make sure that it is a comprehensive school, rather than an alternative school with fewer school hours and fewer services. Such alternative schools—e.g. county community schools and community day schools—may be the same schools to which expelled students are transferred after losing their expulsion hearing, and these schools generally have fewer resources and much higher dropout rates than comprehensive schools.

2. Alternatives to Discipline

Advocates for school discipline reform champion numerous alternative procedures as more effective than suspension and expulsion at solving conflicts among students and engaging youth in school. Among these is Restorative Justice, a process that focuses on redressing harm instead of on punishment. In the school discipline context, Restorative Justice also seeks to build strong, positive relationships throughout the school community and to develop shared values and guidelines for behavior. Restorative Justice can take several forms, including restorative circles, family group conferences and peer mediation.

A number of districts in the Bay Area, including Oakland and San Francisco Unified School Districts, are implementing Restorative Justice programs. If your client attends school in a district with a Restorative Justice program, consider whether the alleged offense is one that might be appropriate for Restorative Justice. If so, you can advocate for the school to use its Restorative Justice procedures before resorting to the expulsion process.

3. Alternative District Counseling Process

Districts may have a variety of processes available for addressing problems students are having in school. For example, in San Francisco, a process called a "Counseling Conference" is available to address everything from academic to behavior to attendance problems. Advocates can push for these lower-level processes to be used before the district resorts to expulsion to address whatever challenges the student is having in school.

4. Probationary Period with the District's Consent

LSC has had the (rare) experience of schools being willing to readmit a student with an understanding that, if things go well and there are no further disciplinary infractions, the school will drop the expulsion proceedings. This is not a common occurrence, but it is worth having in

mind. Note that this *differs* from a suspended expulsion (Cal. Educ. Code § 48917), in which the student has been formally expelled by the governing board but is allowed to return to school on probationary status. Instead, this would be an informal agreement entered into with the district.

5. Special Education Assessment

If you believe your client may have a qualifying disability under the IDEA or Section 504 (discussed above), you should discuss with your client and her family whether they want to pursue a special education assessment and assert the IDEA's disciplinary protections. Some families are hesitant to have a child "labeled" as "special ed," so the family may need extensive information from you about the effects and possible advantages of this course of action. Note that a school district cannot evaluate a child for special education without parental consent, so your client's parent (or other education rights holder) will play a central role in this decision. If the student and parent(s) agree to pursue special education services, the parent should contact the district in writing to request that the student be formally assessed and granted the protections provided under the IDEA. In that letter she might also assert that the school had prior knowledge of her child's disability, depending on the circumstances. A sample letter to the district is included in Appendix F. If the school refuses to accommodate a request for assessment and IDEA protections (i.e., a manifestation determination), the parent (or education rights holder) may file a due process complaint.

E. Preparing for the Hearing

As the hearing date approaches (which may be quite soon after you've received a case), you will want to prepare your presentation for the hearing itself. This involves preparing testimony with your client and potential witnesses, procuring any needed documentary evidence, finalizing your presentation to the panel, and ensuring the presence of an interpreter, if needed.

Make sure you remain in regular contact with your client, who may be quite anxious in the days leading up to the hearing. Build time into your meetings to discuss your client's questions or concerns; the status of the case and any supporting evidence you have discovered; the status of any negotiations with the school district; and your updated assessment of your client's prospects at the hearing. Note that young clients may have trouble remembering everything you have told them about these possibly overwhelming or even frightening proceedings. You should frequently revisit with your client what she can expect as the next steps in the process and what the possible outcomes may be, to minimize surprise and uncertainty as much as possible. We sometimes find it helpful to review a typical hearing script with our client. See the Oakland Unified disciplinary hearing script in Appendix G, which is representative of how most hearings are structured.

1. Deciding Whether Your Client Should Testify

As a preliminary matter, you will need to decide whether your client should testify at the hearing. You may need to make this decision on the spot at the hearing itself. Among other factors, your decision should be informed by whether your client has already written a statement for the school about the incident. If she has, explore whether your client's verbal testimony would contradict the written statement or might help clarify the written statement and improve her case.

Another important consideration will be whether the school brings witnesses to the hearing. As discussed above in Section III.E, the board may not expel a student based solely on hearsay evidence, with limited exceptions. If, at the hearing, the school only presents hearsay evidence, do **not** have your client testify. Your client's testimony would provide the hearing panel with direct

(non-hearsay) evidence that could support an expulsion. Because this strategic decision cannot be made in advance, you may need to prepare your client to testify but explain that ultimately it may be better for her not to testify, depending on how the school presents its case.

Note that if your client was arrested for the alleged offense and has a pending delinquency case, the client **should not** make any statements at the expulsion hearing under any circumstances. The hearing will be recorded, and the District Attorney can subpoena the tape from the expulsion proceeding and use it against your client in the delinquency proceeding.

Finally, you might also consider whether it would be damaging to your client to go through the process of testifying at the hearing. While some students may find it empowering to tell their side of the story, others may be highly uncomfortable or even find the process traumatizing. Discuss with your client whether she feels comfortable testifying and how her testimony may help you to advance her goals. Sometimes, attorneys present a written statement by the student (or the student may read the letter aloud) in lieu of testimony; this may be a safer option, especially if you can ensure with the hearing officer that the student will not be cross-examined about the contents of his letter. Since these hearings are informal and not governed by typical rules of evidence, there is some flexibility in how to present your case.

2. Preparing Your Hearing Presentation

Make sure you have gone through the following steps in preparing for the hearing:

- ✓ Prepare witnesses to testify. Inform your witnesses that in addition to cross-examination by the school representative, the hearing panel will be permitted to question them, as well.
- ✓ Finalize documentary evidence, including letters of support and relevant records from the student's education file. Bring plenty of copies for each panel member and the district.
- ✓ Prepare opening and closing statements for the hearing (discussed further in Section VII below).
- ✓ Ensure that an interpreter will be present, if needed.

VII. The Expulsion Hearing

A. Overview of an Expulsion Hearing

Although many hearing procedures are mandated by law, the style of an expulsion hearing can differ significantly from district to district. In some districts, the hearings resemble formal proceedings; in others, they are conducted more as informal meetings. You should consider how your presentation style might change, as a strategic matter, depending on the district.

1. Participants at the Expulsion Hearing

The hearing panel or hearing officer: The governing board may contract with a hearing officer or administrative panel to conduct the hearing. Cal. Educ. Code § 48918(d). Bay Area school districts often use hearing panels. The panel must consist of three or more certified individuals, such as

school principals, vice principals, deans, or other administrative personnel. Crucially, the panel members **cannot** be members of the school board or employees of the school at which the pupil is enrolled. *Id.* In addition, some districts have a separate administrator who is present at and oversees the hearing, ensuring compliance with hearing procedures and moving the hearing along through its various stages.

The school representative: A representative of the student's school will be at the hearing to present the school's evidence in favor of expulsion. The school's representative is usually a dean, principal, or vice principal.

The school's witnesses: The school may bring witnesses to testify in support of the school's expulsion recommendation.

The student and student's representative: The student has a right to be present at the hearing and to be represented by legal counsel or a non-attorney advisor.

The student's witnesses: If available, you may wish to bring witnesses to testify in your client's defense. The student's right to present witnesses is guaranteed under the Education Code. Cal. Educ. Code § 48918(b)(5). The parent(s) of the student may fully participate in the hearing and may testify.

2. Stages of an Expulsion Hearing

Expulsion hearings generally follow the outline below. For further reference, a sample hearing script from Oakland Unified School District is included as Appendix G to this manual. When you are preparing your client for the hearing, you might use the sample script as an aide when explaining to your client what she can expect at the hearing.

- Instructions and introductions: Generally, the hearing will begin with an explanation of the hearing process and the charges against the student. The parties who are present may also be introduced at this time.
- Opening statements: The school and the student (or student's representative) each have a chance to give an opening statement. Note that the school may not give a formal statement and instead may move directly into its presentation of the case. Regardless, you should still ask to make your opening statement before the school presents its case.
- School presents case: The school will give a summary of the alleged event and present its documentary evidence. If the school has brought witnesses, the school conducts its direct examination first. Direct examination is followed by cross-examination by the student's representative. Finally, the hearing panel may question the witness if it so chooses. Note that witnesses may be sworn in by the panel.
- Student presents case: After the school has finished its case, the student has an opportunity to testify and presents her witnesses and documentary evidence. The school is given the chance to cross-examine all witnesses, and the hearing panel may also ask questions if it chooses.
- Closing statements: At the conclusion of the hearing, the school and student should be given a chance to make closing statements. Note that this closing stage may be a good

opportunity for the parent to additionally make a statement about his desired outcome, whether or not the parent has testified in the case.

B. Defending Against Expulsion

You have three main lines of defense at an expulsion hearing: (1) the school has failed to present substantial evidence proving the elements needed for expulsion; (2) the school did not meet all procedural requirements; and (3) there are positive equities in the student's favor, so even if the student could lawfully be expelled, the hearing panel should in its discretion decline to recommend expulsion to the governing board. If there is evidence of status-based discrimination, you may consider raising this at the hearing as well as filing a complaint with the U.S. Department of Education's Office of Civil Rights.

1. School's Failure to Present Substantial Evidence in Support of Expulsion

In asserting that the school failed to meet its burden of proof, you might argue that:

- the student has not been proven guilty of an expellable offense; and
- even if the student did commit a school-related expellable offense, the secondary findings have not been proven (for a non-mandatory expulsion case).

a) Failure to Prove Commission of Offense

The school's evidence regarding the alleged offense can be challenged effectively through your witnesses' testimony and through cross-examination, among other tactics. Remember that the governing board's decision to expel must be based on relevant and "substantial evidence showing that the pupil committed" the offense. Cal. Educ. Code § 48918(f)&(h). Keep an eye out for the following:

- Was the alleged act related to a school activity or school attendance?
- How thorough was the school's investigation?
- Were there students present for the incident whose statements were not included in the expulsion packet?
- Are there inconsistent witness statements?

If the school brings no witnesses, you can cross-examine the school's representative about these issues.

At the hearing, be aware of whether the school presents any direct evidence in support of expulsion. As discussed in Section III.E, the governing board may not base an expulsion order solely on hearsay evidence, except in limited circumstances. If those circumstances do not apply and the school presents no direct evidence at the hearing, you should highlight for the panel at the end of the school's presentation that the school's affirmative case contained only hearsay.

b) No Secondary Findings

Secondary findings provide a critical chance for advocacy at expulsion hearings. For non-mandatory-expulsion offenses, even if the school proves that your client committed an expellable

offense, you can still defend against expulsion if the secondary findings are not met. Recall that only one of the two secondary findings must be satisfied to support expulsion.

(1) Other means of correction are not feasible or have repeatedly failed to bring about proper conduct.

When you prepare for the hearing, you should review your client's disciplinary record to determine whether she previously committed acts similar to the alleged offense. If your client has never committed a similar act before, the school **cannot prove** that other means of correction have repeatedly failed to bring about proper conduct. If your client has committed similar acts before, search her education file to determine whether the school has tried any of the following alternative means of correction, or similar strategies:

- Conferences with the student, school personnel, the student's parents, and/or other students;
- Referrals to a school counselor, psychologist, social worker, or school Wellness Center;
- Intervention-related teams that assess the student's behavior and develop individualized plans to address the behavior;
- Referral for a psychological or special education assessment;
- Anger management or other behavior modification counseling;
- Restorative Justice;
- Positive behavioral supports or interventions; and/or
- Other support services.

If the school has never tried other means of correcting the behavior, and such alternative means are feasible, your client **cannot** be expelled, unless the school satisfies the other secondary finding, below.

(2) Due to the nature of the student's conduct, the student's continued presence at school would cause a continuing danger to the physical safety of the student or others.

If the student's behavior did not threaten the physical safety of other students or school personnel, you can argue that this secondary finding cannot be met. Even if the student's behavior arguably posed a safety threat (e.g., the student was involved in a physical altercation with other students), look for evidence that the student would not pose a safety threat if she were to return to school. For example, other involved students may have been expelled, moved schools, or graduated. Additionally, if the school declined to extend your client's suspension pending the hearing (and your client has not committed any additional dangerous offenses), you can argue that the school itself does not consider your client to be a danger.

2. Procedural Violations

Procedural violations should be raised at the hearing as a defense to expulsion, as well as to create a record for appeal. You might raise these issues through direct examination of your client and/or her parent, or through cross-examination of the school's representative. In Oakland Unified School District, the panel hears procedural concerns first and only proceeds further if there were no significant procedural violations. In all districts, if procedural violations occurred, you should argue that an expulsion would be invalid and your client should be returned to school immediately.

Pay attention to the procedural requirements articulated in *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring substantive notice of allegations and meaningful opportunity for student to be heard, in context of lengthy suspension) and *Charles S. v. San Francisco Unified School District*, 20 Cal. App. 3d 83 (Cal. Ct. App. 1971) (requiring appropriate notice of suspension and access to a prompt meeting or hearing at which the suspended student may informally present his side of the case). In particular, the California Court of Appeals has emphasized that the time provisions for holding an expulsion hearing are mandatory and jurisdictional. If the school fails to hold the hearing within the required 30-day timeframe, any action taken at the hearing is invalid. *Garcia v. Los Angeles County Board of Ed*., 123 Cal. App. 3d 807 (Cal. Ct. App. 1981). Also be sure to reference these procedural protections as codified in the California Education Code, most of which we have listed in Section III.C.

3. Positive Equities

Recall that for non-mandatory-expulsion offenses, it is within the governing board's discretion whether to expel a student. And, even for students found to have committed a mandatory offense, the governing board still has discretion to order a suspended expulsion. It is therefore important to present positive equities on your client's behalf at the hearing. This can be done effectively through witnesses, letters of support, and your client's own statement, if your client will be testifying. Your equitable evidence should demonstrate your client's positive character and dedication to her schooling. If your client will be speaking directly, she should talk about her future goals, why she wants to go back to school, and how she will improve her school performance if she is given the chance to return. It is important that the student demonstrate humility, and articulate lessons learned from the experience (or from discipline she already received from parents and the school), as well as show remorse or contrition where necessary. An apology can often go a long way.

4. Bias

If you believe that your client has been discriminated against on the basis of race, color, national origin, sex, disability or age, you can raise this to argue against expulsion at the hearing. Racial bias may be evident in the way the school handled the incident leading to the expulsion referral (for example, your client, a student of color, was involved in a fight with a white student and only your client was disciplined). Alternatively, you may discover an apparent pattern of discrimination in the way your client's school generally disciplines students. You can obtain data on the race, special education status, and English-language learner status of students disciplined in each district and at each school from past school years (usually two years prior) at http://dq.cde.ca.gov/dataquest/ and http://dq.cde.ca.gov/dataquest/DQP.asp. For more recent school discipline data and the corresponding status-based breakdown, you may request this information from the school and the district through a public records request.

If there is evidence of status-based discrimination, you might also discuss with your client the possibility of filing a discrimination complaint with the federal Office of Civil Rights. This process, described above in Section IV.G, is distinct from the expulsion proceedings. Remember that an OCR complaint must typically be filed within 180 days after the discrimination occurred.

VIII. After the Expulsion Hearing

A. The Panel's Final Recommendation

Remember that if your hearing is before a hearing panel or hearing officer, the decision must still be reviewed by the governing board of the school district, who holds the ultimate authority to expel. Although the hearing panel must make its decision to recommend expulsion within three days, the written notice sent to the student and parent may take a few days to be delivered. Thus, you or the parent may choose to call the district office to learn the verdict by phone or in person. If the panel recommends that your client *not* be expelled, the expulsion proceedings are over and the student must immediately be reinstated in her school (unless her parent or guardian requests a difference placement in writing). Cal. Educ. Code § 48918(e). If the panel recommends to the governing board that your client be expelled, the case will continue for review by the governing board. Note that even if your client has been recommended for expulsion by the panel, the governing board may still decide otherwise or issue a suspended expulsion (even in the case of a mandatory expulsion offense). See Cal. Educ. Code § 48918(f); Cal. Atty. Gen. Opinion No. 96-501, 80 Ops. Cal. Atty. Gen. 85, 1997 Cal. AG LEXIS 25 at *6-7 (full text included in Appendix B).

Different school districts have different practices for board review, so you should consult the school district's procedures. Although the governing board often simply rubber-stamps the hearing panel's recommendation, sometimes the board will be open to your and your client's input and will engage in a substantive review of the recommendation. Before the board, you should emphasize any mitigating circumstances, character references, and other positive equities. It would be helpful for the parents or caregivers to also speak to corrective actions taken by the student and/or their own disciplinary actions to assure the board that the student has accountability. Note that the board will typically not hear any new evidence and will rely on the hearing panel's factual findings. In some limited circumstances, however, the board may decide to hold a supplemental hearing. Cal. Educ. Code § 48918(f)(1). Therefore, even if you lose a hearing in front of a panel or hearing officer, it is usually wise to submit a letter (or brief) and/or oral argument in front of the governing board to seek a better ultimate result for your client.

B. If Your Client Is Expelled

1. Terms of Expulsion

If the governing board expels your client, they must state the length of expulsion and assign the student to an appropriate educational placement. Cal. Educ. Code § 48916. Additionally, the board must put a rehabilitation plan in place that outlines the expectations the student must meet in order to be readmitted to a comprehensive school at the conclusion of the term of expulsion. Cal. Educ. Code § 48916(b). Counsel your client on the importance of complying with the rehabilitation plan to maximize her chances of smooth readmission to the school district at the end of the expulsion.

a) Length of Expulsion

Generally, the date on which the student will be reviewed for readmission cannot be later than the last day of the semester following the semester in which the student was expelled. Cal. Educ. Code § 48916(a). If the student is expelled during the summer, the date for readmission cannot be later than the last day of the semester following the summer session. *Id.* If the student has been expelled for a mandatory expulsion (zero tolerance) offense, the date for readmission must be one year from the date of the expulsion; however, the board may set an earlier date "on a case-by-case basis." *Id.*

b) Rehabilitation Plan Required

The student's rehabilitation plan may include "recommendations for improved academic performance, tutoring, special education assessments, job training, counseling, employment, community service, or other rehabilitative programs." Cal. Educ. Code § 48916(b). You as the attorney have a crucial role to play in ensuring that the rehabilitation plan is meaningful, not overly onerous, and will enable the student to succeed both during and after the term of expulsion. If the student's expulsion was related to alcohol or controlled substances, the school can require the student to enroll in a drug rehabilitation program before returning to school, if the student's parent consents. Cal. Educ. Code § 48916.5. It may be possible for you to challenge overly burdensome terms in the rehabilitation plan through your argument before the board as they review a panel's recommendations, by subsequent written request to the board, or through an appeal.

c) Alternative School Placement

During the term of expulsion, the student must be provided with an "educational program." Cal. Educ. Code § 48916.1(a). Usually, the student is placed in some type of county-run alternative program, such as a county community school or a continuation school designed for expelled students, those behind in credits, and students transferred by probation or a school attendance review board (SARB) related to truancy.[26] If that kind of program is unavailable, ensure that the student has been placed in a school setting that meets her educational needs.

In no event shall an expelled student be involuntarily placed on independent study or given part-time home instruction as a replacement for an educational setting. Education Code § 51747(c)(7) states that "independent study is an optional educational alternative in which no pupil may be required to participate." Guidance from the California Department of Education makes clear that "involuntary transfer or assignment of a student to full-time independent study is both illegal and, from an administrative perspective, unwise." Cal. Dep't of Educ., *Independent Study Operations Manual* at Chapter 2, p.5 and Ch. 8, p.6, *available at* http://www.cde.ca.gov/sp/eo/is/isoperationsmanual.asp. For a sample administrative complaint for violation of this law and policy, see Appendix H.

2. Readmission

Each district must develop its own process for readmission, which must be made available to the student and parent at the time of expulsion. Cal. Educ. Code § 48916(c). At the end of the term of expulsion, the district must readmit the student unless the governing board finds that the student (1) has failed to meet the conditions of her rehabilitation plan, or (2) "continues to pose a danger" to campus safety, other students, or school staff. *Id.* If readmission is denied, the governing board must provide the family with written notice describing the reasons for denying readmission and indicating what alternative educational placement is available to the student (which may be the same alternative program the student was attending during the term of expulsion). Cal. Educ. Code § 48916(d)-(e). Check the district's own policies and procedures to determine how a student would challenge denial of readmission. Alternatively, the student may at that time elect to transfer to a different school district by invoking residency or through an inter-district transfer. Cal. Educ. Code §§ 48915.2; 48916(d)-(e).

[26] Legal standards for placement in county or community day schools in all of these contexts are discussed in Education Code §§1980 et seq.

3. Suspended Expulsion

If the governing board suspends your client's expulsion order, counsel your client about the importance of good behavior during the suspended expulsion. Make sure your client understands that if she violates *any* district rule regarding student conduct, she could be expelled immediately under the terms of her original expulsion order *without a hearing*. (See discussion of suspended expulsion above in Section III.E.3.) You can also play a role in maximizing your client's chance of success during a suspended expulsion. For example, you might work with the client's family and school to set up support services for your client upon her return to school.

C. Expunging School Records

After your client has successfully completed a term of a suspended expulsion, the expulsion should be expunged from her school records. Cal. Educ. Code § 48917(e). It is advisable for you or the parent to ensure that the records are actually expunged.

Even students without a suspended expulsion may submit a request to the governing board for expungement of a suspension or expulsion. Some districts have a form available through the superintendent's office, like Oakland's "Request to Expunge Student Discipline Records." If there is no form, you, the student and/or parent(s) might submit a letter directly to the school board. Make sure to include information about any positive equities in the student's favor and explain why expungement is important for her. Include letters of support from any (present or past) school administrators, teachers or other school staff that you can obtain. Additionally, letters of support from the student's community connections (e.g., counselors or church members) may be important to show the student in a good light. If the expungement request is granted, it is wise to review the student's school records to ensure that all mentions of the expulsion proceedings have been removed.