No. C093475

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

NATOMAS UNIFIED SCHOOL DISTRICT,
Plaintiff and Respondent,
v.
SACRAMENTO COUNTY BOARD OF EDUCATION,
Defendant and Appellant,

I.O., BY AND THROUGH HIS GUARDIAN AD LITEM, D.O.,
Real Party in Interest and Appellant.

Sacramento County Superior Court
Case No. 34-2019-80003194
Hon. Laurie M. Earl,
Judge of the Sacramento County Superior Court
Hon. Michael W. Jones,
Judge of the Placer County Superior Court
(sitting by designation per Cal. Code Civ. Proc., § 394)

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF APPELLANT SACRAMENTO COUNTY BOARD OF EDUCATION

ROB BONTA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
SRIVIDYA PANCHALAM
Supervising Deputy Attorney General

BENJAMIN T. CONWAY
CARLY J. MUNSON
*ALEXIS M. PIAZZA (SBN 316047)
Deputy Attorneys General
300 South Spring Street, Ste. 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6552
E-mail: Alexis.Piazza@doj.ca.gov
Attorneys for Amicus Curiae the Attorney General of California

August 29, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION AND STATEMENT OF INTEREST

Students with discipline issues should be kept in school, allowing their behaviors to be corrected without derailing their education—provided that can be accomplished in a way that keeps all students safe. To protect all students' interests, the Legislature has enacted a detailed statutory scheme governing student discipline. In particular, the law *mandates* the expulsion only of students who pose the greatest threat to safety, such as by possessing an explosive or firearm at school. This case, however—involving an elementary school student, I.O., who brought unloaded, plastic, orange-tipped BB guns and a sealed bag of white plastic BBs to school—does not involve those most serious violations for which expulsion is mandatory.[1] In these less serious circumstances, schools must exercise their statutorily defined *discretion* and follow statutorily prescribed *procedures* before deciding to expel a student from school. That did not occur here before Respondent Natomas Unified School District ("the District") expelled student I.O. Appellant Sacramento County Board of Education ("the County Board") thus properly set aside the District's expulsion order, and the trial court's order setting aside the County Board's decision was in error.

The Attorney General submits this brief to assist the Court in interpreting and applying the laws governing student

[1] Like the parties, the Attorney General uses the term "BB gun." That term may be a misnomer, however, to the extent that a "BB" refers to a metal projectile, unlike the plastic balls I.O. possessed here. (See AR 148, 198; 1 AA 235.)

expulsions in three respects. First, the law is clear that a student may only be expelled from school for having committed a violation of the Education Code that the Code categorizes as properly subject to expulsion, and that a student's disruption or defiance is not an expellable violation. Second, before expelling a student for any violation for which a school district has discretion to expel, a district must lawfully establish that expulsion is an appropriate remedy. To do that, a district must make and support a secondary finding justifying expulsion—such as that "due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others." Finally, before expelling a student for any violation, a school district must also comply with the Education Code's requirements, grounded in students' due process rights, ensuring students have a full and fair opportunity to present a defense.

As California's chief law officer, the Attorney General has the independent power to ensure that the State's laws are appropriately enforced. (Cal. Const., art. V, § 13; see also *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14-15 [the Attorney General possesses "broad powers" to protect the public interest].) In particular, the Attorney General has the power to enforce applicable state laws protecting students' fundamental right to a free public education. (See Cal. Const., art. IX, §§ 1, 5.)

As set out below, consistent with the Legislature's intent and considerations of due process, the laws governing expulsion should be interpreted to serve school safety objectives, but also to

account for the disciplined student's educational rights and needs. Strict adherence to the expulsion laws' procedures ensures equal opportunity and benefit and non-discrimination in public schools. The Attorney General, representing the public interest, is profoundly interested in this Court's correct resolution of the issues presented in this case, and respectfully submits this brief as amicus curiae in support of the County Board.[2]

BACKGROUND

I. LEGAL BACKGROUND: THE EDUCATION CODE'S DETAILED EXPULSION PROVISIONS

The Legislature has enacted a detailed statutory scheme governing student discipline, including with respect to the significant step of expelling a student from school. As discussed below, that scheme addresses not only the circumstances that may be subject to expulsion, but also the processes a school district must follow before expelling a student from school.

A. "Expulsion" defined

An expulsion is the most serious disciplinary action that a school administrator may recommend and that a school district may impose on a student.

The Education Code defines an expulsion as the "removal of a pupil from (1) the immediate supervision and control, or (2) the general supervision, of school personnel." (Ed. Code, § 48925,

[2] The Attorney General submits this brief as amicus curiae pursuant to rule 8.520(f)(8) of the California Rules of Court. The brief is submitted in the Attorney General's independent capacity and not on behalf of any state agency or entity.

subd. (b).) In practice, an expulsion ordinarily involves the removal of a student from all comprehensive schools within their local school district for a period of one year, with some exceptions, and in some cases longer. (See Ed. Code, § 48916.)[3] Expulsions are accordingly rare; the California Department of Education reports a total statewide enrollment of over 6.3 million students, and a total of 5,236 expulsion orders, during the 2018-2019 school year.[4]

The direct educational consequences for an expelled student are significant. During the period of expulsion, students are typically placed in an alternative educational program, such as a county-run community school. (See Ed. Code, §§ 48915, subd. (f), 48916, subd. (d).) The student may be required to follow a rehabilitation plan, ordered by the district's governing board. (Ed. Code, § 48916, subd. (b).) During that period, students expelled for certain serious violations—including for violations under Education Code section 48915, subdivision (a)—are prohibited from attending regular program schools in another

---

[3] In contrast, a suspension is a short-term exclusion from regular classroom instruction, which may not last more than five days, except during the pendency of an expulsion proceeding. (See Ed. Code, §§ 48911, subds. (a), (g)), 48925, subd. (d).)

[4] The number of expulsions has dropped significantly over the two school years impacted by COVID-19-related school closures. (See California Department of Education, "Discipline Data," <https://dq.cde.ca.gov/dataquest/dqCensus/DisExpRate.aspx?year=2018-19&agglevel=State&cds=00> [as of Aug. 29, 2022] [view Expulsion Rate Report].)

school district. (Ed. Code, § 48915.2, subd. (a).)[5] Students expelled for any other violation may be limited in their ability to attend a school in another district, and even if that attendance is allowed, it can happen only after the receiving district conducts a hearing. (Ed. Code, § 48915.1, subd. (a).)

At the end of the expulsion period, students may seek readmission into their local school district's regular program. (Ed. Code, § 48916, subd. (c).) The school district must readmit the student, unless the school district's governing board "makes a finding that the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district." (*Ibid.*) And for students expelled for certain serious violations—even after the period of expulsion—they may be limited in their ability to attend a school in another district. (Ed. Code, § 48915.2, subd. (b).) Even if that attendance is allowed, it can happen only after the receiving district conducts a hearing. (*Ibid.*)

B. "Must-expel" and "may-expel" violations of the Education Code

Precisely because a student's expulsion from school is a serious disciplinary action, the Legislature has enacted a detailed statutory scheme defining which acts may or must be subject to

---

[5] One of the District's grounds for I.O.'s expulsion was Education Code section 48915, subdivision (a). (AR 108.) That provision prohibits in relevant part a student's possession of any "dangerous object of no reasonable use to the pupil." (Ed. Code, § 48915, subd. (a).)

expulsion. A student may only be expelled for having committed an expellable violation of the Education Code. (See Ed. Code, §§ 48900, subds. (a)-(j) & (*l*)-(n), 48900.2, 48900.3, 48900.4, 48915, subds. (a)(1)(A)-(E), (c)(1)-(5).)[6] Expulsion proceedings begin with a recommendation for expulsion from the student's school principal or the district superintendent to the governing board, alleging that the student has committed an expellable violation. (Ed. Code, § 48915, subds. (a), (c).) Only the governing board, however, may order a student expelled from the district. (Ed. Code, § 48915, subds. (b), (d), (e).)

For the expellable violations that the Legislature has deemed to be the most serious, school and district officials have no discretion—a principal or school superintendent must recommend expulsion, and a governing board must order an expulsion, after determining that a student has committed an enumerated violation. (Ed. Code, § 48915, subds. (c), (d).) Those violations include possessing, selling, or furnishing a firearm; brandishing a knife at another person; unlawfully selling a controlled substance; committing or attempting to commit a sexual assault; and possessing an explosive. (Ed. Code, § 48915, subd. (c)(1)-(5).) (None of these "must-expel" violations are at issue in this case.)

---

[6] Education Code section 48900.7 also authorizes a principal or superintendent to recommend expulsion for terroristic threats, but that section is not included in section 48915's lists of violations for which a governing board may order a student expelled. (See Ed. Code, §§ 48900.7, 48915.)

For all other expellable violations, school and district officials have limited discretion in deciding whether to recommend and then order an expulsion. (See Ed. Code, § 48915, subds. (a), (b), (e).) For these "may-expel" violations, school principals and superintendents have two categories of discretion in deciding whether to recommend an expulsion. First, for may-expel violations listed in section 48915, subdivision (a)—such as possessing a "dangerous object of no reasonable use to the pupil" —the principal or superintendent "shall recommend expulsion," unless they find that expulsion "should not be recommended under the circumstances or that an alternative means of correction would address the conduct." (Ed. Code, § 48915, subd. (a).)[7] Second, for all other may-expel violations—such as possessing a "dangerous object" or an imitation firearm—school principals and superintendents may recommend expulsion after determining that a student has committed such a violation. (See Ed. Code, § 48900, subds. (a)-(j) & (*l*)-(n).)[8]

For all may-expel violations, the governing board in turn has limited discretion in deciding whether to order a student expelled. Upon receiving a recommendation for expulsion for these other violations, the governing board "may order a pupil expelled" if

---

[7] The District's findings relied on this subdivision as one grounds for I.O.'s expulsion. (See AR 109 [citing Education Code section 48900, subdivision (a)]; County Board Brief at 25-26.)

[8] The District's findings relied on these subdivisions as additional grounds for I.O.'s expulsion. (See AR 109 [citing section 48900, subdivisions (b) and (m)]; County Board Brief at 25-26.)

two conditions are met. (Ed. Code, § 48915, subds. (b), (e).) First, following a hearing, the governing board must find that the student committed the violation—that is, make a *violation finding*. (*Ibid.*) Second, the governing board must find either that "[o]ther means of correction are not feasible or have repeatedly failed to bring about proper conduct" or that "[d]ue to the nature of the act [or violation], the presence of the pupil causes a continuing danger to the physical safety of the pupil or others"—that is, make a *secondary finding*. (*Ibid.*) Thus, for all but the most serious expellable violations not at issue here, the Legislature has required that the governing board make a violation finding *and* a secondary finding before ordering any student expelled.

C. Expulsion procedures

The Legislature's detailed statutory scheme governing expulsions addresses not only which violations may be subject to expulsion, but also the processes a school district must follow before expelling a student for any violation. (See Ed. Code, §§ 48900-48927.)

The Legislature's procedural framework governing expulsions was enacted following the United States Supreme Court's landmark decision in *Goss v. Lopez* (1975) 419 U.S. 565. (See *Garcia v. Los Angeles County Bd. of Educ.* (1981) 123 Cal.App.3d 807, 812 [explaining that the Legislature made a series of amendments from 1975 to 1978 to the Education Code's hearing requirements to provide students with due process following *Goss*].) The Court held that Due Process requires that

students be "given some kind of notice and afforded some kind of hearing" before any short-term suspension, but suggested that longer-term suspensions or expulsions "may require more formal procedures." (*Goss*, *supra*, 419 U.S. at 584.) The Legislature accordingly set out in substantial detail the different procedures required before a student may be expelled from school. (See *Review of Selected 1977 California Legislation* (1978) 9 Pacific L.J. 281, 507-508 ["The Legislature attempted to anticipate the situations left open by *Goss* by providing the 'additional and more formal procedures' suggested by that opinion."].) That framework exists in substantially similar form today. (See Ed. Code, §§ 48900-48927.)

Informed by considerations of due process, the State's expulsion law includes a number of procedural requirements designed to ensure informed institutional decision making and that students have a full and fair opportunity to be heard. First, in relevant part, once a principal or superintendent recommends that a student be expelled, the student is entitled to a hearing. (Ed. Code, § 48918, subd. (a).) The hearing must be held before the school district's governing board, or else a properly appointed hearing officer or administrative panel. (Ed. Code, § 48918, subds. (a)(2), (d).) Any panel must be "impartial" and include "three or more certificated persons, none of whom is a member of the governing board of the school district or employed on the staff of the school in which the pupil is enrolled." (Ed. Code, § 48918, subd. (d).) The governing board's hearing must generally be held within thirty schooldays of the principal's or superintendent's

recommendation, and the governing board must generally decide whether to order the expulsion within ten schooldays of the hearing. (Ed. Code, § 48918, subd. (a)(1)-(2).)

Second, the student is entitled to written notice of the hearing, which must include notice of several important protections at the hearing. (See Ed. Code, § 48918, subd. (b)(5).) In particular, the student must be advised of their right to appear in person or be represented by legal counsel or a nonattorney advisor; to inspect and obtains copies of all documents to be used at the hearing; to confront and question all witnesses who testify at the hearing; to question all other evidence presented; and to present oral and documentary evidence on the student's behalf. (*Ibid.*)

Third, the law prescribes the quantity and character of evidence that must support a governing board's decision to expel a student. In particular, the decision to expel "shall be based upon substantial evidence relevant to the charges adduced at the expulsion hearing." (Ed. Code, § 48918, subds. (f)(2), (h)(1).) In addition, except in limited circumstances where a witness would face an unreasonable risk of psychological or physical harm in testifying, "no evidence to expel shall be based solely upon hearsay evidence." (Ed. Code, § 48918, subd. (f)(2).) And although "[t]echnical rules of evidence shall not apply to the hearing, [] relevant evidence may be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." (Ed. Code, § 48918, subd. (h)(1).)

Upon a governing board's final action to expel a student, the district must provide written notice of the decision and of the student's rights, including their right to appeal the expulsion to the county board of education. (Ed. Code, § 48918, subd. (j).) The county board must then hold a hearing to resolve the appeal. (Ed. Code, § 48919.) The county board's review is limited to whether the district's governing board (1) acted without or in excess of its jurisdiction; (2) held a fair hearing; (3) committed a prejudicial abuse of discretion; or (4) excluded or failed to consider relevant and material evidence. (Ed. Code, § 48922, subd. (a).) An abuse of discretion is established if, among other things, the decision to expel "is not supported by the findings prescribed by Section 48915." (Ed. Code, § 48922, subd. (c)(2).)

II. POLICY BACKGROUND: THE LEGISLATURE'S MOVE AWAY FROM "ZERO-TOLERANCE" DISCIPLINE POLICIES

The Legislature has carefully promoted the policy of this State to ensure that students are both safe and in school. In particular, and as discussed below, over the last five decades, the Legislature has carefully limited the list of must- and may-expel violations. And in recent years, the Legislature has largely shifted away from exclusionary discipline.

The Legislature's modern scheme governing student expulsions has long enumerated the acts that could lead to an expulsion. (See Stats. 1977, c. 965, §§ 3 & 15, pp. 2,919-2,920 and 2,923.)[9] At that time, the statutory scheme granted school and

[9] Before 1977, the Education Code permitted a student to be expelled for "good cause," without limiting the violations that (continued…)

district officials limited discretion to recommend or expel a student for any expellable violation. (*Ibid.*) But that scheme did not require a principal or school superintendent to recommend an expulsion, or a governing board to order an expulsion, for any violation. (See *ibid.*)

Must-expel violations were not added to the Education Code until the 1990's era of "zero tolerance" policies of school discipline. A cornerstone of that era was the federal Gun Free Schools Zone Act of 1994, which required states receiving federal funds to have a law expelling for at least one year any student who is determined to have brought a firearm to school. (Gun-Free Schools Act of 1994, Pub. L. No. 103-227, § 1032, 108 Stat. 125, 270–71 (codified as amended at 20 U.S.C. § 7961).) The Act "marked the national arrival of zero tolerance as applied to schools," as states across the country enacted mandatory expulsions law for firearms. (See Jill Richards, *Zero Room for Zero Tolerance: Rethinking Federal Funding for Zero Tolerance Policies* (2004) 30 U. Dayton L. Rev. 91, 97.)

In California, the first mandatory expulsion was for possession of a firearm, first added in 1992. (Assem. Bill No. 678 (1992), Stats. 1992, c. 16, pp. 2,450-2,451 [providing that a governing board "shall expel," or else refer to an alternative education program, a student who possesses a firearm, under

---

(…continued)

could lead to expulsion. (See Stats. 1976, c. 1010, § 2, pp. 3,584-3,595; see also *post*, Argument, II.A.)

certain circumstances].) The Legislature briefly removed firearm possession in 1992 before re-adding it the following year. (See Sen. Bill No. 1930 (1992), Stats. 1992, c. 909, p. 4226 [removing "shall expel" language]; Assem. Bill No. 342 (1993), Stats. 1993, c. 1255, pp. 7,284-7285 [in an urgency statute taking immediate effect on Oct. 11, 1993, re-adding "shall expel" language, including for firearm possession]; Sen. Bill No. 1198 (1993), Stats. 1993, c. 1256, pp. 7,287-7,288 [in a regular statute signed same day as Assembly Bill 342, maintaining "shall expel" language for firearm possession].)

The Legislature expanded the list of must-expel violations in the years that followed. The Legislature briefly added possession of a knife or explosive in 1993, though those violations were removed from the list of "shall expel" violations soon after. (See Assem. Bill No. 342 (1993), Stats. 1993, c. 1255, pp. 7,284-7285; Sen. Bill No. 1198 (1993), Stats. 1993, c. 1256, pp. 7,287-7,288.) The Legislature subsequently added: selling and furnishing a firearm, brandishing a knife at another person, and unlawfully selling a controlled substance (Assem. Bill No. 966 (1995), Stats. 1995, c. 972, pp. 7,410-7,412); sexual assault or attempted sexual assault (Assem. Bill No. 692 (1996), Stats. 1996, c. 915, pp. 5,164-5,180); County Board Request for Jud. Notice, Ex. C, p. 26 ["[I]t is critical to make the zero-tolerance rule mandatory for all schools to ensure student safety and to increase parent and community awareness of how seriously schools take the issue."]); and possession of an explosive device (Sen. Bill No. 166 (2001), Stats. 2001, c. 116, pp. 1,273-1,274). The Legislature added the last of

those changes expressly to come into conformity with the Gun Free School Zones Act. (Sen. Bill No. 166 (2001), Stats. 2001, c. 116, pp. 1,272-1,273.)

Marking a shift, over the last two decades the Legislature has made a series of amendments to discourage or even limit schools' use of exclusionary discipline for all but the most serious violations. First, the Legislature has narrowed the list of must- and may-expel violations. For example, in 2012, the Legislature added exceptions for possession of any controlled substance, where the substance is an over-the-counter medication or a medication prescribed to the student. (Ed. Code, § 48915, subd. (a)(1)(C)(ii).) In addition, the Legislature clarified that "[t]he act of possessing an imitation firearm, as defined in subdivision (m) of Section 48900, is not an offense for which suspension or expulsion is mandatory" under subdivision (c). (Ed. Code, § 48915, subd. (c)(1)). And in 2014, the Legislature removed as a basis for expulsion a violation of section 48900, subdivision (k), prohibiting a student from disrupting school activities or otherwise willfully defying the valid authority of those school personnel engaged in the performance of their duties. (See Assem. Bill No. 420 (2014).) At that time, the Legislature also removed subdivision (k) as a basis for suspension of students in grades 3 or below, a prohibition which the Legislature more recently expanded to grades 4 through 8. (See *ibid.*; Sen. Bill No. 419 (2019); see also County Board Brief at 66-70 [detailing several other amendments].)

Second, over that same time period, the Legislature has amended section 48915 only once, broadly making it less likely a student will face expulsion. (See Assem. Bill No. 2537 (2012).) Specifically, the Legislature provided school principals and superintendents with broader discretion to decline to recommend an expulsion for any violation listed under subdivision (a). (See Ed. Code, § 48915, subd. (a)(1).) The Legislature also reaffirmed its intent that the acts enumerated in Article 1, commencing with section 48900, "form the exclusive bases for the imposition of suspension or expulsion." (Assem. Bill No. 2537 (2012).)

Third, the Legislature has repeatedly encouraged schools to use alternatives to exclusionary discipline. The Education Code has long encouraged "that alternatives to suspension or expulsion be imposed," at least to address a student who is truant, tardy, or otherwise absent from school. (See Stats. 1977, c. 965, § 3, p. 2,920 [adding section 48900].) More recently, the Legislature has expanded that subsection to broadly encourage school districts to use "the Multi-Tiered System of Supports, which includes restorative justice practices, trauma-informed practices, social and emotional learning, and schoolwide positive behavior interventions and support" (also known as PBIS). (Sen. Bill No. 419 (2019).) These alternatives to exclusionary discipline "may be used to help pupils gain critical social and emotional skills, receive support to help and transform trauma-related responses, understand the impact of their actions, and develop meaningful methods for repairing harm to the school community." (Ed. Code, § 48900, subd. (w)(2).)

Similarly, the Education Code has long provided that a principal or superintendent "may use their discretion to provide alternatives to suspension or expulsion" for all violations listed by section 48900, such as by imposing counseling or anger management programs. (See Assem. Bill No. 653 (2001).) More recently, the Legislature has expanded that section, now expressly "encourag[ing]" principals and superintendents "to provide alternatives to suspension or expulsion, using a research-based framework with strategies that improve behavioral and academic outcomes, that are age appropriate and designed to address and correct the pupil's specific misbehavior." (Ed. Code, § 48900, subd. (v); see also Ed. Code, §§ 48900.5, subd. (b), 48900.6.)

The Legislature has been clear that these changes were a response to—and made in recognition of the harmful effects of—the zero tolerance, pro-expulsion policies of the 1990's. (See County Board Brief at 63-65.) In 2012, for example, the Legislature declared that the public policy of this State "is to ensure that school discipline policies and practices support the creation of safe, positive, supportive, and equitable school environments where pupils can learn." (Assem. Bill No. 1729 (2012), § 1, subd. (a).) But "[t]he overuse of school suspension and expulsion . . . does not result in safer school environments or improved pupil behavior," and is instead "associated with lower academic achievement, lower graduation rates, and a worse overall school climate." (*Id.*, § 1, subd. (b).) In contrast, "[r]esearch has found that nonpunitive classroom discipline and

in-school discipline strategies are more effective and efficient than suspension and expulsion for addressing the majority of pupil misconduct." (*Id.*, § 1, subd. (f).) The Legislature also found that suspensions and expulsions "are disproportionately imposed on pupils of color, pupils with disabilities, lesbian, gay, bisexual, and transgender pupils, and other vulnerable pupil populations." (*Id.*, § 1, subd. (d).) Such measures thus undermine the state's public policy of ensuring that school discipline is "implemented and enforced evenhandedly" and is not "disproportionately applied to any class or group of pupils." (*Id.*, § 1, subd. (h).)

Recent research from the National Center for Education Statistics supports the Legislature's determination that zero tolerance policies are not necessary to ensure school safety. (See Irwin et al., Institute of Education Sciences, Report on Indicators of School Crime and Safety: 2021 (June 2022) <https://nces.ed.gov/pubs2022/2022092.pdf> [as of Aug. 29, 2022].) In particular, despite a national trend away from exclusionary discipline, "[o]verall, throughout the last decade, several crime and safety issues have become less prevalent at elementary and secondary schools." (*Id.* at p. 2.)

ARGUMENT

The Attorney General here addresses three points that may assist the Court in resolving the questions presented on appeal. First, the law is clear that a student may be expelled from school only where the student has committed an expellable violation set out in the Education Code. A student's disruption or defiance

under Education Code section 48900, subdivision (k), is expressly *not* an expellable violation. Although this has been the law for nearly a decade, the District unlawfully relied on I.O.'s disruption or defiance as a basis for his expulsion. The County Board correctly concluded that the District lacked authority to order I.O. expelled on that basis.

Second, before expelling a student for any may-expel violation, a school district must lawfully establish a secondary finding that justifies expulsion as the appropriate disciplinary action. To establish a secondary finding that a student poses a "continuing danger" to physical safety requires a prospective and individualized inquiry into the student's unique circumstances. The text, statutory scheme, and legislative history of the "continuing danger" requirement support that interpretation. The District misconstrued that requirement. The County Board thus correctly determined that the District abused its discretion in finding that I.O. poses a continuing danger.

Finally, before expelling a student for any violation, a school district must comply with the Education Code's requirements, grounded in students' due process rights, ensuring students have a full and fair opportunity to present a defense. In particular, a school district must provide a student an opportunity to present relevant and material evidence. In this case, in expelling I.O., the District did not meet this requirement. The County Board correctly determined that the District's expulsion order was therefore invalid.

For these reasons, this Court should uphold the County Board's decision setting aside the District's expulsion order and expunging I.O.'s record of expulsion.

I. A SCHOOL DISTRICT MAY NOT EXPEL A STUDENT FOR DISRUPTING SCHOOL ACTIVITIES OR WILLFUL DEFIANCE

As noted above, the law is clear that a student may only be expelled for having committed an expellable violation set out in the Education Code. (See Ed. Code, §§ 48900, subds. (a)-(j) & (*l*)-(n), 48900.2, 48900.3, 48900.4, 48915, subds. (a)(1)(A)-(E), (c)(1)-(5); see also Assem. Bill No. 2537 (2012).) The law is also clear that a student may not be recommended for expulsion for disrupting school activities or otherwise willfully defying the valid authority of those school personnel engaged in the performance of their duties. (Ed. Code, § 48900, subd. (k)(2) ["[T]hose acts shall not constitute grounds for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion."].)[10] This has been the law for nearly a decade. (Assem. Bill No. 420 (2014).)

The District clearly violated the law in ordering I.O. expelled on this basis. Specifically, I.O.'s principal recommended to the District's governing board that I.O. be expelled under section 48900, subdivision (k), for disrupting school activities or

[10] While Education Code section 48900, subdivision (k)(3)'s prohibition would preclude an expulsion recommendation today, subdivision (k)(2)'s identical prohibition applied at the time of I.O.'s expulsion. (Ed. Code, § 48900, subds. (k)(2) [operative until July 1, 2020], (k)(3) [operative starting on July 1, 2020].)

otherwise willfully defying the valid authority of school personnel. (AR 117-118.) Upon that recommendation, the District's governing board made findings that I.O. violated section 48900, subdivision (k), for having "created a scene," "causing panic," and leaving parents and students "scared, nervous and confused." (AR 110.) The governing board ordered I.O. expelled, listing section 48900, subdivision (k), as one grounds for I.O.'s expulsion. (AR 107-108.)

For these reasons, the County Board correctly concluded that the District lacked authority to order I.O. expelled for disrupting school activities or otherwise willfully defying the valid authority of school personnel. (See AR 16, fn. 5, and 17.) The trial court likewise erred when it apparently upheld the District's expulsion on the basis of subdivision (k). (See Trial Court Decision at 36.)

Although the District does not specifically argue in defense of its decision to expel I.O. on the basis of subdivision (k), nor does the District disclaim reliance on these grounds. In fact, on appeal the District repeats five times that willful defiance and disruption of school activities was one of the grounds for expulsion. (District Brief at 1-3, 10, and 15.) More troubling, the District cites the governing board's factual findings *made in support of expelling I.O. under subdivision (k)* as relevant here. (District Brief at 57 [citing governing board's finding that I.O. caused "fear and panic" and caused parents and students to be "scared, nervous and confused"].)

While the law is clear, the District in this matter nonetheless relied on assertions of disruption in the expulsion proceedings, and has continued to make those assertions in the litigation. This Court should therefore reiterate that disruption of school activities cannot serve as the basis of expulsion.

II. BEFORE EXPELLING A STUDENT FOR A MAY-EXPEL VIOLATION, A SCHOOL DISTRICT MUST MAKE A SUPPORTED FINDING THAT SUCH DISCIPLINE IS APPROPRIATE

As noted above, for discretionary may-expel violations, the Education Code requires that a school district governing board make a secondary finding justifying expulsion as an appropriate remedy before ordering any student expelled. (*Ante*, Background, Part I.B.) The manner in which this Court construes these requirements is of statewide significance, as districts often fail to meaningfully make secondary findings.[11]

In this case, the District relied on a secondary finding that I.O. poses a continuing danger to physical safety. (AR 108.) As discussed below, as a matter of law, a "continuing danger" finding

---

[11] See United States Department of Education, Office of Civil Rights, Compliance Review Resolution Letter to Victor Valley Union High School District (Aug. 16, 2022) at 12, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09145003-a.pdf> [as of Aug. 29, 2022] [finding that district had practice of expelling students "without proving secondary findings" and that district administrators "would simply check the box that these findings were made after the hearing ended"]; see also Amicus Brief of Nonprofit Expulsion Representation Providers at 16 ["In the experience of *amici*, school administrators *automatically* characterize the student as a continuing danger in every expulsion referral"] [emphasis added].

requires an individualized inquiry into the student's unique circumstances. In other words, merely reciting the details of a student's violation of the Education Code is insufficient. The text, statutory scheme, and legislative history of the "continuing danger" requirement, and the Attorney General's long-held position construing that provision, all support that interpretation. To conclude otherwise—as the District does here—would blur the Legislature's clear line between must-expel and may-expel violations. The County Board thus correctly determined that the District abused its discretion in finding that I.O. poses a continuing danger to physical safety.

A. A school district's "continuing danger" finding supporting expulsion requires an individualized inquiry into the student's unique circumstances

This Court should hold that the governing board must engage in an individualized inquiry into the student's unique circumstances to establish a secondary finding that a student poses a continuing danger to physical safety. The District disagrees, arguing that a governing board may rely solely on the "nature of the act" for which a student faces expulsion. (See District Brief at 59 and fn. 28 [arguing that section 48915, subdivision (b), "allows a school district the flexibility to determine whether a violation [of the Education Code] in itself warrants expulsion"].) As explained below, the text, statutory scheme, and legislative history of the "continuing danger" requirement all support a contrary construction. Instead, an individualized inquiry of the student and that student's unique circumstances—and not a mere recitation of the "nature of the

act"—is required before resorting the extreme remedy of expulsion.

In construing the continuing danger provision, this Court's "fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.) To do that, courts begin "by examining the statute's words, giving them a plain and commonsense meaning," and by "consider[ing] the language of the entire scheme and related statutes, harmonizing the terms when possible." (*Ibid.*) And when a statute's language is ambiguous, courts may turn to extrinsic aids, including legislative history. (See *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530.)

Starting with the statutory text, the Education Code requires that a governing board find, depending on the underlying violation, that "[d]ue to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others" (Ed. Code, § 48915, subd. (b)) or "[t]hat due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others" (Ed. Code, § 48915, subd. (e)). These requirements initially point to the "nature of the" act or violation, which is a retrospective inquiry, focused the details of the student's act or violation. A governing board's ultimate inquiry, however, is prospective, focused on whether the student's "presence of the pupil causes a continuing danger" to the student or others. Thus, a governing board must engage in a two-part inquiry, first into

the details of the nature the act or violation, and ultimately into the details of the student's ongoing presence on campus.

The statutory scheme confirms that a continuing danger finding must be based not only on an evaluation of the student's act or violation, but on the individual circumstances surrounding the student's case and the risks associated with the student's continued presence on campus. As discussed above, for the most serious violations—the must-expel violations—a governing board must expel a student upon finding that the student committed such a violation. (*Ante*, Background, Part I.B; Ed. Code, § 48915, subds. (c), (d).) But for all other violations, a governing board may expel a student only after making a secondary finding justifying expulsion as an appropriate remedy, separate and apart from finding that the student committed such a violation. (See Ed. Code, § 48915, subds. (b), (e)) If a school district were to conclude that one of these violations necessarily satisfied the secondary findings requirement without an individualized inquiry into the student's ongoing presence on campus, the district would effectively ignore the "continuing danger" requirement's plain language as well as the Legislature's careful scheme distinguishing between these categories of violations.

That section 48915's continuing danger finding requires an individualized inquiry is also confirmed by the Education Code's subsequent sections requiring school districts to conduct a similar inquiry before re-admitting or initially enrolling a student expelled from school. For example, after reviewing an expelled student's request for readmission, a governing board "shall

readmit the pupil, unless the governing board makes a finding that the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district." (Ed. Code, § 48916, subd. (c).) It would be a perverse interpretation of the Education Code if it permitted a governing board to order a student expelled due only to the "nature of the" act or violation, under section 48915, but then required that same board to readmit that same student upon their request, regardless of the nature of the act or violation, under section 48916. The better interpretation of both sections is that a governing board must ultimately evaluate the individual circumstances of a student and the continuing danger they may pose.

Similarly, when receiving a request for enrollment from a student expelled from another school district, a school district's governing board must hold a hearing to determine whether the prospective student poses a danger to pupils or employees. (See Ed. Code, §§ 48915.1, subd. (a), 48915.2, subd. (b).) The hearing must be held according to the same rules and regulations governing expulsions. (*Ibid.*) And after the hearing, the governing board's discretion to grant or deny enrollment is limited principally by the governing board's continuing danger determination. (See Ed. Code, §§ 48915.1, subds. (c), (e), 48915.2, subd. (b).) Again, it would be a perverse interpretation of the Education Code if it permitted a governing board to order a student expelled due only to the "nature of the" act or violation, under section 48915, but then required another school district to

enroll that student—in some cases during the period of expulsion—regardless of the nature of the act or violation, under section 48915.1 and 48915.2. Again, reading these sections together, the better interpretation is that a governing board must ultimately evaluate the individual circumstances of a student and the continuing danger posed.

The Education Code's legislative history also confirms this interpretation. The modern "continuing danger" requirement was first enacted 1977 as part of the Legislature's response to *Goss*. (See *Slayton v. Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 549-550.) Before then, governing boards could generally expel students upon a showing of "good cause." (*Ibid.*; see Stats. 1976, c. 1010, § 2, pp. 3,584-3,587.) A governing board could also expel a student who violated school rules "if necessary." (See Stats. 1976, c. 1010, § 2, p. 3,587 [adding Ed. Code, § 48906].) The 1977 amendments thus "narrowed the discretionary application of suspension and expulsion as disciplinary measures by substituting specific criteria against which such decisions by . . . governing boards must be measured." (*Slayton, supra*, 161 Cal.App.3d at 549; see also Stats. 1977, c. 965, § 18, p. 2,924 [repealing Ed. Code, § 48906].) To interpret the continuing danger requirement to be less than demanding would be to revert to the amorphous "good cause" or "if necessary" standards the Legislature specifically rejected to ensure students' due process rights following *Goss*.

In addition, since 1977, the Legislature has made significant changes to the secondary findings requirements, underscoring

their significance. The post-*Goss* scheme initially required, even where the governing board finds that a student poses a continuing danger, that the governing board also find "that other means of correction are not feasible," before ordering a student expelled. (See Stats. 1977, c. 965, § 15, p. 2,923; *Garcia*, *supra*, 123 Cal.App.3d at p. 810.) Since then, however, the "other means of correction" requirement has been moved and no longer applies to a continuing danger finding. (See Stats. 1983, c. 498, § 91, pp. 2,116-2,117; Ed. Code, § 48915, subds. (b), (e).) Thus, the continuing danger requirement has grown in significance as an independent secondary basis to justify expulsion as an appropriate remedy. Courts should thus defer to the Legislature's careful line drawing by not blurring the line between the two categories of violations.

Indeed, it is the Attorney General's long-held position that a continuing danger finding requires an individualized inquiry. (See 1997 Cal. AG LEXIS 79, *11-12, 80 Ops. Cal. Atty. Gen. 348, 352-353.) In this prior opinion, the Attorney General concluded that a school district zero-tolerance policy requiring the expulsion of any student who possesses alcohol or a controlled substance for the first time—a may-expel violation—would violate the Education Code's requirements around secondary findings. (*Ibid.*) A district could not categorically determine that "other means of correction are not feasible or have repeatedly failed to bring about proper conduct," the Attorney General explained, without evaluating "such past experience . . . *with respect to the particular pupil*" facing expulsion. (*Ibid.* [emphasis added].) Likewise, a

district could not categorically determine that such a student poses a continuing danger to physical safety, because some "rational connection must still be made between *the presence of the student* on campus and a continuing danger to the physical safety of the pupil or others." (*Ibid.* [emphasis added].) To make a categorical determination that a class of violations automatically establish a "continuing danger" finding would be to abdicate the district's responsibility to exercise discretion, but "a district may not refuse to exercise the discretionary authority granted to it under the statutory scheme." (*Ibid.*)

For the reasons stated above, this Court should hold that, to establish a secondary finding in support of a governing board's expulsion decision, the governing board must engage in an individualized inquiry, examining not only the details of the nature the act or violation but also the details of the student's ongoing presence on campus.

B. The District did not conduct an individualized inquiry into I.O.'s unique circumstances

The District essentially concedes that it did not look beyond the "nature of the act" for which I.O. faced expulsion when determining that he poses a continuing danger—indeed, the District's primary legal argument is the law does not require anything more. For example, the District argues that it may merely examine the nature of a student's act without considering whether a student's "character, attendance, or past behavior in the classroom mean[s] his presence [is] a continuing danger to the safety of the pupil or others." (District Brief at 39.) Even more explicit, the District argues that section 48915 "allows a

school district the flexibility to determine whether a violation of [the Education Code] *in itself* warrants expulsion." (District Brief at 59 fn. 28 [emphasis added].) For the reasons explained above, that position misconstrues the law and blurs the Legislature's clear line between must-expel and may-expel violations of the Education Code.[12]

Having misconstrued the law, the District's decision and findings failed to support a "continuing danger" finding. The findings of fact adopted by the District's governing board exclusively address the "nature of the act" for which I.O. was expelled. (See AR 108-111.) The District's stated justification for expulsion, aside from pointing to I.O.'s underlying violations of the Education Code, is that I.O. admitted to "shooting one BB gun, although there were no BBs in the chamber, and trying to pass the imitation firearm as real." (AR 108.) To be sure, these findings are relevant to the "nature of the act" for which I.O. faced expulsion, and speak to the dangerousness of that act. But the District is wrong, as a matter of law, in arguing that I.O.'s conduct was or can be "so inherently dangerous to himself and other students as to pose a continuing danger." (District Brief at

---

[12] The trial court similarly misconstrued the law, suggesting that the underlying violation was sufficient to establish a continuing danger finding. (See, e.g., Trial Court Decision at 16 ["This case is the story of a student with guns at school, *regardless of the character of the* guns or *student*." emphasis added."], 2 ["Students with a gun at school can be expelled. I.O. was a student with a gun at school. I.O. was expelled."].)

61 fn. 29.) Instead, an individualized and prospective inquiry is necessary.

Because the District misconstrued the law in finding that I.O. poses a continuing danger, the County Board correctly determined that the District abused its discretion in ordering I.O. expelled.

III. BEFORE EXPELLING A STUDENT FOR ANY VIOLATION, A SCHOOL DISTRICT MUST AFFORD STUDENTS THE PROCESS SET OUT IN THE EDUCATION CODE

As noted above, informed by due process considerations, the California Legislature has enacted a robust statutory scheme establishing the processes a school district must follow before expelling a student for any violation. (See *ante*, Background, Part I.C.) The Attorney General focuses on one such requirement at issue here. In particular, the law requires students be afforded a full and fair opportunity to be heard, including an opportunity to present evidence and witnesses in their defense. (Ed. Code, § 48918, subds. (b)(5), (h)(1).) For the reasons discussed below, the County Board correctly concluded that the District failed to comply with this significant requirement in ordering I.O. expelled from school and that the expulsion was therefore invalid.

A. A school district must provide students an opportunity to present relevant and material evidence in their own defense

Students facing expulsion have the right to present oral and documentary evidence on their own behalf, including witnesses. (Ed. Code, § 48918, subd. (b)(5); see also Ed. Code, § 48923, subd. (a) [county board reviews district's expulsion decision for whether

"relevant and material evidence which . . . was improperly excluded"].) Relevant evidence, even hearsay evidence, may be admitted and given probative effect so long it is "the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." (Ed. Code, § 48918, subd. (h).) Here, both the documentary evidence and witnesses presented by I.O. were relevant to issues pending before the expulsion panel and should have been considered. Moreover, this is the type of evidence that is routinely provided and admitted at expulsion hearings statewide.

Here, as the County Board has explained, the record shows I.O. was deprived his right to present relevant and material evidence. (County Board Brief at 53-59.)[13] For example, I.O. presented a law enforcement witness to testify as to the nature of the unloaded, plastic BB guns he had brought to school, including their dangerousness and whether they could reasonably be confused with firearms. (AR 38, 69-70.) Based on the District's allegations, both the dangerousness of the plastic BB guns and the features that would distinguish them from imitation firearms were at issue. (See Ed. Code, §§ 48900, subds. (b), (m), 48915, subd. (a)(1)(B)).) The District's administrator, sitting as "hearing officer," refused to let him be sworn as a witness. (AR 70.)

---

[13] The County Board has well-explained the pitfalls of the trial court's labeling I.O. a continuing danger in part because *his father* "lacked remorse" in questioning the school district's evidence. (County Board Brief at 77-79; Trial Court Decision at 36.)

Similarly, the record shows that the same administrator excluded relevant testimony and evidence regarding I.O.'s character. For example, the administrator apparently denied I.O.'s request to have a teacher testify on his behalf (AR 222), and the administrator excluded written statements from other students expressing a desire to have I.O. back within the school community. (AR 224.) In defense of this exclusion, the District argues that the testimony of non-percipient witnesses was not relevant to any issue before its governing board. (District Brief at 39-40, 60.) But that argument rests on the District's misinterpretation of the "continuing danger" requirement. (See District Brief at 39 [arguing that a continuing danger finding does not depend on whether a student's "character, attendance, or past behavior in the classroom mean[s] his presence [is] a continuing danger"].) The lower court made that same error. (Trial Court Decision at 25-26.) In contrast, as discussed above, the governing board was required to look beyond the nature of I.O.'s act and into his unique circumstances and the details of his ongoing presence on campus. (See *ante*, Argument, Part II.B.)

For these reasons, the County Board correctly determined that the District deprived I.O. a reasonable opportunity to present relevant and material evidence in his defense, and that the District's expulsion order was therefore invalid.

CONCLUSION

For the reasons explained above, this Court should uphold the County Board's decision setting aside the District's expulsion order and expunging I.O.'s record of expulsion.

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
SRIVIDYA PANCHALAM
Supervising Deputy Attorney General

/s/ Alexis M. Piazza

ALEXIS M. PIAZZA
BENJAMIN T. CONWAY
CARLY J. MUNSON
Deputy Attorneys General
Attorneys for the Attorney General of California as Amicus Curiae

August 29, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached amicus curiae brief of the Attorney General uses a 13-point Century Schoolbook font and contains 7,949 words.

ROB BONTA
Attorney General of California

/s/ Alexis M. Piazza

ALEXIS M. PIAZZA
Deputy Attorney General
Attorneys for the Attorney General of California as Amicus Curiae

August 29, 2022