

# **Education Manual Appendices**

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## **Appendix A**

Student Discipline Rights (CA Education  
Code [2015] §48900a1-48900.5)

**STUDENT DISCIPLINE RIGHTS**  
All References are to the California Education Code (2015)

**§ 48900. Grounds for suspension or expulsion; legislative intent:**

A pupil shall not be suspended from school or recommended for expulsion, unless the superintendent of the school district or the principal of the school in which the pupil is enrolled determines that the pupil has committed an act as defined pursuant to any of subdivisions (a) to (r), inclusive:

(a)(1) Caused, attempted to cause, or threatened to cause physical injury to another person.

(2) Willfully used force or violence upon the person of another, except in self-defense.

(b) Possessed, sold, or otherwise furnished a firearm, knife, explosive, or other dangerous object, unless, in the case of possession of an object of this type, the pupil had obtained written permission to possess the item from a certificated school employee, which is concurred in by the principal or the designee of the principal.

(c) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of, a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, an alcoholic beverage, or an intoxicant of any kind.

(d) Unlawfully offered, arranged, or negotiated to sell a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, an alcoholic beverage, or an intoxicant of any kind, and either sold, delivered, or otherwise furnished to a person another liquid, substance, or material and represented the liquid, substance, or material as a controlled substance, alcoholic beverage, or intoxicant.

(e) Committed or attempted to commit robbery or extortion.

(f) Caused or attempted to cause damage to school property or private property.

(g) Stole or attempted to steal school property or private property.

(h) Possessed or used tobacco, or products containing tobacco or nicotine products, including, but not limited to, cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets, and betel. However, this section does not prohibit use or possession by a pupil of his or her own prescription products.

(i) Committed an obscene act or engaged in habitual profanity or vulgarity.

(j) Unlawfully possessed or unlawfully offered, arranged, or negotiated to sell drug paraphernalia, as defined in Section 11014.5 of the Health and Safety Code.

(k)(1) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties.

(2) Except as provided in Section 48910, a pupil enrolled in kindergarten or any of grades 1 to 3, inclusive, shall not be suspended for any of the acts enumerated in this subdivision, and this subdivision shall not constitute grounds for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion. This paragraph shall become inoperative on July 1, 2018, unless a later enacted statute that becomes operative before July 1, 2018, deletes or extends that date.

(l) Knowingly received stolen school property or private property.

(m) Possessed an imitation firearm. As used in this section, "imitation firearm" means a replica of a firearm that is so substantially similar in physical properties to an existing firearm as to lead a reasonable person to conclude that the replica is a firearm.

**(n)** Committed or attempted to commit a sexual assault as defined in Section 261, 266c, 286, 288, 288a, or 289 of the Penal Code or committed a sexual battery as defined in Section 243.4 of the Penal Code.

**(o)** Harassed, threatened, or intimidated a pupil who is a complaining witness or a witness in a school disciplinary proceeding for purposes of either preventing that pupil from being a witness or retaliating against that pupil for being a witness, or both.

**(p)** Unlawfully offered, arranged to sell, negotiated to sell, or sold the prescription drug Soma.

**(q)** Engaged in, or attempted to engage in, hazing. For purposes of this subdivision, “hazing” means a method of initiation or preinitiation into a pupil organization or body, whether or not the organization or body is officially recognized by an educational institution, which is likely to cause serious bodily injury or personal degradation or disgrace resulting in physical or mental harm to a former, current, or prospective pupil. For purposes of this subdivision, “hazing” does not include athletic events or school-sanctioned events.

**(r)** Engaged in an act of bullying. For purposes of this subdivision, the following terms have the following meanings:

**(1)** “Bullying” means any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

**(A)** Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.

**(B)** Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health.

**(C)** Causing a reasonable pupil to experience substantial interference with his or her academic performance.

**(D)** Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

**(2)** **(A)** “Electronic act” means the creation and transmission originated on or off the schoolsite, by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including, but not limited to, any of the following:

**(i)** A message, text, sound, or image.

**(ii)** A post on a social network Internet Web site, including, but not limited to:

**(I)** Posting to or creating a burn page. “Burn page” means an Internet Web site created for the purpose of having one or more of the effects listed in paragraph (1).

**(II)** Creating a credible impersonation of another actual pupil for the purpose of having one or more of the effects listed in paragraph (1). “Credible impersonation” means to knowingly and without consent impersonate a pupil for the purpose of bullying the pupil and such that another pupil would reasonably believe, or has

reasonably believed, that the pupil was or is the pupil who was impersonated.

(III) Creating a false profile for the purpose of having one or more of the effects listed in paragraph (1). “False profile” means a profile of a fictitious pupil or a profile using the likeness or attributes of an actual pupil other than the pupil who created the false profile.

(B) Notwithstanding paragraph (1) and subparagraph (A), an electronic act shall not constitute pervasive conduct solely on the basis that it has been transmitted on the Internet or is currently posted on the Internet.

(3) “Reasonable pupil” means a pupil, including, but not limited to, an exceptional needs pupil, who exercises average care, skill, and judgment in conduct for a person of his or her age, or for a person of his or her age with his or her exceptional needs.

(s) A pupil shall not be suspended or expelled for any of the acts enumerated in this section unless the act is related to a school activity or school attendance occurring within a school under the jurisdiction of the superintendent of the school district or principal or occurring within any other school district. A pupil may be suspended or expelled for acts that are enumerated in this section and related to a school activity or school attendance that occur at any time, including, but not limited to, any of the following:

(1) While on school grounds.

(2) While going to or coming from school.

(3) During the lunch period whether on or off the campus.

(4) During, or while going to or coming from, a school-sponsored activity.

(t) A pupil who aids or abets, as defined in Section 31 of the Penal Code, the infliction or attempted infliction of physical injury to another person may be subject to suspension, but not expulsion, pursuant to this section, except that a pupil who has been adjudged by a juvenile court to have committed, as an aider and abettor, a crime of physical violence in which the victim suffered great bodily injury or serious bodily injury shall be subject to discipline pursuant to subdivision (a).

(u) As used in this section, “school property” includes, but is not limited to, electronic files and databases.

(v) For a pupil subject to discipline under this section, a superintendent of the school district or principal may use his or her discretion to provide alternatives to suspension or expulsion that are age appropriate and designed to address and correct the pupil's specific misbehavior as specified in Section 48900.5.

(w) It is the intent of the Legislature that alternatives to suspension or expulsion be imposed against a pupil who is truant, tardy, or otherwise absent from school activities.

#### **§ 48900.2. Additional grounds for suspension or expulsion; sexual harassment:**

In addition to the reasons specified in Section 48900, a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in Section 212.5.

For the purposes of this chapter, the conduct described in Section 212.5 must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or

pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment. This section shall not apply to pupils enrolled in kindergarten and grades 1 to 3, inclusive.

**§ 48900.3. Hate violence:**

In addition to the reasons set forth in Sections 48900 and 48900.2, a pupil in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence, as defined in subdivision (e) of Section 233.

**§ 48900.4. Additional grounds for suspension or expulsion; harassment, threats, or intimidation:**

In addition to the grounds specified in Sections 48900 and 48900.2, a pupil enrolled in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has intentionally engaged in harassment, threats, or intimidation, directed against school district personnel or pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment.

**§ 48900.5. Suspension; restrictions on imposition; exception; other means of correction:**

(a) Suspension, including supervised suspension as described in Section 48911.1, shall be imposed only when other means of correction fail to bring about proper conduct. A school district may document the other means of correction used and place that documentation in the pupil's record, which may be accessed pursuant to Section 49069. However, a pupil, including an individual with exceptional needs, as defined in Section 56026, may be suspended, subject to Section 1415 of Title 20 of the United States Code, for any of the reasons enumerated in Section 48900 upon a first offense, if the principal or superintendent of schools determines that the pupil violated subdivision (a), (b), (c), (d), or (e) of Section 48900 or that the pupil's presence causes a danger to persons.

(b) Other means of correction include, but are not limited to, the following:

(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 service 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 program, or a plan adopted pursuant to Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)).

(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 schoolday 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.

(9) Any of the alternatives described in Section 48900.6.

## **Appendix B**

Attorney General Opinions (from Lexis)



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ATTORNEY GENERAL'S OPINIONS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF  
CALIFORNIA

Opinion No. 98-504

*1998 Cal. AG LEXIS 83; 81 Ops. Cal. Atty. Gen. 264*

July 29, 1998

**REQUESTBY:**

[\*1]

GEORGE RUNNER

MEMBER OF THE CALIFORNIA ASSEMBLY

**QUESTION:**

THE HONORABLE GEORGE RUNNER, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following question:

Is a school district required to allow a pupil or a pupil's parent or guardian to be represented at an expulsion hearing by a non-attorney such as an "educational advocate" or "administrative law advisor"?

**CONCLUSION**

A school district is not required to allow a pupil or a pupil's parent or guardian to be represented at an expulsion hearing by a non-attorney such as an "educational advocate" or "administrative law advisor," but it may allow such representation under duly adopted rules and regulations.

**OPINIONBY:**

DANIEL E. LUNGREN, Attorney General; Gregory L. Gonot, Deputy

**OPINION:**

**ANALYSIS**

The question presented concerns the authority of a school district to restrict representation of a pupil or a pupil's parent or guardian at an expulsion hearing conducted pursuant to *Education Code section 48918*. n1 Is a school district required to allow a pupil or his parent or guardian to be represented by someone other than an attorney? We conclude that while a school district may permit representation at an expulsion hearing by a non-attorney, it [\*2] is not required to do so.

n1 All references hereafter to the Education Code are by section number only.

Section 48918 states in part:

"The governing board of each school district shall establish rules and regulations governing procedures for the expulsion of pupils. *These procedures shall include, but are not necessarily limited to,* all of the following:

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"(a) The pupil shall be entitled to a hearing to determine whether the pupil should be expelled . . . ."

"(b) Written notice of the hearing shall be forwarded to the pupil at least 10 calendar days prior to the date of the hearing. The notice shall include: the date and place of the hearing; a statement of the specific facts and charges upon which the proposed expulsion is based; a copy of the disciplinary rules of the district that relate to the alleged violation; a notice of the parent, guardian, or pupil's obligation pursuant to subdivision (b) of Section 48915.1; and *notice of the opportunity for the pupil or the pupil's parent or guardian to appear* [\*3] *in person or employ and be represented by counsel*, to inspect and obtain copies of all documents to be used at the hearing, to confront and question all witnesses who testify at the hearing, to question all other evidence presented, and to present oral and documentary evidence on the pupil's behalf, including witnesses . . . ." (Italics added.)

The language of section 48918 raises two questions: (1) does the phrase "represented by counsel" include non-attorneys and (2) may a school district's rules and regulations authorize representation by persons in addition to those specifically enumerated in the statute?

In analyzing the provisions of section 48918, we are guided by well-established principles of statutory interpretation. The overriding objective of statutory construction is to ascertain and effectuate the Legislature's intent. ( *Larson v. State Personnel Bd.* (1996) 28 Cal.App.4th 265, 276.) In ascertaining such intent, we turn initially to the statutory language itself ( *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826), giving each word its usual and ordinary [\*4] meaning ( *Da Fonte v. UpRight, Inc.* (1992) 2 Cal.4th 593, 601). Every word, phrase, and sentence in a statute should, if possible, be accorded significance. ( *Penasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 1186.) A statute must be construed in the context of the entire statutory scheme of which it is a part, in order to achieve consistency among the related provisions. ( *People v. Hull* (1991) 1 Cal.4th 266, 272.)

"Counsel" in this context commonly means "a person professionally engaged in the trial or management of a cause in court," "a legal advocate managing a case at law," "a lawyer appointed or engaged to advise and represent in legal matters a particular client, public officer, or public body," or "one called on to advise." (Webster's Third New Internat. Dict. (1971) p. 518.)

Based upon this dictionary definition alone, it would appear that under section 48918, representation of a pupil or his parent or guardian at an expulsion proceeding would be by an attorney rather than a non-attorney. Such construction of the terms of section 48918 is supported by the types of [\*5] tasks a counsel may perform at the hearing: questioning witnesses and presenting oral and documentary evidence on the pupil's behalf (§ 48918, subd. (b)), objecting to hearsay evidence as the basis for the decision to expel (§ 48918, subd. (f)), and requesting the issuance of subpoenas (§ 48918, subd. (i)). n2

n2 The hearing may become more trial-like if the district board refers the matter to a county hearing officer or to a hearing officer of the State Office of Administrative Hearings. (§ 48918, subd. (d).) However, we note that the technical rules of evidence do not apply in an expulsion hearing (§ 48918, subd. (h)), and we are informed that representation by a non-attorney is generally permitted in hearings conducted by an administrative hearing officer.

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Another indicator of the Legislature's intent in its use of the term "counsel" in section 48918 is contained in the language of a related statute, section 48925. There, for purposes of suspension or expulsion, "pupil" is defined to include "a pupil's [\*6] parent or guardian or legal counsel." (§ 48925, subd. (e).) Consequently, any right that may be exercised by the pupil may also be exercised on his behalf by the parent or guardian or by *legal counsel*. This definition of "pupil" may be viewed as providing the underlying definition of "counsel" for the procedural requirement that the pupil be notified of the opportunity to "employ and be represented by counsel." (§ 48918, subd. (b).)

Also of significance is the fact that, in the context of another type of hearing, the Legislature has differentiated between "counsel" and other persons appearing on behalf of the pupil. Section 56505 authorizes non-attorneys to advise special education pupils during the dispute resolution process. It states that any party to a hearing has the "right to be accompanied and advised by counsel and by individuals with special knowledge or training relating to the problems of children and youth with disabilities." (§ 56505, subd. (e)(1).) This language indicates that, when using the term "counsel" in section 48918, the Legislature was not referring to non-attorney advisers.

On balance, while the matter is not free from doubt, we believe that when the Legislature [\*7] used the term "counsel" in subdivision (b) of section 48918, it was referring to an attorney licensed to practice law.

We turn now to a consideration of the effect of the introductory language contained in section 48918. Does it permit a district board to adopt rules and regulations that would allow representation by a non-attorney in an expulsion hearing, even though the term "counsel" in subdivision (b) of section 48918 refers only to attorneys? We believe that a district board may authorize representation by a non-attorney.

While the district board is empowered to "establish the rules and regulations governing procedures for the expulsion of pupils," it is required to "include" only those procedures specifically identified by the Legislature. (§ 48918.) Our review of the legislative history of section 48918 discloses that the procedures which the statute mandates for inclusion were designed to establish uniform minimum standards of due process for the protection of both pupils and the school district. In *Garcia v. Los Angeles County Bd. Of Education* (1981) 123 Cal.App.3d 807, 812, the court examined the legislative history of section [\*8] 48918 (then section 48914) and declared:

"It appears from the history and from the reading of the statute that the intent of the legislation is to provide a student with the protection of due process when faced with the possible forfeiture of the 'legitimate entitlement to a public education as a property interest.' [Citation.]"

Accordingly, so long as notification of the opportunity to be represented by an attorney is preserved, we see no impediment to a district board's adoption of rules and regulations permitting pupils to be represented by non-attorney advocates or advisors. Whether a district board chooses to allow such representation or not, the due process concerns of section 48918 would be satisfied.

We recently reached a similar conclusion in 80 Ops.Cal.Atty.Gen. 221 (1997), where we examined a statute allowing the parties at a Public Utilities Commission hearing "to be heard in person or by attorney." (*Id.*, at p. 222.) We concluded that although the term "attorney" used in the statute did not include non-attorneys, the commission could authorize representation by non-attorneys at its administrative hearings. ( [\*9] *Id.*, at p. 223 ["we perceive nothing in section 1706 that would negate the PUC's power to authorize representation at a formal proceeding by a

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nonattorney"].) In reaching our conclusion, we relied in part upon the following language contained in *Consumers Lobby Against Monopolies v. Pub. Util. Com.* (1979) 25 Cal.3d 891, 913-914:

" 'Nonattorneys are generally not permitted to participate in judicial proceedings; rather, with a few limited exceptions, a person must be licensed as an attorney before he can appear in court. In Public Utility Commission proceedings, by contrast, the participants are not required to be licensed attorneys, and it is common for such persons to make appearances on behalf of others. The commission's own rules explicitly acknowledge this practice. [Citation.] Moreover, even a brief perusal of the California Public Utilities Commission Reports demonstrates that appearances by nonattorneys comprise a substantial and important part of the practice before that body. We must infer that the commission believes such persons are competent to participate in its proceedings in a representative [\*10] capacity.'" (*Id.*, at p. 223.) n3

n3 In our 1997 opinion, we noted that representation of clients by non-attorneys before administrative tribunals "has long been recognized by the courts of this state. ( *Welfare Rights Org. v. Crisan* (1993) 33 Cal.3d 766, 770 [welfare hearings]; *Consumers Lobby Against Monopolies v. Pub. Util. Com.*, *supra*, 25 Cal.3d at 913-914 [PUC hearings]; *Staley v. California Unemp. Ins. App. Bd.* (1970) 6 Cal.App.3d 675, 678 [unemployment insurance appeals]; *Bland v. Reed* (1968) 261 Cal.App.2d 445, 449 [workers' compensation appeals].)" (80 Ops.Cal.Atty.Gen., *supra*, 224.)

We conclude that a school district is not required to allow a pupil or a pupil's parent or guardian to be represented at an expulsion hearing by a non-attorney such as an "educational advocate" or "administrative law advisor," but it may allow such representation under duly adopted [\*11] rules and regulations.

ATTORNEY GENERAL'S OPINIONS  
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF  
CALIFORNIA

No. 97-903

1997 Cal. AG LEXIS 79

December 5, 1997

**TYPE:** OFFICIAL OPINION

**OPINIONBY:**

[\*1]

DANIEL E. LUNGREN, Attorney General; GREGORY L. GONOT, Deputy Attorney General

**OPINION:**

THE HONORABLE DICK MONTEITH, MEMBER OF THE CALIFORNIA STATE ASSEMBLY, has requested an opinion on the following question:

May a school district adopt a "zero tolerance" policy mandating expulsion of a student for a first offense involving the possession of a controlled substance or alcohol?

**CONCLUSION**

A school district may not adopt a "zero tolerance" policy mandating expulsion of a student for a first offense involving the possession of a controlled substance or alcohol. Such an automatic expulsion policy would contravene state law as explicitly determined by the Legislature.

**ANALYSIS**

The Legislature has enacted a comprehensive statutory scheme (*Ed. Code*, §§ 48900-48926) n1 governing the suspension and expulsion of pupils from elementary and secondary schools. "Suspension" is defined as the "removal of a pupil from ongoing instruction for adjustment purposes . . ." (§ 48925, subd. (d)), is limited to five consecutive days (§ 48911, subd. (a)), and may be imposed by the school principal or the district superintendent on the basis of an informal conference with the pupil (§ 48911 subd. (b)). "Expulsion" [\*2] is the "removal of a pupil from (1) the immediate supervision and control, or (2) the general supervision, of school personnel . . ." (§ 48925, subd. (b).) Expulsion, as the most drastic measure a school district may take in response to student offenses, "must be exercised with great care." (57 Ops.Cal.Atty.Gen. 439, 441 (1974).) n2

n1 All section references herein are to the Education Code.

n2 In 80 Ops.Cal.Atty.Gen. 85, 87-88 (1997), we concluded that a school district may suspend the enforcement of an expulsion order.

We are asked whether a school district may adopt a "zero tolerance" policy requiring the expulsion of any student who commits a controlled substance or alcohol possession offense, even if

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the student has no prior record. We conclude that such an automatic expulsion policy would contravene state law.

Expulsion requires a hearing for the pupil and his or her parent or guardian before the governing board of the school district (§ 48918, subd. [\*3] (a)), a hearing officer, or administrative panel (§ 48918, subd. (d)) within 30 schooldays from the date of the expulsion recommendation made by the school principal or the district superintendent (§ 48918, subd. (a)) and may be appealed to the county board of education (§ 48919).

The offenses that may result in expulsion--including expulsion for the possession, use, sale, or provision of a controlled substance or an alcoholic beverage or intoxicant--are set forth in section 48900:

"A pupil may not be suspended from school or recommended for expulsion unless the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has:

". . . .

"(c) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of any controlled substance . . . , an alcoholic beverage, or an intoxicant of any kind.

". . . ."

With specific regard to expulsions for offenses involving controlled substances or alcohol, section 48915 provides:

"(a) Except as provided in subdivision[] (c) . . . , the principal or the superintendent of schools shall recommend the expulsion of a pupil for any of the following acts committed at school or [\*4] at a school activity off school grounds, unless the principal or superintendent finds that expulsion is inappropriate, due to the particular circumstance:

". . . .

"(3) Unlawful possession of a controlled substance . . . , except for the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis.

". . . .

"(b) Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of section 48918, the governing board may order a pupil expelled upon finding that the pupil committed an act listed in subdivision (a) or in subdivision . . . (c) . . . of section 48900. A decision to expel shall be based on a finding of one or both of the following:

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

"(2) Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.

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### ATTORNEY GENERAL'S OPINIONS

"(c) The principal or superintendent of schools shall immediately suspend . . . and shall recommend expulsion of a pupil that he or she determines has committed [\*5] any of the following acts at school or at a school activity off school grounds:

". . . .

"(3) Unlawfully selling a controlled substance . . . .

". . . .

"(d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c) . . . .

". . . ."

Section 48914 requires the governing board of each school district to establish rules and regulations governing procedures for the expulsion of pupils.

The proposed zero tolerance policy, as contemplated in the question presented, would call for the principal or superintendent to recommend expulsion of a student for the first instance of any of the offenses involving controlled substances or alcohol, and for the district board to decide in favor of the recommended action by finding either that "other means of correction are not feasible" (§ 48915, subd. (b)(1)) or that "due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or to others" (§ 48915, subd. (b)(2)). Drug and alcohol offenses would be treated as automatically meeting one of these criteria.

A school district may, it is argued, reasonably conclude that because [\*6] of an intractable and ongoing drug problem at its schools, other means of correction are not feasible, particularly where notwithstanding repeated and emphatic warnings against student involvement with drugs and alcohol, the pupil has knowingly violated the rules. It is also argued that because of the impaired physical and mental state that drugs and alcohol can produce, particularly in impressionable young persons who are not fully cognizant of their limits, the nature of the offense is such that the presence of a pupil who has knowingly violated the zero tolerance policy represents a continuing danger to the physical safety of other pupils. Thus, it is contended that any violation of the zero tolerance policy may be treated by the district board as satisfying one or both of the criteria set forth in section 48915, subdivision (b).

In effect, the proposed zero tolerance policy would mean that the principal, the superintendent, and the district board must treat the first offense as leading inexorably to expulsion because the district has concluded that any drug or alcohol offense inherently meets the criteria of section 48915, subdivision (b). As part of the zero tolerance policy, [\*7] all students would be given explicit warning as to the consequences of a violation. The deterrent effect of the policy would be based upon the students' knowledge that the first instance of any of the offenses involving controlled substances or alcohol would, without exception, result in expulsion.

In determining whether the proposed local school policy would be consistent with state law, we look to well-established principles of statutory construction when interpreting the controlling language of sections 48900-48926. As explained by the Supreme Court in *Dyna-Med., Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387:

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"Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute [\*8] must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citation.]"

Initially, we observe that section 48915 identifies one situation in which an offense involving controlled substances *must* result in expulsion. The principal or superintendent "shall" immediately suspend and "shall" recommend expulsion of a pupil who he or she determines has committed the act of unlawfully selling a controlled substance at school or at a school activity off school grounds. (§ 48915, subd. (c)(3).) The governing board of the district "shall" order such pupil expelled upon finding that the pupil did commit the offense in question. (§ 48915, subd. (d).) Expulsion is also mandated for three other offenses that directly involve physical safety. [\*9] n3 Non-sale offenses involving controlled substances require that the principal or superintendent "recommend" expulsion, unless the responsible official "finds that expulsion is inappropriate, due to the particular circumstance." (§ 48915, subd. (a).) This legislative directive, however, does not apply to "the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis." (§ 48915, subd. (a)(3).)

n3 These offenses are: possessing, selling, or otherwise furnishing a firearm; brandishing a knife at another person; and committing or attempting to commit a sexual assault or committing a sexual battery. (§ 48915, subd. (c)(1), (2), (4).)

The district board "may," upon recommendation of the principal or the superintendent, order a pupil expelled upon finding that the pupil committed one of the acts in question. (§ 48915, subd. (b).) However, as noted previously, such decision must be based upon a finding that other means of correction are not feasible or have repeatedly [\*10] failed to bring about proper conduct (§ 48915, subd. (b))(1)) n4 of that, due to the nature of the act, the presence of the pupil would cause a continuing danger to the physical safety of the pupil or others. (§ 48915, subd. (b)(2).)

n4 As we are concerned here with first offenses, the second clause of section 48915, subdivision (b)(1) would not, as a practical matter, be available as a basis for the district's decision to expel.

With regard to the finding set forth in subdivision (b)(1) of section 48915, the district would necessarily rely on a lack of success in utilizing other means of correction for drug and alcohol offenses. We believe such past experience must be with respect to the particular pupil whose expulsion proceeding is before the district. For example, a pupil whose record suggests a tractable nature or who demonstrates genuine remorse for his or her actions may be suspended (§ 48900.5) or required to perform community service on school grounds during nonschool hours (§ 48900.6). A finding under subdivision [\*11] (b)(1) of section 48915 that does not take into account



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individualized circumstances may deny the pupil's right to due process. (See *Garcia v. Los Angeles County Bd. of Education* (1981) 123 Cal.App.3d 807, 810-813.)

Under subdivision (b)(2) of section 48915, the inquiry is whether, in view of the nature of the act, the continued presence of the pupil would pose a risk to the physical safety of the pupil or others. This finding, with its focus on the nature of the act, lends itself to a more categorical approach. However, a rational connection must still be made between the presence of the student on campus and a continuing danger to the physical safety of the pupil or others. (See *Tot v. U.S.* (1943) 319 U.S. 463, 466-468; *Rafaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288,291-301; *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1306.) Drug or alcohol use by its very nature poses a danger to the physical safety of the user, particularly if the user is a minor. Those who must interact with one who uses drugs [\*12] or alcohol may also be at risk as to their physical safety. However, it would be difficult to conclude that the offending pupil must be removed from the school in order to avert a continuing danger to his or her physical safety or that of other pupils *in all cases*.

Leaving aside questions of arbitrariness and lack of evidentiary support, the fatal flaw we find in the proposed policy is that it is in conflict with the Legislature's determination that mandatory expulsion is for the most serious offenses, namely, possessing, selling, or otherwise furnishing a firearm; brandishing a knife at another person; unlawfully selling a controlled substance; or committing or attempting to commit a sexual assault or battery. (§ 48915, subd. (c).) Indeed, the Legislature does not even direct consideration of expulsion for all drug offenses; it excepts from such administrative action a first offense possession of one ounce or less of marijuana. (§ 48915, subd. (a)(3).) n5 Other than with respect to the four extremely serious offenses listed in section 48915, subdivision (c)(3), a district may not refuse to exercise the discretionary authority granted to it under the statutory scheme.

n5 We also note that the Legislature has explicitiy recognized suspension as an appropriate disciplinary measure for a first offense involving a controlled substance or alcohol. Section 48900.5 provides in part as follows:

"Suspension shall be imposed only when other means of correction fail to bring about proper conduct. However, a pupil . . . may be suspended for any of the reasons enumerated in Section 48900 upon a first offense, if the principal or superintendent of schools determines that the pupil violated subdivision (a), (b), (c), (d), or (e) of Section 48900 or that the pupil's presence causes a danger to persons or property or threatens to disrupt the instructional process."

[\*13]

Instead, the Legislature intended a case-by-case application of the criteria set forth in section 48915, subdivision (b), since an expulsion results in such serious consequences for the student and for the district in terms of the alternative educational arrangements that must be made for the expelled student. (See § 48916.) We also note that the use of an automatic approach in dealing with drug and alcohol offenses would make subdivision (b)(2) of section 48915 virtually meaningless. If every drug or alcohol possession offense may be deemed to cause a continuing danger to the physical safety of the pupil or others, so also may the other offenses listed in subdivision (a) of

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section 48915, since they involve the infliction of physical injury or the threat thereof. In order for subdivision (b)(2) of the statute to have any real significance, the offenses least likely to produce a direct physical threat (e.g., a first time alcohol possession offense) must be viewed as eligible for diversion of the student into disciplinary channels other than expulsion. To remove offenses from consideration of non-expulsion disciplinary action simply because they involve drugs or alcohol would make [\*14] such offenses subject to harsher treatment than, for example, causing serious physical injury to a pupil in a schoolyard gang attack. The Legislature has already decided that only one particular drug offense warrants mandatory expulsion--the sale of a controlled substance. (§ 48915, subd (d).) A school district may not undermine such legislative determination in fashioning its own mandatory expulsion policy.

Accordingly, we conclude that a school district's proposed zero tolerance policy which would mandate expulsion for a first offense involving possession of a controlled substance or alcohol would be inconsistent with state law governing expulsions of school students and therefore may not be adopted by a school district.

\* \* \* \*

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ATTORNEY GENERAL'S OPINIONS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

**Opinion No. 96-501**

*1997 Cal. AG LEXIS 25; 80 Ops. Cal. Atty. Gen. 85*

**April 24, 1997**

**REQUESTBY:**

[\*1]

DANIEL E. LUNGREN, Attorney General (Anthony M. Summers, Deputy)

**OPINION:**

Requested by: MEMBER OF THE CALIFORNIA ASSEMBLY

THE HONORABLE KERRY MAZZONI, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following questions:

1. May a school district suspend the enforcement of an expulsion order if the pupil has committed one of the offenses for which expulsion must be ordered?
2. In taking final action to expel a pupil, must the governing board disclose the pupil's name and the cause for the expulsion?

**CONCLUSIONS**

1. A school district may suspend the enforcement of an expulsion order even when the pupil has committed one of the offenses for which expulsion must be ordered.
2. In taking final action to expel a pupil, the governing board must disclose the pupil's name and the cause for the expulsion.

**ANALYSIS**

The Legislature has enacted a comprehensive statutory scheme (*Ed. Code*, §§ 48900-48926) n1 governing the suspension and expulsion of pupils from public elementary and secondary schools. "Suspension" is the "removal of a pupil from ongoing instruction for adjustment purposes . . ." (§ 48925, subd. (d).) "Expulsion" is the "removal of a pupil from (1) the immediate [\*2] supervision and control, or (2) the general supervision, of school personnel . . ." (§ 48925, subd. (b).)

n1 All references hereafter to the Education Code are by section number only.

The focus of the two questions presented for resolution is the expulsion of a pupil under the terms of section 48915. Section 48915 provides:

"(a) Except as provided in subdivisions (c) and (e), the principal or the superintendent of schools shall recommend the expulsion of a pupil for any of the following acts committed at school or at a school activity off school grounds, unless the principal or superintendent finds that expulsion is inappropriate, due to the particular circumstance: T". . .

"(b) Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board may order a pupil expelled upon finding that the pupil committed an act listed in subdivision (a) or in subdivision (a), (b), (c), (d), or (e) of Section 48900. A decision to expel shall be based on a finding of one or both of the following:

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### ATTORNEY GENERAL'S OPINIONS

". . . .

"(c) The principal or superintendent of schools shall immediately [\*3] suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds:

"(1) Possessing, selling, or otherwise furnishing a firearm. This subdivision does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district.

"(2) Brandishing a knife at another person.

"(3) Unlawfully selling a controlled substance listed in Chapter 2 (commencing with *Section 11053*) of *Division 10 of the Health and Safety Code*.

"(4) Committing or attempting to commit a sexual assault as defined in subdivision (n) of Section 48900 or committing a sexual battery as defined in subdivision (n) of Section 48900.

"(d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c), and shall refer that pupil to a program of study that meets [\*4] all of the following conditions:

"(1) Is appropriately prepared to accommodate pupils who exhibit discipline problems.

"(2) Is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school.

"(3) Is not housed at the schoolsite attended by the pupil at the time of suspension.

"(e) Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board may order a pupil expelled upon finding that the pupil, at school or at a school activity off of school grounds violated subdivision (f), (g), (h), (i), (j), (k), (l), or (m) of Section 48900, or Section 48900.2, 48900.3, or 48900.4, and either of the following:

". . . ."

Sections 48900, 48900.2, 48900.3, and 48900.4 list numerous acts for which a pupil may be suspended or recommended for expulsion. Section 48911 sets forth the procedures to be followed in suspending a pupil.

#### 1. Suspension of Expulsion Order Required By Law

We are first asked whether a school district may suspend the enforcement of an expulsion order that is required by law (§ 48915, subd. (d)). We conclude [\*5] that it may.

For committing one of the offenses described in subdivision (c) of section 48915, a pupil is to be "immediately suspended," and the principal or superintendent "shall recommend expulsion." Under subdivision (d) of the statute, "the governing board shall order [the] pupil expelled upon finding that the pupil committed an act listed in subdivision (c) . . ." "Shall" is clearly mandatory in this context, where the Legislature has also used the permissive term "may" (see, e.g., § 48915, subd. (b), (e)). (See *Forster v. Superior Court* (1992) 11 Cal.App.4th 782, 791 ["since the Legislature used the words both 'shall' and 'may' in the different subdivisions . . . , it presumably did so to distinguish between mandatory and directory provisions"].)

While we have indicated that expulsion is the "removal of a pupil from (1) the immediate supervision and control, or (2) the general supervision of school personnel," (§ 48925, subd. (b)), numerous acts must

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### ATTORNEY GENERAL'S OPINIONS

take place before a pupil is removed from school supervision, including: (1) commission of the offense, (2) recommendation of expulsion, (3) determination that the offense was committed, (4) the vote to expel, (5) issuance [\*6] of the order of expulsion, and (6) enforcement of the order of expulsion. The mandate of subdivision (d) of section 48925 is that the governing board must "order a pupil expelled." Voting and issuance of an expulsion order are different from the enforcement of the order.

Whether an order of expulsion must be enforced or may be suspended is determined by a different statute, section 48917. Subdivision (a) of section 48917 provides:

"The governing board, upon voting to expel a pupil, may suspend the enforcement of the expulsion order for a period of not more than one calendar year and may, as a condition of the suspension of enforcement, assign the pupil to a school, class, or program that is deemed appropriate for the rehabilitation of the pupil."

Under section 48917 an expulsion order may be suspended in its enforcement if specified conditions are met.

We are to interpret statutes so as to harmonize their various purposes. "A statute must be construed "in the context of the entire statutory scheme of which it is a part, in order to achieve harmony among the parts."" (*People v. Hull* (1991) 1 Cal.4th 266, 272.) "Statutes or statutory sections relating to the same [\*7] subject must be harmonized, both internally and with each other, to the extent possible." (*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 268.)

Section 48915 deals with a board's vote to expel, while section 48917 concerns the enforcement of an expulsion order. As indicated in the latter statute, the enforcement of an expulsion order may be suspended and the pupil assigned "to a school, class, a program that is deemed appropriate for the rehabilitation of the pupil." In this manner sections 48915 and 48917 are harmonized, and each is given effect. Neither supersedes the other.

We thus conclude in answer to the first question that a school district may suspend the enforcement of an expulsion order even when the pupil has committed one of the offenses for which expulsion must be ordered.

#### 2. Disclosure of the Pupil's Name and Offense

The second question presented is whether a pupil's name and the offense committed must be disclosed to the public when the pupil is ordered expelled. We conclude that disclosure is required.

Section 48918 provides several procedural methods for conducting a hearing to determine whether a pupil should be expelled. [\*8] The hearing may be conducted by the governing board, a hearing officer, or an administrative panel. If the hearing is conducted by a hearing officer or administrative panel, findings of fact and a recommendation must be submitted to the governing board. (§ 48918, subd. (f).)

With respect to whether the governing board must disclose a pupil's name and the cause for expulsion, section 48918 provides:

"The governing board of each school district shall establish rules and regulations governing procedures for the expulsion of pupils. These procedures shall include, but are not necessarily limited to, all of the following:

". . . .

"(c) . . . the governing board shall conduct a hearing to consider the expulsion of a pupil in a session closed to the public, unless the pupil requests, in writing, at least five days prior to the date of the hearing, that the hearing be conducted at a public meeting. Regardless of whether the expulsion hearing is conducted in a closed or public session, the governing board may meet in closed session for the purpose of deliberating and determining whether the pupil should be expelled.

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". . . .

"(j) Whether an expulsion hearing is conducted by the governing [\*9] board or before a hearing officer or administrative panel, final action to expel a pupil shall be taken only by the governing board in a public session . . .

"(k) The governing board shall maintain a record of each expulsion, including the cause therefor. Records of expulsions shall be a nonprivileged, disclosable public record.

"The expulsion order and the causes therefor shall be recorded in the pupil's mandatory interim record and shall be forwarded to any school in which the pupil subsequently enrolls upon receipt of a request from the admitting school for the pupil's school records."

Thus an expulsion hearing must be conducted in closed session unless the pupil makes a written request that the hearing be conducted at a public meeting. The final action of the governing board to expel a pupil must be taken in public, and the minutes must include the reason for the expulsion. (See also §§ 35145-35146.) Section 48918 expressly answers the question whether the cause of a pupil's expulsion must be disclosed to the public. It must.

As for identifying the expelled pupil, we believe that the pupil's name is also subject to public disclosure under the terms of section 48918. [\*10] We are to interpret statutes so as to effectuate the intent of the Legislature. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724.) "In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent. [Citation.]" (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.) The words of a statute are to be given "their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) "Statutes are to be given a reasonable and commonsense interpretation . . ." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1392.)

Here, section 48918 requires that "final action to expel a pupil shall be taken only by the governing board in a public session" and that "a record of each expulsion, including the cause therefor . . . shall be a nonprivileged, disclosable public record." We believe that the commonly understood meaning of the phrase "final action to expel a pupil" necessarily includes the pupil's name. It defies common sense to suggest that the phrase "a record of each expulsion" was intended by the Legislature [\*11] not to identify the pupil. The pupil's name must be considered part of the final action taken by the governing board and of the record of expulsion. (See 59 Ops.Cal.Atty.Gen. 619, 621-622 (1976); 44 Ops.Cal.Atty.Gen. 147, 149-150 (1964).)

We recognize that section 49076 generally prohibits the disclosure of "pupil records" without parental consent or a judicial order. A "pupil record" is "any item of information directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his duties whether recorded by handwriting, print, tapes, film, microfilm or other means." (§ 40961, subd. (b).) This confidentiality provision is consistent with the Legislature's treatment of juvenile court records, which are confidential (*Welf. & Inst. Code*, § 827; see, e.g., *In re Christopher W.* (1973) 29 Cal.App.3d 777; *In re Fred C.* (1972) 26 Cal.App.3d 320), and with the rules of confidentiality of personal information maintained by government agencies (*Civ. Code*, § 1798.24).

Although the Legislature has expressed a general policy in favor of the nondisclosure of a pupil's records, [\*12] it has in section 48918 required that expulsion records "shall be a nonprivileged, disclosable public record." The specific directive of section 48918 controls the more general statutory language favoring nondisclosure. (See *Woods v. Young* (1991) 53 Cal.3d 315, 325 ["specific provision relating to a particular subject will govern a general provision"]; *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 Cal.App.4th 867, 873 ["the specific controls the general"].) n2

n2 Courts have both withheld the names of pupils suspended or expelled (see, e.g., *John A. v. San Bernardino City Unified School Dist.* (1982) 33 Cal.3d 301; *Fremont Union High Sch. Dist. v. Santa*

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*Clara County Bd. of Education* (1991) 235 Cal.App.3d 1182; *Gordon J. v. Santa Ana Unified Sch. Dist.* (1984) 162 Cal.App.3d 530) and disclosed such names (see, e.g., *Garcia v. Los Angeles County Bd. of Education* (1981) 123 Cal.App.3d 807; *Lovell v. Poway Unified School Dist.* (9th Cir. 1996) 90 F.3d 367; *Coplin v. Conejo Valley Unified School Dist.* (C.D.Cal. 1995) 903 F.Supp. 1377). Whether a school district would be subject to liability for the failure to disclose the name is beyond the scope of this opinion. (See *Skinner v. Vacaville Unified School Dist.* (1995) 37 Cal.App.4th 31.)

[\*13]

The Legislature has also declared that certain California statutes (§§ 49060-49079) are to be applied in a manner consistent with the provisions of the federal Family Education Rights and Privacy Act (20 U.S.C. § 1232g) "regarding parental access to, and the confidentiality of, pupil records in order to insure the continuance of federal education funds to public educational institutions within the state . . ." (§ 49060.) The federal law prohibits the release of any records relating to the discipline of students without the written consent of the parents; otherwise, "no [federal] funds shall be made available" to the institution. (20 U.S.C. § 1232g(b)(1).) However, the federal law does not purport to preempt any state laws, and section 48918 is not one of the statutes identified by the Legislature as requiring interpretation consistent with the federal law. n3

n3 The Legislature has declared that the confidentiality terms of sections 49060-49079 are to control over any conflicting provisions contained in section 12400 and in *Government Code* sections 6250-6270. We cannot add section 48918 to this list specified in section 49060 in the guise of statutory interpretation. "Courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions." (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1097.) The Legislature thus knows how to resolve the conflict between section 48918 and sections 49060-49079 in favor of the latter statutory scheme if it chooses to do so. (See *Safer v. Superior Court* (1975) 15 Cal.3d 230, 236, 238; *Board of Trustees v. Judge* (1975) 50 Cal.App.3d 920, 927; see also *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 196; *DeWeese v. Unick* (1980) 102 Cal.App.3d 100, 106; *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 607.)

[\*14]

We conclude in answer to the second question that in taking final action to expel a pupil, the governing board must disclose the pupil's name and the cause for the expulsion. The minutes of the meeting must so reflect. In responding to requests from the public for the release of expulsion records, the school district is required to disclose the pupil's name and the cause for the expulsion.

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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF  
CALIFORNIA

Opinion No. 96-906

*1997 Cal. AG LEXIS 24; 80 Ops. Cal. Atty. Gen. 91*

April 24, 1997

**OPINIONBY:**

[\*1]

DANIEL E. LUNGREN, Attorney General (ANTHONY M. SUMMERS, Deputy Attorney General)

**OPINION:**

THE HONORABLE DICK MONTEITH, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on the following questions:

1. Under what circumstances may a pupil be expelled from school for "possessing" a firearm?
2. What circumstances constitute an abuse of discretion by a county board of education in reversing the decision of a governing board of a school district to expel a pupil?
3. May the governing board of a school district seek judicial review of a decision of the county board of education reversing the district board's decision to expel a pupil?

**CONCLUSIONS**

1. A pupil may be expelled from school for "possessing" a firearm if the pupil knowingly and voluntarily has direct control over the firearm. The only exceptions are where the pupil has the permission of school officials to possess the firearm or where the possession is brief and solely for the purpose of disposing of the firearm such as handing it to school officials.
2. A county board of education abuses its discretion in reversing the decision of a governing board of a school district to expel a pupil if it does not comply with the statutory [\*2] requirements applicable to such review.
3. The governing board of a school district may seek judicial review of a decision of the county board of education reversing the district board's decision to expel a pupil.

**ANALYSIS**

The Legislature has enacted a comprehensive statutory scheme (*Ed. Code, §§ 48900-48926*) governing the suspension and expulsion of pupils from elementary and secondary schools. "Suspension" is the "removal of a pupil from ongoing instruction for adjustment purposes. . . ." (§ 48925, sub. (d).) "Expulsion" is the "removal of a pupil from (1) the immediate supervision and control, or (2) the general supervision, of school personnel. . . ." (§ 48925, subd. (b).)

n1 All references hereafter to the Education Code are by section number only.

The three questions presented for resolution concern the expulsion of a pupil for possessing a firearm on school property. What does "possession" mean, when does a county board of education abuse its discretion in reversing a school board's decision to expel a pupil, and may the school board seek judicial review of the county board's decision?



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1. "Possession" of a Firearm

Section 48900 states in part:

"A pupil may not [\*3] be suspended from school or recommended for expulsion unless the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has:

". . . .

"(b) Possessed, sold, or otherwise furnished any firearm, knife, explosive, or other dangerous object unless, in the case of possession of any object of this type, the pupil had obtained written permission to possess the item from a certificated school employee, which is concurred in by the principal or the designee of the principal.

". . . .

"A pupil may not be suspended or expelled for any of the acts enumerated unless that act is related to school activity or school attendance occurring within a school under the jurisdiction of the superintendent or principal or occurring within any other school district.

". . . ."

Section 48915 provides in part:

". . . .

"(c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds.

"(1) Possessing, selling, or otherwise furnishing a firearm. This subdivision [\*4] does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess a firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district.

". . . ."

The first question concerns the meaning of the terms "possessed" and "possessing" in sections 48900 and 48915 as they related to the possession of a firearm.

In addressing this question, we rely on well established principles of statutory construction. We are to interpret statutes so as to effectuate the intent of the Legislature. ( *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724.) "In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent. [Citation.]" ( *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.) The words of a statute are to be given "their usual and ordinary meaning." ( *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) "Statutes are to be given a reasonable [\*5] and commonsense interpretation . . . ." ( *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1392.)

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"Possession" in this context has been defined by the courts as the immediate control of an object; the thing possessed must be under the dominion of the possessor ( *People v. Bigelow* (1951) 104 Cal.App.2d 380, 385.) Possession may be in the hand, clothes, purse, bag, or other container ( *People v. Sills* 156 Cal.App.2d 618, 622.) Having the object for even a limited time and purpose constitutes possession. ( *People v. Neese* (1969) 272 Cal.App.3d 235, 245.) However, brief possession solely for the purpose of disposing of the object is not unlawful, as in the case where a person removes illegal drugs from the pocket of an unconscious friend and immediately throws them away. ( *People v. Mijares* (1971) 6 Cal.3d 415; see also *People v. Cole* (1988) 202 Cal.App.3d 1439.) We believe that "disposing" of an object in this context includes transferring it to law enforcement officers or other proper authorities.

Accordingly, if a pupil is handed a firearm by another pupil, brings it to a restroom, and abandons it, such acts constitute [\*6] a violation of section 48900 or 48915, unless the sole purpose of the brief possession is to dispose of the firearm. If a pupil places a firearm in the backpack of another pupil, tells the other pupil of the firearm's location, and the other pupil returns the firearm an hour later wrapped in a coat, both pupils have sufficient "possession" to constitute a violation of section 48900 or 48915; no intention to dispose of the firearm could be asserted based upon such limited facts. It also constitutes a violation of either statute if the pupil accepts a firearm from another pupil, hides it under his coat for a short time, and then returns the firearm. As long as the possession is knowing and voluntary and not for the purpose of disposing of the firearm, e.g., handing the firearm to school officials, the pupil "possesses" the firearm regardless of the length of time involved.

We conclude in answer to the first question that a pupil may be expelled from school for "possessing" a firearm if the pupil knowingly and voluntarily has direct control over the firearm. The only exceptions are where the pupil has the permission of school officials to possess the firearm (§§ 48900, 48915) or where [\*7] the possession is brief and solely for the purpose of disposing of the firearm such as handing it to school officials.

## 2. Abuse of Discretion

The second question presented concerns the circumstances under which a county board of education abuses its discretion in reversing the decision of a school board to expel a pupil. We conclude that the failure to comply with the governing statutory requirements would constitute an abuse of discretion.

Following expulsion by the governing board of a school district, an appeal to the county board of education is available to the pupil or the pupil's parent or guardian. (§ 48919.) The basis for the county board's decision is the record of the hearing before the district governing board. (§ 48921.) The scope of the county board's review is defined by section 48922:

"(a) The review by the county board of education of the decision of the governing board shall be limited to the following questions:

"(1) Whether the governing board acted without or in excess of its jurisdiction.

"(2) Whether there was a fair hearing before the governing board.

"(3) Whether there was a prejudicial abuse of discretion in the hearing.

"(4) Whether there is relevant [\*8] and material evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the governing board.

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"(b) As used in this section, a proceeding without or in excess of jurisdiction includes, but is not limited to, a situation where an expulsion hearing is not commenced within the time periods prescribed by this article, a situation where an expulsion order is not based upon the acts enumerated in Section 48900, or a situation involving acts not related to school activity or attendance.

"(c) For purposes of this section, an abuse of discretion is established in any of the following situations:

"(1) If school officials have not met the procedural requirements of this article.

"(2) If the decision to expel a pupil is not supported by the findings prescribed by Section 48915.

"(3) If the findings are not supported by the evidence.

"A county board of education may not reverse the decision of a governing board to expel a pupil based upon a finding of an abuse of discretion unless the county board of education also determines that the abuse of discretion was prejudicial."

A county board's decision is also [\*9] circumscribed by the terms of section 48923:

"The decision of the county board shall be limited as follows:

"(a) Where the county board finds that relevant and material evidence exists which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the governing board, it may do either of the following:

"(1) Remand the matter to the governing board for reconsideration and may in addition order the pupil reinstated pending such reconsideration.

"(2) Grant a hearing de novo upon reasonable notice thereof to the pupil and to the governing board. The hearing shall be conducted in conformance with the rules and regulations adopted by the county board under Section 48919.

"(b) In all other cases, the county board shall enter an order either affirming or reversing the decision of the governing board. In any case in which the county board enters a decision reversing the local board, the county board may direct the local board to expunge the record of the pupil and the records of the district of any references to the expulsion action and such expulsion shall be deemed not to have occurred."

These statutes define [\*10] the scope of the county board's discretion. If a county board should act in a manner not authorized by the statutes, such failure would constitute an abuse of discretion. (See *Code Civ. Proc.*, § 1094.5, subd. (b); *Laupheimer v. State of California* (1988) 200 Cal.App.3d 440, 463; *City of Poway v. City of San Diego* (1984) 155 Cal.App.3d 1037, 1041 ["the question of abuse of discretion, which is established if the agency has not proceeded as required by law . . ."].)

Accordingly, we conclude in answer to the second question that a county board of education abuses its discretion in reversing the decision of a governing board of a school district to expel a pupil if it does not comply with the statutory requirements applicable to such administrative review.

ATTORNEY GENERAL'S OPINIONS

3. Judicial Review

The final question presented is whether the governing board of a school district may seek judicial review of the decision of a county board of education reversing the school board's decision to expel a pupil. We conclude that it may.

Section 48924 provides:

"The decision of the county board of education shall be final and binding upon the pupil and upon the governing board of the school district. [\*11] The pupil and the governing board shall be notified of the final order of the county board, in writing, either by personal service or by certified mail. The order shall become final when rendered."

Do the words "final" and "binding" contained in section 48924 preclude a school board from seeking judicial review of the county board's order?

In *Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Education* (1991) 235 Cal.App.3d 1182, the governing board of a school district sought judicial review of the decision of a county board of education reversing the school board's decision to expel a pupil. It was unquestioned that the school board could seek judicial review, and indeed the trial court granted the board's petition for a writ of mandate ordering the county board to set aside its decision; on appeal, the judgment in favor of the school board was affirmed.

While there is no explicit statutory directive for judicial review of a county board's decision concerning expulsion, it is the general rule that the decisions of administrative bodies rendering quasi-judicial decisions are reviewable under the administrative mandate provisions of *Code of Civil Procedure* [\*12] section 1094.5. (See *Temescal Water Co. v. Dept. of Public Works* (1955) 44 Cal.2d 90, 102.) The language of section 48923, that the decision of the county board is "final and binding upon the pupil and upon the governing board of the school district," in no way precludes either the school board or the pupil from seeking judicial review. Indeed, the statement that the decision is "final and binding" establishes one of the requirements for judicial review, since only final administrative decisions may be reviewed by a court. (See, e.g., *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 245.)

We thus conclude in answer to the third question that the governing board of a school district may seek judicial review of a decision of the county board of education reversing the district board's decision to expel a pupil.

\* \* \* \*

## **Appendix C**

### **Sample Letter(s)—Requesting Records and Postponement**

## **Letter Requesting Records**

[DATE]

Pupil Services

[ADDRESS]

**RE:   Records Request for *STUDENT***

Dear Pupil Services:

I will be representing *student* in his upcoming expulsion hearing. I write at this time to request copies of all documents to be used at, or in preparation for, *Student's* expulsion hearing pursuant to California Education Code §§ 49069 and 48918(b). I specifically request a copy of the expulsion packet for STUDENT, including, but not limited to, all statements made by any school staff, any administrators, any students, and any eye witnesses regarding the alleged incident. I also request any and all investigative reports made about the alleged incident, STUDENT's disciplinary records, and any other documents or evidence that SCHOOL has regarding the alleged incident and/or any evidence the school intends to present at STUDENT's expulsion hearing.

[optional] I also request copies of STUDENT's entire cumulative educational file, including all special education or disability-related records kept by the DISTRICT regarding STUDENT.

I will expect to receive copies of the records as soon as possible, but no later than DATE, within five business days of this request, as required by California Education Code § 49069.

I have enclosed a copy of a parental consent form authorizing my access to these records. Please e-mail the materials to me at EMAIL ADDRESS or fax them to my attention at 999-9999. Feel free to contact me at 999-9999 should you have any questions, wish to discuss settlement, or require additional information.

Please direct all further contact with STUDENT's family regarding the pending expulsion recommendation through my office. Thank you for your assistance in this matter.

Sincerely,

[NAME]

Attorney

Cc: *Principal at School*

## **Letter Requesting Postponement**

***VIA FACSIMILE***

[DATE]

Pupil Services

**RE: Request for Postponement of Expulsion Hearing**

Dear Pupil Services:

Pursuant to California Education Code section 48918(a), please accept this letter as a formal written request for postponement of the [*Scheduled hearing date*] expulsion hearing scheduled for [*Minor*]. I will be representing [*Minor*] in this matter and will contact you in the next few days to reschedule the hearing.

You may contact me at XXX-XXX-XXXX should you have any questions or require additional information.

Sincerely,

Attorney

*Cc: Principal at School*

## **Appendix D**

### **Guidelines for Interviewing Children & Youth**



## **INTERVIEWING BASICS**

Learn as much as you can about the client, her history, and the case before you interview

Identify best language for communication and ensure proper translation if needed

Be mindful of context - minimize distractions and avoid interruptions

Try to keep first meeting short, follow up further at a later interview

Make sure client is comfortable

Interview youth alone (without parents/friends)

Explain your role (can be helpful to discuss in context of roles of other people in process)

Explain that representation is client directed and who gets to make decisions

Clarify that services are free

Explain confidentiality

Explain the rules for your interview and what you will do with information

Explain why you are taking notes

Give permission to say I don't know, yes, no, and affirm there is no right answer

Explain that you want to learn about client and why you will be asking questions

Start general and discuss neutral topics first (e.g., getting here, what you had for breakfast)

Move to specific topics you need to discuss for representation – be clear about why you need to talk about difficult topics

Ask open ended questions and let client talk freely if s/he is willing

Follow up with more specific questions

Use simple words and examples whenever possible

Check in regularly to confirm understanding

As you finish up, check if there was something else child wants to discuss

Briefly summarize the content of the interview and what you will do with information

Remind client she is in control of information/decisions

Explain your next steps and what you need from client

End on lighter topic if you can and be clear about how to stay in touch

**Tips for Interviewing Teens:**

Respect client's priorities/needs; don't ignore feelings

Don't take attitude/behavior personally

Use concrete language and expect concrete questions

Be direct and non-judgmental; avoid "talking down"

Be mindful of allegiance to friends, concern about peers, and conflicted dependence on parents/family

Remember that youth may be "present" focused; may lack abstract thinking skills

Follow youth's lead and let tell story without interruption

**Dos and Don'ts:**

Don't use words like secret

Don't overpromise

---

HANDOUT (reprint)

**Jean Koh Peters Questions**

Jean Koh Peters' "Seven Questions to Keep Us Honest" are key benchmarks to help attorneys representing children, even very young children, develop positions based on objective criteria.

1. In making decisions about the representation, am I making the best effort to see the case from my client's subjective point of view, rather than exclusively from an adult's point of view?
2. Does the child understand as much as I can explain about what is happening in her case?
3. If my client were an adult, would I be taking the same actions, making the same decisions, and treating her in the same way?
4. If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

5. Is it possible that I am making decisions for the gratification for the adults in the case, and not for the child?

6. Is it possible that I am making decisions in the case for my own gratification and not for that of my client?

7. Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

Source:

Koh Peters, Jean. Representing Children in Child Protective Proceedings: Ethical and Practical

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## **Appendix E**

### **Sample Client Interview Memo (Redacted)**

ATTORNEY WORK PRODUCT  
PRIVILEGED AND CONFIDENTIAL

## MEMORANDUM

---

TO: File COPIES: Abigail Trillin  
Katie Fleet

FROM: James M. Schurz

DATE: June 17, 2013

RE: [REDACTED] Expulsion Hearing: Interview of [REDACTED] June 7 and June 11,  
2013. Interview with [REDACTED] June 13, 2013

---

This memorandum summarizes my telephone conversations with [REDACTED] on Friday, June 7 and Tuesday, June 11. We spoke for roughly two hours and 20 minutes. I also summarize my meeting with [REDACTED] and [REDACTED] on June 13. We spent two hours together.

## I. BACKGROUND

**Identifying information.** [REDACTED] is an 11-year-old, Latino boy of medium build. He wore a 49ers jersey with Frank Gore's name on the back. Date of birth: [REDACTED] He just completed fourth grade at [REDACTED] in [REDACTED], California. Home address: [REDACTED] Phone: [REDACTED] He is warm and friendly. He speaks easily and makes eye contact frequently.

**Family environment.** [REDACTED] full name [REDACTED] adopted [REDACTED] in 2008. [REDACTED] was born in [REDACTED] He is a Contra Costa County native, graduating from [REDACTED] in [REDACTED]. [REDACTED] has lived with [REDACTED] since he was four years old. [REDACTED] is one of three adopted children. He has two brothers: [REDACTED], age 16, who is [REDACTED]'s biological brother, and [REDACTED], 18 years old, who joined their family more recently. [REDACTED] lived with [REDACTED] and [REDACTED] in a foster home before [REDACTED] and [REDACTED] began living with [REDACTED] [REDACTED] has two grandparents, [REDACTED]'s father and stepmother, who are actively engaged in the children's lives. [REDACTED] has a partner who is also involved in the children's lives. (I stopped short of inquiring further as to [REDACTED]'s relationship in the first interview, and it did not come up in the second.)

[REDACTED]'s biological parents are not involved in his life. Both were described as having alcohol and crystal meth problems. [REDACTED] is concerned that [REDACTED] may suffer from neurological disorders as a result of exposure to crystal meth and alcohol during gestation and early childhood. He does not have the same concerns about [REDACTED] but he intends to have him tested.

█████ is articulate, pro-active, and well-intentioned. He speaks easily about his children, evincing an understanding of █████'s emotional and psychological state. He clearly loves █████ and is committed to █████'s well-being. He stated *three times* during our initial conversation: "I am not going to lose this child."

█████ is close with his adopted grandparents. His grandmother is helping █████ write the letter for the expulsion hearing. The grandparents are supportive of their son as a father, attending the meeting on June 3 with school officials to support their son and grandson. They also have a relationship independent of █████ with █████. He visits their house and stays overnight.

█████ is close with his brother █████. He describes him as "smart, nice and smart." █████ is currently taking computer classes at █████ College. █████ does not spend a lot of time with him, but he has a great deal of respect for him.

█████'s relationship with his brother █████ is more complicated. He described █████ as "strong and mean." When I pushed him as to how his brother was mean he thought about it and said: "he is just angry." █████ has not seen █████ for several months but understands that he is living in █████.

The family is experiencing a number of traumas right now that have placed a significant stress on the family and █████:

█████'s *unemployment*. █████ has been unemployed for 18 months. Prior to that time he had worked continuously for █████ and, most recently, for █████ as a Clinical Research Assistant and Clinical Research Coordinator. His unemployment benefits ran out earlier this year. He is concerned that they will be forced to sell their house.

█████ *leaving the family to join a gang*. █████ reports that █████ has been deeply impacted by █████'s running away in January. █████ recounted that █████ had been involved in some sort of shooting incident. It was not clear whether █████ had fired the gun. It did not appear that anyone was injured. As a result of the incident, █████ had been threatened by gang members. He stopped attending school "as a safety measure." █████ was uncertain as to the accuracy or truthfulness of █████'s story. █████ had been in trouble before and attended the █████ REACH program, a diversion program for parents and their children. █████ believes █████ is living in █████, but he has not seen him since February.

█████ has been worried about his brother. And he is concerned that he is being compared to his brother. He told his father twice during our interview, "I am not going to end up like █████" "I am not █████"

*Grandfather in hospital*. In the last week, █████'s father – █████ -- was hospitalized for several days. █████ did not share the details, but it was a clear source of concern. █████ spoke of his grandparents lovingly. He said that he is the fourth █████ in their family line with some pride. █████ was born with the name █████. When he was adopted, █████ added the "█" so that his son could be part of a family tradition, but they continue to call him

██████████ is close to his grandmother. He will be writing his letter to the Hearing Officers with her this weekend.

**Physical environment.** ██████████ and ██████████'s home is on a cul-de-sac in ██████████, a community just each of ██████████ on ██████████. The home is large, approximately 3,600 feet, and sparsely furnished. Inside, the house is clean and well-cared for. It is consistent with other homes in the area. The neighborhood is well-maintained with evidence of children – portable basketball hoops on the edge of properties, chalk drawings on the street. It appears safe and clean. There are no cyclone fences surrounding yards or bars on windows. The gardens are well-tended.

Inside ██████████ and ██████████'s house there are a number of photographs on the wall of family members, grandparents, weddings, and school portraits. ██████████ and ██████████ have a cat, and ██████████ participates in caring for the cat. The overall impression was a warm home.

**██████████ Elementary School.** ██████████'s school is roughly half a mile away. He rides his scooter to and from school. The school's mission statement is included on its website:

██████████ Elementary School is a Professional Learning Community committed to working collaboratively in an ongoing process of collective inquiry and action research so all students can reach their full individual potential. We hold high expectations for our students and have a belief that every student can learn. We work together to create a Caring School Community which promotes tolerance, respect, and personal responsibility with the goal of providing a safe nurturing learning environment in which students can learn.

The principal's "open" letter provides further details about the school:

██████████ Elementary houses over 745 students (Cubbies) from grades kinder through fifth and a preschool program with over 39 students. ██████████ staff includes twenty-eight classroom teachers, two learning center teachers, two part time district music teachers, a part time psychologist, one speech therapist, twenty-six dedicated support staff, two preschool teachers, two preschool paraprofessionals, a part time Assistant Principal, and a Principal.

██████████ houses a Before and After School Extended Day Learning Center for those needing before and after school childcare. We are proud of our Bridge Program for students who require special educational services in the area of emotional support. This class is comprised of one classroom teacher and one paraprofessional. ██████████ School also offers a music program supported by a district band and a music teacher.

██████████ staff embraces the philosophy of universal student achievement. Staff embraces and values diversity while being committed to providing a learning environment that suits varying learning styles and needs. The goal is to instill the work habits associated with the mindset that hard work and determination are essential factors for success. Expectations are set high for all students in both social and academic success. To ensure students succeed a Cubby Pride Committee is actively supporting the teaching of ██████████'s Cubby Pride Social Life Skills in daily instruction. The Cubby Pride Committee is composed of teachers, parents, and administration and focuses on the development and teaching of nine adopted Cubby Pride Life Skills with the goal of cultivating a Caring School culture for all members of ██████████'s school community.

██████████ is one of six schools in the ██████████ School District. Each is a neighborhood school of roughly the same size.

**School has retained Counsel.** The school district has retained Ms. ██████████ (██████████, CA) to represent it in this proceeding.

## II. GROUNDS FOR EXPUSION: THE MAY ██████████ 2013 KNIFE POSSESSION

██████████ Principal of ██████████ School seeks to expel ██████████ for violating California Education Code section 48900 (b) (possession of knife, explosive, or other dangerous object and 48900 (K) (disrupted school activities or otherwise willfully defied the valid authority of school personnel engaged in the performance of their duties).

The violations occurred on Tuesday, May 21, 2013 when ██████████ was discovered to have a six inch knife (3.5 inch double blade) in his backpack. ██████████ did not brandish the knife, but showed the knife to a fourth grade school friend.

Based on a review of the file, it appears school authorities followed the correct procedures in terms of notice and timing.

*Criminal justice issues.* Although law enforcement officials were called and a police report was prepared, no action is being taken. The police report is *not* part of the hearing file.

### A. ██████████'s Performance at School is Generally Above Level

██████████ speaks with enthusiasm about school. He has had the same teacher the last two years for third and fourth grades: Ms. ██████████. He likes art projects (particularly drawing with colored pencils), track and field, and language arts. He is particularly excited about geometry. This year he studied California history including the missions, the Gold Rush, and the growth of San Francisco.

The comments from his teacher this last year indicate that she believes ██████████ is capable of performing at level when he commits himself.

First trimester: ██████████ can be a very nice and respectful student. He also proves to be very intelligent but often has bad days. He needs to put forth his best effort in order to be successful. [ ]

Second trimester: ██████████ continues to struggle with classroom behavior, he needs to work on staying focused and ignoring those around him. Please help at home by reminding ██████████ to be responsible for his homework and backpack. He is a very capable student.

Third trimester: ██████████ is a bright student who can be very



successful when he puts his mind to it. He should always to do his best and to avoid distractions. [ ] A Student Team meeting was held on 4/24/13 to address the concerns of [REDACTED]'s behavior.

[REDACTED]'s report card reflects a mixed assessment. He is a strong math student with "high proficiency" ratings in most areas. In the language arts area, he is generally rated in the "low proficiency" range.

The only area where [REDACTED] has received consistently low evaluations in "classroom behavior" and "playground behavior." At the same time he receives positive evaluations for "respects school property" and "has a positive attitude."

## **B. The Administrative Record Does Not Support Expulsion [in Some Areas].**

### **1. Teacher Pre-Expulsion Hearing Evaluation Form.**

We have some potential areas for cross-examination with this form. The overall assessment on the form is more negative than the contemporaneous three trimester report card indicates. This is the most fertile area for questioning.

**Example (class effort):** Hearing form shows "not meeting standard" for "Class Effort." [This is consistent with his assessment on the report card of "needs improvement" under the heading "shows effort in class work" in the Study Skills section] But [REDACTED]'s Report Card shows he is performing at a "Proficient level" in most areas in language arts and math. His assessment in social studies, science, computers, PE, music and art are all satisfactory, proficient or high proficient.

[REDACTED] is a capable student who is performing at level or above level in virtually all areas. (See teacher narrative comments.) This assessment is also reflected in the written comments on the Pre-Expulsion Form: "When he applies himself he is successful." Despite the contemporaneous evaluations on the report card and the inconsistent statement in the "Additional Comments" section of the Pre-Expulsion Hearing Evaluation Form, [REDACTED] received a "not meeting standard" for class effort.

Bottom line: The Pre-Expulsion Hearing Evaluation Form is inconsistent with all other evidence.

**Example (attitude):** Pre-Expulsion Hearing Evaluation Form: Attitude is "progressing towards standard." But the Report Card shows "satisfactory" for each trimester under the Citizenship heading "Has a positive attitude."

**Example (behavior):** Pre-Expulsion Hearing Form: Behavior is "progressing toward standard."

**Confirm:** Homework "meets standard"

**Confirm:** At no time prior to Pre-Expulsion Hearing Evaluation Form did [REDACTED]’s “tardy” become a source of concern or subject of comment in his Report Card.

## 2. Incident at school involving 3.5 inch knife.

The incident report is consistent with the written statement from the student.

What is inconsistent and does not stand up to examination is [REDACTED]’s explanation. His father [REDACTED] does not believe [REDACTED]’s explanation. [REDACTED] the director of REACH, upon hearing the explanation stated: “that is quite a story.” She did not challenge [REDACTED], but she also made it clear that it is more important to tell the truth about mistakes.

The details of “[REDACTED]” have become more and more opaque. [REDACTED] told me that he was “scared” when he was talking with the principal. I suspect the story is largely made up. At this stage, [REDACTED] lacks the skills or maturity to rewind the story and accurately report what happened. [REDACTED] does not believe that [REDACTED] is being put up by some older child.

[REDACTED] demonstrates genuine remorse for what he is putting his father through. He is scared.

I do not believe it would be fruitful to push [REDACTED]’s version of the incident.

The more promising line of questioning will demonstrate:

- (1) [REDACTED] did not “brandish” the weapon at any time.
- (2) [REDACTED] did not take the knife out of his backpack at any time.
- (3) [REDACTED] informed a friend about the knife at the end of school while the children were being dismissed. [The disruption to the school day was minimal and did not interfere with any lesson plan.]

## 3. Disciplinary Record

This is a weak spot. There are 11 documented “infractions” in 2012-13. None, with the exception of the knife incident, rise to the level of expulsion (or resulted in suspension). All of the disciplinary actions are being addressed as part of the interventions currently being undertaken by [REDACTED] and his father.

### III. FAMILY INTERVENTION: A COMPREHENSIVE PROGRAM TO ADDRESS [REDACTED]’S BEHAVIOR IN SCHOOL

[REDACTED] is preparing a statement outlining the program he is putting in place for his son. It includes the following elements:

- Weekly psychotherapy. [REDACTED] Psychotherapy Institute of Individual, Family and Community Development, [REDACTED] CA [REDACTED]. Started: June 2013.

- REACH Program. [REDACTED] is participating in the [REDACTED] REACH project skills workshop on a voluntary basis. Once a week skills workshop with peers lead by [REDACTED] [REDACTED] (“REACH Project’s goal is to advance safe, healthy and accountable behaviors among youths and their families since 1970.”) [REDACTED]
- Wrap Around Services. [REDACTED] is enlisting the Wrap-Around Services of the [REDACTED] Adoption Agency. This piece is still coming into place, but he has high hopes for this program. The office knows [REDACTED] They worked [REDACTED] in the context of the problems he was experiencing with [REDACTED]

I believe this is a strong argument for us: [REDACTED]’s family is taking this incident seriously. It is responding swiftly to create a support network that will assist [REDACTED] in understanding the seriousness of this most recent incident and help him develop a skill set to make better decisions.

I am currently exploring whether we want to secure one or more letters from these health professionals/service providers to include as part of the materials we provide to the hearing board.

## **Appendix F**

### **Sample Letter(s)—Request for SPED Assessment**

**SAMPLE LETTER:  
FIRST REFERRAL FOR SPECIAL EDUCATION ASSESSMENT**

**INSTRUCTIONAL NOTE:**

To request assessment to determine whether your child is eligible for special education services, submit a WRITTEN LETTER to the School District Special Education Director. Cc the principal, teacher or others involved with your child's education. Tell the school district that you are concerned about your child's educational progress, and briefly why, and that you are making a referral for assessment for special education services.

You will want to retain PROOF of the letter's delivery. Consider sending the letter "return/receipt requested" from the post office. Or hand deliver and ask that your letter be date stamped and a copy of this given to you before you leave. Or fax your letter and print your "successful transmission" fax report and follow up by phone to ensure the letter was received.

A WRITTEN letter triggers an important timeline under the Individuals with Disabilities Act (IDEA) law:

- From the time the school district receives your letter, the school district has 15 calendar days (not counting large school holidays) to present you with an Assessment Plan for your consent.
- From the time you receive an Assessment Plan, you have 15 calendar days (if you wish to take them) to ask all the questions you need to feel comfortable to give "informed consent" by signing the plan.
- From the time you consent to the Assessment Plan, the district has 60 days (not counting large school holidays) to assess your child and hold the first Individualized Education Plan (IEP) meeting.

In an initial IEP meeting, you and administrative, educational, and assessor team members will discuss the assessment results and make a determination whether the child qualifies for special education services. If your child qualifies, an IEP document will be developed.

If your child is currently enrolled by you in private school, you must request assessment from the school district in which the private school is located, even if this is not the district in which you live. (New when IDEA law was reauthorized in 2004.)

DATE

NAME

DIRECTOR OF SPECIAL EDUCATION SERVICES

SCHOOL DISTRICT NAME

ADDRESS

CITY, CA ZIP

Dear NAME:

I am the parent/guardian of STUDENT, who is currently in the GRADE. My child has not been doing well in school, and I am concerned about STUDENT's educational progress and whether there may be something impeding STUDENT's learning. I would like to have my child assessed for special education.

I am writing to make a referral for assessment for special education services for STUDENT, as required by 5 C.C.R Sec. 3021 (a). STUDENT may be eligible for special education assistance. I am requesting that STUDENT be given a comprehensive assessment by the school district and that an IEP meeting be scheduled for him/her. As part of the assessment process, I also request that my child be assessed under Section 504 of the Rehabilitation Act of 1973 to determine whether she should be identified as "handicapped" pursuant to that law and to determine what, if any, accommodations might be required in her educational program in the event that she does not qualify for special education services or in addition to special education services. This is also to request that the SCHOOL DISTRICT'S NAME Section 504 Coordinator be present at the IEP meeting to discuss the results and recommendations of the Section 504 assessment.

Additionally, I request that STUDENT be assessed for Educationally-Related Mental Health Services. I believe my child would benefit from counseling support and other related services at school.

I look forward to receiving an assessment plan within 15 days. If you have any questions, please feel free to contact me. Thank you for your cooperation and assistance.

Sincerely,

[PARENT'S NAME]

cc: Principal  
Resource Specialist

## **Appendix G**

### **Pupil Disciplinary Hearing Panel— Script (OUSD)**

## APPENDIX G: SCRIPT FOR EXPULSION HEARING FROM OAKLAND UNIFIED SCHOOL DISTRICT

August 2011

### Oakland Unified School District Family, Schools and Community Partnerships Pupil Disciplinary Hearing Panel PDHP SCRIPT

#### Introduction:

1. This hearing is being taped. In the matter of [state full name of pupil (s)] this hearing will come to order. The time is \_\_\_\_\_. The date is \_\_\_\_\_. The place is the Oakland Unified School District, Student, Family and Community Services, and we are holding this hearing in \_\_\_\_\_.
2. My name is \_\_\_\_\_, and I will be chairing this hearing panel. Will the other members of the PANEL please state their name for the record.
  - a. [ If present ] Will the TRANSLATOR please identify ...self for the record and state position held.
3. Will the SCHOOL REPRESENTATIVE please identify ...self for the record and state position held.
4. STUDENT: Young man / lady, will you please state your first name, last name; Birthdate; address; zip code; telephone number?  
What grade are you in? What school do you attend?
5. PARENT / GUARDIAN: Will (student's name) parents or guardians please identify themselves for the record and state relationship to \_\_\_\_\_.  
Did you receive your notice about the hearing?  
Do you have any questions about the notice?

#### *( REPEAT IDENTIFYING INFORMATION FOR EACH PUPIL / PARENT )*

6. If a pupil or parent is not present at the time the hearing is convened, state either of the following statements if true:
  - a. Let the record indicate that although properly noticed (student's full name and / or parent's / guardian's full name) are not present and the panel has not received a prior written request for continuance, the hearing will proceed as scheduled.
  - b. Let the record indicate that the Panel received two days prior to this hearing a written request for continuance from (name of pupil and / or parent /guardian) and a request for a continuance was granted to (new date and time).
7. If pupil has a REPRESENTATIVE / COUNSEL or if PANEL'S ADVISOR is present, have each identify ... self and state position.
8. If a pupil, parent or representative arrives late, identify each for record as above, noting the time of arrival and proceed with hearing from point at which you are.

\*\*\* [ If NON-WITNESS RELATIVES OR FAMILY FRIENDS are present ] they should be



identified for the record **and** an affirmative response from pupil's parent or guardian that permission is granted for their presence should be elicited. [Otherwise, such persons must be excluded because the hearing is closed (unless a parent / guardian has requested a hearing opened to the public; in case of a multi-pupil hearing, all parents / guardians would have to agree to an open hearing) and part of the pupil's school record which may be disclosed except with parent consent or under judicial order. ]

**Statement of Purpose and Authority of Panel:**

9. This Panel has been established by the Board of Education for the purpose of determining whether or not a student is guilty or not guilty of offenses for which expulsion has been recommended. The decision as to \_\_\_\_\_ guilt or innocence will be based solely on the properly admitted evidence presented at this hearing.

If the Panel finds that (s)he / they are guilty, (s)he / they may be recommended for expulsion or an alternative placement could be recommended such as placement at another comprehensive school or an opportunity/continuation program. [ If in Special Education, the pupil could be referred to the Department of Exceptional Children for appropriate placement.]

Expulsion means not being allowed to attend any school within the Oakland Unified School District until further permitted by the Oakland Unified School District's Board of Education..

**Procedure of the Hearing:**

The way we will proceed in this hearing is as follows: The Panel will permit both sides -- the school and the parent -- to make an opening statement. An opening statement is a brief statement, which states what you hope to prove by being here. The administrator will then read into the record the charges the school site is bringing against the pupil

Afterwards, the school will be allowed to present its case, including witnesses, and evidence to prove the charges. The parent/guardian (or representative) will be given the opportunity to question any and all witnesses and examine any and all evidence presented by the school.

After the school presents its side of the story, if the pupil(s) would like to give her (his) / their side of the story to disprove or otherwise respond to the charges(s), with his (her) / their parent's permission, (s)he / they may do so. Also if the pupil has any witnesses, the witness will be allowed to testify before \_\_\_\_\_ testifies and the school representative will be given an opportunity to question any witnesses and examine any evidence presented by the pupil.

After the Panel has heard all witnesses and received all evidence, the school representative and the parent will be given an opportunity to make a closing statement. A closing statement is an opinion, by the respective side, and based on the witnesses and evidence presented, as to whether or not the case has been proven or not proven against the pupil, and what disposition (or outcome) the Panel should make.

The law gives the Panel up to three school days to make a decision on the charges. We will take three school days, or we may take a short recess to make our determination immediately. We will let you know towards the end of the hearing, today, which choice we will take, before we do so.

Are there any questions as to how the hearing is going to proceed? [Panel may respond to questions on procedure.]

**Opening Statements:**

10. Is there an opening statement on behalf of the school?

Does the parent / guardian have an opening statement on behalf of the pupil?  
[ What do you hope or intend to prove by being here today? ]

**Oath:**

11. (Administrator), Please raise your right hand. Do you affirm that the testimony that you are about to give this Panel is the truth and is given under penalty of perjury?
12. Will you please state the Education Code violation(s) that \_\_\_\_\_ school has filed against (pupil's\ name). [If **(b)**, **(c)**, **(d)** charge, request a thorough description of the object.] [ Request should be repeated for each pupil. ]

Read the ed code and description of each ed code charge file.

(Administrator), Please describe the incident that led you to file these charges.

**Questions:**

13. (Individually ask **each** parent / guardian or representative by name) if (s)he has any questions for (state name of administrator).  
[ **Reminder:** This is the opportunity to ask questions about the administrator's testimony (factual and sequential information); remarks and statements are allowed only during the closing statement. ]

Ask each Panel member if (s)he has any questions for (state name of administrator).

14. (Administrator), Do you have any witnesses on behalf of (name of school)? [ Recess until witness is seated. ]

**Witness Oath and Explanation:**

15. My name is \_\_\_\_\_, and I am chairing this hearing Panel. [Introduce other Panel members, school representative, parents, and other representatives.]

**OATH:** Please raise your right hand. Do you affirm that the testimony that you are about to give this Panel is the truth and is given under penalty of perjury?

Please state your first and last name (and spell them). Please tell us your place of employment and position held.

(Administrator), Please direct your witness.

**Questions:**

[ Repeat procedure for # 13 for questions of witness. ]  
[ Procedure is repeated for each defendant pupil and any witness he or she calls on behalf of... ]

**Student Witness Oath and Explanation:**

16. If present, ask parent / guardian if (s)he gives permission for their son / daughter to give his / her side of the story. Yes / No.

**Oath:** Do you affirm that the testimony that you are about to give the Panel is the truth and is given under penalty of perjury? Do you know perjury means? Perjury means to lie under oath. If you go to court and affirm / swear to tell the truth, and the judge later finds out that you did not tell the truth, the judge could send you to juvenile hall for not telling the truth. We cannot do that,

but we expect you and we want you to tell us the truth. So will you tell us the truth? Yes / No.  
Please state your first and last name and spell them; grade; school.

**Questions for Student Witnesses:**

[ Repeat procedure for # 13 for questions of witness. ]

**Oath for Pupil(s):**

17. Ask parent / guardian if (s)he gives permission for their son / daughter to give his / her side of the story. Yes / No.

Ask pupil is (s)he has any witness(es) to present on his / her side of the story. (If pupil is going to testify for ... self, (s)he should be allowed to do so after presenting his or her witness(es). (Calling on the pupil after his or her witness(es) allows an opportunity for pupil to be asked about anything that t may have been stated by the witness. )

**Oath:** Do you affirm that the testimony that you are about to give the Panel is the truth and is given under penalty of perjury? Do you know perjury means? Perjury means to lie under oath. If you go to court and affirm / swear to tell the truth, and the judge later finds out that you did not tell the truth, the judge could send you to juvenile hall for not telling the truth. We cannot do that, but we expect you and we want you to tell us the truth. So will you tell us the truth? Yes / No.  
Please state your first and last name and spell them; grade; school.

**Questions for Pupil(s):**

[ Repeat procedure for # 13 for questions of witness.

Individually ask parent / guardian, representative by name if (s)he would like to ask any questions.

Give school administrator same opportunity to question witness(es) and pupil(s). ]

Ask Panel members if they have any questions.

**Closing Statement:**

18. After all witnesses have testified for each side,

Ask Administrator if (s)he has a closing statement on behalf of (name of school).

**(“In the event that we do not recommend expulsion, what is your recommendation?” )**

Each parent / guardian, representative is asked by name: Do you have a closing statement as to what should be the outcome of this hearing?

**Options:**

19. (a). If the Panel will **decide** the case **today**, state:

The hearing is now recessed for purposes of deliberation.

- (b). The Panel will take **three school days**, so state:

The Panel will take up to the three school days for purpose of deliberation. Pupil and parent will be notified by mail of our decision and should receive notification in approximately 7 days. The Panel will now take a recess with the hearing record remaining open for the purpose of our findings and recommendations, if any.[When a decision is reached, the Panel should go back on record, noting the date, time, and which Panel members are present, and enter its findings, e.g. ]

**Decision:**

20. The **Panel finds** that (name of pupil) is:

(a) **not guilty** of violating Education Code Section(s): \_\_\_\_\_

(b) **guilty** of violating Education Code Section(s): \_\_\_\_\_

- (c) **If recommending expulsion** also read into the record the appropriate statement(s) below (if applicable):

The Panel also finds that (name of pupil) is guilty of violating

1. Education Code Section 48915 (a) (1) Causing serious injury to another person
2. Education Code Section 48915 (a)(2), (c)(5) Possession of a knife, explosive or other dangerous object
3. Education Code Section 48915 (c)(1) Possession, selling, or furnishing of a firearm
4. Education Code Section 48915 (c)(3) Unlawful sale of a controlled substance
5. Education Code Section 48915 (a)(4) Robbery or extortion

**If found guilty and recommended for expulsion, also state:**

- that other means of correction are not feasible and have repeatedly failed to bring about proper conduct  
**and/or**
- that due to the nature of the violation(s), the presence of the pupil causes a continuing danger to the physical safety of others.

**21. The Panel orders:**

- that (pupil's full name) is referred to the Placement Officer for placement for
  - **Another Comprehensive Placement**
  - **Opportunity Program**
  - **Continuation Program**
- that (pupil's full name) is:
  - placed on **Suspended Placement** for another comprehensive school.  
If probation is violated, order for change in placement will be enforced.
  - referred to the Department of Exceptional Children for appropriate placement
  - **returned** to the Referred Site
- placed on probation with contracts for behavior
  - [ State time period (i.e. Fall and Spring of ...) ]
- due to the seriousness of the violation that this matter be forwarded to the Oakland Unified School District Board of Education, with findings of fact and the recommendation that the pupil be **expelled**.

This hearing is now adjourned. The time is \_\_\_\_\_ .

## **Appendix H**

Sample Complaint re: Independent Study  
(Redacted)

September 4, 2013

Writer's Direct Contact  
415.268.6449  
JSchurz@mofo.com

**Via E-Mail and U.S. Mail**

Superintendent Richard Rogers  
Oakley Union Elementary School District  
91 Mercedes Lane  
Oakley, CA 94561

Complaint: Failure to Provide Adequate Educational Program to Andres Smith

Dear Mr. Rogers:

I represent Mr. Thomas Smith and his son, Andres Smith, in connection with the Expulsion Recommendation of the Board of Education of the Oakley Union Elementary School District ("District"). I write to notify you of our complaint against the District for its failure to provide Andres Smith with a lawful and adequate educational program.

On July 23, 2013, the District fully expelled Andres Smith, an 11-year-old incoming fifth grader at Gehringer Elementary School in Oakley, California for the unauthorized possession of a knife. (The Findings of Fact, Conclusions and Order in *The Matter of the Expulsion of Andres Smith, Student #BB-6/2013* (the "Order").<sup>1</sup>) The District ordered that, during the period of Andres Smith's expulsion, he was to be "provided with an alternative educational program at the District office." (Order at 3.) The "alternative educational program" is comprised of two sessions a week with an individual tutor for 2.5 hours each session for a total of 5 hours a week.

The alternative educational program is unlawful and inadequate because it does not meet the requirements of Cal. Educ. Code § 48916.1(a); to the extent that the program is an individual instruction program, it is not appropriate since Andres does not have a disability and fully expelled students cannot participate in individual instruction programs operated by the District; and, to the extent that the program is a *de facto* independent study program, it is unlawful because fully expelled students cannot participate in independent study programs and independent study may not be imposed absent voluntary consent and a written contract.

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<sup>1</sup> A copy of the Order is attached for your reference.

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On August 30, 2013 we requested that the District provide the forms and/or procedures necessary for the resolution of any possible complaints regarding Andres's alternative educational program. *See* 5 Cal. Admin. Code § 4621 ("Each local educational agency shall adopt policies and procedures . . . for the investigation and resolution of complaints.").

Given the time-sensitive nature of this complaint and the District's failure to provide us with applicable complaint procedures, we are sending copies of this Complaint to the President of the District's Governing Board as well as to the California Department of Education.

### **The District Has Failed to Provide an Adequate Alternative Educational Program**

Public education is a fundamental right. *See Serrano v. Priest*, 5 Cal. 3d 584, 608-10 (1971). Education is "a major determinant of an individual's chances for economic and social success in our competitive society" and "a unique influence on a child's development as a citizen and his participation in political and community life." *Id.* at 605. "[E]ducation is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *see also* California Constitution Article IX, section 1 (recognizing importance of "[a] general diffusion of knowledge and intelligence").

Accordingly, "[a]t the time an expulsion of a pupil is ordered, the governing board of the school district shall ensure that an educational program is provided to the pupil who is subject to the expulsion order for the period of the expulsion." Cal. Educ. Code § 48916.1(a). "The mandated education program should be responsive to the abilities and needs of the student. . . Also, the student's instructional program should be able to address needs for learning related to the behavioral issues that led to the expulsion." Cal. Dep't of Educ., Independent Study, Frequently Asked Questions, available at <http://www.cde.ca.gov/sp/eo/is/faq.asp#n30>. All students in grades 4 to 8 must receive 54,000 minutes of instruction annually. Cal. Educ. Code § 46201(b)(3). In fact, the California Department of Education recommends 50-60 minutes *a day* of mathematics instruction alone for all students, *not including homework*. *See* The Mathematics Framework for California Public Schools Kindergarten through Grade Twelve (2005), Chapter 1, page 10.

The five-hour per week tutoring program that the District ordered is patently inadequate. The program fails to provide a sufficient number of hours of instruction: it does not even provide the minimum number of hours of mathematics instruction that the California Department of Education recommends.

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Moreover, the program does not respond to Andres's needs or address behavioral issues. According to his report card, "Andres continues to struggle with classroom behavior, he needs to work on staying focused and ignoring those around him." Taking him out of the classroom setting will only prevent him from working on the issues that the District has identified.

Finally, by virtue of the fact that the program does not permit Andres to interact with other students, it fails to provide the level of social interaction necessary for him to achieve social success, *see Serrano*, 5 Cal. 3d at 605, or to gain exposure to cultural values necessary for him to adjust normally to his environment, *see Brown*, 347 U.S. at 493.

### **The District Cannot Order Andres to Participate in Individual Instruction**

The District has represented to counsel for Andres that the alternative placement program in which it ordered Andres to participate is a "direct instruction" program pursuant to Cal. Educ. Code § 48206.3. Under that section, "a pupil *with a temporary disability which makes attendance in the regular day classes or alternative education program in which the pupil is enrolled impossible or inadvisable* shall receive individual instruction provided by the district in which the pupil is deemed to reside." Cal. Educ. Code § 48206.3 (emphasis added). An individual instruction program is not appropriate here for two reasons: Andres does not have a disability and fully expelled students cannot participate in individual instruction programs operated by the District.

First, individual instruction programs are intended for students with disabilities and are thus not appropriate for students who do not have disabilities. In fact, the District's policy is to require parents who wish to enroll their children in the program to "provide the school district with a medical letter or report from the attending physician, and/or surgeon, or the report of the psychologist, as appropriate, stating the diagnosed condition, and certifying that the severity of the condition prevents the student from attending school." Oakley Unified School District, Home Hospital Instruction, available at [http://www.ouesd.k12.ca.us/cms/page\\_view?d=x&piid=&vpid=1374930696338](http://www.ouesd.k12.ca.us/cms/page_view?d=x&piid=&vpid=1374930696338). Andres does not have a disability (let alone one that makes attendance in regular day classes or an alternative education program impossible). Thus he cannot be placed into the program.

Second, "[a] pupil expelled from school for any of the offenses listed in subdivision (a) or (c) of Section 48915, shall not be permitted to enroll in any other school or school district during the period of expulsion unless it is a county community school ..., or a juvenile court school..., or a community day school." Cal. Educ. Code § 48915.2(a). Here, Andres is effectively enrolled in the District because the District is providing the alternative placement program at issue and it is being provided at the District office. (Order at 3.) Because Andres has been fully expelled pursuant to Section 48915(a), he cannot be enrolled in a District



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program unless it is a county community school, a juvenile court school, or a community day school. Andres thus cannot be enrolled in a District-provided individual instruction program.

### **The District Cannot Order Andres to Participate in Independent Study**

While, here, the District has not called the alternative placement program an “independent study program,” the program it ordered is a *de facto* independent study program. The California Department of Education defines “independent study” as “an alternative instructional strategy,” in which students “follow the district-adopted curriculum” but “work independently, according to a written agreement and under the general supervision of a credentialed teacher.” Cal. Dep’t of Educ., Quick Guide to Independent Study, available at <http://www.cde.ca.gov/sp/eo/is/quickguideistudy.asp>. While the District has failed to enter into the requisite written agreement, Andres’s program appears to follow the district-adopted curriculum but requires him to work independently under the general supervision of a credentialed teacher.

To the extent that the alternative educational program that the District ordered is a *de facto* independent study program, it is unlawful for two reasons: fully expelled students cannot participate in independent study programs and independent study may not be imposed absent voluntary consent and a written contract.

First, students who are expelled for violations pursuant to Cal. Educ. Code § 48915(a) are limited to community day school enrollment within a school district, and therefore cannot participate in independent study. Cal. Dep’t of Educ., *Independent Study Operations Manual* at 8-6.

Second, even assuming that a fully expelled student could participate in independent study, independent study may not be imposed absent voluntary consent and a written contract. “Independent Study is an optional educational alternative, available to students from kindergarten through high school that is meant to respond to the student’s specific educational needs, interests, aptitudes, and abilities within the confines of school board policy.” Cal. Dep’t of Educ., *Independent Study Operations Manual* at 1-1 (2002 ed.). A student who is referred to or assigned to a program as the result of an expulsion order may be instructed through independent study *only* if the pupil is offered the alternative of classroom instruction. Cal. Educ. Code § 51747(c)(7) (emphasis added). “[I]ndependent study is an optional educational alternative in which *no pupil may be required to participate*.” Cal. Educ. Code § 51747(c)(7) (emphasis added). “[I]nvoluntary 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 2-5 (emphasis in original). In order to ensure that participation in a program of independent study is a voluntary and viable method of instruction, districts must execute a written contract detailing

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the individual terms of the pupil's program of study among the student, the student's parent or guardian (unless the pupil is 18 or older), the certificated employee supervising the independent study, and all persons providing direct assistance to the pupil. Cal. Educ. Code § 51747(c)(8).

There is no evidence of any form of consent here. At no time did Andres Smith or his parent consent to this program; nor did the District ask for their consent. Moreover, contrary to State directives, there is no contract between the district and Mr. Smith and his son relating to the alternative educational program ordered by the Oakley District Board.

**Andres Should Be Allowed to Attend a Comprehensive School at a Different Site**

The Contra Costa County Board of Education recognizes that student in grades one through six who are expelled do not have the same educational options available as do expelled youth who are in grades seven through twelve, due to the limited numbers of students who are expelled in these lower grades. Contra Costa County Office of Educ., *Educational Services for Expelled Students*, August 2012, at 7-8. Nevertheless, independent study can only be offered "if the parent agrees." *Id.* at 8. If an appropriate program is only available at a comprehensive school, an expelled student may be placed in that program (at a site different from which the student was expelled). *Id.* at 2 (citing SB 966).) But to achieve this end, Andres's expulsion must be suspended. *See* Cal. Educ. Code § 48915.2(a).

Thus, to the extent that no adequate community school or other program is available for Andres, the District has two options: (a) suspend his expulsion so that he can attend a comprehensive school at a different site or (b) work with the California Board of Education to establish an appropriate community day school.

Please feel free to contact me immediately if the District is prepared to pursue either of these options. Otherwise, we request that a hearing be set to address this Complaint at the next Board meeting.

Sincerely,

James M. Schurz