CHAPTER XI

STUDENT DISCIPLINE

BOARD POLICIES

Board policies which are sufficiently specific to give students and their parents notice of the standards of behavior and enforcement procedures are necessary in order to maintain student discipline.

Board policies should be:

1. Written in a specific and concise manner;

2. Related to a reasonable and objective standard of behavior. For example, regulation of hair styles may be appropriate when the standard is based on health and safety considerations, but such regulation may not be appropriate where it is based on personal preference;

3. Made available to parents or guardians;[1]

4. Consistently enforced at all schools within the district; and

5. Written as required by statute.[2]

Board policies should not:

1. Express the prejudices or personal point of view of the board members;

2. Simply state that the policy of the board is to comply with the statute and regulations; or

3. Be written in such general language that the policies provide no specific standard or direction.

INVESTIGATION OF STUDENT MISCONDUCT

The principal or his or her designee should thoroughly investigate the facts by interviewing witnesses and obtaining written statements and physical evidence.

1. The person conducting the investigation should interview all persons involved, asking specific questions to determine

[1] Ed. Code, § 35291.

[2] Ed. Code, § 35291.

if a violation has occurred. Notes should be taken of each of the interviews and written statements should be prepared for the witnesses to sign.

2. During the interviews, information regarding all the facts should be sought and the identities of additional witnesses should be sought. An attempt should be made to interview all witnesses.

3. All physical evidence should be preserved (e.g., weapons, drugs, notes, etc.) and turned over to police agencies, if appropriate.

4. Photographs may be taken, if appropriate.

5. A thorough investigation of the facts lays the foundation for successful disciplinary action and avoids problems later in the proceedings.

Based on the investigation of facts, the principal should make a determination as to whether a violation has occurred, which Education Code provision(s) was violated, and who committed the violation.

As part of the principal's investigation of the facts, if the principal has a reasonable suspicion that a particular student has committed a violation, the principal may search the student by ordering the student to empty his pockets, by conducting a "pat down" search, or by searching a student's locker, book bag or purse.[3] Strip searches, searches of body cavities or removal of clothing which exposes a student's underclothing, breasts, buttocks, or genitalia are prohibited by Education Code section 49050. Random searches or searches by members of the opposite sex which would embarrass students or invade their privacy should be avoided.

If a student refuses to allow a principal or other school personnel to conduct a search, the principal should contact the appropriate law enforcement agency if there is reason to believe the student has committed a criminal offense (e.g., drug or weapon possession) or contact the student's parents if the conduct does not constitute a criminal offense. A student who refuses to cooperate (e.g., empty his pockets, allow the search) may still be subject to an administrative search if the principal or other school official has reasonable suspicion.[4]

The principal may request written statements or elicit oral confessions from students without advising students that the "confession" will be used against them (i.e., Miranda warnings).[5]

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[3] New Jersey v. T.L.O., 105 S.Ct. 733 (1985).

[4] Ed. Code, § 48900(k).

[5] In Re Christopher W., 29 Cal.App.3d 777 (1973),

If a minor student is released into the care of peace officers and removed from school premises, the principal or other school official must immediately notify the parent, guardian, or responsible relative of the minor. [6]

The principal or the principal's designee must contact the appropriate law enforcement agency:

1. Prior to the suspension or expulsion of any student for any acts which violate Section 245 of the Penal Code (assault or battery with a deadly weapon or means of force likely to produce great bodily injury including firearms, knives, or any blunt instrument);

2. Within one school day after suspension or expulsion of any student for acts which violate Education Code section 48900, subdivision (c) or (d);

3. Whenever a student commits any acts that may involve the possession or sale of narcotics or of a controlled substance or a violation of Penal Code section 626.9 (possession of a firearm within 1,000 feet of a school) or Section 626.10 (possession of a knife more than 2½ inches long or other specified weapons on the grounds of a school).[7]

DETENTION AND QUESTIONING OF STUDENTS

A. Detention of Students

In general, the courts have held that school officials have broad authority to stop and detain a student in order to ask a question or conduct an investigation, even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious or harassing manner.[8] In addition, the courts have held that school officials are not required to provide Miranda[9] warnings to students prior to questioning a student or prior to a confession or statement by a student, nor are school officials required to allow parents to be present prior to questioning a student.

The California Supreme Court in In Re Randy G. held that school officials are not required to have reasonable suspicion that a school rule or law had been broken in order to detain and question a student. The Court did not define arbitrary, capricious or harassing. Therefore, despite the broad sweep of the decision, districts should act cautiously and reasonably to ensure that the power to stop a minor student to ask questions or conduct an investigation is not abused and not exercised in an arbitrary, capricious or harassing manner.

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[6] Ed. Code, § 48906.

[7] Ed. Code, § 48902.

[8] In Re Randy G., 26 Cal.4th 556 (2001).

[9] See, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The decision in In Re Randy G. arose from a juvenile court proceeding in which a high school student was observed by a school security officer as fixing the lining of his left pocket nervously and acting in a very "paranoid and nervous manner." The student was then called out of class and questioned in the hallway as to whether the student was in possession of anything illegal. The student stated that he was not but a pat down search by a security officer revealed a knife later found to have a locking blade. The minor was then turned over to the police and charged in juvenile court with possession of a knife.[10]

The student moved to suppress the evidence of the knife in juvenile court alleging that the school security officers did not have reasonable suspicion to detain the student. The Court of Appeal applied the reasonable suspicion standard and upheld the detention.[11]

The California Supreme Court upheld the detention but held that reasonable suspicion was not required and went on to discuss the difference between a detention and a search. The California Supreme Court found that a detention was less intrusive and that minor students are required to be in school. The court stated:

> "Without first establishing and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. . . California fulfills its obligation by requiring each school board to establish rules and regulations to govern student conduct and discipline (Education Code section 35291) and by permitting the local school district to establish a police or security department to enforce those rules . . ."[12]

The Court noted that Education Code section 44807 permits principals, teachers and other certificated employees to exercise the same degree of physical control over a pupil that a parent would be legally privileged to exercise (i.e., in loco parentis) which shall not exceed the amount of physical control reasonably necessary to maintain order, protect property or protect the health and safety of pupils or to maintain proper and appropriate conditions conducive to learning. The Court noted that while at school a student may be stopped, told to remain or leave a classroom, directed to go to a particular classroom, given an errand, sent to study hall, called to the office or held after school. A student is not free to roam the halls or remain in the classroom as long as they please. The Court noted:

> "Thus when a school official stops a student to ask a question, it would appear that the student's liberty has not been restrained over and above the limitations already experienced by the student by attending school."[13]

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[10] In Re Randy G., at 559-61.

[11] Id. at 560-61.

[12] Id. at 562-563.

[13] Id. at 563.

The Court recognized that the governmental interest at stake is of the highest order and that education is one of the most important functions of state and local government. The Court stated:

> "School personnel, to maintain or promote order, may need to send students into and out of classrooms, define or alter schedules, summons students to the office or question them in the hall. . . Those officials must be permitted to exercise their broad supervisory and disciplinary powers, without worrying that every encounter with a student will be converted into an opportunity for constitutional review. To allow minor students to challenge each of those decisions through a motion to suppress or in a civil rights action under 42 United States Code section 1983, as lacking articulable facts supporting reasonable suspicion would make a mockery of school discipline and order.
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> "If the school can require the minor's presence on campus during school hours, attendance at assigned classes during their scheduled meeting times, appearance at assemblies in the auditorium and participation in physical education classes out of doors, liberty is scarcely infringed if a school security guard leads the student into the hall to ask questions about a potential rule violation."[14]

The California Supreme Court refused to distinguish the power of school security officers over students from that of other school personnel. The Court indicated that if they were to draw the distinction, the extent of student rights would not depend on the nature of the asserted infringement but on the happenstance of the status of the employee who observed and investigated the misconduct. The Court also reasoned that were the Court to hold its school security officers have less authority to enforce school regulations and investigate misconduct than other school personnel, there would be no reason for schools to employ security officers and schools would be forced to assign certificated or classified personnel to these duties.[15]

In summary, the California Supreme Court has granted broad authority to school officials including security officers to detain and question students on school grounds so long as such authority is not exercised in an arbitrary, capricious or harassing manner. Districts should proceed cautiously and detain and question students only when there is reason to do so. Students should not be stopped and questioned for reasons other than the maintenance of security and order in the school.

B. Questioning of Students

The Legislature has vested school officials with broad power to maintain discipline and order in the public school system.[16] The state has a compelling interest in assuring that schools

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[14] Id. at 566.

[15] Id. at 568-69.

[16] In Re Randy G., 26 Cal.4th 556, 566, 110 Cal.Rptr.2d 516 (2001).

meet their responsibility for the education and training of minor pupils, that without first establishing discipline and maintaining order, teachers cannot begin to educate their students. In addition, the school has the obligation to protect students from mistreatment by other children and to protect teachers themselves from violence.[17]

The Education Code provides that all pupils at public schools must comply with the regulations, pursue the required course of study, and submit to the authority of teachers.[18] Every teacher must enforce the course of study, the use of legally authorized textbooks, and the proscribed rules and regulations, and must hold pupils to a strict account for their conduct on the way to and from school, on playgrounds and during recess.[19]

School officials stand in loco parentis, in place of the parents, with powers and responsibilities similar to those of parents.[20] In In Re Christopher W., the Court of Appeal held that a school principal had no duty to warn a student that his confession could be used against him before listening to it. The Court of Appeal held that Miranda dealt with custodial interrogations before or after arrest, and that the student was not in custody when being taken to the principal's office.[21]

In In Re Corey L.,[22] the Court of Appeal held that numerous courts have ruled that school officials are not required to provide Miranda warnings, and that Miranda does not apply outside the context of custodial interrogations by law enforcement.[23] The Court of Appeal stated:

> "Questioning of a student by a principal, whose duties include the obligations to maintain order, protect the health and safety of pupils, and maintain conditions conducive to learning, cannot be equated with custodial interrogation by law enforcement officers. Many courts which have considered the question have held that school officials need not give Miranda warnings before questioning students about suspected violations of school rules or criminal activity on the grounds that this type of inquiry is not a custodial interrogation within the meaning of Miranda."[24]

Similarly, there is no legal authority that would require school officials to obtain parental permission to interview or remove a student from school.[25] However, if a principal or school

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[17] Ibid.

[18] Ed. Code section 48908.

[19] Ed. Code section 44807.

[20] In Re Christopher W., 29 Cal.App.3d 777, 105 Cal.Rptr. 775 (1973).

[21] Id. at 783; discussing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966); see, also, S.E. v. Grant County Board of Education, 544 F.3d 633, 641, 238 Ed.Law Rep. 28 (6th Cir. 2008).

[22] 203 Cal.App.3d 1020, 250 Cal.Rptr. 359 (1988).

[23] Id. at 1023-1024, citing Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358 (1980).

[24] Id. at 1024, citing Cason v. Cook, 810 F.2d 188, 193 (8th Cir. 1987); Betts v. Board of Education of City of Chicago, 466 F.2d 629, 631 (7th Cir. 1972).

[25] See, In Re Randy G., 26 Cal.4th 556, 110 Cal.Rptr.2d 516 (2001); Law in the School: A Guide for California Schools, School Safety Personnel and Law Enforcement, California Department of Justice, 6th Ed. (August 2000), p. 117.

official releases a minor child to a peace officer for removal from school, the school official must take immediate steps to notify the student's parent, guardian or responsible relative of the action and the place where the minor was taken.[26]

The only exception to this requirement is when a minor student has been taken into custody as a victim of suspected child abuse.[27] In cases of suspected child abuse, school officials must provide the peace officer with the address and telephone number of the minor's parent or guardian, the officer must immediately notify the parent or guardian that the minor is in custody, and where he or she is being held. The officer may refuse to disclose this location for up to 24 hours if he or she has a reasonable belief that such disclosure would endanger the safety or disturb the custody of a minor.[28]

PRESERVATION OF EVIDENCE

When the principal or other school administrator conducts an investigation of an incident, he or she must be aware of the responsibility to preserve evidence which would be introduced at a possible expulsion hearing.

The following kinds of evidence should be preserved:

1. Witness testimony is the kind of evidence familiar to most of us. Percipient witnesses are those who were present at the scene of the incident or who observed the conduct leading up to the incident.

    a. The witness' name, address and telephone number as well as a written statement of the witness' observations should be obtained from the witness at the time of the incident. The statement should be reviewed with the witness as soon as possible after the incident to elicit any other information that may be important. The statement should be acknowledged by the witness as correct and signed and dated.

    b. Witnesses should be advised to make a factual statement about who was present, what was said, what occurred and the sequence of events. Witnesses should be discouraged from including opinions or unsubstantiated statements.

    c. Written statements are considered to be hearsay evidence and standing alone cannot be the basis of

[26] Ed. Code section 48906.
[27] Ibid.
[28] Ibid.

an administrative finding. Therefore, at least some of the witnesses must be called to testify at the time of the hearing.

d. Expert witnesses are those who have the education, training or experience which qualify them to make judgments and to offer opinions. Such witnesses may be used to confirm, for example, that the substance obtained from the student was marijuana, or that certain items are "drug paraphernalia."

2. Admissions are statements made by the accused wherein he acknowledges guilt or the truth of certain facts. For example, a student may admit that he was present at the time of the incident and that he was fighting, although insisting that he was defending himself against an aggressor. The student may admit he is guilty of the alleged violation, and may be willing to make and sign a written statement to that effect.

3. There are many things that need to be preserved as evidence. Any weapons (knives, guns, belts, chains) used by the student should be identified and kept in the custody of the school district or the police. Any drugs, drug paraphernalia, pornographic literature, or other items pertinent to proving the offense should be labeled and preserved. The person (school administrator, police officer) who took the items from the student must be called as a witness to testify about how he or she obtained them.

4. Business records may also be obtained and reproduced as documentary evidence. Examples of such records include hospital and insurance reports of damage to property.

5. Official records such as police reports, court orders or judgments and death certificates may also be used as evidence. When obtaining such records, certified copies of the documents should be obtained.

6. When a witness or accused student makes one statement about the incident at the time it occurs and another statement at the time of the hearing, the prior inconsistent statement can be used as evidence of the untrustworthy nature of that person's testimony. Thus, the written statements signed by the accused or witnesses may be very important to "impeach" a witness at the time of the hearing.

NOTIFICATION OF LAW ENFORCEMENT

Education Code section 48902(a) requires the principal of a school or the principal's designee, before the suspension or expulsion of any pupil, to notify the appropriate law enforcement authorities of the county or city in which the school is situated, of any acts that may violate Penal Code section 245 (assault with a deadly weapon or force likely to produce great bodily harm). Section 48902(b) requires the principal of a school or the principal's designee, within one school day after suspension or expulsion of any pupil, to notify, by telephone or any other appropriate method chosen by the school, the appropriate law enforcement authorities of the county or the school district in which the school is situated of any acts of the pupil that may violate Education Code section 48900(c) or (d) (unlawful possession, use, or sale of controlled substances).

Education Code section 48902(c) states that the principal of a school or the principal's designee shall notify the appropriate law enforcement authorities of the county or city in which the school is located of any acts of a pupil that may involve the possession or sale of narcotics or of a controlled substance or violation of Penal Code sections 626.9 or 626.10 (possession of guns or other weapons on school property). The principal of a school or the principal's designee shall also report any acts specified in Education Code section 48915(c), paragraph (1) or (5) (possession of an explosive or possession, sale, or furnishing of a firearm) committed by a pupil or non-pupil on a school site.

Education Code section 48902(d) states that a principal, the principal's designee, or any other person reporting a known or suspected act set forth in Sections 48902(a) or 48902(b) is not civilly or criminally liable as a result of making any report authorized by Education Code sections 48900-48918, unless it can be proven that a false report was made and that the person knew the report was false or the report was made with reckless disregard for the truth or falsity of the report. Section 48902(e) states that the principal of a school or the principal's designee reporting a criminal act committed by a school-age individual with exceptional needs shall ensure that copies of the special education and disciplinary records of the pupil are transmitted for consideration by the appropriate authorities to whom he or she reports the criminal act. Any copies of the pupil's special education and disciplinary records may be transmitted only to the extent permissible under federal law.

INVOLUNTARY TRANSFER OF STUDENTS

The question frequently arises as to whether due process requires a formal hearing before involuntarily transferring a student for disciplinary reasons. With respect to due process, the courts have stated that once it is determined that due process applies, a question remains as to what process is due.[29]

In Goss v. Lopez,[30] the United States Supreme Court held that students facing suspensions of 10 days or less have a property interest in educational benefits and a liberty interest in their reputations that qualify them for protection against arbitrary suspensions under

[29] Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

[30] 419 U.S. 565, 95 S.Ct. 729 (1975).

the due process clause.[31] The court noted that neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure that the school chooses, no matter how arbitrary.[32] The court noted that a student has an interest in avoiding unfair or mistaken exclusion from the educational process.[33]

In Goss v. Lopez, the court held that students facing temporary suspensions have an interest that qualifies for protection under the due process clause and held that the student must be given oral or written notice of the charges against him and, if he or she denies them, an explanation of the evidence the authorities have, and an opportunity to present his or her side of the story. The court held that these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school are required. The court held that the state, having chosen to extend the right of education to students, may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.[34]

In Goss v. Lopez, the United States Supreme Court held that the due process clause does not require that the hearings in connection with suspension of 10 days or less follow trial-type procedures. The court held that the due process clause does not give students the right to be represented by counsel, to confront and cross-examine witnesses against them, or to call their own witnesses. It requires only minimal procedural protections that give the student an opportunity to explain his or her version of the facts and that the student first be told what the allegations are against them. The court held that an informal give and take between students and school administrators, preferably prior to the suspension, satisfies due process. If the student's presence on the school campus poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, the student may be immediately removed from school without an informal give and take exchange. In such an event, the court held that the necessary notice and rudimentary hearing should be followed up as soon as possible.[35]

The appellate courts have applied Goss v. Lopez in the context of involuntary transfers of students and have held that the involuntary transfer of students is a lesser penalty than suspension since the students are not denied an education and their education continues uninterrupted. In Arundar v. DeKalb County School District,[36] the Fifth Circuit Court of Appeals dismissed a student's lawsuit alleging a violation of due process rights. The Court of Appeals held that in the absence of an independent source, such as a state statute, entitling a high school student to a particular course of study, the school district's involuntary transfer of a high school student to another school that did not have all the courses of study that the student wanted did not amount to a deprivation of a property interest for Fourteenth Amendment purposes. The Court of Appeals stated:

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[31] Id. at 729.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] 620 F.2d 493 (5th Cir. 1980).

> "The missing ingredient in plaintiff's complaint is that there is no allegation of any 'independent source, such as state statutes or (other) rules,' entitling the plaintiff to the particular course of study which she claims has been denied her. In the absence of such an entitlement, plaintiff's wishes with respect to a particular curriculum choice, no matter how great that desire might be, do not, under Goss, amount to a 'property' interest for Fourteenth Amendment purposes."[37]

In Zamora v. Pomeroy,[38] the Tenth Circuit Court of Appeals held that a student suffered no constitutional injury under the Fourteenth Amendment's due process clause when the school district transferred the student to another school for allegedly possessing marijuana in his locker. The student alleged that the school that he was transferred to was inferior to the school that he came from. However, the Court of Appeals held that Goss v. Lopez requirements did not apply since the student was not suspended and did not suffer any interruption in his education. The court also noted that there was no lack of due process in the case since Zamora was given many opportunities to present his version of the facts and did not take advantage of that opportunity. Marijuana was found in the student's locker but Zamora did not take the opportunity, when confronted, to explain whether the marijuana was his or not. The school administrators drew a reasonable inference that the marijuana belonged to him and involuntarily transferred him to another school.[39] The Court of Appeals concluded:

> "In the present case, the school authorities fashioned a remedy which was in harmony with the Constitution. The student was not deprived of education. They went to some length to impose a sanction which would guarantee that he would continue his school work so that he could graduate. Also, after that year, he was readmitted to Roswell High School, from which he did graduate. Zamora was not separated from the educational process; he completed it…
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> "Inasmuch as the sanctions imposed were far less severe than an expulsion, and in view that his offense was serious, it cannot be said that they evidence an injury within the framework of the constitution, one which is capable of supporting jurisdiction of this court. The Zamoras' allegations that the ESC was so inferior to amount to an expulsion from the educational system are not borne out by the record, and in the absence of a clear showing that the ESC assignment was substantially prejudicial, the Zamoras lack the requisite standing to attack the appellees' actions on that ground."[40]

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[37] Id. at 494.

[38] 639 F.2d 662 (10th Cir. 1981).

[39] Id. at 668.

[40] Id. at 669-70. See, also, Martinez v. School District No. 60, 852 P.2d 1275, 83 Ed.Law Rep. 454 (Colo. 1992), in which the Colorado Court of Appeals held that the involuntary transfer of a student does not rise to the level of a

In Nevares v. San Marcos Consolidated Independent School District,[41] the Fifth Circuit Court of Appeals held that the school district had not violated the due process clause of the Fourteenth Amendment when it did not provide a student with a hearing before transferring the student involuntarily to an alternative educational program. In Nevares, the student was detained for aggravated assault by the police for reportedly throwing stones at a car and injuring one of the passengers. School officials questioned the student and the student refused to make any statements. The student's father admitted the act in question had occurred but maintained that his son's behavior had been in self-defense and requested a meeting to discuss the situation before the school took any action. The principal explained that according to school regulations, once there was reason to believe an aggravated assault had been committed, the student would be reassigned to the alternative education program. When the principal confirmed with the juvenile authorities that the aggravated assault charge was still pending, the principal decided to transfer the student to the alternative education program. The student then filed an action in U.S. District Court.[42]

The Court of Appeals held that the student had no standing to sue in federal court since the student was not being denied access to public education, not even temporarily. The court noted that the student was only being transferred from one school program to another program with stricter discipline. Under Texas law, the alternative program was maintained by Texas schools for those students whose violation of the law or the school's code of conduct falls short of triggering suspension or expulsion, but who for reasons of safety and order must be removed from the regular classroom.[43]

In Nevares, the Court of Appeals noted that previous court decisions have held that there is no protected property interest in a particular curriculum or in participation in interscholastic athletics.[44] In addition, the Court of Appeals noted that a transfer to a different school for disciplinary reasons has also been held not to support the federal court's jurisdiction on constitutional grounds.[45] The Court of Appeals concluded:

> "We recognize the importance of trust in confidence between students and school administrators. For that reason, the student and parents must be treated fairly and given the opportunity to explain why anticipated assignments may not be warranted. But that is for Texas and the local schools to do. We would not aid matters by relegating the dispute to federal litigation, and because the United States Constitution has not been offended in the present dispute, we retire from it."[46]

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suspension under Goss v. Lopez since the student's education is not interrupted and that absent such an interruption, a board of education is not required to comply with state statutes relating to suspension and expulsion.

[41] 111 F.3d 25, 117 Ed.Law Rep. 470 (5th Cir. 1997).

[42] Id. at 26.

[43] Id. at 26.

[44] Id. at 27. See, Arundar v. DeKalb County School District, 620 F.2d 493 (5th Cir. 1980); Walsh v. Louisiana High School Athletic Association, 616 F.2d 152 (5th Cir. 1980); Ryan v. CIF, 94 Cal.App.4th 1048 (2001).

[45] Ibid. See, Zamora v. Pomeroy, 639 F.2d 662, 669-70 (10th Cir. 1981).

[46] Id. at 27. See, also, Buchanan v. City of Bolivar, 99 F.3d 1352, 114 Ed.Law Rep. 25 (6th Cir. 1996); C.B. v. Driscoll, 82 F.3d 383, 108 Ed.Law Rep. 1126 (11th Cir. 1996).

In Ponce v. Socorro Independent School District,[47] the Fifth Circuit Court of Appeals held that a student's speech that threatened a Columbine-style attack on a school was not protected by the First Amendment. The Court of Appeals held that the student did not have standing to challenge the ability of a school to transfer the student to an alternative education program based on the content of his journal and upheld the actions of the school district.[48]

In California, the courts have applied the due process rights set forth in Goss v. Lopez.[49] In Granowitz v. Redlands Unified School District, the California Court of Appeal applied Goss v. Lopez to students facing temporary suspensions and held that a full evidentiary hearing for suspensions of 10 days or less was not required.[50]

In California, there are no specific statutes authorizing involuntary transfers from one comprehensive high school to another or from one comprehensive elementary or middle school to another. Education Code section 48900(v) authorizes a superintendent or principal to use discretion to provide alternatives to expulsion, but no process is provided.

However, Education Code section 48432.5 authorizes the governing board of each high school or unified school district which assigns students to continuation schools to adopt rules and regulations governing procedures for the involuntary transfer of pupils to continuation schools. Such rules and regulations must provide that written notice be given to the pupil and the pupil's parent or guardian informing them of the opportunity to request a meeting with a designee of the district superintendent prior to the transfer. At the meeting, the pupil or the pupil's parent or guardian shall be informed of the specific facts and reasons for the proposed transfer and shall have the opportunity to inspect all documents relied upon, question any evidence and witnesses presented, and present evidence on the pupil's behalf. The pupil may designate one or more representatives and witnesses to be present with him or her at the meeting.

A decision to transfer the pupil involuntarily shall be based on a finding that the pupil committed a violation of Education Code section 48900, which lists the grounds for suspension and expulsion or has been habitually truant or irregular in attendance and instruction upon which he or she is lawfully required to attend. The decision to transfer shall be in writing, stating the facts and reasons for the decision, and sent to the pupil and the pupil's parent or guardian. It shall indicate whether the decision is subject to periodic review and the procedure therefor.

None of the persons involved in the final decision to make an involuntary transfer of a student to a continuation school shall be a member of the staff of the school in which the pupil is enrolled at the time that the decision is made. A pupil, with the concurrence of a designee of the district superintendent, may transfer voluntarily to a continuation school in order to receive special attention such as individualized instruction. Involuntary transfer to a continuation school shall be imposed only when other means fail to bring about pupil improvement. However, a pupil may be involuntarily transferred the first time if he or she commits an act enumerated in

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[47] 508 F.3d 765, 227 Ed.Law Rep. 561 (5th Cir. 2007).

[48] Id. at 768. See, also, Heyne v. Metropolitan Nashville Public Schools, 655 F.3d 556, 272 Ed.Law Rep. 805 (6th Cir. 2011); Swindle v. Livingston Parish School Board, 655 F.3d 386, 272 Ed.Law Rep. 779 (5th Cir. 2011).

[49] See, Granowitz v. Redlands Unified School District, 105 Cal.App.4th 349, 129 Cal.Rptr.2d 410 (2003).

[50] Id. at 354-56.

Education Code section 48900, if the principal determines that the pupil's presence causes a danger to persons or property or threatens to disrupt the instructional process.

No involuntary transfer to a continuation school shall extend beyond the end of the semester following the semester during which the acts leading directly to the involuntary transfer occurred unless the local governing board adopts a procedure for yearly review of the involuntary transfer conducted pursuant to Section 48432.5 at the request of the pupil or the pupil's parent or guardian. A pupil who has voluntarily transferred to a continuation school shall have the right to return to the regular high school at the beginning of the following school year and with the consent of a designee of the district superintendent, may return at any time. In summary, we would recommend that school districts give oral or written notice of the charges to students and, if the student denies the charges, an opportunity to present their side of the story. If the student is being transferred to a continuation school, then the statutory requirements of Education Code section 48432.5, discussed above, and board policy should be followed.

In Nathan G. v. Clovis Unified School District,[51] the Court of Appeal upheld the involuntary transfer of Nathan G. from Clovis High School to a continuation school pursuant to Education Code section 48432.5. The Court of Appeal turned down the student's appeal requesting the court to order the school district to set aside the transfer, expunge any mention of the transfer from his academic records, and to reinstate him at Clovis High School.

On November 17, 2011, Nathan G., then a senior at Clovis High School, was suspended after he admitted to school officials that he and other students had smoked marijuana prior to their arrival on campus in violation of Education Code sections 48900(c) and 48900(k). In a letter dated November 17, 2011, Nathan G.'s parents were informed of the school district's decision to recommend involuntary transfer to continuation school.[52]

On November 30, 2011, Nathan G. and his parents met with school administrators and Nathan G. again admitted he had smoked marijuana on November 17, 2011. In addition, the administrative record indicated that Nathan G. was involved in an alcoholic-related incident one month earlier.[53]

In a written decision dated November 30, 2011, Clovis High School found that Nathan G. had violated Education Code section 48900, and other means had failed to bring about pupil improvement. The school district also concluded that Nathan G.'s presence at Clovis High School caused a danger to persons or property that threatened to disrupt the instructional process. The school district then transferred Nathan G. involuntarily to continuation school for the remainder of the school year.[54]

The involuntary transfer of students is governed by Education Code section 48432.5. The Court of Appeal noted that Education Code section 48432.5 uses the word "meeting" in a broad sense and notes that a pupil's parent or guardian has the opportunity to request a meeting

[51] 224 Cal.App.4th 1393, 169 Cal.Rptr.3d 588, 302 Ed.Law Rep. 1181 (2014).

[52] Id. at 1397-98.

[53] Id. at 1398.

[54] Id. at 1399.

with the superintendent's designee prior to the transfer. At the meeting, the pupil or the pupil's parents must be informed of the specific facts and reasons for the proposed transfer and have the opportunity to inspect all documents relied upon, questioning evidence and witnesses presented, and present evidence on the pupil's behalf. The court noted that the school district may not deny the parent the opportunity for a meeting and concluded that the court must review the involuntary transfer proceedings pursuant to Code of Civil Procedure section 1094.5.[55]

The Court of Appeal rejected the student's argument that the school district was required to attempt all other means before involuntarily transferring a student. The Court of Appeal noted that Section 48432.5 states, "Involuntary transfer to a continuation school shall be imposed only when other means fail to bring about pupil improvement." The Court of Appeal held that "other" does not mean "all" and stated, "The plain language of the statute does not require a school or district to exhaust all other corrective means before it could suspend or expel a student."[56] The same standard applies to involuntary transfers.

The Court of Appeal further held that while there is a fundamental right of equal access to public education and the right to public education is a fundamental right under the California Constitution, the involuntary transfer to a continuation school under Education Code section 48432.5 does not violate the right to a public education. In contrast, the Court of Appeal held that a suspension or expulsion denies access to public education while an involuntary transfer does not.[57]

In summary, the Court of Appeal upheld the right of school districts to involuntarily transfer students pursuant to Education Code section 48432.5.[58]

Assembly Bill 570[59] added Education Code section 48432.3, effective January 1, 2014.

Education Code section 48432.3(a) states that if the governing board of a school district chooses to voluntarily enroll high school pupils in a continuation school, the governing board of the school district shall establish and adopt policies and procedures governing the identification, placement, and intake procedures for these pupils. These policies and procedures shall ensure that there is a clear criterion for determining which pupils may voluntarily transfer or be recommended for a transfer to a continuation school, and that this criterion is not applied arbitrarily, but is consistently applied on a district-wide basis. Approval for the voluntary transfer of a pupil to a continuation school shall be based on a finding that the voluntary placement will promote the educational interests of the pupil.

Education Code section 48432.3(b) states that the policies and procedures adopted pursuant to Section 48432.3 shall also ensure the following:

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[55] Id. at 1401.
[56] Id. at 1403.
[57] Id. at 1404-05.
[58] Id. at 1405-06.
[59] Stats. 2013, ch. 365.

1. The voluntary placement in a continuation school shall not be used as an alternative to expulsion unless alternative means of correction have been attempted pursuant to Education Code section 48900.5.

2. The policies and procedures shall strive to ensure that no specific group of pupils, including a group based on race, ethnicity, language status, or special needs, is disproportionately enrolled in continuation schools within the school district.

3. If the governing board of a school district chooses to permit pupils to voluntarily transfer to a continuation school, a copy of the policies and procedures adopted under Section 48432.3 shall be provided to a pupil whose voluntary transfer to a continuation school is under consideration, and to the parent or legal guardian of that pupil.

4. That the transfer is voluntary and the pupil has a right to return to his or her previous school.

5. Upon a parent or legal guardian's request and before a pupil is transferred, the parent or legal guardian may meet with a counselor, principal, or administrator from both the transferor school and the continuation school to determine if transferring is the best option for the pupil.

6. To the extent possible, voluntary transfer to a continuation school occurs within the first four weeks of each semester.

The provisions of Education Code section 48423.3 should be read in conjunction with Education Code section 48432.5. Section 48423.3 applies to voluntary enrollment of students in continuation schools or voluntary transfers of students to continuation schools. Section 48432.5 applies to involuntary transfers of students to continuation schools for disciplinary reasons or truancy.

Senate Bill 1111,[60] effective January 1, 2015, amends several sections of the Education Code regarding county community schools and the involuntary transfer process for pupils. In addition, SB 1111 amends Education Code section 48918 with regard to situations where expulsion is not recommended after a hearing.

SB 1111 deletes the references to homeless students in Education Code sections 1981 and repeals 1981.2. Therefore, referrals to county community schools can no longer be made on the basis of homelessness. Districts should review and update policies accordingly.

[60] Stats. 2014, Ch. 837.

Under SB 1111, students who are expelled may still be enrolled in county community schools.[61] Under Education Code section 1981.5(a), a pupil involuntarily enrolled in a county community school after an expulsion for any reason shall have the right to reenroll in his or her former school or another comprehensive school immediately after being readmitted from the expulsion order. Nothing in this section is intended to limit the school placement options that a school district may recommend for a pupil being readmitted.[62] Subsection (b) notes that only the governing board of the school district that issued the initial order or subsequent order to expel may extend the duration of an expelled pupil's placement in a county community school, in accordance with Education Code section 48916.[63]

Education Code section 1981(b) is amended with regard to SARB referrals to community schools. SB 1111 will require the school district and county office of education to determine the following prior to referring a pupil:

1. The county community school has space available to enroll the pupil.

2. The county community school meets the educational needs of the pupil.

3. The parent, guardian, or responsible adult of the pupil has not expressly objected to the referral based on one or more of the following reasons:

    a. Reasonable concerns related to the pupil's safety.

    b. Geographic accessibility.[64]

    c. Inability to transport.

    d. The school does not meet the pupil's educational needs.[65]

For objections from the parent, guardian, or responsible adult, the school district may require the objection to be in writing if it has advised the parent, guardian, or responsible adult

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61 Ed. Code sections 1981 (a), 1981.5 (a).

62 Ed. Code section 1981.5 (a).

63 If a student would wish to continue in the community school placement, the District could offer a voluntary transfer, with parent/guardian/responsible adult consent, pursuant to Education Code section 1981 (d).

64 For purposes of this section, "geographically accessible" means that the pupil can reasonably travel to and from the school and is able to pay for any transportation costs that are above and beyond the costs to attend his or her school of residence or prior school, whichever is farther away. Ed. Code section 1981 (f). If the county community school recommended by a SARB is not geographically accessible to the pupil, the school attendance review board shall also include in its recommendation a school option for the pupil that is geographically accessible to the pupil and meets the criteria specified above. Ed. Code section 1981 (b) (2).

65 Ed. Code section 1981 (b) (1).

that they may object, in writing, for one of these reasons.[66] Therefore, districts might consider developing a notice letter to address these components. In response to an objection based on any of the four reasons described above, the school district may either address the express objection or find an alternative placement in another comprehensive or continuation school within the school district. Under SB 1111, if the school district has offered the pupil "all other options," the school district may refer the pupil to the county community school.[67]

Finally, SB 1111 provides that the pupil has the right to return to his or her prior school or another appropriate school within his or her school district at the end of the semester following the semester when the acts leading to referral occurred. The right to return shall continue until the end of the pupil's 18th year of age, except that a pupil with exceptional needs shall have the right to return until he or she turns 22 years of age.[68]

Under SB 1111, referrals to community schools by Probation under Education Code section 1981 (c) will require a number of additional steps.[69] Education Code section 1981 (c) (1) (A) provides that a pupil who is on probation, with or without the supervision of a probation officer and consistent with an order of a juvenile court, who are considered to be wards of the court[70] and ordered placed[71] may be referred to a county community school.

Education Code section 1981 (c) (1) (B) provides for a referral if the pupil is under the supervision of a probation officer[72] only with the consent of the minor and the minor's parent or guardian. Under Education Code section 1981 (c) (1) (C), for pupils under the supervision of a probation officer pursuant to Welfare and Institutions Code sections 726 and 727 (a) (3),[73] the referrals will also require the consent of the pupil's parent, guardian, or responsible adult appointed by the juvenile court to make educational decisions for the pupil. Enrollment under this section is subject to the requirement that all educational and school placement decisions shall seek to ensure that the youth:

1. Is in the least restrictive educational program;

2. Has access to the academic resources, services, and

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[66] Ed. Code section 1981 (b) (1) (C) (ii).

[67] Ed. Code section 1981 (b) (3).

[68] Ed. Code section 1981 (b) (4).

[69] Unless specifically ordered by a juvenile court, nothing in this subdivision shall be construed to conflict with the existing rights of a parent, guardian, or responsible adult appointed by the juvenile court pursuant to Section 726 of the Welfare and Institutions Code to make educational placement decisions for the minor. Ed. Code section 1981 (c) (1) (D).

[70] "Wards of the court" references Welfare and Institutions Code sections 601, 602. Section 601 applies to a minor who "persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parents, guardian, or custodian, or who is beyond the control of that person," violates a curfew ordinance, has four or more truancies within one school year, or is referred by a SARB or probation officer. Section 602 applies to a minor who violates any law except for murder or specified sex crimes.

[71] "Ordered placed" references Welfare and Institutions Code sections 725, 727 (a) (2), 729.2, and 791.

[72] This section refers to supervision by Probation pursuant to Welfare and Institutions Code section 654.

[73] Welfare and Institutions Code sections 726 sets forth criteria for placement out of the home for a minor as well as limitation of parental rights. Welfare and Institutions Code section 727 (a) (3) provides for a court to order the care, custody, and control of the minor or nonminor to be under the supervision of the probation officer who may place the minor or nonminor in specified placements.

extracurricular and enrichment activities that are available to all pupils, and

3. Are based on the best interests of the child.[74]

In addition, referrals by probation officers under the above two sections (Education Code section 1981 (c) (1) (B) and (c) (1) (C)) are also subject to the following:

1. The attorney for, or the person holding the educational rights of, a pupil who is under the jurisdiction of the delinquency court may use the procedures set forth in California Rule of Court 5.651 to address any change of placement that results in the enrollment of the pupil in a county community school that is not his or her school of origin.

2. The attorney or the person holding the educational rights appointed by the court for a pupil who is under the jurisdiction of the delinquency court may, during a regularly scheduled hearing, raise any concerns with respect to whether the enrollment of the pupil in a county community school is meeting the educational needs of the pupil.

3. Nothing in this subparagraph is intended to limit in any way the rights or responsibilities of any person as set forth in paragraph (2) of subdivision (c) of Section 726 of the Welfare and Institutions Code and California Rule of Court 5.651.[75]

Under Education Code section 1981 (c) (2), probation officers may refer students who are on probation or parole and not in attendance at any school, if enrollment is with the consent of the parent, guardian, or responsible adult, or the pupil, if he or she is 18 years of age or older.[76]

For all probation referrals to county community schools, the referrals must be consistent with Education Code section 48645.5 (b).[77]

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74 Ed. Code section 1981 (c) (1) (C).

75 Ed. Code section 1981 (c) (1) (E).

76 Ed. Code section 1981 (c) (2) further states that "Nothing in this subdivision shall impact the provision of services or funding for youth up to 25 years of age pursuant to subdivision (b) of Section 1982, as that section read on September 25, 2013.

77 Ed. Code section 1981 (c) (4). Education Code section 48645.5 provides:
(a) Each public school district and county office of education shall accept for credit full or partial coursework satisfactorily completed by a pupil while attending a public school, juvenile court school, or nonpublic, nonsectarian school or agency. The coursework shall be transferred by means of the standard state transcript. If a pupil completes the graduation requirements of his or her school district of residence while being detained, the school district of residence shall issue to the pupil a diploma from the school the pupil last attended before detention or, in the alternative, the county superintendent of schools may issue the diploma.

Education Code section 1981 (d), as amended, provides that school districts may approve voluntary transfers to pupils whose parent, guardian, or responsible adult requested enrollment in a county community school under the following conditions:

1. A pupil shall not be enrolled in a county community school unless the school district determines that the placement will promote the educational interests of the pupil and the county community school has space available to enroll the pupil.

2. A parent, guardian, or responsible adult of a pupil enrolled in a county community school may rescind the request for the placement, and the pupil shall be immediately reenrolled in the school that the pupil attended at the time of the referral, or, with the consent of the parent, guardian, or responsible adult, another appropriate school.

SB 1111 amendments reference existing provisions to ensure programmatic needs of students enrolled in county community schools are met. Education Code section 1981 (e) provides that procedures outlined in Education Code section 51225.2 (b) through (e) govern the transfer of credits, records, including special education records, and grades must be followed.[78] For transfers to and from county community schools, each school district and county office of education shall accept for credit full or partial coursework satisfactorily completed by a pupil while attending a public school, juvenile court school, or nonpublic, nonsectarian school or agency. Coursework shall be transferred by means of the standard state transcript. If a pupil completes the graduation requirements of his or her school district of residence while being detained, the school district of residence shall issue to the pupil a diploma from the school the pupil last attended before detention or, in the alternative, the county superintendent of schools

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(b) A pupil shall not be denied enrollment or readmission to a public school solely on the basis that he or she has had contact with the juvenile justice system, including, but not limited to:
(1) Arrest.
(2) Adjudication by a juvenile court.
(3) Formal or informal supervision by a probation officer.
(4) Detention for any length of time in a juvenile facility or enrollment in a juvenile court school.

[78] Ed. Code section 51225.2 provides:
(b) Notwithstanding any other law, a school district and county office of education shall accept coursework satisfactorily completed by a pupil in foster care while attending another public school, a juvenile court school, or a nonpublic, nonsectarian school or agency even if the pupil did not complete the entire course and shall issue that pupil full or partial credit for the coursework completed.
(c) The credits accepted pursuant to subdivision (b) shall be applied to the same or equivalent course, if applicable, as the coursework completed in the prior public school, juvenile court school, or nonpublic, nonsectarian school or agency.
(d) A school district or county office of education shall not require a pupil in foster care to retake a course if the pupil has satisfactorily completed the entire course in a public school, a juvenile court school, or a nonpublic, nonsectarian school or agency. If the pupil did not complete the entire course, the school district or county office of education shall not require the pupil to retake the portion of the course the pupil completed unless the school district or county office of education, in consultation with the holder of educational rights for the pupil, finds that the pupil is reasonably able to complete the requirements in time to graduate from high school. When partial credit is awarded in a particular course, the pupil in foster care shall be enrolled in the same or equivalent course, if applicable, so that the pupil may continue and complete the entire course.
(e) A pupil in foster care shall not be prevented from retaking or taking a course to meet the eligibility requirements for admission to the California State University or the University of California.

may issue the diploma.[79] Education Code section 1981 (e) further references Education Code section 49068, which requires the transfer of the permanent record no later than ten schooldays following the date the request is received.[80]

Education Code section 1983 (a) states that "Pupils enrolled in county community schools shall be assigned to classes or programs deemed most appropriate for reinforcing or reestablishing educational development." Section 1983 (b) provides that these classes or programs include but are not limited to "basic educational skill development, on-the-job training, school credit recovery assistance, tutorial assistance, and individual guidance activities." With regard to independent study, Education Code section 1983 (c) requires that independent study must satisfy the individually planned educational program and meet all requirements of independent study programs, including voluntary participation.[81] Education Code section 1983 (f) requires compliance with applicable federal and state laws and regulations regarding special education, and section 1983 (g) requires compliance with applicable state and federal laws and regulations regarding services and programs for English learners.

CODE OF CONDUCT FOR STUDENT ATHLETES

California law allows school districts to impose additional rules of conduct for student athletes and students participating in extracurricular activities. Students may be disciplined and/or removed from extracurricular activities for violations of Section 48900 of the Education Code and for violating additional rules adopted by the school district.

Education Code section 48900 sets forth the grounds for suspension and expulsion of students. Education Code sections 35291, 35291.5, and 35179 give school districts broad authority over extracurricular activities. Education Code section 35291 authorizes the governing board of any school district to prescribe rules for student behavior and to notify the parent or guardian of all pupils of the availability of the rules of the district pertaining to student discipline. Education Code section 35291.5 sets forth a procedure for participation of parents, teachers, and school administrators in the drafting of school discipline rules.

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[79] Ed. Code section 48645.5 (a).

[80] Education Code section 49068 states: (a) The Legislature finds and declares that the academic record of a transferring pupil is essential to the pupil's placement, academic success, and timely graduation. The Legislature further finds and declares that an accurate, updated pupil record enhances school safety, academic achievement, and pupil welfare when the record of a transferring pupil includes transcripts, immunization records, and, when applicable, suspension notices, expulsion records, and individualized education programs.
(b) If a pupil transfers from one public school to another or to a private school, or transfers from a private school to a public school within the state, the pupil's permanent record or a copy of it shall be transferred by the former public school or private school no later than 10 schooldays following the date the request is received from the public school or private school where the pupil intends to enroll.
(c) As used in this section, "schoolday" means a day upon which the school is in session or nonholiday weekdays during the summer break.
(d) A public school requesting a transfer of a record pursuant to this section shall notify the parent of his or her right to receive a copy of the record and a right to a hearing to challenge the content of the record.
(e) The state board may adopt rules and regulations concerning the transfer of records.
(f) Nothing in this section shall supersede any other state or federal law governing the transfer of pupil records for specific pupil populations, including, but not limited to, Sections 49069.5 and 56043.

[81] Ed. Code section 51745 *et seq.*

Education Code section 35179(a) states:

> "Each school district governing board shall have general control of, and be responsible for, all aspects of the interscholastic athletic policies, programs, and activities in its district, including, but not limited to, eligibility, season of sport, number of sports, personnel, and sports facilities. In addition, the board shall ensure that all interscholastic policies, programs, and activities in its district are in compliance with state and federal law."

The courts have held that participation in extracurricular activities is not a protected right guaranteed under the United States or California Constitution.[82] Rather, ". . . the opportunity to participate in interscholastic . . . activity is a privilege. . . ."[83]

Therefore, students may be removed from participation in extracurricular activities for violations of Education Code section 48900 and school rules adopted for student athletes. However, parents and students must be given notice of the rules and the rules should be sufficiently clear so that parents and students are on notice as to what conduct is prohibited.

GROUNDS FOR SUSPENSION AND EXPULSION

Pursuant to Education Code section 48900, a student may not be suspended or recommended for expulsion unless the superintendent or the principal determines that the student has committed any one or more of the following acts:

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;

3. Possessed, sold, or otherwise furnished any firearm, knife, explosive, or other dangerous object unless, in the case of possession of any such object, the student had obtained written permission from a certificated school employee, which is concurred in by the principal or designee of the principal;[84]

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[82] Steffes v. California Interscholastic Federation, 176 Cal.App.3d 739, 222 Cal.Rptr. 355 (1986).

[83] Ryan v. California Interscholastic Federation-San Diego Section, 94 Cal.App.4th 1048, 1061, 114 Cal.Rptr.2d 798 (2001).

[84] In In Re Z.R., 168 Cal.App.4th 1510, 86 Cal.Rptr.3d 495 (2008), the Court of Appeal ruled that a minor violated Penal Code section 626.10 when he was found with a box cutter that had a razor exposed on school property. The juvenile court found a violation of Penal Code section 626.10 and adjudged the minor a ward of the court and ordered probation, with various terms and conditions. In the student discipline context, under the Education Code, Education Code section 48900 broadly prohibits firearms, knives, explosives or other dangerous objects. Clearly, a box cutter with an exposed blade would constitute a dangerous object under Education Code section 48900(b) and a student could be suspended or expelled, as well as referred to juvenile authorities for prosecution under Penal Code section 626.10.

4. Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of any 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;

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

6. Committed or attempted to commit robbery or extortion;

7. Caused or attempted to cause damage to school property or private property;

8. Stolen or attempted to steal school property or private property;

9. Possessed or used tobacco, or any products containing tobacco or nicotine products, including, but not limited to cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets and betel;[85]

10. Committed an obscene act or engaged in habitual profanity or vulgarity;

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

12. 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;[86]

13. Knowingly received stolen school property or private property;

[85] Education Code section 48901 expands the definition of tobacco to include electronic cigarettes, pipes, cigars, and hookah. See, also, Business and Professions Code section 22950.5

[86] This grounds may not be used for a student expulsion and may only be used for a student suspension for students in grades 4-12.

14. Possessed an imitation firearm. "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;[87]

15. Committed or attempted to commit a sexual assault as defined in Sections 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;[88]

16. Harassed, threatened, or intimidated a student who is a complaining witness or witness in a school disciplinary proceeding for the purpose of either preventing that student from being a witness or retaliating against that student for being a witness, or both;

17. Unlawfully offered, arranged to sell, or sold the prescription drug Soma or

18. Engaged in, or attempted to engage in, hazing as defined in Penal Code section 245.6(b).[89]

19. Engaged in an act of bullying, including, but not limited to, bullying committed by an electronic act.[90]

20. 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 Section 48900,

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[87] As an example, Penal Code section 16700 defines a BB gun as an "imitation firearm."

[88] With regard to sexual assault, the cited Penal Code sections criminalize the following acts: rape (Pen. Code, § 261), "unlawful sexual intercourse" (Pen. Code. § 266(c)), sodomy (Pen. Code § 286), lewd or lascivious acts with a child under age 14 (Pen. Code, § 288), oral copulation (Pen. Code, § 288(a)), and penetration of genital or anal openings by foreign or unknown objects (Pen. Code, § 289). Penal Code section 243.4 provides that the following acts constitute "sexual battery": (a) touching an intimate part of another person while that person is unlawfully restrained; (b) touching an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, (c) causing a person to masturbate or touch an intimate part of either the accused or a third person, if the victim is institutionalized for medical treatment and is seriously disabled or medically incapacitated; (d) causing another, against that person's will while that person is unlawfully restrained either by the accused or an accomplice, or is institutionalized for medical treatment and is seriously disabled or medically incapacitated, to masturbate or touch an intimate part of either of those persons or a third person, (e) touching an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse. See Attachment #14.

[89] Penal Code section 245.6(b) states: "(b) "Hazing" means any method of initiation or preinitiation into a student organization or student body, whether or not the organization or body is officially recognized by an educational institution, which is likely to cause serious bodily injury to any former, current, or prospective student of any school, community college, college, university, or other educational institution in this state. The term "hazing" does not include customary athletic events or school-sanctioned events."

[90] Ed. Code section 48900(r).

> except that a pupil who has been adjudged by a juvenile court to have committed, as an aider or 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 Section 48900(a).[91]

As of January 1, 2016, bullying as a cause for student discipline is defined as follows:

> 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 or 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, video, or image.
>
> (ii) A post on a social network Internet Web site, including, but not limited to:

[91] See, Ed. Code section 48900(t). Penal Code section 31 requires that the persons charged with aiding and abetting have knowledge of the wrongful purpose of the perpetrator. Under California law, a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice, aids, promotes, encourages, or instigates the commission of the crime. See, In Re Malcolm M., 147 Cal.App.4th 157, 54 Cal.Rptr.3d 74 (2007).

(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.

(iii) An act of cyber sexual bullying.

(I) For purposes of this clause, "cyber sexual bullying" means the dissemination of, or the solicitation or incitement to disseminate, a photograph or other visual recording by a pupil to another pupil or to school personnel by means of an electronic act that has or can be reasonably predicted to have one or more effects described in subparagraphs (A) to (D), inclusive, of paragraph (1). A photograph or other visual recording, as described above, shall include the depiction of a nude, semi-nude, or sexually explicit photograph or other visual recording of a minor where the minor is identifiable from the photograph, visual recording, or other electronic act.

(II) For purposes of this clause, "cyber sexual bullying" does not include a depiction, portrayal, or image that has any serious literary, artistic, educational, political, or scientific value or that involves athletic events or school-sanctioned activities.

(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.

A student in grades 4-12 may be suspended or recommended for expulsion pursuant to Education Code section 48900.4 if the superintendent or principal determines that the student has intentionally engaged in harassment, threats, or intimidation, directed against a student or a

group of students, or school district personnel, 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 that student or group of students by creating an intimidating or hostile educational environment. A student may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the student is enrolled determines that the student has made terroristic threats against school officials or school property, or both.[92]

"Terroristic threat" includes any statement, whether written or oral, by a person who willfully threatens to commit a crime which will result in death, great bodily injury to another person, or property damage in excess of one thousand dollars ($1,000), with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, or for the protection of school district property, or the personal property of the person threatened or his or her immediate family.[93]

Of these elements, the most difficult to prove may be specific intent that the statement is to be taken as a threat, as it is not always clear what the intent of an individual is or was, and proving that the threat is "unequivocal, unconditional, immediate, and specific" and has "an immediate prospect of execution." Specific intent is often determined from testimony, written statements, and contemporaneous writings (such as social media posts) by the accused party and witnesses. For unequivocal, immediate, and specific nature of the threat, fact-finders will look to testimony, witness statements and contemporaneous writings (such as planning documents) as well as other information such as timing of the threat and whether the student had the means to carry out the threat.

The above acts must relate to school activity or school attendance within the school district or another school district which occur at any time, including, but not limited to:

1. While on school grounds;

2. While going to or coming from school;

3. During the lunch period, whether on or off campus; or

4. During, or while going to or coming from, a school sponsored activity.[94]

The governing board of each school district may regulate the possession or use of any electronic signaling device, such as pagers, by students while the students are on campus,

[92] Ed. Code section 48900.7.

[93] Ibid.

[94] Ed. Code section 48900(r).

attending school-sponsored activities, or under the supervision of school district employees.[95] For students who are truant, tardy, or otherwise absent from assigned school activities, all reasonably available alternatives to suspension are to be implemented. Education Code section 48900. These alternatives may include the assignment of a failing grade pursuant to rules and regulations adopted by the governing board pursuant to Education Code section 49067.

DEFINITION OF SEXUAL HARASSMENT

Education Code section 212.5[96] defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone in the education setting under any of the following conditions:

(a) Submission to the conduct is explicitly or implicitly made a term or a condition of the individual's employment, academic status or progress.

(b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.

(c) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.

(d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

DEFINITION OF SEXUAL ASSAULT

Education Code section 48900(n) states that a student may be suspended or expelled for committing or attempting to commit a sexual assault as defined in Penal Code sections 261, 266c, 286, 288, 288a, or 289. Penal Code section 261 defines rape[97] as a general intent crime and requires only the perpetrator's criminal intent to commit sexual intercourse without the other person's consent or to commit the act against the will of the victim. The requisite criminal intent is the intent to do the prohibited act. Such intent may be inferred from all the facts and circumstances disclosed by the evidence and is proven by acts, conduct, and circumstances connected with the offense.[98] The crimes that are includable in the crime of rape by force and

[95] Ed. Code section 48901.5.

[96] The statutory language of Education Code section 212.5 is set forth in Attachment 1.

[97] The statutory language of Penal Code section 261 is set forth in Attachment 1.

[98] 18 Cal.Jur.3d Criminal Law: Crime Against a Person, Section 524, Page 75.

violence are the crimes of assault with intent to commit rape, simple assault, battery, and an attempt to commit rape.[99]

Penal Code section 266c[100] defines unlawful sexual intercourse as a crime in which a person induces another person to engage in sexual intercourse, sexual penetration, oral copulation, or sodomy when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear and which does induce fear.

Penal Code section 286[101] defines sodomy as sexual conduct consisting of contact between the penis of one person and the anus of another person. Penal Code section 288[102] defines lewd or lascivious acts as any person who commits specified acts with a child who is under the age of 14 years.

Penal Code section 288a[103] defines oral copulation as an act of copulating in the mouth of one person with the sexual organ or anus of another person. Penal Code section 289[104] defines forcible acts of sexual penetration as an act that is accomplished against the victim's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person.

DEFINITION OF SEXUAL BATTERY

Education Code section 48900(n) makes committing sexual battery as defined in Penal Code section 243.4[105] a suspendable or expellable offense. Penal Code section 243.4 defines sexual battery as the (a) touching an intimate part of another person while that person is unlawfully restrained; (b) touching an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, (c) causing a person to masturbate or touch an intimate part of either the accused or a third person, if the victim is institutionalized for medical treatment and is seriously disabled or medically incapacitated; (d) causing another, against that person's will while that person is unlawfully restrained either by the accused or an accomplice, or is institutionalized for medical treatment and is seriously disabled or medically incapacitated, to masturbate or touch an intimate part of either of those persons or a third person, (e) touching an intimate part of another person, if the touching is against the will of the person touched, and the touching is for the purpose of sexual arousal, sexual gratification, or sexual abuse.

Both Education Code section 48900(n) and 48915(c)(4) make it an expellable offense if the student committed or attempted to commit a sexual assault or sexual battery. Education Code section 48915(c)(4) refers to Education Code section 48900(n) when it refers to sexual assault or sexual battery.

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[99] 18 Cal.Jur.3d Criminal Law: Crime Against a Person, Section 530, Page 89.

[100] The statutory language of Penal Code section 266c is set forth in Attachment 1.

[101] The statutory language of Penal Code section 286 is set forth in Attachment 1.

[102] The statutory language of Penal Code section 288 is set forth in Attachment 1.

[103] The statutory language of Penal Code section 288a is set forth in Attachment 1.

[104] The statutory language of Penal Code section 289 is set forth in Attachment 1.

[105] The statutory language of Penal Code section 243.4 is set forth in Attachment 1.

However, the scope of Education Code section 48915(c)(4) is more limited than Section 48900(n). In order to expel a student under Section 48915(c), the principal or superintendent of schools must determine that the offense was committed at school or at a school activity off school grounds.

Under Education Code section 48900(s), the act must be related to school activity or school attendance. Under Education Code section 48900(s), a pupil may be suspended or expelled for the acts that are enumerated in Section 48900 and related to school activity or attendance that occurred at any time, including, but not limited to, any of the following:

(a) While on school grounds.

(b) While going to or coming from school.

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

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

DEFINITION OF OBSCENE ACT

Certainly, sexual assault and sexual battery would constitute an obscene act. However, the term obscene act which is not defined in the Education Code is much broader. Merriam Webster's Collegiate Dictionary, Eleventh Edition (2008), defines obscene as disgusting to the senses, repulsive, abhorrent to morality or virtue designed to incite to lust or depravity, containing or using language regarded as taboo in political usage, repulsive by reasons of crass disregard of moral or ethical principles, so excessive as to be offensive.

Under California law such offenses as indecent exposure and sexual exploitation of minors are considered obscene conduct or obscene acts which are punishable by law. Child pornography and distribution of child pornography could also be included under obscene acts under California law.[106]

CONSENT IN SEXUAL ASSAULT CASES

Sexual assault or forcible rape is generally defined as an act of sexual intercourse accomplished against the victim's will by force or threat or the continuation of an act of sexual intercourse after the victim withdraws consent. The courts have established specific principles with respect to the issue of consent involving cases of rape, sexual assault or sexual battery.[107]

In People v. Williams,[108] the California Supreme Court held that there are two components, one subjective and objective under the People v. Mayberry case. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believe that

[106] 18 Cal.Jur.3d Criminal Law: Crimes Against a Person Sections 761-766 Pages 417-436.

[107] See People v. Mayberry, 15 Cal.3d 143, 125 Cal.Rptr. 745 (1975).

[108] 4 Cal.3d 354, 14 Cal.Rptr.2d 441 (1992).

the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was a concern.[109]

Consent for purposes of rape prosecutions as defined as "positive cooperation, an act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."[110]

In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a Mayberry instruction. The defendant must produce some evidence of the victim's equivocal conduct that lead the accused to reasonably believe that there was consent.[111]

In criminal procedures, the defendant bears the burden of raising a reasonable doubt as to whether he harbored a reasonable and good faith but mistaken belief of consent. In Mayberry, the California Supreme Court held that a requested instruction regarding mistake of fact was required when some evidence deserving of consideration existed to support the contention that there was a mistake of fact.

In People v. Flannel,[112] the California Supreme Court further explained that a trial court must give a request for instruction only when the defense is supported by substantial evidence that is evidence sufficient to deserve consideration by the jury, not whenever any evidence is presented, no matter how weak. Thus, in determining whether the Mayberry instruction should be given, the trial court must examine whether there is substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse.[113]

In People v. Williams, the California Supreme Court stated:

> "Thus, because of the Mayberry instruction is premised on mistake of fact, the instruction should not be given absent substantial evidence of equivocal conduct that would have lead a defendant to reasonably and in good faith believe consent existed where it did not….

[109] Id. at 360-61.

[110] Id. at 361. Note 6.

[111] Ibid.

[112] 25 Cal.3d 668, 684-685, 116 Cal.Rptr. 84 (1979).

[113] Ibid.

> "There was no substantial evidence of equivocal conduct warranting an instruction as to reasonable and good faith, but mistaken, belief of consent to intercourse."[114]

In People v. Williams, the California Supreme Court further stated the Mayberry instruction should not be given where a defendant asserts a claim of reasonable and good faith but mistaken belief and consent based on the victim's behavior after the defendant had exercised with threat and force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another. The Court stated:

> "The jury should, however, be further instructed, if appropriate, that a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.'"[115]

In People v. Roundtree,[116] the California Supreme Court held that the crime of rape therefore is necessarily committed when a victim withdraws her consent during an act of sexual intercourse but is forced to complete the act. The statutory requirements of the offense are met when the act of sexual intercourse is forcibly accomplished against the victim's will. The Court held that initial consent by the victim to the act of sexual intercourse is not determinative.[117]

In In re John Z.,[118] the California Supreme Court held that pursuant to Penal Code section 261(a)(2), forcible rape occurs when the act of sexual intercourse is accomplished against the will of the victim by force or threat of bodily injury and it is immaterial at what point the victim withdraws her consent so long as that withdrawal is communicated to the male and he thereafter ignores it.[119] The Court rejected the defendant's argument that the defendant should be given a reasonable time to withdraw after the female unequivocally withdraws consent. The Court found that the victim in this case told the defendant three times that she needed to go home and he did not accept her withdrawal of consent. The Court concluded, "Nothing in the language of Section 261 or the case law suggests that the defendant is entitled to persist in intercourse once his victim withdraws her consent."[120]

In People v. Stitely,[121] the California Supreme Court held that the mistake of fact defense has two components:

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[114] Id. at 362.
[115] Id. at 364.
[116] 77 Cal.App.4th 846, 91 Cal.Rptr.2d 921 (2000).
[117] Id. at 851.
[118] 29 Cal.4th 756, 128 Cal.Rptr.2d 783 (2003).
[119] Id. at 762.
[120] Id. at 763.
[121] 35 Cal.4th 514, 26 Cal.Rptr. 3d 1 (2005).

1. The defendant must have honestly and in good faith albeit mistakenly, believed that the victim consented to sexual intercourse. This subjective component involves evidence of equivocal conduct by the victim that the defendant mistook for consent.

2. The objective component ask whether the defendant's mistaken belief regarding consent was reasonable under the circumstances. In order to give such an instruction upon request, the trial court must find substantial evidence supporting each feature of the defense.[122]

In People v. Dominquez,[123] the California Supreme Court held that the Mayberry defense has two components, one subjective and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, the defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent.

In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe the person has consented to sexual intercourse that belief must conform to circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a Mayberry instruction. The right to a Mayberry instruction in the absence of a request thus depends on whether the defendant has proffered substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse.[124]

In summary, in criminal proceedings the offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the perpetrator forcibly continues despite the objection. Forcible rape occurs when the act of sexual intercourse is accomplished against the victim's will by force or threat of bodily injury and it is immaterial at what point the victim withdraws her consent, as long as that withdrawal is communicated to the male and he thereafter ignores it. Nothing in the language of the statute or the case law suggests that the male is entitled to persist in intercourse once his victim withdraws her consent. Also, the crime of rape is necessarily committed when a victim withdraws her consent during an act of sexual intercourse but is forced to complete the act. The act of sexual intercourse is forcibly accomplished against the victim's will and the outrage to the victim is complete.[125] How those standards used in criminal proceedings will be utilized in student discipline matters has not yet been determined by the courts.

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[122] Id. at 553-54.

[123] 39 Cal.4th 1141, 47 Cal.Rptr.3d 575 (2006).

[124] Id. at 1148.

[125] 18 Cal.Jur3d Criminal Law: Crimes Against the Person Section 539 Page 111.

POSSESSION OF A CONTROLLED SUBSTANCE

A. What Constitutes Possession

Education Code section 48900 authorizes the suspension or expulsion of a student who possess a firearm, knife, explosive, a dangerous object, a controlled substance, drug paraphernalia or an imitation firearm. In People v. Hutchinson,[126] the California Supreme Court held that unlawful possession of the illegal drugs is established by proof of:

1. The exercise of dominion and control over the contraband,

2. Knowledge of the presence of the contraband, and

3. Knowledge that the material was a narcotic.[127]

Possession may be in the student's hands, clothes, backpack, purse, bag or other container.[128] Having the object for even a limited time and purpose constitutes possession.[129] Brief possession solely for the purpose of disposing of the drugs, firearms or other objects is not unlawful, including transferring the object to law enforcement officers or other proper authorities such as school administrators.[130]

In a 1997 opinion,[131] the Attorney General noted that if a student was handed a firearm by another student, brings it to a restroom, and abandons the firearm, the student could be expelled under Education Code section 48900 or 48915, unless the sole purpose of the brief possession of the firearm was to dispose of it. If a student places a firearm in the backpack of another student, tells the other student of the firearm's location, and the other student returns the firearm an hour later wrapped in a coat, both students have sufficient possession to constitute a violation of Section 48900 or 48915. Since no intention to dispose of the firearm could be asserted based on these facts, the Attorney General concluded that if a student accepts a firearm from another student, 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 the firearm by handing it to school officials, the student "possesses" the firearm regardless of the length of time involved and may be expelled under Education Code section 48900 or 48915.[132]

The Attorney General concluded:

> "We conclude . . . 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

[126] 71 Cal.2d 342, 455 P.2d 132, 78 Cal.Rptr. 196 (1969).

[127] Id. at 345.

[128] People v. Sills, 156 Cal.App.2d 618, 622 (1958).

[129] People v. Neese, 272 Cal.App.3d. 235, 245 (1969).

[130] People v. Mijares, 6 Cal.3d. 415 (1971); People v. Cole, 202 Cal.App.3d 1439 (1988).

[131] 80 Ops.Cal.Atty.Gen. 91 (1997).

[132] Id. at 94.

> firearm . . . or where the possession is brief and solely for the purpose of disposing of the firearm such as handing it to school officials."[133]

The above discussion gives some general guidance with regard to possession of drugs or firearms or other dangerous objects. The facts in each case may vary and must be analyzed on a case by case basis. Districts should consult with legal counsel when the facts relating to possession are unclear.

B. Medical Marijuana

Even if a public school student has a prescription from a physician authorizing the use of marijuana for medical use, state law does not exempt public school students from the provisions of the Education Code which prohibit the use or possession of marijuana at a public school. School districts may suspend or expel students found in possession of marijuana at school, even if they have a prescription from a physician.

This opinion is based in part on a decision of the California Supreme Court which held that an employer may discipline an employee for using medical marijuana at work. In Ross v. Ragingwire Telecommunications, Inc.,[134] the California Supreme Court held that the California Fair Employment and Housing Act (FEHA) did not require the employer to accommodate an employee who used medical marijuana. The Court also held that the employee did not state a cause of action for termination in violation of public policy.

The California Supreme Court reviewed the provisions of the Compassionate Use Act of 1996[135] which gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, including possession. Federal law, however, continues to prohibit the drugs possession even by medical users.[136]

In Ross, the Plaintiff was fired when a pre-employment drug test required of new employees revealed his marijuana use. The marijuana had been prescribed by his physician for medical purposes. The lower court held that the Plaintiff could not state a cause of action against his employer for disability related discrimination under FEHA,[137] or for wrongful termination in violation of public policy.[138] The California Supreme Court affirmed the decisions of the lower court and noted that under California law, an employer may require a pre-employment drug test and take illegal drug use into consideration in making employment decisions.[139]

The Plaintiff alleged that under FEHA, the employer discriminated on the basis of physical disability or medical condition and that the employer must make reasonable

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[133] Id. at 94-95.
[134] 42 Cal.4th 920, 174 P.3d 200, 70 Cal.Rptr.3d 382 (2008).
[135] Health and Safety Code section 11362.5, added by initiative, Prop. 215, as approved by voters, Gen. Elec. (Nov. 5, 1996).
[136] Id. at 923; 21 U.S.C. Section 812, 844(a).
[137] Government Code section 12900, et seq.; Section 12940(a).
[138] Stevenson v. Superior Court, 16 Cal.4th 880, 887, 66 Cal.Rptr. 2d 888 (1997); Tameny v. Atlantic Richfield Company, 27 Cal.3d 167, 170, 176-178, 164 Cal.Rptr. 839 (1980).
[139] Loder v. City of Glendale, 14 Cal.4th 846, 882-883, 59 Cal.Rptr. 2d 696 (1997).

accommodations for Plaintiff's lower back pain which he treats with marijuana. By denying him employment and failing to make reasonable accommodations, the Plaintiff alleges that the Defendant violated FEHA.[140]

The California Supreme Court rejected the Plaintiff's argument that marijuana has the same status as a legal prescription drug and noted that the California voters merely exempted medical users and their primary caregivers from criminal liability. The court held that nothing in the text or history of the Compassionate Use Act suggest the voters intended the measure to address the rights and obligations of employers and employees.[141] The court held that state law does not require employers to accommodate the use of illegal drugs, and in Loder, the court held that employer could require prospective employees to undergo testing for illegal drugs and alcohol.[142]

The court in Ross noted that the proponents of the Compassionate Use Act consistently described the proposed measure to the voters as motivated by the desire to create a narrow exception to criminal law.[143] The court in Ross further stated, "…The measure did not purport to change the laws affecting public intoxication with controlled substances…or the laws addressing controlled substances in such places as schools and parks…and the act expressly provided that it did not 'supersede legislation prohibiting persons from engaging in conduct that endangers others'."[144] [Emphasis added.]

Under Education Code section 48900(c), a pupil may be suspended or expelled for possessing, using, selling or otherwise furnishing or being under the influence of marijuana. Under Education Code section 48915(a)(3), if a pupil possesses more than one ounce of marijuana, the pupil must be recommended for expulsion.

Based on the reasoning of the California Supreme Court in Ross, in which the California Supreme Court ruled that the California voters merely exempted medical users of marijuana from criminal liability and that the voters did not change the law with respect to the possession of marijuana at school, it is our opinion that the courts would uphold a school district's suspension or expulsion of a student who possessed, used, sold or otherwise furnished marijuana at school.

VICTIMS OF BULLYING

Education Code section 48900.9(a) states that the superintendent of a school district, the principal of a school, or the principal's designee may refer a victim of, witness to, or other pupil affected by, an act of bullying, to the school counselor, school psychologist, social worker, child welfare attendance personnel, school nurse, or other school support service personnel for case management, counseling, and participation in a restorative justice program, as appropriate. Section 48900.9(b) states that a student who has engaged in an act of bullying may also be referred to the school counselor, school psychologist, social worker, child welfare attendance

[140] 42 Ca. 4th 920, 926 (2008).
[141] Id. at 926.
[142] Loder v. City of Glendale, 14 Cal.4th 846 (1997).
[143] Id. at 929.
[144] Id. at 929.

personnel, or other school support service personnel for case management and counseling, or for participation in a restorative justice program, pursuant to Education Code section 48900.5.

This legislation supports the practices of many school districts and reinforces existing programs in which districts are referring victims of bullying and perpetrators of bullying to counseling programs.

DISCIPLINE OF STUDENTS FOR OFF-CAMPUS CONDUCT

The key phrase in Education Code section 48900, "related to school activity or school attendance," has not been interpreted by the California courts. However, federal and state courts in other states have interpreted similar language and provide us with some possible guidelines to be utilized in California. In Nicholas B. v. School Committee of Worcester,[145] a Massachusetts state court held that a student's expulsion for an off-campus assault of another student on a public street near school property after the dismissal of school was reasonable. The court found that the fight was a continuation of an earlier conflict that had occurred during the school day.

In Giles v. Brookville Area School District,[146] a Pennsylvania state court upheld an expulsion of a student for selling marijuana to a fellow student while off campus. Negotiations for the sale occurred during one of their classes. While on campus, the student buyer resold a portion of the marijuana purchased from Giles to other students who were later caught smoking on school grounds.

In Boucher v. School Board of the School District of Greenfield,[147] the Court of Appeals upheld a school district's decision to expel a high school junior for writing an article in an underground newspaper that explained how students could "hack" into the school's computers. The article included instructions on accessing the school's computers, discovering passwords, viewing active users on the computer network, and accessing the school district business files. The court held that the article was not protected under the First Amendment of the United States Constitution, since the article advocated on-campus action and represented a blueprint for the vandalism of the school district's computer system, which was detrimental to the interest of the school district. The court noted that as a result of the article, the school district was required to change all of the system's passwords mentioned in the article and hire an outside consultant to test the computer system to see if the system had been compromised.

In J.S. v. Bethlehem Area School District,[148] the Supreme Court of Pennsylvania upheld the discipline of a student who created a website on his home computer and solicited donations for a hit man to kill his Algebra teacher. The web page also pictured the Algebra teacher decapitated with blood dripping from her neck and also portrayed her face changing into that of Adolf Hitler. The Supreme Court of Pennsylvania found that there was a sufficient connection between the website and the school campus to consider the conduct school related. The court noted that the off-campus website was accessed by the student at school and was shown to a

[145] 412 Mass. 20, 587 N.E.2d 211, 72 Ed.Law Rep. 1006 (Mass. 1992).

[146] 669 A.2d 1079, 106 Ed.Law Rep. 712 (Pa. Commw. 1995).

[147] 134 F.3d 821, 123 Ed. Law Rep. 500 (7th Cir. 1998).

[148] 807 A.2d 847 (pa. 2002).

fellow student. J.S. informed other students at school of the existence of the website. Faculty members and school administration also accessed the website at school. The website was aimed specifically at students and others connected with the school and a teacher and the principal were the subjects of the website.

The Supreme Court of Pennsylvania also found that the website posted by J.S. disrupted the entire school community, including teachers, students, and parents. The court found that the most significant disruption caused by the posting of the website to the school environment was the emotional and physical injury to the teacher. The teacher was unable to complete the school year and took a medical leave of absence for the next year. The teacher's absence for over twenty days at the end of the school year necessitated the use of three substitute teachers that unquestionably disrupted the delivery of instruction to the students and adversely impacted the educational environment.

In addition, the court in J.S. noted that students were also adversely impacted. Certain students expressed anxiety about the website and their safety. Some students visited counselors. The website was a topic of conversation at the campus and resulted in feelings of helplessness and low morale among the staff and students at the school. The atmosphere of the entire school community was described by the court as if a student had died. In addition, the court noted that certain parents were understandably concerned for school safety and questioned the delivery of instruction by substitute teachers. The court stated:

> "In sum, the website created disorder and significantly and adversely impacted the delivery of instruction. Indeed, it was specifically aimed at this particular school district and seemed designed to create precisely this sort of upheaval. Based upon these facts, we are satisfied that the school district has demonstrated that J.S.'s website created an actual and substantial interference with the work of the school to a magnitude that satisfies the requirements of Tinker. Thus, for the reasons stated above, we find the school district's disciplinary action taken against J.S. do not violate the First Amendment right to freedom of speech."

In J. S. v. Blue Mountain School District[149] and Layshock v. Hermitage School District,[150] the Third Circuit Court of Appeals held that the school districts in those two cases exceeded the ability of school districts to discipline students for off-campus conduct. In J. S., an eighth grade student created a fake profile of a middle school principal. The profile contained crude content and vulgar language suggesting that the principal engaged in inappropriate conduct. The profile contained insulting comments about the principal's wife and child. While the profile was publicly accessible for one day, the district's computers blocked access to the profile which was on MySpace. The Court of Appeals concluded that the student created the profile as a joke and took steps to make it private so that access was limited. Therefore, the

[149] 650 F.3d 915, 271 Ed.Law Rep. 656 (3rd Cir. 2011).

[150] 650 F.3d 205, 271 Ed.Law Rep. 638 (3rd Cir. 2011).

Court of Appeals concluded that there was no disruption to the educational process at the school.[151]

In Layshock, the student was a twelfth grade student who used a computer at his grandmother's house to create a 'parody profile' of the principal on MySpace. The profile made fun of the principal's size and contained several comments of an inappropriate nature. Most of the school's student body viewed the profile on non-school computers, but on two occasions, students viewed the site at school, including one occasion in which the student accessed the site and shared it with other students. Again, the Court of Appeals concluded that there was insufficient evidence of disruption to the instructional process at the school to authorize the school district to discipline the student.[152]

In C.R. v. Eugene School District,[153] the Ninth Circuit Court of Appeals held that an Oregon school district has the authority to discipline seventh grade students for their off-campus sexually harassing speech. The Court held that the suspension did not violate the seventh grade students' First Amendment free speech rights, did not violate the students' procedural due process rights, and did not violate the students' substantive due process rights.[154] The decision in C.R. is consistent with the legal advice many school attorneys give to school districts in California.

C.R. was a 12-year-old student in the Eugene School District when he was suspended from Monroe Middle School for sexually harassing two younger students. The incident that led to his suspension was the last in an escalating series of encounters with two younger students at the school.[155] It occurred about five minutes after school let out, a few hundred feet from the school campus. C.R. challenged his suspension in federal district court under the First Amendment, arguing that because the harassment occurred off-campus, in a public park, the school lacked the authority to discipline him. C.R. also challenged his suspension on due process grounds. The district court rejected C.R.'s claims and granted the School District's motion for summary judgment.

The Court of Appeals noted that students in public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[156] At the same time, the First Amendment rights of public school students are not automatically coextensive with the rights of adults in other settings.[157] The basic educational mission of the school may at times conflict with the speech rights of its students. Thus, the courts have recognized that

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[151] Id. at 920-22.

[152] Id. at 208-10.

[153] 835 F.3d 1142 (9th Cir. 2016).

[154] It should be noted that in California, Education Code section 48900(s) states that a student may be disciplined for acts that are related to school activities or school attendance that occur at any time, including, but not limited to, while on school grounds, going to or from school or a school sponsored activity, and during the lunch period whether on or off campus.

[155] Under California law, Education Code section 48900(s), C.R.'s conduct would be related to school activity (e.g., going from school).

[156] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733 (1969); Chandler v. McMinnville Sch. Dist., 978 F.2d. 524, 527 (9th Cir. 1992).

[157] See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 106 S.Ct. 3159 (1986).

schools must achieve a balance between protecting the safety and well-being of their students and respecting those same students' constitutional rights.[158]

The Court of Appeals noted that the Supreme Court has outlined four types of student speech that schools may restrict:

1. Vulgar, lewd, obscene, and plainly offensive speech;[159]

2. School-sponsored speech;[160]

3. Speech promoting illegal drug use;[161] and

4. Speech that falls into none of these categories.[162]

The Ninth Circuit Court of Appeals noted that it had considered whether schools may regulate students' off-campus speech, and that both times the Court of Appeals concluded that the school's regulation was permissible.[163]

In LaVine, a high school student wrote a poem from the perspective of a school shooter. In Wynar, a student was expelled for a series of messages threatening to commit a school shooting, which was sent to friends via the social website MySpace. Both cases involved off-campus speech. The Court of Appeals cited cases in the Fourth Circuit, Fifth Circuit and Eighth Circuits, and concluded that where it is reasonably foreseeable that off-campus speech would reach the school, it was susceptible to regulation by the school district.[164]

The Court of Appeals held that once the Court has determined that a student's off-campus speech was subject to regulation by the school district, the Court applies Tinker to evaluate the constitutionality of the school's imposition of discipline. Under Tinker, schools may restrict speech that might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities or that collides with the rights of other students to be secure and to be let alone.

The Court of Appeals noted that although the harassment at issue in this case took place off school property, it was closely tied to the school. First, all of the individuals involved were students. Second, the incident took place on a path that begins at the schoolhouse door. The path then runs from the school's fields across a public park that shares a boundary with school property, before eventually meeting a neighboring street. Third, all of the students had been let

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158 LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001); Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973)).

159 See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 106 S.Ct. 3159 (1986).

160 Hazelwood [School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988).

161 Morse v. Frederick, 551 U.S. 393, 127 S.Ct. 2618 (2007).

162 Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733 (1969); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1067 (9th Cir. 2013).

163 LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1072 (9th Cir. 2013).

164 See, Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011); S.J.W. v. Lee's Summit R–7 School District, 696 F.3d 771 (8th Cir. 2012); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).

out of school just minutes before the incident. The Court of Appeals noted that because the harassment happened in such close proximity to the school, administrators could reasonably expect the harassment's effects to spill over into the school environment. Simply seeing their harassers in the hallway could well be disruptive to the affected students. A student who is routinely subject to harassment while walking home from school may be distracted during school hours by the prospect of the impending harassment. A student's ability to focus during the day could be impaired by intrusive worries about whether he or she would once again face uncomfortable and sexually intimidating comments immediately after school lets out.

The Court of Appeals noted that administrators could also reasonably expect students to discuss the harassment in school. There was also the prospect that the older students would continue to harass the younger students if they encountered one another in the hallways or the schoolyard. The Court of Appeals concluded, "Under either the nexus test or the reasonable foreseeability test, the School District could take reasonable disciplinary action against C.R.'s off-campus speech."[165]

The Court of Appeals further concluded that the school district's action were reasonable and did not violate the First Amendment rights of the students. The Court of Appeals stated:

> "In sum, we conclude: First, the district court correctly held that the School District could discipline C.R. for his off-campus speech. Second, the School District's decision to suspend C.R. for two days for sexual harassment was permissible under *Tinker*. Sexually harassing speech, by definition, interferes with the victims' ability to feel safe and secure at school. The district court did not err in granting summary judgment to the School District on C.R.'s First Amendment claims."[166]

The Court of Appeals also upheld the suspension on procedural due process grounds, holding that the Constitution only requires informal procedures when schools suspend students for ten days or less. The student must be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.[167] The Court found that the school district gave the student sufficient notice.

The Court of Appeals also rejected the students' appeal on substantive due process grounds. The Court of Appeals held that no fundamental rights were at stack and that the school district acted appropriately so long as it applied the appropriate procedural safeguards.

The ruling in C.R. is consistent with California law, which allows the imposition of discipline on students if the conduct is related to school activity.

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165 835 F.3d 1142, 1152 (9th Cir. 2016)

166 Id. at 1153.

167 Goss v. Lopez, 419 U.S. 565, 581, 95 S.Ct. 729 (1975).

At this time, it is unclear precisely under what conditions students may be suspended or expelled for off-campus conduct. Districts should seek legal advice before suspending or expelling students based on off-campus speech.

SUSPENSION PROCEDURES

A. Suspensions from Class by Teachers[168]

1. A teacher may suspend a student from class for the day of the suspension and the day following for any of the acts set forth in Education Code section 48900. The teacher must:

    a. Immediately report the suspension to the principal;

    b. Immediately send the student to the principal or principal's designee for appropriate action; and

    c. As soon as possible, ask the parent or guardian of the student to attend a parent-teacher conference regarding the suspension. Whenever practicable, a school counselor or school psychologist shall attend the conference. At the request of the teacher or parent, a school administrator shall attend the conference.

2. During the period of the suspension, the student shall not return to the class from which the student was suspended unless both the teacher and principal agree to do so. A student suspended from a class shall not be placed in another regular class during the period of suspension. However, if the student is assigned to more than one class per day this requirement shall apply only to other regular classes scheduled at the same time as the class from which the student was suspended.

3. A teacher may also refer a student to the principal or the principal's designee for consideration of a suspension from school for any of the acts enumerated in Education Code section 48900.

B. Attendance of Suspended Child's Parent for Portion of Schoolday

1. The governing board of each school district may adopt a policy authorizing teachers to require that the parent of a student suspended by a teacher pursuant to Education Code section 48910 for committing an obscene act, engaging in

[168] Education Code section 48910.

habitual profanity or vulgarity, or disrupting school activities or otherwise willfully defying the valid authority of school officials, attend a portion of a schoolday in the class from which the student was suspended.[169]

2. Attendance is only required of the parent actually living with the student.[170]

3. The principal shall send a written notice to the parent stating that attendance by the parent is pursuant to law.[171]

4. The parent who receives the written notice shall attend class. The notice may specify that the parent's attendance be on the day in which the student is scheduled to return to class or within a reasonable period of time thereafter.

5. After the classroom visitation the parent shall meet with the principal or his/her designee prior to leaving the school.

C. Suspensions from School by Principal

1. The principal or the principal's designee or the superintendent may suspend a student (including disabled students) from school for no more than five consecutive schooldays.[172]

2. A student may be suspended upon a first offense if the principal or superintendent determines that the student violated subdivision (a), (b), (c), (d), or (e), of Section 48900 or that the student's presence causes a danger to persons or property or threatens to disrupt the instructional process.[173]

3. In all other cases, a student may be suspended only when other means of correction fail to bring about proper conduct.[174] A principal may also 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.[175]

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[169] Ed. Code section 48900.1(a).

[170] Ed. Code section 48900.1(c).

[171] Ed. Code section 48900.1(c).

[172] Ed. Code section 48911.

[173] Ed. Code section 48900.5.

[174] Suspension includes supervised suspension as set forth in Ed. Code § 48911.1.

[175] Ed. Code section 48900(v).

Suspension, including supervised suspension, 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. However, a pupil, including an individual with exceptional needs, 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.[176]

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.

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.

[176] Ed. Code section 48900.5(a).

9. Any of the alternatives described in Section 48900.6.[177]

Education Code section 48900.6 authorizes the principal of a school or the principal's designee to require a pupil to perform community service on school grounds or with written permission of the parent or guardian of the pupil off school grounds, during the pupil's non-school hours as part of, or instead of, disciplinary action. Community service may include, but is not limited to, work performed in the community or on school grounds in the areas of outdoor beautification, community or campus betterment, and teacher, peer, or youth assistance programs.[178]

D. Informal Conference or Meeting with the Student

Prior to suspension, a conference between the student and whenever practicable the school employee who referred the student shall be conducted by the principal, principal's designee or the superintendent unless there is a clear and present danger to the lives, safety or health of students or school personnel.[179] At the conference the principal or the principal's designee or the superintendent shall advise the student of the reason for the disciplinary action and the evidence against him or her, including the other means of correction that were attempted before the suspension as required by Education Code section 48900.5,and the student shall be given the opportunity to present his/her version of the facts and evidence.[180] If a student is suspended without a conference prior to suspension, both the parent and student must be notified of the student's right to a conference and the student's right to return to school for a conference. The conference must be held within two schooldays, unless the student waives this right or is physically unable to attend for any reason.[181]

At the time of suspension a school employee must make a reasonable effort to contact the parent or guardian in person or by telephone.[182]

Written notice of the suspension must be sent to the parent.[183] It is recommended that the written notice (see Attachment 1) include the following:

1. A statement of facts leading to the decision to suspend, including the specific offense committed by the student;

2. The date and the time the student will be allowed to return to school; and

3. A statement of the right of the parents to view the student's records.

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[177] Ed. Code section 48900.5(b).

[178] Ed. Code section 48900.6.

[179] Ed. Code section 48911(b) and (c).

[180] Ed. Code section 48911(b).

[181] Ed. Code section 48911(c).

[182] Ed. Code section 48911(d).

[183] Ed. Code section 48911(d). The constitutionality of the suspension procedures was upheld by the courts in Granowitz v. Redlands Unified School District, 105 Cal.App.4th 349, 129 Cal.Rptr.2d 410 (2003).

If the school district requests that the parents attend a meeting with school officials to discuss the student's behavior, they shall respond to such a request without delay.[184] However, the student may not be penalized if the parent fails to attend a scheduled conference.[185] In addition, reinstatement of the student may not be made contingent on parents' attendance at a conference.[186]

Any case where expulsion from any school or suspension for the balance of the semester from continuation school is being processed by the governing board, the school district superintendent or other person designated by the superintendent in writing may extend the suspension until the governing board has rendered a decision in the expulsion action. However, an extension may be granted only if the school district superintendent or the superintendent's designee has determined, following a meeting in which the pupil and the pupil's parent or guardian are invited to participate, that the presence of the pupil at the school or in an alternative school placement will cause a danger to persons or property or a threat of disrupting the instructional process. If the pupil or the pupil's parent or guardian has requested a meeting to challenge the original suspension pursuant to Section 48914, the purpose of the meeting shall be to decide upon the extension of the suspension order, and may be held in conjunction with the initial meeting on the merits of the suspension. If the pupil is a foster child, the school district shall also invite the pupil's attorney and an appropriate representative of the county child welfare agency to participate in the meeting.[187]

If the school district has established a policy that permits school officials to conduct a meeting with the parent or guardian of a suspended student to discuss the causes and the duration of the suspension, the school policy involved and other matters pertinent to the suspension, then a meeting shall be held with the appropriate school official. However, under Education Code section 48914, the district has broad discretion in adopting a policy. Districts should consult with legal counsel in drafting a policy.[188]

E. Contents of Board Policy

The board policy adopted pursuant to Education Code section 48914 may include the following procedures:

1. The school official should discuss facts leading to the suspension with the parent, listen to every contrary fact the parent may have, and review all written documentation;

2. The school official may wish to investigate the facts further if the parent presents facts which differ from the school official's facts;

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[184] Ed. Code section 48911(f).

[185] Ed. Code section 48911(f).

[186] Ed. Code section 48911(f).

[187] Ed. Code section 48911(g).

[188] Ed. Code section 48911(h).

3. The school official's designee should allow parents to review the student's records and be prepared to discuss the contents of the records;

4. The school official should be prepared to discuss the student's overall conduct and adjustment in school;

5. The school official should be prepared to discuss the reasons for suspension;

6. The school official may wish to discuss alternative education programs, if appropriate; and

7. The school official should be prepared to discuss the appropriateness of the penalty.

F. Supervised Suspension Classrooms

A student suspended from a school for any of the reasons enumerated in Sections 48900 and 48900.2 may be assigned, by the principal or principal's designee, to a supervised suspension classroom for the entire period of suspension if the student poses no imminent danger or threat to the school, other students, staff, or if an action to expel the student has not been initiated. Students assigned to a supervised suspension classroom shall be separated from other students at the school site for the period of suspension in a separate classroom, building, or site for students under suspension. Each student is responsible for contacting his or her teacher(s) to receive assignments to be completed while the student is assigned to the supervised suspension classroom. The teacher shall provide all assignments and tests that the student will miss while suspended. If no classroom work is assigned, the person supervising the suspension classroom shall assign schoolwork.

At the time a student is assigned to a supervised suspension classroom, a school employee shall notify, in person or telephone, the student's parent or guardian. Whenever a student is assigned to a suspension classroom for more than one class period, a school employee shall notify, in writing, the student's parent or guardian. This does not place any limitations on the school district's ability to transfer a student to an opportunity school or class or a continuation education school or class.[189]

The governing board may discuss suspension or other disciplinary action against a pupil in closed session unless the parent requests an open hearing.[190]

G. Disabled Students

Special education students may be suspended in the same manner as regular students, except that suspensions for an indefinite period, such as those pending a due process or expulsion

[189] Ed. Code section 48911.1.

[190] Education Code sections 35145, 48912.

hearing, have been held by the United States Supreme Court[191] to constitute a change of placement in violation of the "stay put" provisions of the IDEA and are not acceptable for special education students. Accordingly, special education students may be suspended for two days,[192] or five days,[193] up to 20 total school days in any school year.[194]

An individual with exceptional needs may be suspended for up to, but not more than, 10 consecutive school days in accordance with federal law.[195] To extend the suspension beyond 10 consecutive school days requires the consent of the parents or a court order. Under federal law, a "change of placement" occurs if:

1. The suspension is for more than 10 consecutive days; or

2. The student is subjected to a series of suspensions that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each suspension, the total amount of time the student is suspended, and the proximity of the suspension to one another.

However, federal law does allow the suspension or removal of a student with a disability from the student's current placement for not more than 10 consecutive school days, and additional suspensions or removals of not more than 10 consecutive school days in the same school year for separate incidents of misconduct, as long as those suspensions do not constitute a change of placement.[196]

H. Restrictions on Days of Suspension

Except where a student's suspension is extended pending an expulsion hearing, the total number of days for which a student may be suspended from school may not exceed 20 schooldays in any school year, unless for purposes of adjustment, a student enrolls in or is transferred to another regular school, an opportunity school or class, or a continuation education school or class, in which case the total number of schooldays for which the student may be suspended shall not exceed 30 days in any school year. A school district may count suspensions that occur while a student is enrolled in another school district toward the maximum number of days for which a student may be suspended in any school year.[197]

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[191] Honig v. Doe, 108 S.Ct. 592 (1988).

[192] Ed. Code section 48910.

[193] Ed. Code section 48911(a).

[194] Ed. Code section 48903.

[195] Ed. Code section 48915.5.

[196] 34 C.F.R. §§ 300.519, 300.520.

[197] Ed. Code, § 48903.

A school district may suspend a pupil enrolled in a continuation school or class for a period not longer than the remainder of the semester for violations of Education Code section 48900.[198]

I. Limits on Suspension for Students in Grade K-3

Education Code section 48900(k) was amended to prohibit suspension of students in grades K through 3 for disrupting school activities or otherwise willfully defying the valid authority of supervisors, teachers, administrators, school officials, and other school personnel engaged in the performance of their duties.[199] Teachers may still suspend students from class for the day of the suspension and the day following, pursuant to Education Code section 48910.

Education Code section 48900(k)(2) prohibits a school district from recommending a student in grades K through 12 for expulsion for disrupting school activities or otherwise willfully defying the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties. Students in grades 4 through 12 may be suspended or involuntarily transferred for disrupting school activities or willful defiance.

Education Code section 48900(k)(2) becomes inoperative on July 1, 2018, unless a later enacted statute that becomes operative before July 1, 2018, deletes or extends that date.

CONFERENCE TO DISCUSS EXTENSION OF SUSPENSION PENDING EXPULSION PROCEEDINGS

The superintendent or superintendent's designee may extend the suspension while the expulsion is being processed.[200] A conference with the student and the student's parents to discuss the decision to extend the suspension must be held (see Attachment 2). In order to extend the suspension, the superintendent or superintendent's designee must find that the presence of the student at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the educational process.[201]

Following the conference to discuss extension of the suspension, a written notice of the superintendent or superintendent's designee's decision should be sent to the parents. The notice should state the findings of the superintendent's designee as to whether the student's presence at school or in an alternative school placement causes a danger to persons or property or a threat of disrupting the educational process (see Attachment 3). With respect to foster children, the district superintendent or the district superintendent's designee, including, but not limited to, the educational liaison for the school district, shall also invite the pupil's attorney and an appropriate representative of the county child welfare agency to participate in the meeting where the extension of suspension is being discussed.[202]

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[198] Education Code section 48912.5.

[199] Stats. 2014, ch. 660.

[200] Ed. Code section 48911(g).

[201] Ed. Code section 48911(g).

[202] Ed. Code section 48911(g).

The term "discretionary act" appears to apply to recommendations for expulsions under Education Code section 48900, and not expulsions under Education Code section 48915, which are mandatory expulsion offenses or mandatory recommendations to expel offenses. If a recommendation of expulsion is required, the district may provide notice of the expulsion hearing to the child's attorney and the county child welfare agency.[203]

MANDATORY EXPULSION AND REFERRAL

Education Code section 48915, subdivision (c), requires the principal or superintendent of schools to immediately suspend and recommend for expulsion students determined to have committed any of the following acts at school, or at a school activity off school grounds:

1. Possessing, selling, or otherwise furnishing a firearm;
   (The subdivision does not apply to an act of possessing an imitation firearm or to an act of possessing a firearm if the student has 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;[204]

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, or committing a sexual battery as defined in subdivision (n) of Section 48900; or

5. Possession of an explosive.[205]

The governing board of the school district is required to order the student expelled upon finding the student committed any of the above acts and is required to refer that student to a program of study that meets all of the following conditions:

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[203] Ed. Code section 48918.1(b).

[204] Section 48915(g) defines "knife" for purposes of mandatory expulsion and states, "As used in this section, "knife" means any dirk, dagger, or other weapon with a fixed, sharpened blade fitted primarily for stabbing, a weapon with a blade fitted primarily for stabbing, a weapon with a blade longer than 3-1/2 inches, a folding knife with a blade that locks into place, or a razor with an unguarded blade."

[205] The term "explosive" means a "destructive device" as defined by federal law, 18 U.S.C. § 921. Federal law defines "destructive device" as any explosive, incendiary or poison gas, bomb, grenade, rocket having a propellant charge of more than 4 ounces, missile having an explosive or incendiary charge of more than ¼ ounce, mine or device similar to any of the devices described in the preceding clauses. A "destructive device" also means any type of weapon other than a shotgun which may readily be converted to expel a projectile by the action of an explosive or other propellant, and which has any barrel of more than ½ inch in diameter.

1. Is appropriately prepared to accommodate students who exhibit discipline problems;

2. Is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school; and

3. Is not housed at the school site of the student at the time of suspension.[206]

MANDATORY RECOMMENDATION FOR EXPULSION

Pursuant to Education Code section 48915(a),[207] the principal or superintendent of schools is required to recommend the expulsion of a student for any of the following acts, unless the principal or superintendent determines that expulsion should not be recommended under the circumstances or that an alternative means of correction would address the conduct:[208]

1. Causing serious physical injury to another person, except in self-defense;

2. Possession of any knife, or other dangerous object of no reasonable use to the student;

3. Unlawful possession of any controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, except for the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis, or the possession of over-the-counter medication for use by the pupil for medical purposes or medication prescribed for the pupil by a physician;

4. Robbery or extortion; or

5. Assault or battery, as defined in Sections 240 and 242 of the Penal Code, upon any school employee.[209]

Upon recommendation by the principal, superintendent, or hearing officer or administrative panel, the governing board may order a student expelled upon a finding that the student committed an act listed in Section 48915, subdivision (a), or in subdivision (a) of Section 48900. The prohibited acts under Section 48900 are as follows:

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[206] Ed. Code section 48915(d).

[207] Stats. 2012, ch. 431 (A.B. 2537), effective January 1, 2013.

[208] Ed. Code section 48915(a)(2) states, "If the principal or the superintendent of schools makes a determination as described in paragraph (l), he or she is encouraged to do so as quickly as possible to ensure that the pupil does not lose instructional time."

[209] Penal Code section 240 defines "assault" as "an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another." Penal Code section 242 defines "battery" as "any willful and unlawful use of force or violence upon the person of another."

1. Caused, attempted to cause, or threatened to cause physical injury to another person;

2. 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 student 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;

3. Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of, any 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;

4. Unlawfully offered, arranged, or negotiated to sell any 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 then either sold, delivered, or otherwise furnished to any person another liquid, substance, or material and represented the liquid, substance, or material as a controlled substance, alcoholic beverage, or intoxicant; and

5. Committed or attempted to robbery or extortion.[210]

The decision to expel must 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; or

2. Due to the nature of the act, the presence of the student causes a continuing danger to the physical safety of the student or others.[211]

PERMISSIVE RECOMMENDATION FOR EXPULSION

The governing board of a school district may order a student expelled upon the recommendation of the superintendent or the principal of the school in which the student is enrolled upon a finding that the student violated any of the following:

1. Caused or attempted to cause damage to school property or private property;

[210] Ed. Code section 48900(b).

[211] Ibid.

2. Stolen or attempted to steal school property or private property;

3. Possessed or used tobacco, or any products containing tobacco or nicotine products, including, but not limited to, cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets, and betel;

4. Committed an obscene act or engaged in habitual profanity or vulgarity;

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

6. 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;

7. Knowingly received stolen property or private property;

8. 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;

9. Committed sexual harassment;

10. Caused, attempted to cause, threatened to cause, or participated in an act of hate violence; or

11. Intentionally engaged in harassment, threats, or intimidation, directed against a student or group of students.

The governing board must make either of the following findings when expelling students for these offenses:

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

2. Due to the nature of the act, the presence of the student causes a continuing danger to the physical safety of the student or others.

REFERRAL OF EXPELLED STUDENTS

Students expelled for permissive expulsion violations may be referred to a comprehensive middle, junior or senior high school or an elementary school if the county superintendent of schools certifies that an alternative program of study is not available at a site away from a comprehensive middle, junior or senior high school or an elementary school. Otherwise, a student expelled for mandatory expulsion offenses or mandatory recommendation offenses shall be referred to a program of study that meets all of the following conditions:

A. Is appropriately prepared to accommodate students who exhibit discipline problems;

B. Is not provided at a comprehensive middle, junior, or senior high school or at any elementary school; and

C. Is not housed at the school site attended by the student at the time of suspension.[212]

EXPULSION

A. Notice and Timing of Hearing

The expulsion hearing must be held within 30 schooldays of the time the principal or superintendent determines the student has violated a subsection of Education Code section 48900, unless the student or his parents request a postponement in writing. At least one postponement of 30 calendar days shall be granted. Additional postponements may be granted at the discretion of the governing board.[213]

If compliance with the above time requirements is impractical, the hearing, for good cause, may be postponed by the superintendent or designee up to five additional schooldays.[214] Written notice of the hearing must be given at least 10 calendar days prior to the date of the hearing (see Attachment 4).[215] The notice must include the following:

1. The date and place of the hearing;

2. A statement of the specific facts and charges upon which the proposed expulsion is based;

3. A copy of all the district's disciplinary rules and regulations relating to the alleged violation;

4. A notice of the parent, guardian, or student's obligation under Education Code section 48915.1, subdivision (b), to

[212] See, Ed. Code section 48915(d).

[213] Ed. Code section 48918(a).

[214] Ed. Code section 48918(a).

[215] Ed. Code section 48918(b).

inform subsequent school districts of his or her status with the previous school district;

5. A statement that the student or parents have the right to appear in person or to be represented by legal counsel or by a nonattorney adviser;

6. A statement that the student or parents have the right to inspect and obtain copies of all documents to be used at the hearing;

7. A statement that the student and parents have the right to confront and question all witnesses who testify at the hearing, question all other evidence presented, and present oral and documentary evidence on the student's behalf, including witnesses; and

8. A statement may be included indicating that the hearing will be in closed session unless the parent requests an open hearing in writing five days in advance.

With respect to foster children, if the decision to recommend expulsion is a discretionary act, the governing board of the school district shall provide notice of the expulsion hearing to the pupil's attorney and an appropriate representative of the county child welfare agency at least ten calendar days before the date of the hearing. The notice may be made using the most cost-effective method possible, which may include, but is not limited to, electronic mail or a telephone call.[216] With respect to students who are homeless, if the decision to recommend expulsion is a discretionary act, the governing board of the school district shall provide notice of the expulsion hearing to the local educational agency liaison for homeless children and youth at least 10 calendar days before the date of the hearing. The notice may be made using the most cost-effective method possible, which may include, but is not limited to, electronic mail or a telephone call.[217]

If the recommendation of expulsion is required and the pupil is a foster child, the governing board of the school district may provide notice of the expulsion hearing to the pupil's attorney and an appropriate representative of the county child welfare agency at least ten calendar days before the date of the hearing. The notice may be made using the most cost-effective method possible, which may include, but is not limited to, electronic mail or a telephone call.[218] If a recommendation of expulsion is required and the pupil is a homeless child or youth, the governing board of the school district may provide notice of the expulsion hearing to the local educational agency liaison for homeless children and youth at least 10 calendar days

[216] Ed. Code section 48918.1(a) (1).

[217] Ed. Code section 48918.1(b) (1).

[218] Ed. Code section 48918.1(a) (2).

before the date of the hearing. The notice may be made using the most cost-effective method possible, which may include, but is not limited to, electronic mail or a telephone call.[219]

In a hearing in which a student is alleged to have committed or attempted to commit a sexual assault or a sexual battery, a complaining witness shall be given five days' notice prior to being called to testify, and shall be entitled to have up to two adult support persons, including, but not limited to, a parent, guardian, or legal counsel, present during their testimony. Prior to a complaining witness testifying, support persons shall be admonished that the hearing is confidential. The person presiding over an expulsion hearing may remove a support person whom the presiding person finds is disrupting the hearing. This section does not require a student to be represented by legal counsel or a nonattorney adviser.[220]

The governing board must render its decision within 10 school days following the conclusion of the hearing, unless the student requests in writing that the decision be postponed. If the hearing is held by a hearing officer or administrative panel, or the governing board does not meet on a weekly basis, the governing board shall render its decision within 40 school days after the student's removal from his or her school of attendance for the incident for which the recommendation for expulsion is made, unless the student requests in writing that the decision be postponed.[221]

B. Conduct of Expulsion Hearing

The hearing is conducted in closed session unless the student requests an open hearing in writing five days in advance of the hearing. Whether the hearing is conducted in open or closed session, the governing board may meet in closed session to deliberate and determine if the student shall be expelled. If any other persons are admitted into the closed deliberation session, the parent, the student and the counsel of the student must be allowed to attend the closed session.[222]

If the hearing is to be conducted at a public meeting, and there is a charge of committing or attempting to commit a sexual assault or a sexual battery, a complaining witness shall have the right to have his or her testimony heard in a closed session when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are not alternative procedures to avoid the threatened harm. Such alternative procedures include a videotaped deposition or an examination in another place communicated to the hearing room by means of closed-circuit television.[223]

The governing board may delegate the authority to conduct the hearing to an administrative panel of certificated employees from other schools or to a hearing officer.[224]

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[219] Ed. Code section 48918.1(b) (2).

[220] Ed. Code section 48918(b)(5).

[221] Ed. Code section 48918(a).

[222] Ed. Code section 48918(c).

[223] Ed. Code section 48918(c).

[224] Ed. Code section 48918(d). Section 48918(d) requires the panel members to be certificated employees but does not require the panel members to be administrators or to hold an administrative credential.

The administrative panel or hearing officer must decide within three school days following the hearing whether to recommend expulsion to the governing board.[225]

If the administrative panel or hearing officer decides against expulsion, the student must be immediately reinstated and permitted to return to the same instructional program, any other instructional program, a rehabilitation program, or any combination of these programs. The placement shall take place after the consultation with the student's teachers and parents. The decision not to recommend expulsion shall be final.[226]

If the administrative panel or hearing officer recommends expulsion, the governing board must review the panel's findings of facts and recommendations, which must be based solely on the evidence presented at the hearing, before ordering expulsion.[227]

The governing board may conduct a supplementary hearing if it wishes.[228] The hearing must be recorded so that an accurate and complete written transcript can be made.[229] Technical rules of evidence do not apply but the evidence presented must be the kind upon which reasonable people are accustomed to rely in the conduct of serious affairs.[230]

In hearings which include an allegation of committing or attempting to commit a sexual assault or a sexual battery, evidence of specific instances of a complaining witness' prior sexual conduct is to be presumed inadmissible and shall not be heard absent a determination by the person conducting the hearing that extraordinary circumstances exist requiring the evidence be heard. Before the person conducting the hearing makes the determination on whether extraordinary circumstances exist, the complaining witness shall be provided notice and an opportunity to present opposition to the introduction of the evidence. In the hearing on the admissibility of the evidence, the complaining witness shall be entitled to be represented by a parent, guardian, legal counsel, or other support person. Reputation or opinion evidence regarding the sexual behavior of the complaining witnesses is not admissible for any purpose.[231]

The decision of the governing board must be based on substantial evidence relevant to the charges addressed. No decision to expel may be based solely upon hearsay evidence.[232]

The administrative panel or hearing officer may, upon a finding that good cause exists, determine that disclosure of either the identity of a witness or the testimony of the witness at the hearing, or both, would subject the witness to an unreasonable risk of psychological or physical harm. Upon this determination, the testimony may be received and examined by sworn declaration. Copies of the declaration shall be made available to the student after the

[225] Ed. Code section 48918(e).
[226] Ed. Code section 48918(e).
[227] Ed. Code section 48918(f).
[228] Ed. Code section 48918(f).
[229] Ed. Code section 48918(g).
[230] Ed. Code section 48918(h).
[231] Ed. Code section 48918(h).
[232] Ed. Code section 48918(f).

declarations have been edited to delete the name and identity of the witness. In all other cases the witnesses should be present to testify and be cross-examined.[233]

The final action by the governing board to expel must be taken in public session.[234]

Written notice of the decision to expel must be sent by the superintendent or the superintendent's designee to the parents which must include notice of their right to appeal to the county board of education, a notice of the education alternative placement to be provided to the student during the time of the expulsion, and their obligation under Education Code section 48915.1, subdivision (b), upon the student's enrollment in a new school district, to inform that district of the student's expulsion.[235]

The governing board's decision must be made within 10 school days following the conclusion of the hearing unless the student requests in writing that the hearing be postponed. If the hearing is held by a hearing officer or administrative panel, or the governing board does not meet on a weekly basis, the governing board shall make its decision within 40 school days of the date the student was removed from school unless the student requests a postponement in writing.[236]

The governing board may issue subpoenas for the personal appearance of witnesses but is not required to do so.[237] A record of each expulsion, including the reason for the expulsion, must be maintained. The order and causes therefore must be recorded in the student's mandatory interim record and forwarded to any school in which the student subsequently enrolls upon request from the admitting school for the student's school records.[238] Under federal law, the record of expulsion is a confidential record and the expelled student's name may not be disclosed.[239]

C. Rules and Regulations

Education Code section 48918.5 requires each district to establish rules and regulations governing procedures for conducting expulsion hearings involving allegations of sexual assault or sexual battery. The procedures must include the following:

1. At the time that the expulsion hearing is recommended, the complaining witness shall be provided with a copy of the applicable disciplinary rules and advised of his or her right to:

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[233] Ed. Code section 48918(f).

[234] Ed. Code section 48918(j).

[235] Ed. Code section 48918(j).

[236] Ed. Code section 48918(a).

[237] Ed. Code section 48918(i)(1); see, also, Woodbury v. Brown-Dempsey, 108 Cal.App.4th 421, 134 Cal.Rptr.2d 124 (2003).

[238] Ed. Code section 48918(k).

[239] See, Rim of the World Unified School District v. Superior Court, 104 Cal.App.4th 1393, 129 Cal.Rptr.2d 11 (2002).

a. Receive five days' notice of his or her scheduled testimony at the hearing;

b. Have up to two adult support persons of his or her choosing, present in the hearing at the time the witness testifies; and

c. To have the hearing closed during the time the witness testifies;

2. An expulsion hearing may be postponed for one school day in order to accommodate the special physical, mental, or emotional needs of a student who is the complaining witness;

3. The district shall provide a nonthreatening environment for a complaining witness in order to better enable the witness to speak freely and accurately of the experiences that are the subject of the expulsion hearing, and to prevent discouragement of complaints. Each district must provide a room separate from the hearing room for the use of the complaining witness prior to and during breaks in testimony. In the discretion of the person conducting the hearing, the complaining witness shall be allowed reasonable periods of relief from examination and cross-examination during which he or she may leave the hearing room. The person conducting the hearing may arrange the seating within the hearing room in order to facilitate a less intimidating environment for the complaining witness. The person conducting the hearing may limit the time for taking the testimony of a complaining witness to the hours he or she is normally in school, if there is no good cause to take the testimony during other hours. The person conducting the hearing may permit one of the complaining witness's support persons to accompany him or her to the witness stand; and

4. Complaining witnesses and accused students are to be advised immediately to refrain from personal or telephonic contact with each other during the pendency of any expulsion process.

D. Testimony at Hearing

The district should present testimony at the hearing articulating the reasons expulsion was recommended. The testimony should articulate why other means of correction are not feasible or have repeatedly failed to bring about proper conduct. Testimony provided by student witnesses

in an expulsion hearing is privileged and is protected under Civil Code section 47 from actions for defamation.[240]

In the alternative or in addition, the district should articulate why, 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. For example, if the student is being expelled for possession of marijuana, testimony should be presented articulating why a student in possession of marijuana is a danger to the physical safety of the pupil or others (e.g., the danger of being under the influence of marijuana, the increased likelihood of physical injury while driving or engaging in other activities, drowsiness, inability to concentrate, danger of addiction, etc.).

E. Suspension of Expulsion

The governing board, upon voting to expel a student, 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 student to a school, class, or program which is deemed appropriate for the rehabilitation of the student. The rehabilitation program to which the student is assigned may provide for the involvement of the student's parent or guardian in his or her child's education in ways that are specified in the rehabilitation program. A parent or guardian's refusal to participate in the rehabilitation program shall not be considered in the governing board's determination as to whether the student has satisfactorily completed the rehabilitation program.[241]

During the period of the suspension of the expulsion order, the student shall be deemed to be on probationary status. The suspension of an expulsion order may be revoked by the governing board upon the student's commission of any of the acts enumerated in Education Code section 48900 or for any violation of the district's rules and regulations governing student conduct. When the governing board revokes the suspension of an expulsion order, a student may be expelled under the terms of the original expulsion order.[242]

When it is alleged that a student on probationary status pursuant to Education Code section 48917 has committed an offense in violation of Education Code section 48900 or the district's rules and regulations governing student conduct, the principal or the principal's designee should attempt to hold a conference with the student and the student's parent or guardian. At the conference, the student should be informed of the reason the principal or the principal's designee is recommending revocation of the suspension of the expulsion order and the evidence against him or her and the student should be given an opportunity to present his or her version of the facts and evidence in his or her defense. However, the student is not entitled to a full evidentiary hearing. In the event the student or the student's parent or guardian fail to attend the conference, the principal or the principal's designee should consider the evidence and may recommend revocation of the expulsion order.

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[240] Education Code section 48918.6.

[241] Ed. Code section 48917(a).

[242] Ed. Code section 48917(d).

Following the conference, the principal or the principal's designee shall either find that no offense was committed and maintain the student on probationary status, or that an offense was committed and present his or her findings to the governing board to determine whether the revocation of the suspension of the expulsion order should be ordered by the governing board.

Upon satisfactory completion of the rehabilitation assignment of a student, the student shall be reinstated by the governing board in a school of the district. Upon reinstatement, the governing board may also order the expungement of any or all records of the expulsion proceedings.[243]

A decision of the governing board to suspend an expulsion order shall not affect the time period and requirements for the filing of an appeal of the expulsion order with the county board of education required under Education Code section 48919. Any appeal shall be filed within 30 days of the original vote of the governing board.[244]

F. Length of Expulsion

An expulsion order shall remain in effect until the governing board orders the readmission of the student pursuant to the procedures set forth below.[245] At the time of the expulsion of a student for an act other than those described in Education Code section 48915, subdivision (c), the governing board shall set a date, not later than the last day of the semester following the semester in which the expulsion occurred, when the student shall be reviewed for readmission to a school maintained by the district or the school the student last attended.[246]

If an expulsion is ordered during summer session or the intersession period of a year-round program, the governing board shall set a date, not later than the last day of the semester following the summer session or intersession period in which the expulsion occurred, when the pupil shall be reviewed for readmission to a school maintained by the district or to the school the pupil last attended. For a student who has been expelled pursuant to section 48915, subdivision (c) (possessing, selling or otherwise furnishing a firearm, brandishing a knife at another person, unlawfully selling a controlled substance, committing sexual assault or sexual battery), the governing board shall set a date of one year from the date the expulsion occurred, when the student shall be reviewed for readmission to a school maintained by the district, except that the governing board may set an earlier date for readmission on a case-by-case basis.[247]

The governing board shall recommend a plan of rehabilitation for an expelled student at the time of the expulsion order. The plan may include, but not be limited to, periodic review as well as assessment at the time of review for readmission. The plan may also include recommendations for improved academic performance, tutoring, special education assessments, job training, counseling, employment, community service or other rehabilitative programs.[248]

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[243] Ed. Code section 48917(e).

[244] Ed. Code section 48917.

[245] Ed. Code section 48916.

[246] Ed. Code section 48916(a).

[247] Ed. Code section 48916(a),

[248] Ed. Code section 48916(b).

The governing board may require a student who is expelled for reasons related to controlled substances or alcohol, prior to returning to school, to enroll in a county-supported drug rehabilitation program. No student shall be required to enroll in such a program without the consent of his or her parent or guardian.[249] The governing board may order the student readmitted to any appropriate school in the district.

G. Rehabilitation Plans and Readmission of Student[250]

The governing board must adopt rules and regulations establishing a procedure for the filing and processing of requests for readmission and the process for the required review of all expelled students for readmission. Upon completion of the readmission process, the board must readmit the student, unless the board makes a finding that the student has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other students or employees. A description of the procedure must be made available to the student and the student's parent or guardian at the time the expulsion order is entered.

It is recommended that the district's policy include:

1. A readmission form which includes the present address of the student, all educational programs attended by the student during the period of expulsion, all activities of the student during the period of expulsion including, but not limited to counseling, employment, community service or other rehabilitative programs, and other information deemed appropriate by the district staff. The form may also seek information regarding any convictions or similar dispositions of criminal charges by a court or any suspensions, expulsions or other disciplinary action taken against the student by another school or educational program;

2. A procedure which authorizes the district staff to contact persons having contact with the student during the period of expulsion;

3. A procedure by which the district staff submits to the governing board the student's application for readmission, along with any reports compiled by the district staff; and

4. A procedure by which the governing board reviews the application and any accompanying reports and either grants or denies the application for readmission. If the application for readmission is granted, the district staff should inform

[249] Ed. Code section 48916.5.

[250] Ed. Code section 48916.

the student and the student's parent in writing of the school which the student may attend.

If the governing board denies the readmission of an expelled student, the board must make a determination either to continue the placement of the student in the alternative educational program initially selected for the student during the period of the expulsion order or to place the student in another program that serves expelled students, including a county community school.[251]

The governing board must provide written notice to the expelled student and the student's parent or guardian describing the reasons for denying readmission. The written notice must also include the determination of the educational program for the expelled student. The expelled student must enroll in that educational program unless the parent or guardian elects to enroll the student in another school district.[252]

H. Expulsion of Special Education Students[253]

The IDEA[254] sets forth a general rule that during the pendency of any proceedings conducted under the IDEA, the child shall remain in the current educational placement unless the state or local education agency and the parents agree otherwise. If the child is applying for initial admission to a public school, the child shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

The United States Supreme Court in Honig v. Doe,[255] has interpreted this provision as requiring parental permission or a court order if the child is to be removed for more than ten days from the child's current educational placement. The Court in Honig v. Doe noted that at that time, Congress had made no exceptions to the stay-put rule. Since the Court's decision in Honig v. Doe, Congress has amended the IDEA, most notably in 1997 and 2004, to provide for a number of exceptions to the stay-put rule which are discussed below.

The Court in Honig left unanswered whether the limit of ten school days applied to a single incident or to the entire school year. The final regulations state that a change of placement occurs if the child is removed for more than ten consecutive days or the child is subjected to a series of removals that constitute a pattern of exclusion. In determining whether there is an impermissible pattern of exclusion, factors such as the length of each removal, the total amount of time the child is removed and the proximity of the removals to one another will be considered. In the proposed regulations, the U.S. Department of Education had sought to limit suspensions to ten days in a school year.

Due to pressure from school organizations, the United States Department of Education modified the proposed regulations to give school districts more flexibility and to allow removals

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[251] Ed. Code section 48916(d).

[252] Ed. Code section 48916(e).

[253] Education Code section 48915.5 states that expulsion shall be in accordance with federal law.

[254] 20 U.S.C. § 1415(j).

[255] 108 S.Ct. 592, 43 Ed.Law Rep. 857 (1988).

for separate incidents beyond ten school days in one year. However, the United States Department of Education will look to see if there is a pattern of removals in excess of ten days for the same incident or conduct. Under state law, school districts may suspend students up to twenty days in a school year.[256]

Based on the language of the IDEA, it appears that districts may suspend students in excess of ten school days in a school year for separate incidents of misconduct. Section 1415, subdivision (k),[257] states that school personnel may consider any unique circumstances on a case by case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

School personnel may order a change in the placement of a child with a disability who violates a code of student conduct, to an appropriate interim alternative educational setting, another setting, or suspension for not more than ten school days, to the extent that such alternatives are applied to children without disabilities. If school personnel seek to order a change in placement that would exceed ten school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which the procedures would be applied to children without disabilities except that services to suspended or expelled students must be provided, although such services may be provided in an interim alternative educational setting.

A child with a disability who is removed from the child's current placement, irrespective of whether the behavior is determined to be a manifestation of the child's disability, shall continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP and receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not occur again.

Federal law requires a manifestation determination within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. The IEP team shall review all relevant information in the student's file, any information provided by the parents, and teacher observations, to determine if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP. If the individual with exceptional needs is a foster child and the district has proposed a change of placement due to a discretionary recommended expulsion, the attorney for the individual with exceptional needs and an appropriate representative of the county child welfare agency shall be invited to participate in the individualized education program team meeting that makes a manifestation determination. The invitation may be made using the most cost-effective method possible, which may include, but is not limited to, electronic mail or a

[256] Ed. Code section 48903(a).

[257] 20 U.S.C. § 1415(k).

telephone call.[258] If the individual with exceptional needs is a homeless child or youth, the local educational agency liaison for homeless children and youth shall be invited to participate in the individualized education program team meeting that makes a manifestation determination. The invitation may be made using the most cost-effective method possible, which may include, but is not limited to, electronic mail or a telephone call.[259]

If the local educational agency, the parent, and relevant members of the IEP team determine that the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP, the conduct shall be determined to be a manifestation of the child's disability.

If the local educational agency, the parent and the relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team shall:

1. Conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such an assessment prior to such determination before the behavior that resulted in a change of placement;

2. In the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

3. Return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan, except if the child's conduct involved carrying or possessing a weapon, knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance, or the student inflicted serious bodily injury upon another person while at school.

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child:

1. Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a state or local educational agency;

[258] Ed. Code section 48915.5 (d).

[259] Ed. Code section 48915.5 (e).

2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency; or

3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency.

The legislation adds to the IDEA a definition of "serious bodily injury." "Serious bodily injury," for purposes of the IDEA, is defined as bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.[260]

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and all of the procedural safeguards accorded under Section 1415, subdivision (k). The alternative educational setting shall be determined by the IEP team. The parent of a child with a disability who disagrees with any decision regarding disciplinary action, placement, or the manifestation determination, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing. The hearing officer may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others or may return the child to the placement from which the child was removed.

When a parent or local educational agency requests a hearing regarding the interim alternative educational setting or a manifestation determination, the child shall remain in the interim educational setting pending the decision of the hearing officer, or until the expiration of the 45 day time period, whichever occurs first, unless the parent and the state or local educational agency agree otherwise. In such cases, the state or local educational agency shall arrange for an expedited hearing which shall occur within 20 school days of the date the hearing is requested and a decision shall be made within 10 school days after the hearing.

A child who has not been determined to be eligible for special education and related services under the IDEA and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for under the IDEA if the local educational agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.[261] A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:

[260] See 18 U.S.C. § 1365(h)(3).

[261] 20 U.S.C. § 1415(k)(5).

1. The parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

2. The parent of the child has requested an evaluation of the child; or

3. The teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

The 2004 amendments to the IDEA deleted a fourth basis of knowledge that was in previous law which stated, "The behavior or performance of the child demonstrates the need for such services." The deletion of these criteria is a positive one, since this criteria was vague and overly broad.

If a local educational agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors. However, if a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the IDEA, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

The IDEA states that nothing in the IDEA shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a child with a disability. A school district reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.[262]

The regulations contain similar language with additional language that states that any school district reporting a crime may transmit copies of the child's special education and disciplinary records only to the extent that transmission is permitted by the Family Educational Rights and Privacy Act (FERPA).[263] Under FERPA and California law, generally, parental permission would be required to send the student's records to law enforcement authorities. However, under the Education Code the records could be sent to a probation officer or district

[262] 20 U.S.C. § 1415(k)(9).

[263] 20 U.S.C. § 1232g.

attorney for the purposes of conducting a criminal investigation, declaring a person a ward of the court or involving a violation of a condition of probation.[264]

Under California law, if the student with exceptional needs is a foster child and the local education agency has proposed a change in placement due to an act for which a decision to recommend expulsion is at the discretion of the principal or the district superintendent of schools, the attorney for the individual with exceptional needs and an appropriate representative of the county child welfare agency shall be invited to participate in the IEP team meeting that makes a manifestation determination under federal law. The invitation may be made using the most cost effective method possible, which may include, but is not limited to, electronic mail or telephone call.[265]

If the individual with exceptional needs is a homeless child or youth as defined under federal law and the local educational agency has proposed a change of placement due to an act for which a decision to recommend expulsion is at the discretion of the principal or the district superintendent of schools, the local educational agency liaison for homeless children and youth designated under federal law shall be invited to participate in the IEP team meeting that makes a manifestation determination pursuant to federal law. The invitation may be made using the most cost effective method possible, which may include, but is not limited to, electronic mail or telephone call.[266]

I. Expulsion of Homeless and Foster Youth

Under California law, if a decision is made to recommend expulsion and it is a discretionary act and the pupil is a foster child as defined in state law, the governing board of the school district shall provide notice of the expulsion hearing to the pupil's attorney and an appropriate representative of the county child welfare agency at least ten (10) calendar days before the date of the hearing. If a recommendation of expulsion is required and the pupil is a foster child as defined in Education Code section 48853.5, the governing board of the school district may provide notice of the expulsion hearing to the pupil's attorney and an appropriate representative of the child welfare agency at least ten (10) calendar days before the date of the hearing.[267]

If the decision to recommend expulsion is discretionary act and the pupil is a homeless child or youth as defined under federal law, the governing board of the school district shall provide notice of the expulsion hearing to the local educational agency liaison for homeless children and youth designated pursuant to federal law at least ten (10) calendar days before the date of the hearing. The notice may be made using the most cost effective method possible, which may include, but is not limited to, electronic mail or a telephone call. If the recommendation of expulsion is required and the pupil is a homeless child or youth as defined under federal law, the governing board of the school district may provide notice of the expulsion hearing to the local educational agency liaison for homeless children and youth designated under

[264] 34 C.F.R. § 300.529; Ed. Code., § 49076(a)(9).

[265] Ed. Code section 48915.5(d).

[266] Ed. Code section 48915.5(e).

[267] Ed. Code section 48918.1(a).

federal law at least ten (10) calendar days before the date of the hearing. The notice may be made using the most cost effective method possible, which may include, but is not limited to, electronic mail or a telephone call.[268]

EDUCATION PROGRAMS FOR EXPELLED STUDENTS

At the time a student is expelled, the governing board of the school district is required to ensure that an educational program is provided to the student who is subject to the expulsion order for the period of expulsion.[269] The program must not be situated within or on the grounds of the school from which the student was expelled.[270]

If the student was expelled from any of grades K-6, the educational program shall not be combined or merged with educational programs offered to students in any of grades 7-12. The district or county program is the only program required to be provided to expelled students as determined by the governing board of the school district.[271]

The governing board may require a pupil who is expelled from school for reasons related to controlled substances to enroll in a county supported drug rehabilitation program. No student shall be required to enroll in a rehabilitation program without the consent of his or her parent or guardian.[272]

SUBPOENAS IN EXPULSION HEARINGS

Education Code section 48918, subdivision (i), states that governing boards of school districts may issue subpoenas at the request of either the superintendent of schools, or the superintendent's designee, or the student for the personal appearance of percipient witnesses at an expulsion hearing. After the hearing has commenced, the governing board or the hearing officer or the administrative panel, may, upon request of either the county superintendent of schools or the superintendent's designee or the student, issue subpoenas. All subpoenas must be issued in accordance with the California Code of Civil Procedure. Enforcement of the subpoenas is left to the courts.[273]

Any objection raised by the superintendent of schools or the superintendent's designee or the student, to the issuance of subpoenas may be considered by the governing board in closed session or in open session if so requested by the student before the meeting. Any decision by the governing board in response to an objection to the issuance of subpoenas shall be final and binding.[274]

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[268] Ed. Code section 48918.1(b).

[269] Ed. Code section 48916.1(a).

[270] Ed. Code section 48916.1(c).

[271] Ed. Code section 48916.1(d).

[272] Education Code section 48916.5.

[273] See, also, Woodbury v. Brown-Dempsey, 108 Cal.App.4th 421, 134 Cal.Rptr. 2d 124 (2003).

[274] Ed. Code section 48918(i)(2).

The governing board, hearing officer or administrative panel may refuse to issue a subpoena if it finds that a percipient witness would be subject to an unreasonable risk of harm by testifying at the hearing. However, that witness may be compelled to testify by means of a sworn declaration which does not disclose the identity of the witness.[275] These subpoenas may be served in any part of the State in accordance with the Code of Civil Procedure.[276]

All witnesses appearing pursuant to the subpoena, other than parties or officers or employees of the State or any political subdivision thereof, shall receive fees and mileage in the same amount under the same circumstances as witnesses in civil actions in a Superior Court. Fees and mileage shall be paid by the party at whose request the witness is subpoenaed.[277]

Districts interested in issuing subpoenas should request that their governing board delegate authority to issue subpoenas to a school administrator to make the system more workable.

APPEAL TO THE COUNTY BOARD OF EDUCATION

A. Timing of Appeal of Expulsion Order

The student or parent must appeal the decision of the governing board of the school district to expel or suspend an expulsion order within thirty (30) days following the decision.[278] The period within which an appeal is to be filed shall be determined from the date a governing board votes to expel, even if enforcement of the expulsion action is suspended and the student is placed on probation pursuant to Section 48917. A student who fails to appeal the original action of the board within 30 days may not subsequently appeal a decision of the board to revoke probation and impose the original order of expulsion.[279]

The county board of education, or in a class 1 or class 2 county a hearing officer or impartial administrative panel, shall hold the hearing within 20 schooldays following the filing of a formal request. If the county board of education hears the appeal without a hearing pursuant to Section 48919.5, then the board shall render a decision within three schooldays of the hearing, unless the student requests a postponement.[280]

B. Transcript of Hearing

The student must submit a request for a copy of the written transcripts and supporting documents from the district simultaneously with the filing of the notice of appeal with the county board of education. The school district is required to provide the student with the transcript, supporting documents and records within ten schooldays of the request.[281]

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[275] Ed. Code section 48918(i)(3).

[276] Ed. Code section 48918(i)(4).

[277] Ed. Code section 48918(i)(4).

[278] Ed. Code sections 48917, 48919.

[279] Ed. Code section 48919.

[280] Ed. Code section 48919.

[281] Ed. Code section 48919.

It is the responsibility of the student and the student's parent or guardian to immediately file suitable copies of the transcripts, supporting documents and records with the county board of education following transmittal of the records to the student and the student's parent or guardian.[282] The cost of the transcript shall be borne by the student except in either of the following situations:

1. Where the student's parent or guardian certifies to the school district that he or she cannot reasonably afford the cost of the transcript because of limited income or exceptional necessary expenses, or both; or

2. In a case in which the county board reverses the decision of the local governing board, the county board shall require that the local board reimburse the student for the cost of such transcription.[283]

C. Scope of Review

The county board of education reviews the record (written transcript) of the hearing before the district governing board, together with such applicable documentation or regulations as may be ordered.[284] New evidence is not presented unless the county board grants a hearing de novo.[285] As set forth in Education Code section 48922, the review by the county board is limited to the following:

1. Whether the governing board of the school district acted without or in excess of its jurisdiction;

2. Whether there was a fair hearing before the governing board of the school district;

3. Whether there was a prejudicial abuse of discretion in the expulsion hearing; or

4. Whether there is relevant evidence which was improperly excluded or which, in the exercise of reasonable diligence, could not have been produced at the expulsion hearing.[286]

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, 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.

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[282] Ed. Code section 48919.

[283] Ed. Code section 48921.

[284] Ed. Code section 48921.

[285] Ed. Code section 48921.

[286] Ed. Code section 48922(a).

1. An abuse of discretion is established in any of the following situations:

   a. If school officials have not met procedural requirements;

   b. If the decision to expel a student is not supported by the findings prescribed by Section 48915; or

   c. 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 student based upon a finding of an abuse of discretion unless the county board of education also determines that the abuse of discretion was prejudicial.[287]

D. Manner of Hearing Expulsion Appeal

The county board shall hear an appeal of an expulsion order in closed session unless the student requests, in writing, at least five days prior to the date of the hearing, that the hearing be conducted in a public meeting. Upon the timely submission of a request for a public meeting, the county board shall honor the request.[288]

Whether the hearing is conducted in closed or public session, the county board may meet in closed session for the purpose of deliberations. If the county board admits any representative of the student or school district, the board shall, at the same time, admit representatives from the opposing party.[289]

E. Decision of the County Board

Where the county board finds that relevant and material evidence was improperly excluded or if, in the exercise of reasonable diligence, could not have been produced, the county board may remand (return) the matter to the governing board for reconsideration and may, in addition, order the student reinstated pending the hearing, or the county board may grant a hearing *de novo* before the county board.[290] If the county board of education determines that the decision of the governing board of the school district is not supported by the findings required to be made by Section 48915, but evidence supporting the required findings exist in the record of the proceedings, the county board shall remand the matter to the governing board for adoption of the required findings. This remand for the adoption and inclusion of the required findings shall not result in an additional hearing pursuant to Section 48918, except that final action to expel the pupil based on the revised findings of fact shall be taken in a public session.

In all other cases the county board may either affirm or reverse the decision of the governing board. If the decision is reversed, the county board may direct the governing board to

[287] Ed. Code section 48922.

[288] Ed. Code section 48920.

[289] Ed. Code section 48920.

[290] Ed. Code section 48923(a).

expunge the student's record and the records of the district of any references to the expulsion action; and such expulsion shall be deemed not to have occurred.[291] The county board shall notify the parent and the governing board in writing of its decision and the decision shall be the final administrative decision.[292]

JUDICIAL REVIEW

A. The Role of the Courts

Generally, the superior court reviews the student expulsion by means of an administrative mandamus proceeding.[293] The court reviews the administrative record (e.g., written transcript, exhibits, correspondence) and, although not free from doubt, it appears that courts will exercise their independent judgment on the evidence presented.[294] The court will seek to determine the following:

1. Whether the governing board proceeded without or in excess of jurisdiction;

2. Whether there was a fair hearing; and

3. Whether there was a prejudicial abuse of discretion (i.e., whether the governing board acted in accordance with the law, whether its decision is supported by the findings, and whether the findings are supported by the evidence).

[291] Ed. Code section 48923(c).

[292] Ed. Code section 48924.

[293] Civ. Code Proc. section 1094.5.

[294] Garcia v. Los Angeles County Board of Education, 123 Cal.App.3d 807, 177 Cal.Rptr. 29 (1981).

PROCEDURES FOR STUDENT EXPULSION HEARINGS

Chairperson of Administrative Panel or Board President:

"Today is _____ at _____. We are in the offices of the _____ School District. This is a meeting of the _____ School District's expulsion hearing panel. The case number is _____. This panel is formed pursuant to various sections of the Education Code and the policies of the _____ School District. Its purpose today is to conduct a hearing with respect to the recommendation that _____ be expelled from the schools of the _____ School District.

"The members of the panel are _____, _____, and _____. All of us are certificated employees of the _____ School District, and no one is employed at the school where _____ is enrolled.

"The Board of Trustees of the _____ School District has designated this panel to hear the evidence in this case. The primary task of the panel in this hearing is to ascertain the facts. This is not a court of law, and we will not be proceeding here as if it were one. This is an administrative hearing which may have some resemblance to a court proceeding, but is less formal and less technical. Pursuant to Education Code section 48918(h), technical rules of evidence do not apply to expulsion hearings and hearsay evidence is admissible if relevant, as provided.

"For the record, present at this hearing is _____ representing _____. Also present is student _____.

"These proceedings will be tape-recorded. Under the Education Code, the Board of Trustees is permitted to conduct a hearing of this type in closed session unless the student demanded that the hearing be conducted in public by notifying the school district five days in advance.

Chairman (or Board President): "The District and the student are permitted to call and cross-examine witnesses and introduce documentary evidence. The technical rules of evidence will not apply, but all witnesses will be required to testify under oath. Will all persons who may testify in this matter please stand, raise your right hand and be sworn."

All witnesses, including the student if he or she wishes to address the board, should stand and the chairman should read the following oath: "Do each of you swear or affirm that the testimony you may give in this hearing shall be the truth, the whole truth and nothing but the truth?" The chairman should wait until the witnesses have responded.

Chairman (or Board President): "Unless either the District or the student objects, all witnesses will be permitted to remain in the room during the hearing. If either party objects, all witnesses will be excluded until they are called to testify. However, the District and the student will be

permitted to have one or more representatives present to assist in presenting evidence throughout the hearing. Does either party wish to exclude witnesses?"

The district and the student are asked to respond. If either party requests that witnesses be excluded, the chairman shall so order.

"District requests that no students' last names, other than _____ be used in this hearing because to do so would violate those students' confidentiality and privacy rights under state and federal law.

Chairman (or Board President): "The burden of proof in this matter rests with the District. I call upon the District's representative to make an opening statement at this time."

The district's representative makes an opening statement.

Chairman (or Board President): "At this time, the student's representative may make an opening statement or may wait until the District has completed its evidence. Do you wish to make an opening statement at this time?"

The student's representative responds and makes an opening statement if he requests to do so at this time.

Chairman (or Board President): "The District will now present witnesses and evidence. After each witness' testimony, the student or his representative may cross-examine the witness. Re-direct and re-cross examination is permitted and panel members may ask clarifying questions. The District may proceed."

The district, through its representatives, calls each witness in succession. The student's representatives may cross-examine each witness. If documents are submitted in evidence, they shall be received by the chairman and marked consecutively as the district's exhibits no. 1, no. 2, etc.

After the district indicates that it has completed its evidence, the student may make an opening statement if he has not done so and then may proceed to call his witnesses and introduce his documents in the same manner as the district has done, and the district may cross-examine the student's witnesses.

Chairman (or Board President): "All evidence has been received. The student's representative may make a closing statement."

The district makes a closing statement.

The student's representative makes a closing statement.

Chairman (or Board President): "The District, which has the burden of proof, may make its closing statement at this time."

Chairman (or Board President): IF THE HEARING IS HELD BEFORE THE BOARD OF TRUSTEES): "At this time the Board of Trustees will retire to reach a decision."

The board retires or clears the room and discusses the matter and votes on the question "[S]hall be expelled from the _____ School District?" A roll call vote should be taken.

Chairman (or Board President): "The question before the Board of Trustees is '[S]hall _____ be expelled from the _____ School District?' I call for a roll call vote."

Each trustee votes YES (to sustain the expulsion) or NO (to reinstate the student).

Chairman (or Board President): "This concludes the hearing on the matter of the expulsion of student _____."

Chairman (IF THE HEARING IS HELD BEFORE THE ADMINISTRATIVE PANEL): "The Administrative Panel finds that _____ violated Education Code section 48900 by _____, e.g., possession marijuana on a school campus) on _____, 20__. The administrative panel recommends to the board of trustees that the student be expelled, or "The Administrative Panel will deliberate at this time and notify you in writing of its decision."

Following are two sets of sample form letters for suspension and expulsion. The first set involves a hypothetical incident involving a knife and the second set involves a hypothetical incident involving marijuana.

ATTACHMENT NUMBER ONE

SAMPLE SUSPENSION LETTER

May X, 2015

Ms. Jane Doe
123 Mulberry Street
Santa Ana, CA 92701

Re: Suspension of John Doe

Dear Ms. Doe:

This letter is to inform you that your son, John Doe, a student at Orange County High School, has been suspended effective May X, 2015, pursuant to Education Code section 48900, subdivisions (a), (b), (e), and (g), and Section 48911. The reason for the suspension is that on May X, 2015, at a baseball game at Riverside County High School, your son, John Doe, brandished a knife and threatened physical injury to a Riverside County High School student if that student did not give his wallet and money to your son. The threats and assault took place just prior to a baseball game between Orange County High School and Riverside County High School, causing a 15 minute postponement of the beginning of the baseball game.

Based on our interview of witnesses and our review of the facts, we have decided to suspend your son, John Doe, for a period of five (5) consecutive schooldays.

Please be advised that you have the right to review the student records of your son and it is hereby requested that you attend a meeting with the assistant principal of Orange County High School on Wednesday, May X, 2015, at 3:00 p.m. At that meeting, the student's conduct will be reviewed and possible further disciplinary action will be discussed.

If you have any questions, please call the assistant principal of Orange County High School.

Very truly yours,

Assistant Principal

ATTACHMENT NUMBER TWO

SAMPLE EXTENSION OF SUSPENSION LETTER

May X, 2015

Ms. Jane Doe
123 Mulberry Street
Santa Ana, CA 92701

Re: Extension of Suspension of John Doe

Dear Ms. Doe:

Following a review of the facts surrounding the incident of Saturday, May X, 2015, as superintendent's designee for the district, I am considering the extension of the suspension of John Doe and I am considering recommending expulsion. I would appreciate it if you would attend a conference to discuss the possible extension of suspension and recommendation to expel your son on Wednesday, May X, 2015 at 3:00 p.m. in my office.

Very truly yours,

Superintendent's Designee

ATTACHMENT NUMBER THREE

SAMPLE EXTENSION OF SUSPENSION AND RECOMMENDATION TO EXPEL LETTER

May X, 2015

Ms. Jane Doe
123 Mulberry Street
Santa Ana, CA 92701

Re: Extension of Suspension and Recommendation to Expel

Dear Ms. Doe:

Following our conference regarding the extension of the suspension of your son, John Doe, I have decided to extend the suspension and recommend expulsion.

During the conference, we discussed the circumstances surrounding the incident of Saturday, May X, 2015. The incident involved the brandishing of a knife and a threat to cause physical injury to a student of Riverside County High School if the student did not turn over his wallet and money to your son.

This conduct violated Education Code section 48900, subdivisions (a), (b), and (e). I find that the return of your son to Orange County High School or to an alternative school placement in the District would cause a danger to persons or property or a threat of disrupting the educational process.

Therefore, I have decided to extend the suspension of John Doe pending expulsion and have recommended expulsion.

If you have any further questions, please call me.

Very truly yours,

Superintendent's Designee

(Note: If the Superintendent's designee following the conference determines that the student brandished a knife then the Superintendent's designee must recommend expulsion and the governing board must expel the student if the governing board finds that the student brandished a knife. Ed. Code, § 48915(c).)

ATTACHMENT NUMBER FOUR

SAMPLE NOTICE OF EXPULSION HEARING LETTER

May X, 2015

Ms. Jane Doe
123 Mulberry Street
Santa Ana, CA 92701

Re: Notice of Expulsion Hearing

Dear Ms. Doe:

You are hereby given notice that the expulsion hearing for your son, John Doe, will be held on May X, 2015 at 10:00 a.m. before an administrative panel of three school administrators. The hearing will be held at Orange County High School in the conference room.

The specific charges are that on or about Saturday, May X, 2015, at approximately 3:30 p.m. at Riverside County High School prior to a school sponsored baseball game your son, John Doe, caused or attempted to cause, or threatened to cause physical injury to another person in violation of Education Code sections 48900(a) and 48915(a)(1)(A), brandished a knife in violation of Education Code sections 48900(b) and 48915(c)(2), and committed or attempted to commit robbery or extortion against a student at Riverside County High School in violation of Education Code sections 48900(e) and 48915(e).

Enclosed is a copy of the District's policy with respect to student conduct, student suspension and student expulsion. At the hearing, you have a right to represent yourself or obtain legal counsel. You have the right to inspect and obtain copies of all documents to be used at the hearing and have the right to confront and question all witnesses who testify at the hearing, question all other evidence presented and present oral and documentary evidence on the student's behalf including witnesses.

The hearing will be closed to the public, unless you request an open hearing, in writing, five days prior to the hearing.

If you have any questions, please call me.

Very truly yours,

Superintendent's Designee

ATTACHMENT NUMBER FIVE

SAMPLE FINDINGS OF ADMINISTRATIVE HEARING PANEL LETTER

June X, 2015

Ms. Jane Doe
123 Mulberry Street
Santa Ana, CA 92701

Re: Findings of Administrative Hearing Panel

Dear Ms. Doe:

Attached are the Findings of the Administrative Hearing Panel which conducted the expulsion hearing. The hearing panel is recommending to the governing board of the school district that your son, John Doe, be expelled from the schools of the district.

The governing board of the school district will make a final decision on the matter at its meeting on June X, 2015 at 7:00 p.m. You have the right to address the governing board of the school district regarding this matter. The governing board will not conduct a new hearing on the matter, but will review the Findings of the Administrative Panel and its recommendations prior to making a final decision.

If you have any questions, please contact me.

Very truly yours,

Superintendent's Designee

Attachment

Findings of Fact and Recommendations

ATTACHMENT FIVE (A)

SAMPLE FINDINGS OF FACT AND RECOMMENDATIONS

On May X, 2015, a hearing in the matter of the expulsion of John Doe was conducted. Oral testimony and written evidence was presented and the Administrative Panel makes the following findings and recommendations:

FINDINGS OF FACT

1. On Saturday, May X, 2015, John Doe left Orange County High School and traveled to Riverside County High School to attend a baseball game between the two schools. The baseball game was a school sponsored event.

2. At approximately 3:30 p.m., John Doe removed a knife from his backpack, brandished it at a Riverside County High School Student named John Rodriguez and told him that he would cut him up if he did not turn over his wallet and all of his money to him. Several of Rodriguez's friends came to his defense, and a crowd gathered. A number of school administrators and teachers were able to stop the situation from escalating but, as a result, the baseball game was delayed.

3. It is found that John Doe violated Education Code sections 48900(a) and 48915(a)(1)(A), caused, attempted to cause, or threatened to cause physical injury to another person, Education Code sections 48900(b) and 48915(a)(1)(B), possessed a knife, and Education Code sections 48900(e) and 48915(a)(1)(A)(e), committed or attempted to commit robbery or extortion.

4. ☐ Other means of correction are not feasible or have repeatedly failed to bring about proper conduct; and/or

☐ 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.

[A statement supporting the findings in #4 should be added that is individualized to each case. The following is an example:]

[The act of brandishing a knife is a danger to the physical safety of the pupil and others. John Doe and the friends who came to his defense could have been seriously injured.]

RECOMMENDATIONS

5. It is recommended by the Administrative panel that John Doe be expelled from the schools of the district.

Dated: _____

Administrative Panel Member

Administrative Panel Member

_____

_____

Administrative Panel Member

_____

ATTACHMENT NUMBER SIX

SAMPLE EXPULSION LETTER

June X, 2015

Ms. Jane Doe
123 Mulberry Street
Santa Ana, CA 92701

Re: Expulsion

Dear Ms. Doe:

This letter is to notify you that on June X, 2015, the Governing Board of the Orange County Unified School District expelled John Doe from the District. He may apply for readmission after the fall 2015 semester.

The governing board of the school district affirmed the recommendation of the administrative panel and accepted its findings and recommendations. The governing board adopted the findings and recommendations as its own. The governing board hereby finds that John Doe violated Education Code section 48900, subdivisions (a), (b), and (e), and Education Code section 48915, subdivisions (a)(1)(a), (a)(1)(B), and (a)(1)(D), and therefore shall be expelled for the remainder of the spring semester and the fall 2015 semester. John may apply for readmission after the fall 2015 semester. A copy of the findings and recommendations is enclosed.

Please be advised that you have the right to appeal to the Orange County Board of Education within 30 days following the decision of the governing board of the Orange County Unified School District. You should contact _____ at _____, to discuss the appeal procedure.

During the period of his expulsion, an alternative educational placement for John Doe will be provided at _____.

In addition, you are required, pursuant to Education Code section 48915.1, to inform all school districts that you contact for purposes of enrollment that John Doe has been expelled from the Orange County Unified School District. If you fail to inform other school districts of the expulsion, the failure to disclose this information may be considered by other districts in determining whether your son or daughter should be admitted as a student.

If you have any questions, please call.

Sincerely,

Superintendent's Designee

Second set of form letters involving a hypothetical incident involving marijuana

ATTACHMENT NUMBER SEVEN

SAMPLE SUSPENSION LETTER

March X, 2015

Mr. and Mrs. John Miller
123 Mulberry Street
Santa Ana, CA 92701

Re: Suspension of Jason Miller

Dear Mr. and Mrs. Miller:

This letter is to inform you that your son, Jason Miller, a student at Orange County High School, has been suspended effective March X, 2015, pursuant to Education Code section 48900, subdivisions (c), (j) and (k), and Section 48911. The reason for the suspension is that on March X, 2015, Jason Miller was found to be in possession of marijuana and a marijuana bong during the lunch period at Orange County Park in violation of school rules. Jason had invited other students to join him in the park to smoke the marijuana and was stopped by school administrators before he furnished the marijuana to the other students.

Based on our interview of witnesses and our review of the facts, we have decided to suspend your son, Jason Miller, for a period of five (5) consecutive schooldays.

Please be advised that you have the right to review the student records of your son and it is hereby requested that you attend a meeting with the assistant principal of Orange County High School on Thursday, March X, 2015, at 3:00 p.m. At that meeting, the student's conduct will be reviewed and possible further disciplinary action will be discussed.

If you have any questions, please call the assistant principal of Orange County High School.

Very truly yours,

Assistant Principal

ATTACHMENT NUMBER EIGHT

SAMPLE EXTENSION OF SUSPENSION LETTER

March X, 2015

Mr. and Mrs. John Miller
123 Mulberry Street
Santa Ana, CA 92701

Re: Extension of Suspension of Jason Miller

Dear Mr. and Mrs. Miller:

Following a review of the facts surrounding the incident of Tuesday, March X, 2015, as superintendent's designee for the district, I am considering the extension of the suspension of Jason Miller and I am considering recommending expulsion. I would appreciate it if you would attend a conference to discuss the possible extension of suspension and recommendation to expel your son on Wednesday, March X, 2015, at 3:00 p.m. in my office.

Very truly yours,

Superintendent's Designee

ATTACHMENT NUMBER NINE

SAMPLE EXTENSION OF SUSPENSION AND RECOMMENDATION TO EXPEL LETTER

March X 2015

Mr. and Mrs. John Miller
123 Mulberry Street
Santa Ana, CA 92701

Re: Extension of Suspension and Recommendation to Expel

Dear Mr. and Mrs. Miller:

Following our conference regarding the extension of the suspension of your son, Jason Miller, I have decided to extend the suspension and recommend expulsion.

During the conference, we discussed the circumstances surrounding the incident of Tuesday, March X, 2015. The incident involved the possession of marijuana, the possession of a marijuana bong, and the attempted furnishing of marijuana to other students.

This conduct violated Education Code section 48900, subdivisions (c), and (j), section 48915, subdivision (a)(1)(C), and section 48915, subdivision (e). I find that the return of your son to Orange County High School or to an alternative school placement in the District would cause a danger to persons or property or a threat of disrupting the educational process.

Therefore, I have decided to extend the suspension of Jason Miller pending expulsion and have recommended expulsion.

If you have any further questions, please call me.

Very truly yours,

Superintendent's Designee

ATTACHMENT NUMBER TEN

SAMPLE NOTICE OF EXPULSION HEARING LETTER

March X, 2015

Mr. and Mrs. John Miller
123 Mulberry Street
Santa Ana, CA 92701

Re: Notice of Expulsion Hearing

Dear Mr. and Mrs. Miller:

You are hereby given notice that the expulsion hearing for your son, Jason Miller, will be held on March X, 2015, at 10:00 a.m., before an administrative panel of three school administrators. The hearing will be held at Orange County High School in the conference room.

The specific charges are that on Tuesday, March X, 2015, during the lunch period, Jason Miller and five other students went to Orange County Park in violation of school rules to smoke marijuana. Jason was stopped by an assistant principal and was found to be in possession of marijuana and a marijuana bong, in violation of Education Code sections 48900, subdivision (c), and 48915, subdivision (a)(1)(C), possession of a controlled substance; and in violation of Education Code sections 48900, subdivision (j), and 48915, subsection (e), unlawful possession of drug paraphernalia.

Enclosed is a copy of the District's policy with respect to student conduct, student suspension and student expulsion. At the hearing, you have a right to represent yourself or obtain legal counsel. You have the right to inspect and obtain copies of all documents to be used at the hearing, and you have the right to confront and question all witnesses who testify at the hearing, question all other evidence presented, and present oral and documentary evidence on the student's behalf, including witnesses.

The hearing will be closed to the public, unless you request an open hearing, in writing, five days prior to the hearing.

If you have any questions, please call me.

Very truly yours,

Superintendent's Designee

ATTACHMENT NUMBER ELEVEN

SAMPLE FINDINGS OF ADMINISTRATIVE HEARING PANEL LETTER

March X, 2015

Mr. and Mrs. John Miller
123 Mulberry Street
Santa Ana, CA 92701

Re: Findings of Administrative Hearing Panel

Dear Mr. and Mrs. Miller:

Attached are the Findings of the Administrative Hearing Panel which conducted the expulsion hearing. The hearing panel is recommending to the governing board of the school district that your son, Jason Miller, be expelled from the schools of the district.

The governing board of the school district will make a final decision on the matter at its meeting on March X, 2015, at 7:00 p.m. You have the right to address the governing board of the school district regarding this matter. The governing board will not conduct a new hearing on the matter, but will review the Findings of the Administrative Panel and its recommendations prior to making a final decision.

If you have any questions, please contact me.

Very truly yours,

Superintendent's Designee

Attachments
Findings of Fact and Recommendations

ATTACHMENT NUMBER TWELVE

SAMPLE FINDINGS OF FACT AND RECOMMENDATIONS

On March X, 2015, a hearing in the matter of the expulsion of Jason Miller was conducted. Oral testimony and written evidence was presented and the Administrative Panel makes the following findings and recommendations:

FINDINGS OF FACT

1. On Tuesday, March X, 2015, Jason Miller left Orange County High School at lunch time and traveled in his cousin's car across the street to Orange County Park to smoke marijuana with five other students.

2. Jason Miller was in possession of marijuana, a controlled substance, and a marijuana bong when stopped and questioned in Orange County Park during the lunch period by Assistant Principals Smith and Jones.

3. Upon being questioned by Assistant Principal Smith, Jason Miller admitted that he was in possession of marijuana and that he had more marijuana in the trunk of his car which was parked in the school parking lot at Orange County High School. Assistant Principal Smith and Assistant Principal Jones then searched the trunk of Jason Miller's car and found additional marijuana and drug paraphernalia.

4. It is found that Jason Miller violated Education Code sections 48900(c) and 48915(a)(1)(C), unlawful possession of a controlled substance; and subdivision (j), and section 48915(e), unlawful possession of drug paraphernalia.

5. ☐ Other means of correction are not feasible or have repeatedly failed to bring about proper conduct; and/or

   ☒ 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.

6. The possession of marijuana is inherently dangerous to the physical safety of the pupil and others. The fact that Jason Miller invited other students to smoke marijuana with him at the Orange County Park shows that he is a continuing danger to the physical safety of other pupils who may be physically injured while under the influence of marijuana.

RECOMMENDATIONS

7. It is recommended by the Administrative Panel that Jason Miller be expelled from the schools of the district for the remainder of the Spring 2015 semester and the Fall 2015 semester.

Dated: March X, 2015

Administrative Panel Member

_____

George Harris

Administrative Panel Member

_____

Robin Miller

Administrative Panel Member

_____

Bonnie Gonzalez

ATTACHMENT NUMBER THIRTEEN

SAMPLE EXPULSION LETTER

March X, 2015

Mr. and Mrs. John Miller
123 Mulberry Street
Santa Ana, CA 92701

Re: Expulsion of Jason Miller

Dear Mr. and Mrs. Miller:

This letter is to notify you that on March X, 2015, the Governing Board of the Orange County Unified School District expelled Jason Miller from the District for the remainder of the Spring 2015 semester and the Fall 2015 semester. He may apply for readmission after the Fall 2015 semester.

The governing board of the school district affirmed the recommendation of the administrative panel and accepted its findings and recommendations. The governing board adopted the findings and recommendations as its own. The governing board hereby finds that Jason Miller violated Education Code section 48900, subdivisions (c) and (j), and section 48915(a)(1)(C) and (e), and therefore, shall be expelled for the remainder of the Spring and Fall 2015 semesters. Jason may apply for readmission after the Fall 2015 semester. A copy of the findings and recommendations is enclosed.

Please be advised that you have the right to appeal to the Orange County Board of Education within 30 days following the decision of the governing board of the Orange County Unified School District. You should contact the Orange County Department of Education at (714) 327-1074, to discuss the appeal procedure.

During the period of his expulsion, an alternative educational placement for Jason Miller will be provided at the Orange County Department of Education.

In addition, you are required, pursuant to Education Code section 48915.1, to inform all school districts that you contact for purposes of enrollment that Jason Miller has been expelled from the Orange County Unified School District. If you fail to inform other school districts of the expulsion, the failure to disclose this information may be considered by other districts in determining whether your son should be admitted as a student.

If you have any questions, please call.

Sincerely,

Superintendent's Designee

ATTACHMENT NUMBER FOURTEEN

STATUTORY DEFINITIONS OF SEXUAL ASSAULT AND SEXUAL BATTERY FOR PURPOSES OF STUDENT EXPULSION

Sexual Assault		**Sexual Battery**	
Education Code section 48900(n)	Committed or attempted to commit a sexual assault as defined in Section 261, 266c, 286, 288, 288a, or 289 of the Penal Code.	*Education Code section 48900(n)*	Committed a sexual battery as defined in Section 243.4 of the Penal Code.
Education Code section 48915(c)(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.	*Education Code section 48915(c)(4)*	Committing a sexual battery as defined in subdivision (n) of Section 48900.
Penal Code section 261 (rape)	(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: (1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act… (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another. (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused. (4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:	*Penal Code section 243.4 (sexual battery)*	(a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery…. (b) Any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery…. (c) Any person who touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose, is

	(A) Was unconscious or asleep. (B) Was not aware, knowing, perceiving, or cognizant that the act occurred. (C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact. (D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose. (5) Where a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief. (6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death. (7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator		guilty of sexual battery…. (d) Any person who, for the purpose of sexual arousal, sexual gratification, or sexual abuse, causes another, against that person's will while that person is unlawfully restrained either by the accused or an accomplice, or is institutionalized for medical treatment and is seriously disabled or medically incapacitated, to masturbate or touch an intimate part of either of those persons or a third person, is guilty of sexual battery…. (e) (1) Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery…. (2) As used in this subdivision, "touches" means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim. (f) As used in subdivisions (a), (b), (c), and (d), "touches" means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense. (g) As used in this section, the following terms have the following meanings: (1) "Intimate part" means

	does not actually have to be a public official.		the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.
Penal Code section 266c (rape)	Every person who induces any other person to engage in sexual intercourse, sexual penetration, oral copulation, or sodomy when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person's free will, and does cause the victim to so act. . .		
Penal Code section 286 (sodomy)	(a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.		
Penal Code section 288 (lewd or lascivious act)	(a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act. . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child. . .		
Penal Code section 288a (oral copulation)	(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person.		
Penal Code section 289 (act of sexual penetration against the victim's will)	(a)(1)(A) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. . .		

ATTACHMENT NUMBER FIFTEEN

HYPOTHETICAL INVESTIGATION OF SEXUAL ASSAULT AND BATTERY AND SALE OF DRUGS

I. Hypothetical Factual Situation – Alleged Sexual Assault and Battery

On Friday, January 12, 2018, John Smith, an eleventh grade student at Orange County High School, on his way home from school stopped at a friend's house, Jason Ross. When he arrived at the friend's house, he saw that his former girlfriend, Amber Jones, was at his friend's house. John approached Amber to ask her if she would like to go to a school dance with him. Amber told John that she was going to the dance with someone else.

John told Amber that he would like to talk to her about their past relationship. Amber agreed to talk with him in the backyard of the house where other students were present. John told her he wanted to talk with her in private and asked her to go up to the upstairs bedroom of the house. Amber agreed and they went upstairs to the bedroom. They began talking about their past relationship. Amber claims that John reached over and put his hand down the front of her pants underneath her underwear and touched her in a private area. John denies touching Amber at all.

On Tuesday, February 20, 2018, one of Amber's friends, Jessica Rodriguez, told the school counselor, Jennifer McDonald, that John Smith sexually assaulted Amber Jones on Friday, January 12th at Jason Ross' home. The school counselor took notes of the conversation and reported the conversation to Assistant Principal, Jim Adams.

What steps should Assistant Principal, Jim Adams, take to ensure a thorough investigation of what occurred? Is this alleged incident related to school activity? What steps should the Assistant Principal take to determine if the alleged incident is related to school activity?

Assistant Principal, Jim Adams, should thoroughly investigate the facts by interviewing witnesses and obtaining witness statements and physical evidence.

1. The school counselor should type up her notes and make a copy for the Assistant Principal.

2. A witness statement should be obtained from Amber Jones and Jessica Rodriguez.

3. The Assistant Principal should interview Amber Jones' friend and ask her the following questions:

    a. Were you at Jason Ross' home on Friday, January 12, 2018, when the alleged incident occurred?

b. How did you become aware of the alleged incident?

c. Who told you of the alleged incident? When and where were you told of the incident?

d. Who else was present when you were told of the alleged incident?

e. What were you told of the alleged incident?

f. Did you speak directly with Amber Jones about the incident? Did you give Amber Jones any advice on what to do?

g. What prompted you to report this incident to the school counselor, Jennifer McDonald?

h. Has this alleged incident impacted the school in any way? How has it impacted the school?

4. The Assistant Principal should interview Amber Jones and ask her the following questions:

a. I received a report from the school counselor, Jennifer MacDonald, stating that a sexual assault and sexual battery may have occurred at the home of Jason Ross on Friday, January 12, 2018. Can you please tell me what occurred? What time was it when the incident occurred?

b. Prior to going to Jason Ross' home, did you have any discussions with John Smith at school? What were those discussions about?

c. Did you have a prior relationship with John Smith? What was the nature of that relationship?

d. Did you voluntarily go upstairs to a bedroom in Jason Ross' house with John Smith? Why did you agree to do so?

e. What was the nature of your discussion with John Smith when you were in the bedroom? As that discussion progressed, what did John Smith do?

f. Did you consent to John Smith touching you? Did you tell John Smith to stop touching you? What was John Smith's reaction? What happened next?

g. When you went downstairs, while you were still in Jason Ross' house, did you tell anybody what occurred? Who did you tell? What did you tell them? Who else was present?

h. How much longer did you stay at Jason Ross' home? What time did you leave? Where did you go after you left Jason Ross' home?

i. When you got home to your house, did you tell your parents what occurred?

j. Did you attend school the following week? The following month? Did you tell anyone at school what occurred at Jason Ross' house? Who did you tell? When did you tell them?

k. When you came to school on Tuesday, January 16, 2018, did any other students approach you and ask you what occurred at Jason Ross' house on Friday, January 12th? Who asked you? What did you tell them?

l. Has what occurred at Jason Ross' house affected you in any way? How has it affected you? How has it affected your ability to come to school and concentrate on learning?

m. What would you like to see as the outcome of this?

n. We will follow up and interview all of the potential witnesses and also interview John Smith. Are there any text messages, emails, or posts on social media regarding what occurred on January 12, 2018?

o. Have you communicated with John Smith since January 12th? How have you communicated? What have you said to him? What has he said to you?

p. Have you told your parents about what occurred? What was their reaction? Can we discuss this matter with your parents?

5. The Assistant Principal should interview John Smith and ask him the following questions:

a. John, we have received a report about an incident involving Amber Jones that occurred on January 12, 2018, at Jason Ross' house. Please tell me in your own words what you recall about January 12th at Jason Ross' home?

b. Did you ask Amber Jones to go upstairs to a bedroom at Jason Ross' house? Why did you ask her to go upstairs? If you wanted privacy, why didn't you just go outside to an area where there were no other people?

c. When you got to the bedroom what occurred? What did you discuss?

d. Did you have a prior relationship with Amber Jones? What was the nature of that relationship?

e. Why were you concerned with her going to the dance with another student?

f. Did you attempt to touch her in any way? Why?

g. Did you make physical contact with Amber Jones while you were in the bedroom at Jason Ross' house? Where on Amber Jones' body did that physical contact place? Did you put your arm around Amber? Did you kiss her while you were in the bedroom? Did you hug her?

h. How did the conversation end in the bedroom?

i. Did you have any communication with Amber after you left the bedroom in Jason Ross' house? What did you discuss?

j. What time did you leave Jason Ross' house?

k. After you left Jason Ross' house, did you have any communication with Amber Jones between Friday and Tuesday, February 20, 2018? What was the nature of that communication? What did you discuss? What did you say to her? What did she say to you?

l. When you left the bedroom at Jason Ross' house, did Amber Jones seem upset? Were you upset?

m. I have taken notes on our interview. I would appreciate if you would write out a written statement and sign it as to what occurred.

6. The Assistant Principal should interview other students who may have knowledge of what occurred and ask the following questions:

a. Please tell me your name. Are you a student at Orange County High School?

b. Are you acquainted with Amber Jones? How do you know Amber Jones?

c. Are you acquainted with John Smith? How do you know John Smith?

d. Were you at Jason Ross' home on Friday, January 12, 2018? What time did you arrive at Jason Ross' home?

e. While you were at Jason Ross' home did you see John Smith? Did you see Amber Jones?

f. Did you see John Smith and Amber Jones go upstairs at Jason Ross' home? What time did that occur?

g. Did you see John Smith and Amber Jones come down the stairs at Jason Ross' home? Did either John Smith or Amber Jones appear to be upset?

h. Did either John Smith or Amber Jones say anything to you about what occurred upstairs at Jason Ross' house?

i. Did either John Smith or Amber Jones tell you what may have occurred upstairs at Jason Ross' house on January 12th? What did they tell you?

j. Has anyone approached you at school since January 12, 2018, and told you anything about what allegedly occurred on January 12, 2018, at Jason Ross' house?

7. The Assistant Principal should interview Jason Ross about what occurred and ask the following questions:

a. On January 12, 2018, were a number of students from Orange County High School at your house?

b. What time did you arrive at your house on January 12, 2018? Were you the first to arrive at your house? Were your parents home?

c. Did you invite other students from Orange County High School to come to your house on January 12, 2018? When did you invite them? Did you invite them at school? How many students did you invite to your house? How many students came to your house on January 12, 2018?

d. Did you give permission to John Smith and Amber Jones to go upstairs in your house? Did other students go upstairs in your house? Were you aware that John Smith and Amber Jones went upstairs in your house?

e. Did either John Smith or Amber Jones tell you what occurred upstairs in your home on January 12, 2018? What did they tell you? When did they tell you?

f. Did you attend school on January 16, 2018? On January 16, 2018 while at school did you have any conversations with anyone about what occurred at your home between John Smith and Amber Jones on January 12, 2018? Who did you have that conversation with? What did they say? What did you tell them? Did you have any discussions at school after January 16, 2018, with other students at Orange County High School about what occurred at your home on January 12, 2018? Who did you have those conversations with? What did they say to you? What did you say to them?

II. Hypothetical Factual Situation – Alleged Sale of Drugs

On Thursday, January 18, 2018, it was reported to the Assistant Principal, Jim Adams, that an eleventh grade student at Orange County High School was selling cocaine and marijuana during lunch at the park across the street from Orange County High School. Orange County High School has a policy of allowing students to leave campus with parental permission during the lunch period. Many students eat their lunch across the street at the park picnic tables. A neighbor called the school on January 18, 2018, to complain about the possible drug sales occurring in the park.

The Assistant Principal contacted the School Resource Officer from the local police department regarding the call from the neighbor, and they decided that the next day, Friday, January 19, 2018, they would go to the park across the street and see if any drug sales were occurring. On January 19, 2018, the Assistant Principal and the School Resource Officer went across the street to the park but did not observe any suspicious activity or possible drug sales.

The Assistant Principal contacted the neighbor who made the call about possible drug sales and indicated that they went with the School Resource Officer to the park but did not see any drug sales. The Assistant Principal asked the neighbor to call him on his cellphone if the neighbor observed any suspicious activity or possible drug sales in the future.

On Tuesday, January 23, 2018, at approximately 11:30 a.m., the neighbor called the Assistant Principal and told him that there were possible drug sales occurring in the park across the street from Orange County High School. The Assistant Principal contacted the School Resource Officer and walked across the street to the park. As they approached the park a group of students and young adults ran away and the Assistant Principal and School Resource Officer could not detain them. The other students in the park were not engaged in any suspicious activity.

What steps should the Assistant Principal and School Resource Officer take? First, the Assistant Principal and School Resource Officer should attempt to identify any of the students who ran away by asking the students present in the park who the students were who ran away and by possibly identifying them from a yearbook. If the Assistant Principal and School Resource Officer are able to identify the students who ran away, they should ask the following questions when they bring them into the office:

1. Were you in the park across the street from the school January 23, 2018, during the lunch period?

2. If yes, did you leave the park when you saw the Assistant Principal and School Resource Officer approaching the park? Why did you leave the park?

3. While you were in the park, were you engaged in any activities in violation of the law or school rules? What were you doing?

4. If a student admits he was engaged in the buying or selling of illegal drugs, then ask the student if he was engaged in buying or selling the drug. Who did he buy or sell the drug to? Who were the other students present at the time?

5. If the student admits to buying drugs, what drugs did he buy? How much did he pay? Who did he buy the drugs from? Where are the drugs now?

6. If the student admits to selling drugs, who did he sell the drugs to? How much money did he receive for the drugs? Where did he receive the drugs from?

III. Hypothetical Factual Situation – Alleged Weapon on Campus

On Friday, January 19, 2018, a student comes to the office of the Assistant Principal, Jim Adams, and tells him that a student, John Smith, has a large knife and has threatened other students. The Assistant Principal contacts John Smith and brings him into the office with a School Resource Officer. The Assistant Principal and School Resource Officer tell John Smith to empty all of his pockets and his backpack onto the table of the Assistant Principal's office. John Smith does so and no knife or other weapons are found.

What steps should the Assistant Principal and School Resource Officer take? The Assistant Principal and/or School Resource Officer should ask the following questions:

1. John, we received a report that you have a knife on campus and that you have threatened other students. Is that true?

2. John denies having a knife or threatening any other students. Are you upset with any of the students at school? Have you been bullied by any other students in school?

3. How are your grades and your school attendance? Have you been coming to school every day?

4. Do you drive a car to school? Do you park the car in the school parking lot? May we search the car to see if there is a knife in the car?