# Language, Enforcement, and Consequences:
# An Analysis of California's Zero Tolerance Policy and the 1994 Gun Free Schools Act

Thesis

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By

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# ABSTRACT

Amidst the growing number of school shootings taking place around the United States, the Clinton Administration called for the passage of the Gun Free Schools Act of 1994. The Act mandated that all states receiving federal funding enact policies that would expel students who were found in possession of a firearm on school grounds for a minimum of one-year. However, this federal statute did not prohibit states from enacting policies that barred more than just possession of firearms. California, for example, amended Section 48915(c) to the California Education Code, which indicated that an administrator had the authority to recommend expulsion of any student in possession of a firearm, knife, or explosive, or who sexually assaulted or battered another, or who engaged in the sale of illegal substances.

Moreover, Section 48915(c) expanded other sections of the California Education, giving administrators greater discretion to recommend expulsion for minor offenses that normally warrant suspension. In addition, California courts emphasized that school districts have great deference in implementing their own regulations to satisfy California statutory law as long as those regulations are consistent with the state legislature's intent. This indicates that school administrators have broad discretion in implementing state law with minimal limitations.

The purpose of this thesis is three-fold. First analyzes some of the ambiguities in the 1994 Gun Free Schools Act and California's zero tolerance policy under Section 48915(c) of the California Education Code. Second, it examines some of the implications associated with the enforcement of the language in these laws. Third, it observes some of the consequences that result from the implementation and enforcement of these laws. Ultimately, this analysis encourages school administrators to understand the laws and learn to adequately apply them without relinquishing their ethical responsibility to education and the well-being of students.

# DEDICATION

This thesis is dedicated to all students who struggle with the educational system but retain their dream to become leading figures in our society.

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## CHAPTER 1. STATEMENT OF PROBLEM

Zero tolerance policies in schools have been a major topic of controversy over the past three decades. In general, the federal mandate under the Gun Free Schools Act of 1994 only presents an overbroad interpretation of what states must do in order to remove dangerous students from school grounds; however, there is little guidance as to how administrators must apply disciplinary policies and what specific types of conduct they must target. At the local level, states have adopted zero tolerance policies to satisfy this federal requirement, yet states are not restricted from adopting policies that go beyond the language of the federal Act and can seek to punish a wide array of student behaviors.

In this study, the main focus will be on California because its disciplinary measures tend to be one of the most strict and robust in the United States. California's zero tolerance policy [California Education Code Section 48915(c)] not only goes beyond the federal government's goal to remove students who possess firearms on school grounds, it also outlines other serious (and less serious) student offenses that can lead to expulsion. Although California's policy can be considered a commitment to reduce school violence, the purpose of this study is to analyze the policy's guidelines, the language which is ambiguous, overbroad, and overly discretionary. Furthermore, some of the most important cases that broaden some of the elements in zero tolerance policies emanate from California itself. The analysis of California's zero tolerance policy is crucial in educating administrators that the manner in which they interpret and implement

strict policies can have serious consequences on students, administrators, and the overall community, even if their intent is to create a positive, safe environment for students.

In order to identify the issues associated with the drafting and implementations of zero tolerance policies, it is important to (1) analyze some of the ambiguities that are present in both the 1994 Gun Free Schools Act and California's zero tolerance policy, (2) examine some of the implications associated with enforcing these laws, and (3) understand some of the consequences that the interpretation and implementation of these laws have on students. Through this analysis, administrators will not only understand the problems associated with implementing the zero tolerance language, but will serve as a reminder that the way they interpret the law should be in line with their moral commitment to education and the academic well-being of their students.

**A. Gun Free Schools Act of 1994 – Mandate for Zero Tolerance Policies**

Zero tolerance laws are not uniformly codified under federal law, however, their language has evolved since its inception in the federal drug policy of the 1980s. (Skiba, 2000). Initially, zero tolerance was intended to serve as a deterrent mechanism that stated that certain types of behaviors would not be tolerated, and that offenders would be punished regardless of the degree of the offense. (Skiba, 2000). In the late 1980s, increase headlines regarding the rise of school violence prompted concern about the safety of children in school, and educators called for a policy that could deter the propensities of juvenile delinquency. As a result, the Clinton Administration enacted the 1994 Gun Free Schools Act which required that each state receiving federal funding enact a law disciplining students carrying guns to school. (Skiba, 2000)

The 1994 version of the Act mandated states to require local educational agencies to implement policies indicating (1) a minimum expulsion of one year for any student who brings and carries a firearm in school, and (2) that the student be referred to the local law enforcement. (Gun Free Schools Act, 1994). Although the Act imposes this policy on states, states are only required to meet the minimum requirements of the mandate in order to receive federal funding. The Act does not expressly prohibit any states from implementing policies that are more strict than the federal Act and/or that adds additional requirements in connection to a student's suspension and/or expulsion. In addition, the Act does not prohibit states from allowing local school administrators from modifying the expulsion requirement on a case-by-case basis. (Gun Free Schools Act, 1994).

The problem with this Act is the lack of specificity in providing a solution to the increase in school violence. It did not provide any language or provision that would safeguard from the overbroad interpretation of the Act itself. Instead, what the Act provided was just a condition to force states to implement laws that would address the concern of student safety. As a result, it granted states broad discretion in the adoption and enforcement of rules over student conduct. Such flexibility in the interpretation of the law would only vest broad discretion in local school administrators who could also recommend expulsion for other 'lesser offenses.'

**B. California's Zero Tolerance Law (CA Education Code Section 48915(c))**

If we take California, for example, it amended Section 48915(c) to the California Education Code to meet the requirements set forth by the federal Act. However, California also imposed additional provisions that covered a wide array of specific violations. California law requires immediate suspension and recommendation for

expulsion of any student who (1) possesses, sells, or furnishes a firearm, (2) brandishes a knife at another person, (3) sells a controlled substance, (4) commits or attempts to commit a sexual assault (or battery), and (5) possesses an explosive. (California Education Code, 2009). As is evident, the law expands its prohibition beyond possession of firearms, and implements specific violations that implicate the safety of each school. This provision makes 'Recommendation for Expulsion Mandatory' and offenses must take place on school grounds or school activity. (California Department of Education, 2008). Also, California amended Section 48906 to the California Education Code to require immediate referral of a student with a firearm to law enforcement. (California Education Code, 2009).

Although Section 48915(c) of the California Education Code is California's fulfillment to the 1994 Gun Free Schools Act, other sections of the Code have also been incorporated as part of the strict zero tolerance policy. Section 48915(a) also lists common violations for which a principal or superintendent is expected to recommend expulsion unless particular circumstances render it inappropriate. If an administrator recommends expulsion based on the infractions set forth under Section 48915(a) of the California Education Code, the recommendation must be based on one or both of the following: (1) other means of correction are not feasible or repeatedly failed, and/or (2) due to the nature of the act, the presence of the pupil continues to pose a physical threat to himself and others. (California Education Code, 2009). Under Section 48915(a), 'Expulsion is Expected Unless Inappropriate,' and the offenses must take place on school grounds or school activity. (California Department of Education, 2008).

In addition, administrators can also recommend expulsion for other less serious offenses listed under Section 48900; however, that recommendation is discretionary since these offenses typically merit suspension. (California Education Code, 2009). It may involve any violation committed at school, school activity, to/from school, and to/from a school activity. Recommendation of expulsion must also be based on one of the two prongs listed above. These types of offenses are categorized under 'Discretionary Expulsion.' (California Department of Education, 2008).

As a result, the expansion of the federal mandate can be seen through California's zero tolerance policy. California Education Code Section 48915(a)/(c) and Section 48900 present a matrix of possible ways in which an administrator has the authority to recommend expulsion of a student from school. (California Department of Education, 2008). It literally gives administrators the power to recommend expulsion for certain types of student behavior that would normally require only suspension. Thus, three issues must be addressed: (1) the existent ambiguity in the language of the law, (2) the implications associated with the implementation of that language, and (3) the consequences that this implementation has on the academic experience of students.

### C. Effects on Students

#### (1) Students of Color

The effects of over-inclusive zero tolerance laws, like California's, have had a great impact on non-white students who have historically been disadvantaged at an academic setting. Studies have shown that there are significant racial disparities in student suspensions and expulsions. (Gordon, Della Piena, & Keleher, 2000). African-American and Latino students are most likely to be suspended or expelled in comparison

to their White classmates. In addition, these students are most likely to receive harsher forms of punishment with regards to the type of behavior they are disciplined for. (Gordon et al., 2000). Although there are claims that their overrepresentation in the number of students expelled every year have to do with socioeconomic status, it has become evident that race is a substantial factor in the higher rates of school suspension and expulsion. (Zweifler & De Beers, 2002, p. 194).

Additionally, the numbers of non-whites who are excluded from the educational system have a negative effect on the overall minority population. Non-white students are not only denied an opportunity of an education, but they are also "denied avenues to enter employment in the future." (Zweifler & DeBeers, 2002, p. 214). As a result, extensive zero tolerance policies have "created a class of uneducated members in society," most of which are members of socioeconomically disadvantaged communities. (Zweifler & DeBeers, 2002, p. 214). As a result, the combination of minority status and low socioeconomic status deny students of any opportunity for academic success.

Furthermore, these long-term effects on non-white students result from the way administrators interpret and implement zero tolerance policies. Since both the federal and the state mandates do not indicate a step-by-step guideline as to how administrators and teachers (as branches of administrators) should apply disciplinary rules, these students are prone to bias and profiling based on their race. In fact, non-white students are mostly targeted for usual behaviors that may not be at par with their peers, and are profiled among the suspicion that they are "problem students." (Peden, 2001, p. 388). This practice is crucial in the education of non-white students because it turns an

academic setting into an atmosphere of high surveillance and diminishes any sort of relationship that a teacher should have with their students.

When matching the lack of educational opportunity with the lack of a stable academic setting, it becomes obvious that non-white students are being pushed out of the educational system. These students are excluded because of what has been called a "hidden curriculum" with respect to obedience to authority. (Solari & Balshaw, 2007, p. 151). And the problem with such authority rests on the frequency of referrals from the educational setting to law enforcement. With a broad net of suppressive legislation, many students are excluded under these guidelines and pushed towards the juvenile justice system rather than receiving specific help to address their needs. (Wasser, 1999). As a result, the consequence of how administrators interpret and apply zero tolerance policies can lead to a new generation of racial discrimination in schools. (Gordon et al., 2000).

**D. Effects on School Administration**

**(1) Impact on Due Process**

Zero tolerance policies also have an impact on students' procedural due process rights in disciplinary actions. Although a state can enforce disciplinary standards in school, broad application of its policies must still abide with the Constitution. In *Goss v. Lopez* (1975), the Court determined that students must be afforded minimum standards of procedural due process, which consist of notice and an opportunity to be heard, and that additional safeguards would be afforded in matters that are more serious. The importance of procedural due process in this study is whether those safeguards are available when administrators implement zero tolerance policies on student behavior. Although children

have strong interest in the procedural safeguards that minimize the risk of wrongful punishment, problems are present in the way zero tolerance violations are handled by school administrators. (Peden, 2001, p. 370).

The general safeguards or procedural due process are generally lost when violations are processed through the educational structure of authority. When teachers (as branches of administrative authority) have the power to make the initial determination of a student's behavior according to zero tolerance policies, they have the power to refer the student to a higher authority (the principal) without giving the child an opportunity to be heard. By the time the student is given an opportunity to be heard, the student has already been presumed to have violated specific clauses of the zero tolerance law. This means that the procedural safeguards would be dismantled unless other factors that can explain the student's behavior can be taken into account prior to the student's classification as a violator.

The severity of the punishment that a zero tolerance violator receives is crucial in the future life of a student. Violations of zero tolerance policies eventually become part of a student's record, therefore creating a stigma on the student that can later affect him in future academic and employment opportunities. The punishment that the student receives determines the future of every child affected by this policy. After expulsion, a minor can try to seek an education at another institution or simply decide not complete his schooling at all. (Ewing, 2000). Even though California has a provision that requires school districts to provide alternative education to students, the law does not expressly indicate that such programs must be comparable to the school the student was excluded from. There is no evidence that students are given the same educational opportunities as

their peers. The negative impact that exclusion carries on the student signifies that additional safeguards must be afforded.

If zero tolerance procedures are treating children more as criminals than as students, then students should be entitled to greater constitutional protections. In many cases, teachers often misinterpret the behaviors of students, and often conceptualize those acts as being criminal in nature. (Hanson, 2005, p. 316). California provides administrators with the authority to recommend expulsion (mandatory, expected, or discretionary) for any act that fits within one of their many categories. Since administrators have the duty to determine which types of behaviors violate zero tolerance policies, there is always the risk that administrators may be punishing students in a similar manner to the criminal justice system. Accordingly, such broad discretion may deny a student of any fundamental fairness when expulsion is recommended. (Peden, 2001).

**(2) Impact on Teachers**

Teachers are important tools in the implementation of zero tolerance laws because they are branches of administrative authority. They are the ones that first determine whether a student is complying with the disciplinary policies adopted by the school. However, it is unclear whether teachers have the adequate training and expertise to make such determinations, as there are a number of factors that can affect the way they perceive student behavior. Many of these factors include profiling, bias and subjectivity, and cultural conflict.

In adopting zero tolerance policies, teachers are generally asked to identify behavior that may threaten school safety. Teachers must therefore profile students in

order to target possible offenders in their classrooms. (Cooper, 2000). Profiling is a way of examining a student's behavior and determining whether it is "consistent with normal behavior." (Peden, 2001, p. 388). Consequently, teachers are no longer acting within their capacity as educators, but are instead taking the role of law enforcement officials that ensure that students are abiding to a strict set of behavioral guidelines. (Cohen, 2000). This becomes a major issue when the role of a teacher should be to develop a close relationship with the student to better identify any behavioral issues that need to be addressed.

One of the downsides of student profiling is the use of bias in their determinations. Just because a student is perceived as different does not necessarily "translate in the student being dangerous." (Cohen, 2000, p. 335). Therefore, students who fail to satisfy minimal thresholds in their behavioral patterns may be wrongfully labeled as a student who is violent, when in reality the student's behavior may be normative in other contexts. Teachers, directly or indirectly, stereotype students according to what they believe a student should behave and not whether they are objectively violating any school policies. Thus, students are suspended or recommended for expulsion because their actions counter school authority, even if those actions are nonviolent in nature. (Schiraldi & Ziedenberg, 2001). Furthermore, if this class of students may soon enough learn that they are targets of such bias, they may decide to act according to these labels, thus raising the probability of school violence. (McCkay, 1999).

One of the reasons why non-white students are disproportionately punished under zero tolerance laws has to do with cultural differences between students and teachers.

(Pinard, 2003, p. 1114). This results in varying behavioral interpretations that are based on difference, categorization, and stereotype. (Advancement Project & Civil Rights Project, 2000). This misperception adds to the disproportionate discipline of minority students, as student behavior can be interpreted differently according to the cultural context one is in. (Pinard, p. 1114). It has equally been argued that teachers often classify minority students, especially African Americans, to engage in adult-like behavior rather than classifying their behavior as 'childish.' (Ferguson, 2000).

**(3) Impact on Administrators**

Zero tolerance also implicates an administrator's capacity to assess behavior and regulate punishment accordingly. The 1994 Gun Free Schools Act does not prohibit states from allowing local school administrators to modify disciplinary actions on a case-by-case basis. According to the California Education Code Section 48915(a), local school administrators have the authority to recommend expulsion for specific offenses but can also modify the punishment if they determine that the circumstances of the offense do not warrant it. However, school administrators are often reluctant to apply such discretionary because they feel the law requires them to recommend expulsion. Hence, there is a possibility that administrators are not making exceptions or special provisions to any prescribed punishment or analyzing the specific circumstances of the offense. (Wasser, 1999). As a result, students who make innocent mistakes or need help are quickly drawn into the serious consequences of zero tolerance policies, and their education is either interrupted or terminated via suspension or expulsion without exception. Even though administrators cannot modify the one-year recommended expulsion of students in possession of firearms in schools, the future academic career of

any students depends on whether the administrator applies leniency on the student. (Wasser, 1999).

However, their refusal to apply such discretion is due in part to the constant social pressure to lay a 'hard hand' on student misconduct. Some administrators are forced to eliminate leniency considerations because community leaders believe that adherence to the zero tolerance policy sends a message to students that misconduct will not be tolerated on school grounds. (Portner, 1997). Similarly, advocates like the American Federation of Teachers also discourage leniency in disciplinary proceedings because it promotes the importance of school safety. (Bazelon, 1997). Yet, other administrators believe that treating students uniformly can help ensure fairness in disciplinary actions. (Wasser, 1999). Some argue that if they make exceptions to certain student behavior, there may be a propensity to prefer some students over others based on their academic achievements. (Bazelon, 1997). And other administrators impose harsh punishments on students out of fear of litigation – i.e., leniency results in a student committing a violent act.

School administrators are thus failing to enforce their leniency authority on certain violations. It is questionable whether the interest of avoiding litigation and/or sending a clear message about the importance of school safety outweighs a child's interest in seeking an education and becoming an essential participant in society.

**E. Effects on the Community**

Even though California's zero tolerance policy attempts to deter students from engaging in school violence, application of a tougher policy in California school districts is based on the community's pressure and insistence to have safer schools. Due to the

increased number of incidents that have been evident in the past decades (which involved the use of firearms on school grounds), governing school boards have addressed community concerns by expanding the zero tolerance laws to other specific offenses. Although such policy is a catch-all attempt to remedy any specific acts of school violence, it is unclear whether local extensions of the zero tolerance law are accurately addressing the community's concerns about violence.

While zero tolerance laws may not actually prevent serious school violence, it tells the community that tougher laws serve as violence prevention measures or a pro-active disciplinary solution. Due to the increase publicity of school violence, any incident in schools has made the community more fearful of schools and the students who attend them. Minor offenses and infractions have been thrown into the pool of specific actions that schools now want to prevent by enforcing zero tolerance laws without question. The problem then becomes whether zero tolerance laws are actually a remedy to school violence, or whether they are a response to the frustration and fear that communities have toward violence. If this is the case, then casting blame on young people, especially those who are poor and non-white, may not necessarily serve the specific objectives of the community; instead, it pushes students to engage in violence outside of the schools.

If the purpose of zero tolerance laws is to clear out all the troublesome students from the classroom, administrators will seek behavior that threatens school safety regardless of any preventive measures. Unless there are any alternatives to minimize violent crimes, schools will merely transfer over the responsibility to community to handle. The resulting costs to society are obviously based on the support of an

uneducated, undereducated, and unemployed class of individuals. The public must not only bear the burden of public support (welfare and job training) and unemployment payments, but must also bear the consequences of funding a juvenile and criminal justice system that receives an increasing number of students who were excluded from attaining an education. (Hanson, 2005).

### F. Summary of the Problem

The issues that this study will address and examine are three-fold. First, it will analyze some of the ambiguities that are present in both the 1994 Gun Free Schools Act and California's zero tolerance policy under Section 48915(c) of the California Education Code. Second, it will study some of the problems associated with their enforcement. Third, it will connect some of the consequences of zero tolerance policies to some of the ambiguities found in the language and the implications associated with enforcing them.

## CHAPTER 2. REVIEW OF LITERATURE

The following review of literature will help address the issues presented in Chapter 1: (1) some of the ambiguities that are present in both the 1994 Gun Free Schools Act and California's zero tolerance policy; (2) some of the implications associated with enforcing the ambiguous language of those policies; and (3) some of the consequences associated with the interpretation and implementation of those policies.

### A. Federal Mandate of Zero Tolerance Laws

#### a. Gun Free Schools Act of 1994 and 2001.

In her study of the negative effects of zero tolerance policies, Avarita L. Hanson (2005) outlined the implementation of the 1994 Act and its subsequent modification. Hanson explains that in 1994 the Clinton Administration passed the Gun Free Schools Act in response to the violence caused by the use of guns in schools by students. Amidst growing national concern over school violence, the Act's passage was the first time the federal government involved itself in school discipline.

As a result, the federal mandate was codified under Title 18, Section 8921 of the United States Code. Section 8921(b) required that each State receiving federal funds under the Act would be required to adopt a disciplinary policy that punished students who brought a weapon to school. Under Section 8921(b)(1), the Act literally mandated that such state policy require local school districts to expel any student determined to have brought a 'weapon' to school for no less than one-year.

The Act also proscribed the term ‘weapon’ to mean a ‘firearm’ as such term is defined in Title 18, Section 921. A ‘firearm’ is defined in Sections 921(A)-(D) as “any weapon which will or is designed to or may readily be converted to expel a projectile by the action of explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device.” (Crimes & Criminal Procedure, 2009).

Hanson (2005) points out that the 1994 Act did not proscribe any other type of weapon other than that which is defined under Section 921 – a ‘firearm.’ In fact, Congress omitted ‘antique firearms’ from the definition of firearms. (Hanson, 2005). Therefore, it can be argued that children who brought antique firearms, or any other objects not included in the definition, to school would not be subject to discipline under the Act.

The 1994 Act, however, was repealed by the enactment of the No Child Left Behind Act of 2001 (NCLB). However, the NCLB re-enacted and codified the Gun Free Schools Act under Title 20, Section 7151 of the United States Code. This re-enactment came with some modifications that added more specificity to the 1994 version. Hanson (2005) notes that legislators retreated from the usage of the word ‘weapon,’ and emphasized instead that ‘firearm’ would stand as a clear statutory definition. In addition, it used the word ‘firearm’ to emphasize that local school districts could expel a student who not only brought a firearm to school, but also for mere possession of a firearm by a student at school. (Hanson, 2005). This interpretation would be broader than the ‘mere active and intentional act of bringing a firearm’ to school which was indicated in the 1994 Act. (Hanson, 2005).

Furthermore, Congress also clarified 'school' in the Act as "any setting that is under the control and supervision of the local agency for the purpose of student activities approved and authorized by the local educational agency." (No Child Left Behind, 2001). This broad interpretation is compared to the 1994 wording which defined school as 'any academic institution that is under the jurisdiction of local educational agencies in that State.' (Hanson, 2005). This difference made application broader than before. The wording 'any setting' could mean anything that may have some tie to the school even though the school does not have direct control over the presence and whereabouts of the student. (Hanson, 2005).

Both the 1994 and 2001 version of the Act also has special provisions that allow disciplinary actions to differ from the federal mandate. Under Section 7151(b)(1) of Title 20, the Act does not explicitly prohibit a State from allowing a chief administering officer of a local educational agency to modify the expulsion requirement on a case-by-case basis. Similarly, under Section 7151(b)(2), the federal mandate does not prohibit a local education agency from providing alternative education services to students that have been expelled. However, the language is a broad provision that defers discretion to states; it does not require a state to apply it at a local level.

Lastly, the 1994 and 2001 Gun Free Schools Act does impose additional requirements that implicate law enforcement in the educational setting. Under Section 7151(h) of Title 20, any local educational agency that receives federal funding is required to refer a student, who brings a firearm or weapon to school, to the criminal justice or delinquency system. This section gives local educational agencies broad discretion as to what the term 'weapon' means and what constitutes referral to local law enforcements.

### B. California's Compliance with Federal Mandate

#### a. Recommendation for Expulsion (California Education Code Section 48915)

The California Department of Education outlines the State's response to the rise in school violence in the wake of school shootings. Although Section 48915(c) was specifically amended to satisfy the federal requirement, other subdivisions of Section 48915 would also send a 'get tough' message that violent behavior, incidents, and crime would not be tolerated at school. (California Department of Education, 2008).

#### b. Mandatory Recommendation for Expulsion

To abide with the federal mandate of a one-year minimum expulsion of students possessing firearms in school, the California legislature amended Education Code Section 48915(c). Under Section 48915(c), the principal or superintendent must immediately suspend (pursuant to Section 48911) and shall recommend expulsion to any student who (1) possesses, sells, or otherwise furnishes a firearm; (2) brandishes a knife at another person; (3) unlawfully sells a controlled substance (listed in Health & Safety Code Section 11053); (4) commits or attempts to commit a sexual assault or battery as defined in subdivision (n); or (5) possesses an explosive. These acts must also be committed at school or school activity, and unlike subdivisions (a), (b) and (e), the principal or superintendent have no discretionary power to not recommend expulsion. (California Education Code, 2009). Kemerer et al. (2005) notes that upon finding that the student committed the act for which he was recommended suspension, the governing board must order expulsion of the student. However, the governing board may suspend enforcement of the expulsion order. (Kemerer et al., 2005).

Kemerer et al. (2005) discusses what 'possession of a firearm' entails under California law. In California, when there is report that a student might be in possession of a firearm, an employee of the school district must be able to verify that information. There are instances, however, where students will be allowed to carry a firearm on school grounds. Such an exception is only permissible if the student had attained prior written permission from a certificated employee and the principal or any of his authorized designees have approved that permission. Yet, due to the increased concern of violence involving firearms, there have been no contemporary instances where any student has been allowed to carry a firearm to school under this exception. (Kemerer et al., 2005).

The California Attorney General essentially addressed what constitutes possession of an 'impermissible firearm' in 1997. (Kemerer et al., 2005). The Attorney General concluded that a student may be expelled from school for 'possessing' a firearm if the student 'knowingly' and 'voluntarily' has 'direct control' over the firearm. (California Attorney General Opinion, 1997). However, the Attorney General acknowledged the exception where the student has permission of school officials to possess the firearm or where possession is brief and solely for the purposes of disposing the firearm such as handing it to school officials. (California Attorney General Opinion, 1997).

Education Code Section 48915(g) defines a knife as "any dirk, dagger, or other weapon with a fixed, sharpened blade fitted primarily for stabbing, a weapon with a blade fitted for stabbing, a weapon with a blade longer than three and one-half inches, a folding knife with a blade that locks into place, or a razor with an unguarded blade." (California Education Code, 2009). As is used in Section 48915(h), the term 'explosive' means 'destructive device' as described in Section 921 of Title 18 of the United States Code.

Kemerer et al. (2005) notes that Section 921 provides a broad definition to the phrase 'destructive,' which includes a bomb, grenade, any similar device, and a weapon capable of expelling a projectile. A shotgun is not considered a destructive device but it is prohibited as a firearm. (Kemerer et al., 2005).

Kemerer et al. (2005) finally comments that there are instances where a school principal or superintendent will look at the Health and Safety Code and Penal Code sections to determine whether the student has committed an act that warrants expulsion. For example, when a student commits an act for unlawfully selling a controlled substance under the California Education Code Section 48915(c)(3), Chapter 2 of the Health and Safety Code controls what items are classified as 'controlled substances.' These sections, starting with Section 11053 of the Health and Safety Code, contain a list of controlled substances that are either commonly known (opium, cocaine, and marijuana) or are very obscure. (Kemerer et al., 2005). Similarly, an administrator will also look to the Penal Code to determine whether a student has committed an act that can be defined as sexual assault or battery under California Education Code Section 48915(c)(4). The Penal Code provisions supply detailed definitions of a wide range of deplorable acts, from touching a person to sexual gratification to rape. (Kemerer et al., 2005).

**c. Mandatory Recommendation for Expulsion Unless Inappropriate**

The most common causes for expulsion fall under subdivision (a) of Section 48915. In this section, the superintendent must recommend expulsion for any student who (1) causes serious physical injury to another person (except self-defense), (2) possesses a knife or other dangerous instrument that is no use to the student, (3) unlawfully possesses any controlled substance (as defined in Section 11053 of the

California Health & Safety Code), (4) engages in robbery or extortion, or (5) commits assault or battery upon any school employee. The acts must have been committed at school or in a school-activity. Kemerer et al. (2005) explains that an administrator may have to refer to the California Penal Code to determine whether a certain act fits the elements that warrant expulsion. For example, assault or battery is defined under Sections 240 and 242 of the Penal Code. Section 240 defines assault as the "unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (California Penal Code, 2009). Section 242 defines assault as "any willful and unlawful use of force or violence upon the person of another." (California Penal Code, 2009). Similarly, an administrator will also need to look at Section 11053 of the Health and Safety Code for a list of all illegal substances.

A student who has been determined to have committed the act may be suspended if the student causes danger to persons or property or threatens to disrupt the instructional process, or if other means of correction fail to bring the proper conduct. (Kemerer et al., 2005). Although recommendation of expulsion is expected under this subdivision, the principal or superintended has the discretionary power to not recommend expulsion if he/she finds that particular circumstances render it inappropriate. (California Department of Education, 2008). But if the principal or superintendent show that either [1] other means of correction are not feasible or have repeatedly failed to bring about proper conduct, or [2] that due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others, the administrator may recommend expulsion to the governing board. (California Department of Education,

2008). However, even if the governing board orders expulsion, it also has the authority to suspend enforcement of that expulsion order. (Kemerer et al., 2005).

### d. Discretionary Recommendation for Expulsion

There are also lesser offenses for which a student can be suspended and recommended for expulsion. Section 48900 states that a superintendent or principal may suspend student and recommend expulsion if it has been determined that the student has committed any of the acts enumerated under subdivisions (a)-(r) of this section. (California Education Code, 2009). More specifically, students may be suspended and recommended for expulsion if they inflict physical injury to another; possess dangerous objects, drugs, alcohol, drug paraphernalia, or imitation firearm; sell drug paraphernalia, prescription drug Soma, or look alike substances representing drugs or alcohol; commit robbery/extortion, theft, damage to property, obscenity/profanity/vulgarity; disrupt or defy school staff; receive stolen property; commit sexual harassment; harass, threaten or intimidate a student witness; or commit hazing. (California Department of Education, 2008).

The Education Code does not prevent a principal or superintendent from recommending expulsion upon determining that any of the enumerated acts under Section 48900 have been committed. However, the expulsion hearing cannot result in a recommendation for expulsion to the governing board without a finding that (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 creates a continuing danger to the safety of self and others. (Kemerer et al., 2005). If no determination is made prior to the recommendation, the expulsion hearing will be

terminated. Kemerer et al. (2005) finds that if a first-time offender commits one of the enumerated acts, he may only be suspended from school. Since there is no prior discipline imposed on the student, the claim of infeasibility will not control. (Kemerer et al., 2005). And if the principal or superintendent recommends expulsion based on a claim of 'physical safety,' it may not equally stand if the violation is one not involving physical danger. (Kemerer et al., 2005).

Under Section 48900 of the California Education Code, certain terms can be broadly defined and interpreted. For example, Section 11014.5 of the Health and Safety Code define drug paraphernalia as 'any' device that is designed for preparing, testing, and measuring controlled substances, as well as 'any' device that facilitates the intake of that controlled substances. (Kemerer et al., 2005). Similarly, Education Code Section 48900.2 allows discretionary expulsion for sexual harassment incidents. (California Education Code, 2009). Sexual harassment is defined in Penal Code Section 212.5 as 'unwelcome' sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting. (California Penal Code, 2009). Additionally, the California Department of Education notes that under Section 48900(t), school property includes, but is not limited to, electronic files and databases. School property, in this sense, carries a broad definition that is widely discretionary. (California Education Code, 2009).

Finally, unlike Section 48915(a) and (c), disciplinary procedures under Section 48900 apply not only to acts committed in school or school activity, but also on the way to and from school or school activity. (California Department of Education, 2008).

Discretion is granted to the administrators in determining what constitutes 'school grounds and activity' within the meaning of disciplinary procedures.

### C. Redefinition of California's Disciplinary Laws

#### a. T.H. v. San Diego Unified School District (Discretion Not Mandatory)

California's zero tolerance policy had a dramatic change when a school district enforced immediate suspension and mandatory recommendation for expulsion for an act committed under the "mandatory recommendation unless inappropriate" and "discretionary recommendation" categories. The California Court of Appeal addressed this issue in *T.H. v. San Diego Unified School District.*

In *T.H.* (2004), a vice-principal at Kroc Middle School found 12 year-old T.H. physically fighting with another student. T.H. had already been disciplined for fighting in two other occasions during the school year. Under the District's zero tolerance rules, the vice-principal suspended T.H., and recommended expulsion. A hearing was then held before an Expulsion Review Panel consisting of three administrators from other schools. The panel found T.H. willfully used force in attempting to cause physical injury to another student. The Expulsion Review Panel recommended that T.H. be expelled because other means of correction had failed to bring about proper conduct, and because her presence was a continuing danger to herself and others. T.H. had already been suspended before for conduct that involved disruption, sexual harassment, and physical injury, and she had previously engaged in assault and battery and drug paraphernalia-related offenses.

The issue in this case is whether the district's zero tolerance policy of requiring a principal to recommend an expulsion hearing for lesser offenses violated the Education Code. T.H. argued that the policy removed the principal's statutory discretion to not recommend expulsion, and that the principal should have used the discretion given under Education Code Section 48915(a) and (e). Under Section 48915(a), an administrator must recommend expulsion unless the circumstances make it inappropriate. Under Section 48915(e), a governing board has the authority to expel a student who committed an act under Section 48900 if an administrator makes such recommendation.

In this case, the middle school vice-principal recommended that the student be expelled because she was involved in repeated acts of fighting. Under California Education Code Section 48915(a) and (e), this type of offense could lead to an expulsion, but normally a school principal would have the discretion to decide not to refer the matter for an expulsion hearing depending on the circumstances. However, T.H. argued that the district's zero tolerance regulations eliminated that discretion. T.H. added that since this regulation made recommendation for expulsion mandatory for all types of offenses, it was in direct conflict with California law and therefore unconstitutional.

The court did not agree with T.H.'s argument. The court reasoned that although expulsion requirements differed from the statutory requirements, it did not mean the regulations are inconsistent with the applicable statutes. There are no provisions that 'require' a principal to dismiss an expulsion charge when it has been determined that the student has committed the expulsion offense. Instead, the California statute only 'requires' that a principal recommend a student to the school board for an expulsion hearing in Section 48915(c) violations. The court added that a requirement that a school

district must comply with a minimum requirement (mandatory recommendation) for serious offenses does not prohibit a school district from imposing this minimum requirement to all other types of offenses. In fact, the court stated that great deference must be given to school districts to adopt regulations that could carry out the intent of the California Legislature concerning school safety. The court concluded that since T.H. had procedural safeguards through an expulsion hearing, no constitutional violations were present in this case.

### b. Freemont Union High School District v. Santa Clara County Board of Education (Expansion of School Grounds)

Prior to the enactment of the 1994 Gun Free Schools Act, California's Education Code already outlined circumstances in which a student could be suspended and expelled from school. In 1991, the issue of what constituted school grounds was heard by the California Court of Appeal in *Fremont Union High School District v. Santa Clara County Board of Education* (1991). Although Section 48915(c) predated this case, the court's decision on the issue would be subsequently applicable.

In *Fremont* (1991), Matthew was enrolled at Homestead High School in the Fremont Union High School District, but was attending an alternative program in the district in 1991. During one of his lunch periods, Matthew went to another high school campus within the school district, and immediately engaged in an altercation with another student at that campus. Matthew pulled a stun gun and used it against the other student. Matthew was essentially expelled by the governing board for possessing a dangerous object without permission on a school district campus and for threatening to cause physical injury to another, a violation of Sections 48900(a) and (b). The county board,

however, reversed that decision upon determining that the Fremont school district lacked jurisdiction to expel Matthew because he was not attending his own school or school activity at the time of the incident per Section 48900.

The issue here is whether a school has jurisdiction to apply disciplinary procedures on a student that committed a violation that took place at another school that was not his own. Matthew argued that since he was not attending 'his' own school and he was not taking part of any of 'his' school activities when he used the stun gun, that the school lacks jurisdiction to apply disciplinary measures. The court rejected this claim because if the prohibited act had to be related to the suspended pupil's own school activity or to the school the pupil was attending, the statute would have read "related to *his* or *her* school activity or *his* or *her* school attendance" or "related to the *pupil's* school activity or the *pupil's* school attendance." (Fremont Union High School District v. Santa Clara County Board of Education, 1991, p. 1186). Since the statute does not emphasize this language, Section 48900 simply refers to 'school activity or school attendance' generally.

The court ruled that as long as the prohibited act is related to school activity or school attendance, a school may apply its appropriate disciplinary measures. Whether the pupil is attending his or her own school or involved in his or her own school activity does not change the outcome.

**c. (School Districts Have Broad Discretion and Flexibility)**

The broadness in authority has been reiterated in some California court decisions. When the issue of local control arises, courts have been reluctant to limit their control and instead defer discretion to the schools.

In *San Rafael Elementary School District v. State Board of Education* (1999), the San Rafael school district filed a writ of mandate to set aside the Board decision to change district lines stating that it had no authority to reconsider and overturn its findings. Although the discussion in this case was primarily on what constituted 'issues of noncompliance,' the court's citation of California Education Code Section 35160.1(a) in their discussion is of importance. The court stated that under Section 35160.1(a), the Legislature recognized that "school districts, county boards of education, and county superintendents of schools have diverse needs unique to their individual communities and programs […] In addressing their needs […] school districts […] should have the flexibility to create their own unique solutions." (San Rafael Elementary School District v. State Board of Education, 1999, p. 1027). In the context of zero tolerance policies, this flexibility is interpreted in the broad discretion that school districts have in carrying out programs to meet their individual needs. In other words, school districts have broad authority to implement and practice disciplinary policies to carry out their specific objectives.

In *Las Virgenes Educators Association v. Las Virgenes Unified School District* (2007), the court reiterated the school's flexibility to achieve their specific objectives. In *Las Virgenes* (2007), the superintendent changed the 'citizenship' marks for certain students to enable them to attend a school field trip. The teacher who issued those initial citizenship marks then brought an action seeking injunctive relief after the school board affirmed the superintendent's action. One of the issues the court discussed was whether the school district exceeded its authority. The court then cited Section 35160 of the California Education Code, which provides that a school district "may initiate and carry

on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established." (Las Virgenes Educators Association v. Las Virgenes Unified School District, 2007, p. 12). Absent a statutory limitation, a district is free to act as it sees fit within the purposes for which it was established. In zero tolerance policy terms, as long as there are no regulations that speak to the contrary, a school district has wide latitude in initiating and implementing any activity that they see fit. Broad discretion is consistent with school actions.

In *Dawson v. East Side Union High School District* (1994), an injunctive relief action was brought against the high school for using a current events video program containing advertising. In analyzing the school's authority, the court acknowledged two broad and interrelated principles to account: local school districts in California are "granted substantial discretionary control of public education, and that in the exercise of this discretion the school districts have some latitude to adopt or permit uses or procedures which in and of themselves are not strictly educational so long as the uses and procedures are no more than incidental to valid educational purposes." (Dawson v. East Side Union High School District, 1994, p. 1017). In short, both the Constitution and the Legislature have ceded substantial discretionary control to local school districts to act according to their diverse and unique needs, as long as they are not adverse to any law or regulation.

### D. Consequences with Zero Tolerance Application

#### a. Racial Disparities in Suspensions and Expulsions

Ruth Zweifler and Julia De Beers (2002) discuss how in assessing disciplinary procedures in school districts, racial disparities have been a significant factor in excluding children from school. Students of African-American or Latino background have been removed from their schools in greater proportion than White students, and this is due in part to the type of incidents for which students are referred. (Zweifler & De Beers, 2002). African-American students are most likely to be referred for behavior associated with loitering, disrespect, excessive noise, threat, and a catch-all category called conduct interference. (Zweifler & De Beers, 2002). Whereas, white students are referred for more explicit behavior, including smoking, endangering, obscene language, vandalism, and drug/alcohol. (Zweifler & De Beers., 2002). These different categories are more subjective, and the "disproportionate discipline of African-American students may be due in part to the misrepresentation of difference in the behavior of African-American students and White student, which are essentially culturally biased." (Zweifler & De Beers, 2002, p. 205)

Gordon, Della Piana, and Keleher (2000) examined how the public schools have consistently failed to provide the same quality education for non-white students as for white students. They attribute such disparity to a kind of racial profiling that targets non-white students and punishes them as a way to push them out of school. (Gordon et al., 2000). In fact, evidence shows that mitigating factors in disciplinary actions are considered only when administrators believe that the student has a real future that will be destroyed by expulsion; unfortunately, that is not the case for African Americans and

Latinos whose academic futures are directly affected by zero tolerance policies. (Gordon et al., 2000). Zero tolerance policies represent a response to the impression that schools have become much more dangerous over the years, yet statistics show that this is a misconception since there has been little change in the number of threats received by schools. (Gordon et al., 2000). Yet, as a result of zero tolerance policies, the number of students expelled has increased over three times, and this number is projected to increase over the years. (Gordon et al., 2000). One reason for this increase can be due to how teachers and administrators interpret students' behavior and how zero tolerance policies are applied to those specific behaviors. (Gordon et al., 2000). Often times such determination can be based not only on a student's objective behavior, but also by differences in race and ethnicity. (Gordon et al., 2000).

**b. Socioeconomic Impact**

Zweifler and De Beers (2002) argue that although all expelled students are affected the same way, the effects on non-white students are much more significant due to the socioeconomic differences between minority and majority students and families. Since education is considered a valuable asset for socioeconomic mobility, exclusion of minority students from educational services creates an adverse impact on the minority population as a group. (Zweifler & De Beers, 2002). Therefore, zero tolerance policies support a culture that perpetuates a system of "undereducated members." (Zweifler & De Beers, 2002, p. 214). Without an education, non-white students are denied employment opportunities, and the long-term impact on non-white students is an introduction to the penal system. (Zweifler & De Beers, 2002).

Gordon et al. (2000) note that the problem with zero tolerance suspensions and expulsions is the consequential effects on the student's future. Not only are non-white students denied an education, but they are also pushed towards the juvenile justice system. (Gordon et al., 2000). Research indicates that in California, about eight times as many African American men will be in the California prison system than the university system. (Gordon et al., 2000). The problem with this approach is that children are forced to fall behind academically, and they are forced to build a negative attitude about school. The end result is that children are encouraged to drop out of school altogether after they are either suspended or expelled. (Gordon et al., 2000).

Wasser (1999) argues that although such policies may in some instances perform to achieve its objective, it has also drawn important issues revolving the value of education, the significance of justice, and the opportunity made available to children. As stated in the *Brown* decision, a child's economic, political, and social future depends heavily on educational attainment; if children are denied an education, then it is doubtful that any child will be expected to succeed. (Wasser, 1999). In essence, the manner in which zero tolerance policies are administered often denies "children access to alternative education, removes troubled students from important school-based services and supports, severely punishes first offenders, and disparately impacts children of color." (Wasser, 1999, p. 751). The reality of zero tolerance is that students are often caught under its web without receiving thoughtful consideration; in fact, when they are expelled and removed from school, children are denied any source of help that may be available to correct their behavior. (Wasser, 1999).

### c. No Use of Discretion

Zweifler and De Beers (2002) argue that zero tolerance policies are often applied without giving each violation proper examination. In their study, they found that when students violate strict zero tolerance policies, many school administrators tend to ignore the discretionary powers that they have under law and instead prefer to use only the power to recommend for expulsion. The failure to investigate incidents therefore allows for any allegation to be considered even when expulsion is simply "based upon accusations or dubious evidence." (Zweifler & De Beers, 2002, p. 208). Administrators often apply this non-discretionary approach because they either (1) lack accurate information or do not know the statutory exceptions, (2) want to rid themselves of undesirable students, or (3) fear public scrutiny if they happen to miss a student whose actions result in violence. (Zweifler & De Beers, 2002).

Wasser (1999) discusses how school officials often do not exercise their discretion to reduce the severity of the punishment on a case-by-case basis, and they do not apply the exceptions or special provisions that the law grants them. Those school officials that refuse to use their discretion often believe that zero tolerance policies eliminates that discretion or "maintain that they face considerations which militate against leniency under any circumstance." (Wasser, 1999, p. 761). Essentially, administrators have applied a hard-hand approach suggesting that zero tolerance policies dictate punishment without taking into account the circumstances of the offense or the age of the offender. (Wasser, 1999). If school officials are unwilling to interfere in disciplinary proceedings, students who either make innocent mistakes or are in need of assistance may be suspended or expelled under zero tolerance policies even if the

circumstances warrant leniency in punishment. (Wasser, 1999). Moreover, since disciplinary actions disparately affect non-white students, those removed are commonly left without access to any form of alternative education, thus making application of zero tolerance policies "substantively unjust and educationally unwise." (Wasser, 1999, p. 761).

#### d. Removal as a Tool

Zweifler and De Beers (2002) find that standardized testing and merit-based funding have also acted as incentives for using strict zero tolerance policies, as administrators often use it to remove low-scoring students. In the words of one administrator, "We want quality more than quantity. If that means removing dead weight, then we will remove dead weight." (Zweifler & De Beers, 2002, p. 208). Similarly, they have found that in other situations administrators have also used expulsion to remove students who require special accommodations (i.e., for physical and learning disabilities) or students whose behavior irritates the administration. (Zweifler & De Beers, 2002). Zweifler and De Beers (2002) conclude that due to this wide discretion of power, non-white students are disproportionately affected.

Wasser (1999) discusses how zero tolerance policies manifest the struggle of policymakers in ensuring school safety while treating each student with care and fairness. With policies that include a wide net of offenses that go beyond possession of a firearm both on and off-campus, it has become much easier to remove a student from school. (Wasser, 1999). Proponents of zero tolerance policies argue that they enable school officials to remove students that create significant security risks by carrying weapons or drugs to school; in fact, they argue that they serve to "remove the disruptive students, get

control, increase fairness and uniformity in punishment, and improve the conditions under which teachers teach and students learn." (Wasser, 1999, p. 751).

### e. Severity of Punishment and Due Process

Zweifler and De Beers (2002) argue that both the severity of punishments and the consequent effects of expulsion should be reason enough to warrant students with increase due process protection. However, the fact that due process protection are not in correspondence with the gravity of the penalties does not guarantee proper use of zero tolerance policies disciplinary actions. (Zweifler & De Beers, 2002). Although students are afforded some level of protection under *Goss v. Lopez* (which indicates that longer suspension and expulsions require more formal procedures), there is no exact indication as to what those formal procedures are in zero tolerance matters. (Zweifler & De Beers, 2002). In fact, if there is no actual requirement that specific evidence be presented, district personnel are most likely to impose disciplinary punishments that are capricious and unreliable. (Zweifler & De Beers, 2002). There is no procedural protection in the application of zero tolerance policies since personnel act as investigator, prosecutor, judge, and jury. (Zweifler & De Beers, 2002). Even though courts do have jurisdiction over disciplinary matters, most socioeconomically disadvantaged families either are not aware of the law or have the money to hire legal counsel and bring an action against the school board. (Zweifler & De Beers, 2002). But even if a lawsuit is filed, most courts defer judgment to the local school boards themselves. (Zweifler & De Beers, 2002). Hence, no actual protection is afforded.

Peden (2001) explains how zero tolerance policies have diminished procedural due process protections on student disciplinary actions. When zero tolerance policies are

applied, the basic principles of procedural due process, which include notice and an opportunity to be heard, are bureaucratically distorted. (Peden, 2001). For example, teachers are the ones who make the initial decision of whether violations have taken place, and essentially teachers will have no choice but to refer the matter to the principal. The principal then determines whether the violation has been committed and what punishment should be imposed. (Peden, 2001). Then, when the principal recommends expulsion, that action is reviewed by the local school board which decides what level of protection is afforded to the student. (Peden, 2001). Furthermore, if teachers, principals, and superintendents are all hired personnel under the auspices of the school board, it is questionable whether a student can be ensured a fair and impartial hearing, not to mention that school boards hear cases where students have violated policies that the Board itself drafted and implemented. (Peden, 2001). Therefore, it is necessary that adequate procedural due process protections are afforded in zero tolerance policy cases.

Peden (2001) states that the severity of the punishment also warrants increased protections. Disciplinary punishments become part of a student's academic record and consequently affect their eligibility for employment and academic opportunities. (Peden, 2001). Academic expulsion only gives students the option of seeking an education elsewhere or not completing their education at all. (Peden, 2001). Moreover, students are often expelled for behavior that is in violation of a zero tolerance policy even if they never held the intent to commit the offense. (Peden, 2001). This form of punishment is consequently "a grave denial of fundamental fairness which has a far-reaching effect." (Peden, 2001, p. 380).

Under *Goss v Lopez*, the level of due process should be commensurate with the punishment given. (Peden, 2001). The Court in *Goss* stated that there had to be a "connection between the discipline imposed and the offense charged." (Peden, 2001, p. 385). Therefore, interest in general deterrence cannot simply justify a punishment, less can there be a mandatory disciplinary rule without any rational relationship between offense and punishment. (Peden, 2001). Thus, the disparity between offense and punishment is an unreasonable means to attain a legislative end and further protections must be afforded. (Peden, 2001).

Cohen (2000) addresses procedural due process concerns amidst the strong desire to punish and expel students before any act of violence is committed. Targeting students that have not yet acted could potentially deprive the student of his or her due process rights under the 14th Amendment. (Cohen, 2000). Since a student's property right on public education, such interest cannot be abridged because of misconduct without "providing the student fundamentally fair procedures to determine whether the misconduct has even occurred." (Cohen, 2000, p. 333). A student must generally receive notice and an opportunity to be heard before punishment is imposed. (Cohen, 2002). However, since there is no indication of the exact procedure that must be afforded, the Supreme Court has outlined a balancing of interest approach to determine if due process was fulfilled. (Cohen, 2000).

Yet, it is unclear which procedures are actually consistent with due process taking into account student profiling and the way punishment is assessed using behavior or personality traits. (Cohen, 2000). The problem lies on whether specific behavior and/or personality traits that are consistent with a checklist are denying students an opportunity

to challenge those accusations. (Cohen, 2000). Furthermore, a checklist only gives teachers broad discretion as to who to classify as dangerous children. (Cohen, 2000). Cohen (2000) concludes that administrators will fail to rid schools of violence if they use a checklist that has no indication as to where the line is drawn.

### f. Policies Allow for Misperceptions and Wide Interpretations

Peden (2001) argues that although the 1994 and 2001 Gun Free Schools Act allows administrators to examine violations on a case-by-case basis, local school policies tend to be over-inclusive in how they define certain offenses and how they are interpreted by school personnel. For example, administrators can fail to make the distinction between a tool and a dangerous weapon, or between an illegal controlled substance and a household medication. (Peden, 2001). If administrators are unable to construe definitions appropriately, then there is a high chance that some students may be misconceived as dangerous students. (Peden, 2001). And sometimes, definitions will be construed literally without investigating the origins of the alleged violation. Peden illustrates a situation in Arroyo Seco Junior High School in Los Angeles, California, where a student who innocently took a bag of marijuana (which belonged to somebody else) to his parents was expelled because the language of the policy read "a student in possession of marijuana… [must be] brought forth […] for expulsion." (Peden, 2001, p. 374).

Gordon et al. (2000) argue that discipline codes allow for broad interpretation of student conduct, which in turn allows teachers to depend on their conscious and unconscious beliefs about non-white students in making a decision. Findings indicate that if schools allow teachers to suspend students for violations that are broad and not

clearly defined, it only opens the way for bias and cross-cultural misunderstandings. (Gordon et al., 2000). For example, a middle school in San Francisco, California reported that African-American students, making up less than one-third of the population, received almost half of all referrals; most of them were due to conflicts between teachers and students and not necessarily for the possession of a weapon. (Gordon et al., 2000).

Morrison and D'Incau (1997) provide information on what types of students have fallen prey to the wide interpretation of disciplinary policies. Research indicates four profiles of students who were recommended for expulsion under such policies: (1) those who did not have a significant disciplinary history where the offense seemed out of character, (2) those who had been experiencing some disciplinary actions and who also had attendance problems and failing grades, (3) those who had indications of emotional distress, either short or long-term that accompanied their discipline problems, and (4) those who participated in particularly violent offenses, may have been involved in a gang, and who had continual disciplinary problems. (Morrison & D'Incau, 1997).

These classifications served to obtain information about the patterns of offenses across groups and the severity of those offenses. (Morrison & D'Incau, 1997). They found that first offenders are most likely to be caught violating zero tolerance policies in low-severity situations; for example, a student who mistakenly brings a knife to school and holds it in a non-threatening manner may be considered an act that requires mandatory recommendation of expulsion although such behavior may be permissible to the student at home. (Morrison & D'Incau, 1997). This contrast in interpretation without a finding of intent makes students vulnerable to disciplinary policies. (Morrison & D'Incau, 1997).

### g. Profiling as a Tool

Peden (2001) touches upon the issue of profiling and removing students before any violence occur. Profiling is simply "an extension of the school's authority to maintain discipline." (Peden, 2001, p. 388). The gist of student profiling is to be able to target certain students that are possible 'problem children' in order to prevent school violence. (Peden, 2001). It requires identifying certain student behavior, and this may normally be based upon suspicion that a specific behavior is not normal. (Peden, 2001). Some common criteria include the student's demeanor, the student's home life situation, and the student's exhibition or risky behavior like cursing or mood-swings. (Peden, 2001). The use of profiling is therefore risky because it can be overly inclusive and may require a student to answer questions that could classify him/as a potential threat. (Peden, 2001). It similarly carries the risk of stigmatization of the child, which a child could carry for the rest of his educational career. (Peden, 2001).

Cohen (2000) discusses how student profiling is not an effective method of controlling school violence due to its inaccurate assessment of students. Cohen (2000) draws the question whether harsh sanctions should be imposed on students just because teachers and administrators believe that certain students pose specific dangerous characteristics. (Cohen, 2000). In fact, he contends that policing schools by using student profiling only increases the risk of school violence in the long-run. (Cohen, 2000). The use of student profiling has come as a result of the increased fear of school violence and the administration's attempt to prevent any future violent incidents from taking place. (Cohen, 2000). Identification of certain characteristics not only forces

students to abide by strict set of behavioral guidelines, but also results in detrimental consequences that deny students of an education. (Cohen, 2000).

Cohen (2000) describes profiling as a general deductive process. It begins by identifying the setting, gathering evidence, and using that information to explain specific types of behavior. (Cohen, 2000). It is meant to create a pool of potential dangerous people by narrowing down those who meet certain characteristics, while eliminating all others who do not meet the criteria. (Cohen, 2000). In fact, in 1998 the Clinton Administration directed the Department of Education and the National Association of School Psychologists (NASP) to publish a report outlining the early warning signs that deeply troubled people send before exploding into violence. (Cohen, 2000). From this report, one can identify common characteristics among students that committed acts of violence. (Cohen, 2000).

In implementing profiling tactics, administrators prefer to err on the side of safety despite its criticism that it is an "overreaction to the risk of school shootings." (Cohen, 2000, p. 335). The problem with profiling is that it characterizes students as being dangerous just because they are different. (Cohen, 2000). A student who does not satisfy the "normative qualities of the ideal students," may be mislabeled as a dangerous and violent individual. (Cohen, 2000, p. 335). In challenging this practice, the ACLU feels it is "unfair to students to stereotype them, and to say [that just] because they have something in common with other students who have, in fact, committed violent crimes that, therefore, they, themselves are likely to commit a crime." (Cohen, 2000, p. 335). Moreover, mislabeling students as dangerous can also do more harm than good as it can encourage students to play into those labels. (Cohen, 2000). If a student feels he is being

labeled, "he may not give his best effort for the teacher of for the school." (Cohen, 2000, p. 336). And once he/she is labeled, it is possible that that classification may follow him/her throughout his/her educational career. (Cohen, 2000). This stigma can then encourage the student to act consistently with the label that he/she is dangerous, hence invoking a "self-fulfilling prophecy of a crime." (Cohen, 2000, p. 336). Cohen (2000) concludes that placing the responsibility on teachers and administrators to profile students only creates irreparable harm that ultimately leads to more violence.

### h. Differences in Racial Makeup/Understanding

Gordon et al. (2000) point out that targeting of African American and Latino students can be due to the differences in racial makeup between school personnel and the student population. Their finding indicates that most school districts do not require anti-racist or multicultural education training for teachers and administrators. (Gordon et al., 2000). This means that non-white students are most likely to suffer because teachers are not prepared on how to deal with children of different races and cultures. (Gordon et al., 2000).

Pinard (2003) argues that such disparate impact on non-white students can be attributed to the cultural differences between students and school officials. Studies have shown that in the school setting there can be "varying behavioral interpretations based on difference, as well as categorization and stereotype." (Pinard, 2003, p. 1114). For example, in some cultures some verbal expressions are considered normal and genuine, whereas in the school setting a school official may misperceive such expression as a refusal to comply with their demands. (Pinard, 2003). Similarly, a student's nonverbal communication can also be subject to misunderstanding. In some situations, the use of

excessive nonverbal gestures may be conducted in an impassioned manner, yet may be perceived as excessive, combative, or argumentative. (Pinard, 2003). As a result, school officials have a broad definition of what verbal and nonverbal behavior can be subject to disciplinary proceedings.

### i. Significance in the Increased Number of Suspensions/Expulsions

Morrison and D'Incau (1997) examined how zero tolerance policies have significantly increased the number of students recommended for expulsion. The concern over students carrying weapons in school initially pushed forward the creation of zero tolerance disciplinary policies in schools. For example, in California, school principals or superintendents are "obligated by law to recommend expulsion from the school district of any student who commits certain offenses, the primary which are bringing a weapon on campus (or sells or furnishes one), brandishing a knife at another person, or unlawfully selling a controlled substance." (Morrison & D'Incau, 1997, p. 2). Although schools can generate other alternatives, expulsion has essentially increased the number of students whose needs are not adequately served or who need "other options outside of the regular school program." (Morrison & D'Incau., 1997, p. 2).

Morrison and D'Incau (1997) point out several issues with the increase in the number of expulsions. First, expulsion permanently excludes students from an education, therefore denying students a right to an equal education under *Brown v. Board of Education.* (Morrison & D'Incau, 1997). Second, students who are excluded without any academic, social, or mental support may only aggravate problems with delinquency in the long-run. (Morrison & D'Incau, 1997). Third, students with disabilities are not only

vulnerable to anti-social acts, but also subject to disciplinary action for those acts. (Morrison & D'Incau, 1997).

Morrison and D'Incau (1997) provide information on what types of students fall prey to zero tolerance policies. Research indicates four profiles of students who were recommended for expulsion: (1) those who did not have a significant disciplinary history where the offense seemed out of character, (2) those who had been experiencing some disciplinary actions and who also had attendance problems and failing grades, (3) those who had indications of emotional distress, either short or long-term that accompanied their discipline problems, and (4) those who participated in particularly violent offenses, may have been involved in a gang, and who had continual disciplinary problems. (Morrison & D'Incau, 1997).

In their study, these classifications served to obtain information about the patterns of offenses across groups and the severity of those offenses. (Morrison & D'Incau, 1997). They found that first offenders are most likely to be caught violating zero tolerance policies in low-severity situations; for example, a student who mistakenly brings a knife to school and holds it in a non-threatening manner. (Morrison & D'Incau, 1997). Morrison and D'Incau (1997) point out that what may be permitted at home directly conflicts with what is actually permitted on school grounds; this contrast in interpretation make students vulnerable to disciplinary policies. The same can be said of possessing drugs at school; reality is that most students use it to deal with distress at school or at home. (Morrison & D'Incau, 1997).

### j. Factors that Aid in Mitigation

Examination of the expulsion records at one school district indicated that there are system factors that determine whether other alternatives to expulsion may be used. (Morrison & D'Incau, 1997). Morrison and D'Incau (1997) outline system factors that can be considered in expulsion proceedings: (1) the appropriateness of the response from parents, (2) the intervention of community members who know the students best, (3) the support and recommendation of teachers and personnel who can vouch for the student's behavior, and (4) the hiring of an attorney by the student. Thus, evidence shows that expulsion from school is less likely to occur if parents are directly involved in "productive decision-making in regard to the offense" or if the school or the community directly support the student's continued education. (Morrison and D'Incau, 1997, p. 10). However, those files also indicated that a great percentage of those students are at-risk individuals who had failing grades, attendance problems, internal family problems, or a history of disciplinary problems. (Morrison and D'Incau, 1997).

### k. Punishment and Safety

Wasser (1999) states that the strict restrictions imposed on student behavior, on and off school grounds, have been a result of the need to control schools, the level of control deferred to administrators, and the growing concern over youth violence. Zero tolerance policies for weapons, drugs, and other behavior are part of a "larger trend of increasing strictures on student behavior in an attempt by administrators to gain control over students, reduce youth violence, and create safe learning environments for students and teachers alike." (Wasser, 1999, p. 759). The problem with zero tolerance policies is that they are used to tell society that something has been done to deal with youth violence

and ensure school safety; however, these policies have been implemented broadly without taking into account the "interests of the children and teenagers suspended or expelled." (Wasser, 1999, p. 759). Essentially, administrators use three bases to justify this control: (1) strict adherence to the policy sends a message to the general student body population; (2) no exceptions will be made to ensure all students are treated equally according to the policy; and (3) society's concern over school safety leaves no option but to apply the maximum punishment available. (Wasser, 1999, pp. 770-771).

Haft (2000) discusses how principles of zero tolerance policies have undermined the ultimate goal of education, which is to "prepare children to live in a democratic society." (Haft, 2000, p. 797). Instead, schools have been so concerned with safety that students who may pose a risk to others are excluded and ostracized from institutions of learning. (Haft, 2000). As a result, exclusionary policies have implemented strict punishments that ignore the general principle that children have diminished capacity to develop requisite intent. (Haft, 2000). Since disciplinary policies "assume both an injurious intent and an injurious effect based on a single incident, sometimes of possession alone," zero tolerance policies punish students regardless of whether they had no intent to injure anyone and/or did not cause a major disruption to the academic setting. (Haft, 2000, p. 802). In other words, zero tolerance policies mirrors punitive trends in criminal law, yet no determination are ever made as to their intent. (Haft, 2000). Haft (2000) concludes that unless schools have attempted every possible strategy to achieve its goal of educating a child, such strict configurations should be avoided.

### l. Reliance on Law Enforcement

Pinard (2003) discusses how heightened law enforcement and zero tolerance policies have had a disparate impact on non-white students. Since in the school context, formalized relationships have been forged between public schools and law enforcement, there has been an increased reliance upon the criminal justice system to discipline and punish schoolchildren. (Pinard, 2003). As a result, non-white students are disproportionately subjected to "the most punitive sanctions." (Pinard, 2003, p. 1114). In fact, studies have shown that most schools that implement strict policies targeting violence, weapons, alcohol, drugs and tobacco are in areas where a great percentage of students are minorities. (Pinard, 2003). Accordingly, since law enforcement are mostly present in schools with considerable minority enrollment, policies and disciplinary practices have disproportionately pushed non-white students into the juvenile and criminal justice systems. (Pinard, 2003). And this has essentially casted "a broader criminal net over public schools." (Pinard, 2003, p. 1117).

### m. Restorative Justice as a Tool

Haft (2000) argues that restorative justice principles should be used to hold offenders strictly accountable to their behavior while restoring the integrity of the school. Restorative justice seeks to withdraw from the general principle of punishing student for zero tolerance violations by reconciling, repairing, and reassuring those violated by the offender. (Haft, 2000). Its initial focus is on the offense and its process involves getting all parties involved together to resolve communally the direct and indirect consequences of the offense. (Haft, 2000). Restorative justice has three important elements: (1) identifying the needs of the parties, (2) informing and empowering parties, and (3)

establishing accountability for past conduct and future intentions. (Haft, 2000). These elements comport with the aims of public education by reintegrating students as productive members of the community instead of excluding them from an academic setting. (Haft, 2000). Haft finds that mediation within the school setting "permits identification of relevant and influential community members; it provides definite boundaries for determining appropriate, relevant restitution; and, it has a supporting framework of continuous contact between the offender and the community to make it an effective component of ongoing intervention." (Haft, 2000, p. 810).

# CHAPTER 3. RESEARCH METHODOLOGY

## A. Purpose and Objective

This study focuses on legal research and analysis to determine the effectiveness of California Education Code Section 48915(c) in light of the Gun Free Schools Act of 1994 and 2001. The importance of the legal research methodology in this study is to collect, review, and analyze California and federal laws that mandate regulations of school disciplinary policies at the statewide level. Through the legal research formula, this study intends to analyze three main issues: (1) some of the ambiguities in both federal and California zero tolerance policies; (2) some of the implications associated with enforcement of those laws; (3) some of the effects on students that result from the implementation of these laws. This analysis of the laws will ultimately encourage administrators to apply zero tolerance policies adequately without relinquishing their ethical commitment to education.

## B. Legal Research Design

Legal research is defined as the study of authorities, whether case or text, for the purpose of supporting a proposition. (Ballentine's Law Dictionary, 1969). It focuses on the effective assembling of authorities that bear on a specific question of law. (Jacobstein & Mersky, 1973). It serves as an investigatory tool that searches for information to support a specific legal-decision. (Jacobstein & Mersky, 1973). The function of legal research is to acquire understanding of the current state of the law. (Kunz,

Schmedemann, Bateson, Downs, & Catterall, 2004). Moreover, legal research involves the determination and integration of facts, the legal issues or disputes associated with those facts, and the procedure involved in searching for the law itself. (Jacobstein & Mersky, 1973).

Legal research is central to ascertaining the impact that enacted policies have in regulating specific behavior. As a result, it is imperative that a researcher not only extract the underlying principle from a law, but must also determine the principle's course of action, development, and intended outcome. (Jacobstein & Mersky, 1973). In this case, legal research will revolve around the ability to present and analyze legal issues pertaining to this study. And its legal analysis will refer to the process of identifying the issue(s) at stake and "determining what law applies and how it applies." (Putman, 2004, p. 26).

The process of legal research requires that one define the area of study and generate practical terms to narrow the range of information that can help identify a specific issue. (Sloan, 2003). In this study, two iterations of the Gun Free Schools Act (1994 and 2001) are the main sources of information that have set the stage for California's development of a strict zero tolerance policy. As stated in Chapter 2, the Gun Free Schools Act required that any state receiving federal funding enact a policy that expels a student who brings a firearm to school for a minimum of one-year. However, the federal mandate did not impose any limitations on this requirement, allowing states to impose even tougher policies to regulate student behavior. The California Legislature amended Education Code Section 48915(c) to abide with the 1994 Gun Free Schools Act. Section 48915(c) implements a one-year expulsion requirement for a student found in

possession of a firearm on school grounds. However, California also adds the requirement for the mandatory expulsion and mandatory recommendation for expulsion of students who "possess, sell, or otherwise furnish a firearm, brandish a knife at another person, sell a controlled substance, commit or attempt to commit a sexual assault or sexual battery, or possess an explosive." (California Department of Education, 2008).

This information is useful in identifying possible issues in California's Section 48915(c), including the ambiguity and overbreadth of the language, the lack of guidelines in implementing that language, and the consequences that result from a misguided execution of the law. The legal research process stipulates that one become acquainted with legal authorities and determine which type can help decipher the meaning of laws, rules, and regulations. (Sloan, 2003). As a result, it is important that one have a general understanding of the fundamental elements comprising legal authorities in this study.

### C. Legal Authorities

It is important to understand the main sources of authority that are assembled in the review of literature. Legal research defines the term 'sources of law' as "the literature of the law, the authoritative organ of the state which formulates the legal rules, or the derivation of the concepts or ideas expressed in the body of law." (Jacobstein & Mersky, 1973, p. 3). These are the "origins of legal principles in the legislative and judicial process" that can be found in "reported cases, authoritative textbooks, comprehensive text treatments, constitutions, and statutes." (Ballentine's Law Dictionary, 1969).

These sources of legal authority are essentially categorized in two formats, either as primary authority or as secondary authority. Primary sources of authority derive from the constitutions, legislative enactments of law, administrative regulations, and court

opinions. (Sloan, 2003). Secondary sources of authority, on the other hand, are not bodies of laws, but instead are commentaries to the laws that help explain their meanings through analyses and critiques. (Kunz et al., 2004). These sources of authority will help identify, analyze, and support the legal issues pertaining to this study.

When identifying and analyzing these sources of authority, one must also be aware of the parallel forms of government that exist in the United States. The United States Constitution creates a federal system of government in which there is a "separation of powers not only between branches of government (legislative, judiciary, executive) but also between levels of government (federal, state, and local)." (Rich & White, 1996, p. 8). Paul Peterson (1981) defines this system of federalism as:

> "A system of government in which powers are divided between higher and lower levels of government in such a way that both levels have a significant amount of separate and autonomous responsibility for the social and economic well-being of those living in their respective jurisdictions." (p. 67).

The separation of powers in government is relevant when examining primary sources of authority since their classification determines their level of persuasiveness. This will be further explained in the following section.

**a. Primary Source of Authority**

A primary source of authority is used to describe rules or bodies of law, and is generally described as 'the law' that governs conduct in society. (Sloan, 2003). They are sources of legal obligations, duties, and restrictions that include "constitutions, statutes, administrative regulations, executive orders, treaties, and court decisions." (Yang & Miller, 2008, p. 189). These legally binding rules are the "official pronouncement of the

governmental lawmakers," which represents the "tangible aspect of American law" and which is the main object of legal research. (Neacsu, 2005, p. 65). There are four main primary sources of authority that can be found both at the state and federal level: (1) constitutions, (2) statutes, (3) administrative regulations, and (4) court opinions. (Sloan, 2003).

The first form of primary authority is the 'Constitution,' which establishes "a system of government and defines the boundaries of authority granted to the government." (Sloan, 2003, p. 2). The United States Constitution is the supreme source of law in our legal system; it creates the government and defines the rights of every citizen. (Kunz et al., 2004). States, like California, also have their own State Constitution, which runs parallel to the federal Constitution but may differ to some extent. A State Constitution must provide all the rights the United States Constitution guarantees; however, they are not precluded from granting citizens greater rights than what the federal Constitution provides. (Sloan, 2003). As a result, all legal rules must conform to both the State and United States Constitution.

The second form of primary authority involves the regulations that legislative bodies enact. The legislative branch of government, at both the state and federal level, create legal rules and ordinances that regulate "a wide range of behavior by individuals, private entities, and the government." (Sloan, 2003, p. 7). Since these bodies of law are enacted in broad, general terms, the legislature's intent during the legislative process is significant in interpreting the law. (Kunz et al., 2004). At the federal level, Article I, Section 1 of the United States Constitution vests all legislative powers to United States Congress. (U.S. Constitution, Art. I, Sec. 1). Congress consists of two houses, the

Senate and the House of Representatives, which work in conjunction to ratify these laws and regulations. (U.S. Constitution, Art. I, Sec. 1). At the state level, Sec. 1, Article 4 of the California Constitution vests legislative power on a bicameral system that is composed of a Senate and an Assembly. (Cal. Constitution, Art. 4, Sec. 1). Like Congress, the California Legislature has the power to make laws and regulations; however, their application is limited to California only and does not affect other states as federal laws do.

The third primary source of authority lies in regulations and rules that come from the executive branch. (Neacsu, 2005). Since administrative agencies are part of the executive branch, and are essentially in charge of executing the laws passed by the legislature, they have the authority to "create their own regulations to carry out the mandates established by the statute." (Sloan, 2003, p. 3). These agencies can create laws in two ways: (1) they can issue regulatory decisions to resolve specific issues, which can serve as precedent to resolve future disputes; (2) they can propagate regulations "which resemble statutes in that they address a range of behavior and are sated in general terms." (Kunz et al., 2004, p. 7). At the federal level, administrative law can be found in "the compilations of presidential executive orders, those of administrative rules and regulations, and the compilations of administrative decisions." (Neacsu, 2005, p. 65). At the state level, Article 5, Section 1 of the California Constitution grants supreme executive power to the Governor who oversees the function of administrative agencies.

The fourth source of authority comes from court opinions (or decisions). The role of the judiciary branch is generally to interpret the rules enacted by the legislature and the executive branches of government. (Sloan, 2003). Courts can invalidate enacted laws if

they decide that they do not meet constitutional muster (as will be described supra). However, when rules can be applied and when legal disputes enter the federal and state judiciaries, the decisions handed by the courts will not only resolve the issues at hand, but will also create precedents that need to be followed. (Kunz et al., 2004). Since court opinions become an independent source of legal rules, these rules are known as common-law rules (or judge-made laws). (Sloan, 2003). This is because the "result, rules, and reasoning in a decided case" generally become 'the law' that must be followed in other similarly situated disputes "within the court's jurisdiction." (Kunz et al., 2004, p. 7).

As mentioned before, the federal government and each of the state governments have their own independent court systems. Article III, Section 1, of the Constitution creates the United States Supreme Court, and gives Congress the power to create lower courts – the U.S. Courts of Appeals and the U.S. District Courts. (U.S. Constitution, Art. III, Sec. 1). The district courts are the lowest courts that hear all categories of federal cases, criminal and civil; the Courts of Appeals are divided into nine circuit courts and hear appeals from district court decisions or federal administrative agencies; the Supreme Court hears limited cases each year and may hear cases that begin in either state of federal court, and which involve the Constitution or federal law. (U.S. Courts, 2009). In California, Article 6, Section 1 of the State Constitution vests judicial power on the Supreme Court, Courts of Appeal, and superior courts to interpret the laws of the state. (Cal. Constitution, Art. 6, Sec. 1). Most cases begin at a state superior court; the next level of judicial authority resides in the Court of Appeal that reviews superior court decisions; the Supreme Court sits at the top of authority and can review decisions from the Court of Appeals or any issues involving California law. (California Courts, 2009).

In this study, the primary sources of authority are (1) federal and state statutory laws that codify zero tolerance policies, and (2) court decisions that interpret those laws to specific facts. For example, the Gun Free Schools Act of 1994 is codified under Section 8921 of Title 18 of the United States Code; California's zero tolerance policy is codified under Section 48915(c) of the California Education Code. Since these are regulations enacted by both the federal and state legislatures, they are considered 'the law' and are therefore primary sources of authority. Similarly, court decisions, like *T.H. v. San Diego Unified School District* (2004), would also be considered a primary source of authority because it deals with the constitutionality of a school district regulation. Such court ruling would be considered 'the law,' and therefore a source of primary authority.

**b. Secondary Source of Authority**

Secondary authority refers to "commentary on the law or analysis of the law, but not 'the law' itself." (Sloan, 2003, p. 4). These sources are written by "lawyers, scholars, non-governmental bodies, or government officials not acting in a law-making capacity." (Kunz et al., 2004, p. 8). They describe the meaning of the law, analyze its purpose and intent, and offer a critique on its effectiveness in relation to its goals. (Kunz et al., 2004). In addition, these sources explain and analyze the basis for a specific court decision, and evaluate the efficacy of how a law is interpreted and applied. (Sloan, 2003). As a result, most of these commentaries resemble the view of their authors, recommend what the law should be or how it should be applied, and may serve to influence lawmakers or judicial officers. (Kunz et al., 2004).

Although a secondary source of authority is not the law, it is useful in legal research because its "analysis can help you understand complex legal issues and refer you

to primary authority." (Sloan, 2003, p. 4). Constitutions, statutes, and regulations are the heart of the law, yet their language often runs the risk of being ambiguous, vague, and over-broad. Therefore, when it becomes difficult to understand the intention of those drafting legal rules and the rationale behind judicial opinions, researchers may have to resort to secondary forms of writing to understand the law in primary forms of writing. (Neacsu, 2005). These tools are especially useful when there is very limited research on a specific topic. The researcher first looks at what others have written on the subject, and then uses their analysis of the issue to help format his legal research and analysis.

Secondary sources are aids in the legal research process by identifying issues that frame a legal argument. Even though these sources are not binding, and do not need to be followed, they can serve the purpose of helping the researcher construct persuasive arguments that can be influential. (Neacsu, 2005). The reason why this is possible is due to the amount of information that a researcher can find in secondary sources; the way legal rules, regulations, and decisions are summarized, reviewed, and analyzed can help frame and narrow the scope of the research topic. (Neacsu, 2005). In addition, secondary sources serve to find primary authorities based on the area of study. Most secondary authorities can be found in encyclopedias, treatises, periodical articles, *American Law Reports Annotations*, Restatements, and law review articles. (Kunz et al., 2004).

In this study, law review articles, legal journals, and periodicals are secondary sources. These articles comment on the impact of zero tolerance policies on students, administrators, and community; as well as the ambiguity that is present in the language itself. For example, in a law review article, Cohen (2000) comments how zero tolerance

laws have led to unfair profiling and to an inaccurate assessment of students. Since this is just an opinion about the effects of the law, it cannot be cited as 'the law.' Hence, this would be a secondary source.

### c. Mandatory Authority v. Persuasive Authority

Once the types of authorities have been identified (primary v. secondary sources of authority), it is important to understand the weight (or influence) of each type of authority. (Putman, 2004). Since not all authority cited or used by a court are given equal weight, they are classified into two categories "for the purpose of determining its authoritative value, or the extent to which it must be relied on or followed by the court." (Putman, 2004, p. 15). Mandatory and persuasive authorities are the terms that "courts use to categorize the different sources of law" in their decision-making process. (Sloan, 2003, p. 5).

#### (1) Mandatory Authority

Mandatory authority is any "source that a court must rely on or follow when reaching a decision." (Putman, 2004, p. 15). It is classified as a 'binding authority' that a court is obligated to adopt. (Sloan, 2003). They emanate from "the legislature, courts, or agency with jurisdiction over, or the power to regulate." (Kunz et al., 2004, p. 8). For example, a decision of a higher court in the same jurisdiction would be a mandatory authority for a lower court. (Putman, 2004). However, William H. Putman (2004) explains that not all primary authority is mandatory authority as there are instances where courts are not obligated to follow certain law when making a decision. Primary authority "becomes mandatory authority only when it governs the legal question or issue being decided by a court." (Putman, 2004, p. 15).

To determine whether an enacted law is considered mandatory authority, one must take a three-step analysis: (1) one must identify all laws that 'may' govern the issue at hand and determine which of these laws applies to the specific legal area in the dispute; (2) one must identify the elements of the law, which indicates identifying the specific requirements that must be satisfied for the law to apply; and (3) one must apply the facts of the case to the elements of the law. (Putman, 2004, pp. 15-16). If the law governs the issue in the case, then it is mandatory authority and the court must apply it unless it is deemed unconstitutional. (Putman, 2004). Moreover, to determine whether common law (judge-made law) is mandatory authority and binding on another court, two conditions must be met. First, "the court opinion must be on point." (Putman, 2004, p. 17). Second, "the court opinion must be written, by a higher court in that jurisdiction." (Putman, 2004, p. 17).

In this study, the 1994 and 2001 Gun Free Schools Act is an enacted law that mandates states to ratify a zero tolerance policy that removes students in possession of a firearm on school grounds for a minimum of one year. The same can be said with Section 48915(c) of the California Education Code, which enacted the one year expulsion requirement for any student in possession of a firearm, knife, explosive, or controlled substance, or who sexually harasses another. These are enacted 'laws' that must be followed by a court. However, for these authorities to be mandatory, and binding in a court of law, they must also govern the issue at hand, as explained above.

With regards to court decisions in this study, *T.H. v. San Diego Unified School District* (2004), is a perfect example. In *T.H.* (2004), the California Court of Appeal addressed the issue whether an administrator was 'obligated' to use his discretionary

power to not recommend a student for expulsion. *T.H.* would be considered a mandatory authority if a superior court in California was presiding over a case that presented a similar issue, and if *T.H.* proved to be on point in addressing that issue. However, there are other situations where *T.H.* would be considered persuasive authority; this will be discussed in the next section.

**(2) Persuasive Authority**

Persuasive authority, on the other hand, is a 'non binding' authority; courts are not obligated to follow it unless they are persuaded to do so in reaching a decision. (Sloan, 2003). Usually, when mandatory authority is available, "persuasive authority is not necessary, although its use is not prohibited." (Putman, 2004, p. 17). One must note, however, that persuasive authority consists of both primary and secondary sources of authority.

In certain instances, primary sources of authority can be persuasive authority. When courts look at enacted laws, these may be persuasive authority if the laws do not necessarily govern the issue in the case. (Putman, 2004). Sometimes, courts refer to these enacted laws when there are no binding laws that they can refer to. (Putman, 2004). Primary sources of authority in court cases can also be used as persuasive authority. Courts usually look to other primary sources of authority (which may come from lower court decisions or decisions from other court jurisdictions), and use it as persuasive authority if they cannot find a mandatory authority that they can follow for making a decision. (Putman, 2004). However, courts are not precluded from referring to these court decisions if they are "persuaded to adopt the rule or principle established." (Putman, 2004, p. 18).

Secondary sources of authority are always persuasive authority. (Sloan, 2003). Since they are not the 'law,' courts are not required to follow them, and they can never be mandatory authority as a result. (Sloan, 2003). Whenever mandatory authority is available for courts to decide on an issue, persuasive authority is therefore not necessary. However, if there is no mandatory authority, and "there is persuasive primary authority, the secondary authority may be used in support of the primary authority." (Putman, 2004, p. 18). Putman (2004) explains that secondary authority is most valuable when there is no primary authority available, whether mandatory or persuasive. However, such instances are rare since there are "few matters that have never been addressed by either some legislature or court." (Putman, 2004, p. 18).

In the present study, all law review articles, legal periodicals, and publications that speak about zero tolerance policies are secondary sources of authority that may persuade a court's decision on an issue. However, these sources mainly serve the purpose of explaining, analyzing, and/or critiquing the effectiveness of zero tolerance policies in light of California's amendment of Section 48915(c) of the California Education Code.

**d. Use of Legal Authorities**

It is important to understand the role that each form of authority plays in this study. Since the topic of research is focused on California's zero tolerance policy (Section 48915(c) of the California Education Code) amidst the 1994 and 2001 Gun Free Schools Act, the use of primary mandatory sources is essential because they outline the legal principles of this study. The enacted federal law in this case lays out the requirement that all states must ratify a statute that imposes a one-year expulsion on any

student who carries a weapon on school grounds. The language of this law is important in analyzing the initial intent that Congress had in preventing and reducing the number of school violence incidents in the United States. Similarly, the language in Section 48915(c) of the California Education Code is instructional in understanding whether it effectively satisfies Congress' initial intent. Although it is quite clear that Section 48915(c) exceeds the federal requirement by widening the spectrum for which a student can be expelled, the policy's language is still too ambiguous for local educational administrators to enforce. In fact, as Chapter 2 indicates, there are major court cases emanating from California that clarify some of those uncertainties. But when judiciary opinions are published in light of those uncertainties, the scope of the legal review widens since the language of court decisions are considered primary authorities in California.

The use of secondary persuasive forms of authority is crucial in both understanding the ambiguity of the law and in formatting a legal argument based on that ambiguity. Since primary sources do not contain an explanation of what the law means, the secondary sources used in this study underlines the different interpretations of the law and brings to light any flaws associated with those interpretations. Since there is minimal research on California's zero tolerance policy specifically; secondary sources have been useful in framing a legal argument based on the general effects that come with outright disciplinary measures. The purpose of this study is to serve administrators as a guide towards proper implementation of the law; looking at primary sources alone would only limit the scope of the research. Therefore, secondary sources in this study act as both a

finding aid for further legal research and a supplementary tool that extracts the internal meanings of the law.

Most primary and secondary sources of authority used for this study were found using legal search engines, like West Law and Lexis/Nexis, which compile court opinions, federal and state laws, enacted legislation, and law review articles. However, other sources used include Oyez (the U.S. Supreme Court Media), FindLaw (a search engine for cases and codes), Google (which has links to legal periodicals and books), and The Ohio State University's online library index and catalog.

### D. Legal Analysis

#### a. IRAC Method

The process of legal analysis is the method of choice in this study. Legal analysis is defined as the process of "identifying the issue or issues presented […] and determining what law applies and how it applies." (Putman, 2004, p. 26). It is both the process of applying the law to the facts and the "exploration of how and why a specific law does or does not apply." (Putman, 2004, p. 26). This process also examines authorities in detail "in order to predict its effect on future similar circumstances." (Walston-Dunham, 2008, p. 38). In sum, legal analysis is a complex system that requires the skill of locating and identifying similarities and differences in the facts, including what the laws in question are and which attitudes preside over the matter. (Walston-Dunham, 2008).

Legal analysis is the center-base of the legal profession because it applies to the examination of statutes, administrative law, and cases. (Walston-Dunham, 2008). It provides legal researchers with the tool necessary to understand the applicability and non-

applicability of legal principles to a set of given circumstances. (Walston-Dunham, 2008). Moreover, it establishes legal precedents that can supplement a researcher's argument in a study like this one. Ultimately, legal analysis gives insight on what to expect from a legal issue based on past experience dealing with similarly situated circumstances; it can also aid the researcher in formulating a proper course of action to address those legal issues. (Walston-Dunham, 2008).

The form of legal analysis used in this study is the Issue-Rule-Analysis-Conclusion (IRAC) method of analysis, which is generally applied in court decisions. IRAC involves a four-step process. First, one must identify the legal issue(s) raised by the facts. A legal issue is a "problem that must be resolved in order to determine the outcome of a legal dispute." (Cooper & Gibson, 1998, p. 274). This is because wherever a law is applied to certain set of facts, there is always the possibility of issues arising from that application. Second, one must identify and state the law that governs the issue(s). The rules of laws may be statutes or case-law, and they may be broken down into components to further understand any issues. Disputes may arise on what law applies, what the meaning of the law is, and how a law is to be applied to the facts. (Cooper & Gibson, 1998). Third, there must be a determination of how a rule of law applies to the issue. The process involves indentifying the elements of the rule of law (its requirements), applying them to the facts presented, and anticipate any possible counterarguments to its application. (Putman, 2008). Fourth, there must be a conclusion to the legal analysis. This essentially summarizes the results of the analysis, which determines 'how' a rule of law applies to the facts and addresses the issue of a case. (Putman, 2008).

IRAC is a method of legal problem solving because it is widely used when rules of law are "applied to specific facts in order to solve a legal problem." (Cooper & Gibson, 1998, p. 274). IRAC is generally used by courts in identifying the issue in each case and applying applicable law. However, for this study, IRAC is used in three ways. First, every legal authority, primary and secondary, was read and analyzed using the IRAC method to identify issues with the 1994 and 2001 Gun Free Schools Act and California's amendment of Section 48915(c) to the California Education Code. Second, the legal analysis of this study reflects the use of the IRAC method to examine (1) the issues found directly in the language of California law (i.e., its ambiguity), (2) how the law is used to punish a wide array of student behavior, (3) how the application of the law can present negative consequences on students, and (4) why the law should be ultimately revised. Third, the IRAC method will also serve to analyze court decisions that define the extent of California's disciplinary policy.

**b. Judicial Review**

Since this study involves an analysis of judicial opinions in light of the enacted zero tolerance policies, it is important to understand that an explication of IRAC is judicial review. In the United States, judicial review is the power that courts have in reviewing the constitutional validity of laws and annulling their application if they are inconsistent with a superior authority. (Paul & Dickman, 1990). Judiciary review involves three standards of review: (1) Rational Basis, (2) Intermediate Scrutiny, and (3) Strict Scrutiny.

Rational basis is the lowest standard of review applied by the Court when reviewing the validity of a law. *In United States v. Carolene Products Company* (1938),

Footnote Four introduced the rational basis test for an economic legislation. The test states that in order for a law to be constitutionally valid, it must be "rationally related to a legitimate state interest." (United States v. Carolene, 1938). This means that as long as (1) there is a legitimate interest by the government, and (2) reasonable means are used to carry out that interest, then the law will pass constitutional muster.

Intermediate scrutiny is the standard midway between the rational basis review and the strictest form of review. In *Craig v. Boren* (1976), the Supreme Court cultured a middle tier review which required that a state show that the enacted law is "substantially related to an important government interest" for it to be constitutionally validated. This means for a law to pass constitutional muster, a state must provide an "exceedingly persuasive justification" in carrying its objectives. (Lee & Rosenbloom, 2005. p. 145). Intermediate scrutiny does not require the government to have a very convincing reason to uphold the law, but the government must show more than just simply legitimacy in their rationale. (Lee & Rosenbloom, 2005).

Strict scrutiny is the most rigid standard of judicial review in the United States. This level of review is commonly applied to laws that "include classifications based on race, ethnicity, national origin, or alienage." (Cotten & Wolohan, 2003, p. 456). The test under this standard requires the government show that (1) there is a compelling state interest in the law, (2) the law is narrowly tailored to achieve its goals, and (3) the law is the least restrictive means of achieving that interest. (Cotten & Wolohan, 2003). In other words, for a law to pass constitutional muster, "the government must have an essential objective in mind, and the law that it passed must be the only way to accomplish that objective." (Cotten & Wolohan, 2003, p. 456). Therefore, if there is other alternatives

that do not involve outright discrimination, the government must follow those alternatives and the law would be deemed unconstitutional. Almost all suspect classifications fail to meet strict scrutiny. (Cotten & Wolohan, 2003).

These levels of judicial review serve to understand the way courts approach the validity of any form of legislation. In this study, judicial review is important in analyzing court cases that expand the framework of California's zero tolerance policy, and it helps to determine whether judicial review was effectively utilized.

**E. Summary**

This study uses a legal research and analysis methodology to extract the direct and indirect meaning of both the federal and state zero tolerance law. This methodology addresses the three main issues in this study: (1) ambiguity in the federal and state law, (2) the implications in enforcing these laws, and (3) the consequences of their enforcement. To address these issues, the legal methodology research and analysis presents administrators with an in-depth overview of the elements of the law, how they can be interpreted in different factual circumstances, and how courts have interpreted some components of those laws. Furthermore, this analysis hopes to make administrators understand that the way they interpret and enforce these laws can have serious consequences on students if laws are not applied correctly. The purpose of this analysis is therefore to serve as a guide through the law and as a reminder that administrators should retain their commitment to the advancement of education in order to protect the well-being of their students.

## CHAPTER 4. ANALYSIS

As presented in Chapter 2, Section 48915(c) of the California Education Code was the State's response to the requirements imposed by the 1994 Gun Free Schools Act. However, that section of the Code provides little guidance as to how school administrators should apply the law to student behavior; less does the law indicate any limitations on the extent of the law. It is undisputable that school administrators are central to the implementation of California's zero tolerance policy; their role is to implement and enforce the rigid language of the policy to help minimize the risks of school violence. However, administrators must understand that the way they implement and enforce the law may negatively compromise the future livelihood of a student and his/her quality of life in the surrounding community (as indicated in the various studies discussed in Chapter 2).

Zero tolerance policies, in general, have not been the most effective method of reducing or preventing school violence. In fact, administrators know very little about the law, and most of the time they will find it difficult to apply the exact language of the law. Accordingly, this will result in erroneous application of the law, and those who will be mostly targeted are those who lack the intent to commit an offense and those who stereotypically fall in the category of 'possible offenders.' When looking at California, there is minimal research that associates these general consequences to the language of Section 48915(c) of the California Education Code (California's compliance to the Gun

Free Schools Act). There are also nominal studies that analyze the effects that Section 48915(c) has on other subdivisions of Section 48915 of the California Education Code.

Despite the effects zero tolerance legislation has had on students, no California court has invalidated Section 48915(c) or limited the scope of its application. Chapter 2 indicates that major California court decisions have addressed issues that pertain to administrator discretion and the extent of school grounds. However, the way those cases were decided only indicates that California courts prefer to give school districts wide discretion over student behavior rather than limit it. As a result, courts have facilitated the expansion of circumstances in which students can be removed from school. Section 48915(c) of the California Code raises the issue of overbreadth since the ambiguity of the law can be interpreted in several ways by school districts, and because there are no apparent limitations set by the courts. Thus, it is unclear whether California courts are even prepared to apply a strict standard of review to limit the scope of zero tolerance practices.

The following analysis will examine three main issues. First, it will analyze some of the ambiguities present in the 1994/2001 Gun Free Schools Act and the California Education Code Section 48915(c). Second, it will discuss some of the difficulties associated with the implementation and enforcement of these laws to student behavior. Third, it will link some of the general consequences of zero tolerance policies to the federal Act and California's zero tolerance policy. This analysis will help administrators understand the nature and purpose of the law, and shall encourage them to draft initiatives that can effectively apply zero tolerance policies with minimal consequences on students.

## A. Analysis of the Laws Behind Zero Tolerance

### a. Gun Free Schools Act of 1994 and 2001

When Congress first enacted the 1994 Gun Free Schools Act in response to the increase of violent incidents involving the use of firearms on school grounds, it is unclear whether Congress foresaw the possibility that some states would use that mandate to enact tougher laws that would target a wide array of student behaviors. Since Congress did not impose any limitations on how states should adopt the 1994 Gun Free Schools Act, states had ample discretion to determine what language they would adopt in their zero tolerance policies. This not only gave states, like California, the option to adopt policies that go beyond the federal mandate, it also permitted the adoption of language that could be overly broad and with little guidance on how administrators should apply it in their schools. As a result, it can be argued that Congress did not anticipate that the lack of guidance or the omission of limitations would result in the enforcement of strict zero tolerance measures and the deviation from Congress' initial intent.

If one examines the literal language of the 1994 Gun Free Schools Act, the mandate only imposed that states become responsible for preventing the possession and use of a weapon on school grounds. One limitation that the 1994 version imposed was the definition of the word 'weapon' in Section 921 of Title 18 of the United States Code. Under that section, the term 'weapon' would only refer to firearms—or any item that had the capability to shoot an explosive. This meant that as long as an item had the characteristics of an explosive device or had the frame to release a bullet through an explosive mechanism, that item would be classified as a 'weapon' under the law. However, the law did not expand the definition of a firearm; in fact, Congress omitted

'antique firearms' from its definition. (Hanson, 2005). Congress' intention was therefore to bar only the possession of 'actual' firearms that could inflict harm on others. The exclusion of 'antique firearms' implied that Congress did not intend to go beyond the actual definition of a 'firearm.' Therefore, any item that looked like a firearm but which did not have the mechanism to act as a 'weapon' would not be included in the definition.

Another limitation indicated in the 1994 Gun Free Schools Act was that something more than mere possession was necessary to trigger expulsion from school. In fact, the Act intended to target students who actually had the mere 'active intent' to bring a firearm on school grounds. The Act's language made it clear that expulsion would apply to a student who 'had been determined' to be in possession of a firearm. This would indicate that possession alone was insufficient and that individualized assessment of the circumstances was necessary to determine deliberate control over a firearm. This is consistent with many of the school shootings that had taken place around the United States, where students actually premeditated a plan to actively bring firearms to school. Congress' intent was therefore to target students who 'deliberately' brought dangerous firearms to school even when those items were strictly prohibited on school grounds. However, Congress did not go further to explain the meaning of this limitation; less did it impose an outright mandate that states had to align specifically with Congress' intent.

The other limitation imposed by the 1994 Act was the term 'setting,' or the location where possession of a weapon must take place in order for the law to apply. The original language indicated the 'setting' to be any academic institution that was under the jurisdiction of the local educational agency. This meant that as long as schools had control of an academic location where the alleged violation took place, a student could be

subject to the one-year expulsion as mandated by Congress. One could argue that Congress' intent was to limit the application of the one-year expulsion on incidents taking place specifically on school grounds, and that it did not aim at controlling student behavior at other sites that were not necessarily considered academic institutions.. However, it is unclear what Congress actually intended by the wording of the language, and this implied that states had discretion to interpret it and adapt it as they saw fit.

However, when the 1994 Gun Free Schools Act was revised and re-enacted in 2001 under the No Child Left Behind Act, certain modifications clarified some of these ambiguities but also granted broader discretion for states to interpret those laws. First, Congress replaced the word 'weapon' with the word 'firearm' in the Act. Although 'weapon' was defined as a 'firearm' in the 1994 version, it did not make it clear whether the word 'weapon' could be used universally to cover other items that were not specifically a 'firearm.' This correction emphasized that 'firearm' would stand as a clear statutory definition. (Hanson, 2005). However, it did not indicate that states had to stay within the parameters of that definition when adopting their own local versions.

Furthermore, the 2001 version also indicated that 'mere possession' of a firearm was sufficient to trigger a one-year expulsion. This eliminated the earlier assumption that schools needed to look for 'active intent' in determining whether a student was in possession of a firearm. This modification made 'possession' less specific and it granted states broad discretion to determine the specific elements for that word. Yet, regardless of these modifications, states had already been enforcing their own interpretation of the Act for almost seven years. So long as states satisfied the minimal one-year expulsion

requirement and addressed 'firearms' in their statutory language, they were not required to make any further modifications to their laws.

Second, the 2001 version of the Act also clarified the setting in which a student must have been found in possession of a firearm. As was mentioned above, the 1994 version limited the law to any 'school' in control of the local educational agency, which could be construed as any academic institution of learning in the school district's jurisdiction. Nevertheless, the 2001 version expanded the definition of 'school' by adding the following terms: (1) it must be a setting under the control of a school district, and (2) must serve the purpose of any student activity. (No Child Left Behind, 2001). This revision not only removed the specificity that the 1994 version had, but it was ambiguous enough to allow states to expand the meaning of the word 'school.'

As a result, it would be lawful to expel a student for one year if possession of a firearm took place in any setting under the jurisdiction of the school district regardless of whether the setting was used for any academic purpose. This means that the Act would apply to sport arenas/complexes, off-campus school-sponsored events, and even school transportation. Furthermore, the Act would also apply even if the individual were a student at one school but committed the offense in another school that was still under the jurisdiction of the school district. These are just some examples of how broad local educational agencies can interpret the intent of Congress so long as there is a nexus between the setting and the school.

It is important to note, however, that both the 1994 and 2001 iterations of the Gun Free Schools Act do not prohibit states from granting administrators the authority to modify the expulsion requirement on a case-by-case basis. Although on its face this

provision would seem to guarantee students some protection in situations where expulsion would be too harsh based on the circumstances of the offense, the provision did not make it a requirement. States would still be entitled to receive federal funding even if they denied administrators any discretionary power to modify the punishment. The issue with this provision is that states have the authority to make expulsion mandatory for a wide array of offenses, even those that would only merit temporary suspension. This means that if a student commits any enumerated violation under state law, expulsion may be mandatory regardless of the intent of the offender, the mitigating circumstances, or the circumstances of the offense.

In addition, the Act also imposes on states the responsibility of referring any student in possession of a firearm to the local law enforcement agency. Although it is evident that any dangerous student with a firearm on school grounds merits referral to law enforcement, the issue here is whether Congress actually intended to make school administrators an implied branch of the criminal justice system. Since Congress' intent was only to remove and punish students found in possession of a firearm, Congress could not have intended for teachers, principals, and administrators to act as law enforcement officials on school grounds. But Congress did not prohibit the existence of a close relationship between schools and law enforcement agencies. In fact, local governments were free to interpret the law as a mandate for 'absolute association' and could incorporate law enforcement officials as part of the daily monitoring of student behavior.

As this analysis indicates, the 1994/2001 Gun Free Schools Act is overly broad and ambiguous. It grants state-governments wide discretion in how they interpret the law and what regulations they adopt in carrying out the intent of the law. Therefore, it is

important for administrators to know the implications associated with the federal mandate, and how the ambiguity in that law has opened the door to rigid regulations that targets and punishes a wide array of student behavior.

### b. California's Zero Tolerance Law – CA Education Code Sec. 48915(c)

The next form of analysis looks at the state version of the Gun Free Schools Act in California. As mentioned, California satisfied the federal requirement by amending Section 48915(c) to the California Education Code. This amendment not only included a one-year recommended expulsion for any student found in possession of a firearm, but it also added additional factors for which students can be automatically removed. As will be presented later in this section, California focused on any weapon or item that had the potential to threaten the safety of the academic environment. However, the Legislature did not take into account the consequences that this rigid law would have on the overall concept of student disciplinary practices that were already in place before the amendment. In fact, very little was done to impose limitations that could safeguard students from the misapplication of the law by school administrators. It is important that administrators and principals have a general overview of the elements of California law and understand the implications associated with its language.

#### (1) Section 48915(c) – California Amendment

Section 48915(c) of the California Education Code is the state's compliance to the 1994 Gun Free Schools Act. Section 48915(c) prescribes a mandatory expulsion of one-year on any student who possesses, sells, or furnishes a firearm. Under this section, administrators do not have authority to *not* recommend expulsion on case-by-case basis.

To understand the scope of this section and its application, it is important to examine its specific elements in light of the federal Act.

First, Congress made it clear in the Gun Free Schools Act that state policies should at a minimum target and punish students who are in possession of a 'firearm.' However, Congress did not provide any procedure as to how local educational agencies should carry out that task; less did it prescribe any limitations on how broadly states could interpret that authority. In fact, Section 48915(c) of the California Education Code went beyond the federal Act by broadening the situations in which an administrator could recommend expulsion for a student.

Section 48915(c) punishes a student who has been determined to be in possession of a firearm. However, this provision provides no guideline as to how a school employee must 'verify' possession of a firearm in school. Under California law, that guideline is unnecessary since intent is not a prerequisite, and simple possession is sufficient to trigger mandatory recommendation of expulsion. The issue with this element in the law is that employees are not obligated to investigate the circumstances involving possession of a firearm; less are they required to identify what constitutes a 'firearm' and what constitutes 'possession' under California law.

Without any sort of limitation, school employees can target students as long as they find some sort of association with the word 'possession.' For example, if an innocent high school student is given a firearm by another and is immediately apprehended even though he/she did not intend to possess, use, or even bring a firearm to school, that innocent student can be expelled no matter what his/her intent was. Similarly, if a six-year old boy finds a firearm in his house, puts it in his backpack, and

innocently takes it to school under the assumption that it is a toy, he will be recommended for expulsion even though his young age would trigger a lack of intent. These students would essentially be treated at the same standards as another student who premeditates bringing a firearm to school with the intent to cause harm to others. The purpose of zero tolerance legislation was to remove dangerous individuals who are most likely to spark violence on school grounds; without an intent requirement, administrators can exclude both innocent and dangerous individuals regardless of the differences in circumstances.

Furthermore, Section 48915(c) also mandates recommendation of expulsion for any student who brandishes a knife to another person. However, there are two ambiguities in this requirement. The first is based on what constitutes 'brandishing' a knife. For example, some school administrators may consider a small apple knife that accidentally falls out of a lunch bag to be enough to trigger the law. The same can be said of a student who finds a knife on the ground, picks it up, and shows it to his classmates. Obviously, the intent in these two situations differs greatly from that of a student holding a knife in front of another individual in a very threatening manner. The second ambiguity lies in the word 'knife,' which Section 48915(g) defines as any item with "a fixed, sharpened blade that can be used for stabbing." (California Education Code, 2009). Administrators must use their discretion in deciphering what this definition entails, and it could lead to broad interpretations and target items that were not before considered 'knives.' For example, an administrator may consider a student who brings a plastic knife to cut his food during lunchtime an offender of the zero tolerance policy even if the student's intent was to use it as silverware. Similarly, any item that may have

the characteristics of a knife (for example a nail clipper, a sharp pen, or a religious arrowhead) man trigger the law even though the use of the item may be completely harmless.

California's mandatory expulsion, however, goes beyond the mere possession of firearms and knives, making it even more necessary to have 'intent' as a prerequisite for removal. For instance, section 48915(c) of the California Education Code indicates that administrators must recommend expulsion of a student if he/she either unlawfully sells a controlled substance or commits (or attempts to commit) a sexual assault (or battery) on another. With controlled substances, policy requires that administrators refer to California's Health & Safety Code Section 11053 et seq., which identifies all prohibited substances including opiates, opium derivatives, hallucinogenic substances, depressants, and any prepared nervous system stimulants. As to sexual assault or battery, section 48900(n) of the Education Code requires reference to the California Penal Code, which controls the application of criminal laws in the State of California. These specific violations under Section 48900(n) may involve rape, induced and forced sexual intercourse, sodomy, lewd and lascivious conduct, or forceful sexual arousal of another. (California Education Code, 2009).

The issue with these two types of offenses is that these reflect crimes that go punished under California's criminal laws. Criminal law in the United States emphasizes that no one is guilty of a criminal act until indisputable evidence shows that the defendant is guilty of that crime. (Coffin v. United States, 1895). However, at the school level, there is no such presumption since California makes selling a controlled substance and committing (or attempting to commit) sexual assault/battery on school grounds a form of

statutory offense. This means that an administrator does not have discretion to fix the terms of the punishment even if the circumstances of the offense do not warrant removal; instead, the administrator must recommend expulsion. Since there are minimal limitations as to what constitutes 'selling illegal substances' or what meets the standards of 'sexual harassment,' mere association with those terms can trigger expulsion. For example, a student who is asked by another individual to deliver a package to another, unaware that he is delivering an illegal substance, can be considered to be facilitating a sale of that item. In this case, an administrator would have to recommend expulsion even if the circumstances indicate the student did not have the intent to commit the offense. Similarly, a student who consensually, and playfully, wrestles another student of the opposite sex may be vulnerable to the enumerated sexual assault violations listed in Section 48900(n) of the California Education Code. Clearly, in this situation, if the student accidentally touches the other in the private areas, or if the horseplay raises concern that it may be sexual, an administrator must recommend expulsion even if there is insufficient investigation on the matter.

Lastly, Section 48915(c) of the California Education Code also bars the possession of 'explosives,' and is grounds for mandatorily recommending expulsion. Title 18, Section 921 of the United States Code defines an 'explosive' as any type of 'destructive device.' (Crimes & Criminal Procedure, 2009). It is unclear exactly what a destructive device is, but it is a broad phrase that can include a bomb, grenade, a weapon that shoots a projectile, or any derivate thereof. (Kemerer et al., 2005). Again, determining what constitutes an 'explosive' is a task that is not well suited for school

administrators, as they have no criminal law enforcement training in deciphering what is or is not an explosive.

Without specific instruction, administrators would rather recommend expulsion of any student who may be in some form associated with the word 'possession' and 'explosive.' For example, this could target a student who forgets to remove some firecrackers from his backpack and brings it to school, or the student who invents a chemistry project that involves a 'spark' mechanism and brings it to school to show his peers. Whether these situations merit removal is highly questionable; however, administrators would prefer to abide by the law without further evaluation and recommend the student for expulsion, regardless of whether the act was innocent in nature or whether it even involved the type of explosive the Legislature wanted to prohibit.

**(2) Impact of Section 48915(c) on other Sections of Cal. Ed. Code**

Section 48915(c) of the California Education Code plays an important role in the way other school disciplinary sections are read and applied. Section 48915(a), for example, targets other common offenses that merit expulsion but do not necessarily meet the level of severity as Section 48915(c). However, under Section 48915(a), an administrator does have the authority to *not* recommend expulsion if he/she feels that expulsion would be inappropriate given the particular circumstances of the offense. Furthermore, California also targets other less serious offenses under Section 48900 where administrators have discretion to recommend expulsion if they feel that the offense disrupts the function of the academic environment and puts others in physical threat of harm. Unlike Sections 48915(a) and (c), Section 48900 does not consider these

violations to warrant expulsion unless a school administrator uses his/her discretion to recommend it given the nature of the offense.

There are some issues of importance when looking at these two additional sections of the California Education Code. Given the attitude that Section 48915(c) has on sending a 'tough message' to students, there is always a risk that administrators may misapply the law in three ways: (1) administrators may read and interpret Section 48915(a) and Section 48900 to fit the rubric of Section 48915(c); (2) administrators may be reluctant to use their discretion to not recommend expulsion out of fear that they may not be carrying out the mandate of the law; and (3) administrators may be opt to use their discretion to recommend expulsion if they feel the law encourages them to do so. Given public concern about incidents of school violence and an increase number of shootings taking place across the United States, it is no surprise that Section 48915(c) has a significant impact on how administrators view student behavior.

Section 48915(a) of the California Education Code is an 'Expulsion Expected' mechanism that differs from the 'Mandatory Expulsion' label that Section 48915(c) carries. This means that an administrator *is expected* to recommend expulsion of a student unless he/she finds that expulsion is inappropriate given the circumstances. However, an administrator must also satisfy two additional prongs: (1) there must have been a determination that additional forms of correction are no longer feasible, or (2) the nature of the act indicates that the student poses a danger to the physical safety of the student and others. Although these requirements may indicate additional safeguards for students, there is a flaw. Administrators not only can circumvent these safeguards by

incorporating offenses in the Section 48915(c) category, but they could also decide not to use their discretionary authority to *not* recommend expulsion.

When considering how administrators can circumvent the safeguards provided in Section 48915(a), it is important to examine the specific behaviors that can transcend into the Section 48915(c) category. For instance, Section 48915(a) indicates that an administrator must recommend expulsion if a student is found to be in possession of a knife, explosive, or other dangerous object of no reasonable use to the student. Given the fact that zero tolerance policies were meant to deter students from bringing 'weapons' to school to minimize the risk of school violence, administrators can easily read offenses of 'simple possession' as violations of Section 48915(c). Therefore, if a student is in possession of a knife, an administrator can interpret that as 'brandishing a knife' if the student is showing it to another student and the knife is pointing directly at that student. This means that the moment a student displays a 'knife,' that act can be construed to be in violation of Section 48915(c) and no longer a violation of an offense under Section 48915(a). The same analysis applies to simple possession of an explosive, which is the exact same offense listed under Section 48915(c), and no distinction is offered under Section 48915(a). With regards to illegal substances, administrators must refer to Section 11053 of the California Health and Safety Code in recommending expulsion of a student. This indicates that if a student is found to be in possession of no more than one ounce of marijuana for personal use, administrators can still view this as a violation of Section 48915(c) 'selling' if they find the student sharing the marijuana with someone else and money is found on the student himself.

Nevertheless, administrators can also opt not to use their discretion in *not* recommending expulsion even if the circumstances of the offense warrant it. Although administrators must justify their recommendation for expulsion, the safeguards are not difficult to overcome. One must note that Section 48915(a) does not require an administrator to satisfy both prongs—means of correction not feasible and student poses physical danger—in order to recommend expulsion. All an administrator has to do is show that based on the nature of the offense, allowing a student to remain on school grounds would not only tarnish the academic environment of the school, but it raises the propensity of any other student getting hurt.

Therefore, if a student robs or extorts another student, assault or batters another, threatens a school employee, or causes serious physical injury to another, the probability that an administrator will recommend expulsion is high given California's approach of a no-nonsense disciplinary policy. However, the law does not indicate how administrators determine whether self-defense was not involved in the incident, or whether the elements of the offense are consistent with the elements of robbery or extortion, or whether simple horseplay was mistaken as a form of assault or threat to another. Since Section 48915(a) only gives administrators the discretion not to recommend expulsion, administrators can always opt out of investigating the particular circumstances of the offense and simply recommend expulsion as they would in Section 48915(c).

Section 48900 of the California Code, on the other hand, is what one would consider a 'discretionary' method of recommending expulsion. It addresses any lesser offenses that do not require expulsion, but which can be grounds for expulsion if an administrator can show either that no feasible methods of correction are available or that

the student poses a physical threat to self or others. Clearly, this section requires additional findings in order to recommend expulsion; however, this section does not prevent an administrator from doing so. The issue here is that administrators still have the power to remove a student as he would under Section 48915(c). An administrator can erroneously (or intentionally) construe a lesser offense as either a Section 48915(c) offense or Section 48915(a) offense. Alternatively, an administrator can also try to justify his/her recommendation for expelling a student under the 'need for safety rationale.'

Under Section 48900, several enumerated offenses can be construed as a more serious offense. Section 48900 grants administrators the discretion to recommend expulsion for any type of student conduct that causes a disruption to the academic environment; this may include any form of inflicted physical injury, possession of dangerous object, drugs, alcohol, or tobacco, sexual harassment, bullying, obscenity, and extortion, to name a few. The issue here, however, is that these offenses are supposed to be classified as minor offenses that do not require expulsion unless recommended. For example, if a student got into a fight with another student, he may be suspended but not expelled, unless the administrator had reason to believe that his conduct was a serious threat to the school environment and there was sufficient evidence to support that claim.

Nevertheless, some of the enumerated offenses in Section 48900 are similar in nature to those offenses commonly found in Section 48915(a) and (c). This poses the issue of how administrators can distinguish minor offenses from those commonly found in mandatory expulsion proceedings. For instance, a student may be suspended temporarily if he is found to be in possession (or selling) drug paraphernalia or is

determined to have been in possession of a substance that represented drugs. Nonetheless, the question is how do administrators make the determination as to whether the items or substance are (or are not) related to the unlawful selling (or use) of controlled substances. One must keep in mind that Section 48915(c) does not require additional findings to recommend expulsion since an offense involving illegal substances is considered a statutory offense.

Similarly, Section 48900 also considers the commission of sexual harassment a lesser offense that does not necessarily warrant expulsion but which administrators can essentially recommend for expulsion. The issue is how do administrators or school employees differentiate between simple sexual harassment—which can be defined as any unwelcomed verbal or physical behavior of sexual nature—and an attempt to commit a sexual assault—which can be defined as an attempt to engage in illegal sexual contact by force without consent. (Britannica Online Dictionary, 2009). Sometimes it may be difficult to draw the line between two types of offenses, and administrators may erroneously categorize one as the other. For example, a student following a girl with obscene language and suddenly making minor contact can be construed as a student attempting to make sexual contact to a defenseless peer. Based on how an event is perceived, a Section 48900 offense can certainly transgress into a Section 48915(c) category and an administrator can recommend expulsion without the necessity of factual findings.

Moreover, other categories of Section 48900 can similarly be categorized under Section 48915(a). For instance, Section 48900(b) indicates that a student 'may' be recommended for expulsion if an administrator determines he/she is in possession of (or

sold or furnished) a dangerous object which may include a firearm, knife, or explosive. Intuitively, the intention of this section is to target lesser offenses that do not meet the level of violence that may put a school at risk of harm. However, one can argue that due to the public's demand to prevent school violence, administrators are less likely to want to differentiate the different levels of severity in these types of offenses. If we take a student who brings a nail clipper that contains a foldable hook that resembles a pocketknife, would an administrator classify that as a dangerous weapon under Section 48900, or would he categorize it as a dangerous object that requires expulsion unless he feels the circumstances do not warrant it under Section 48915(a)?

A similar form of analysis can be applied to other minor offenses. For example, a student defying a school authority under Section 48900 can be construed as a form of assault or threat on a school employee. A minor case of bullying can be considered a serious form of robbery or extortion under Section 48915(a). And simple possession of any type of illegal substance can always be interpreted as an attempt to use, furnish, or sell under Sections 48915(a) and (c). An administrator has the option of classifying these as more serious violations and can decline to use his discretion to *not* recommend expulsion (even if the student does not merit removal). Alternatively, he could also exercise his discretion under Section 48900 to recommend expulsion if he feels that the student poses a threat to other peers and he can persuade the Board of Education that based on his perception of the event, the student compromises school safety. In light of an anti-school violence climate, the safest option for any administrator would be to remove the student.

### B. Analysis of Important Court Decisions in California

The next part of the analysis tries to answer the question why there have been no apparent limitations on Section 48915(c) of the California Education Code. Given the fact that administrators are given broad discretion in determining what type of student behavior is punishable with expulsion, it would be expected that courts would impose some limitations on how broad the law can be interpreted and applied. But California courts have retreated from invalidating school district regulations because Section 48918 of the California Education Code sets forth mandatory procedures that provide every student with a hearing within 30 days to determine whether the student committed the offense. (California Education Code, 2009).

As a result, California courts prefer to give school districts great deference in the way they handle zero tolerance offenses unless their policies and regulations are constitutionally invalid. When California courts have spoken on issues pertaining to zero tolerance regulations, they continuously indicate that schools should have discretion and flexibility in adopting policies that can help them apply the language of California law. The following analysis will look in depth at two major court decisions that have expanded the applicability of California's zero tolerance policy in schools.

In *T.H. v. San Diego Unified School District* (2004), the California Court of Appeal determined whether a school district had the authority to remove a principal's discretion not to recommend expulsion. In *T.H.* (2004), the student had been recommended for expulsion after she had been involved in repeated instances of fighting with other students. Her behavior fell under those enumerated under Section 48915(a) of the California Education Code, which indicates that an administrator has the discretion to

not recommend expulsion given the circumstances of the offense. However, the district's administrative regulation indicated that principals did not have that discretion, and that recommendation for expulsion was mandatory for that offense.

T.H. asserted a facial challenge to the district's zero tolerance regulation stating that it did not conform to state statute and therefore violated a student's due process rights. The court indicated that since T.H.'s challenge was not based on the district's regulations as applied to her, but instead on the validity of the regulations, the burden would fall on her to prove that invalidity. The court stated that a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the law would be valid." (T.H. v. San Diego School District, 2004, p. 1281). This means that T.H. would have to show that there was a direct and fatal conflict between the regulation and the state statute. The level of review, in this case, was based on one of rational basis.

In this case, the court construed the California statute based on what the Legislature's expressed intent was when enacting Section 48915(a). The court indicated that the Legislature's intent was to provide each school district with a "broad discretion and flexibility to accomplish its educational mission." (T.H. v. San Diego School District, 2004, p. 539). The court added that a school district has broad authority to carry on any program or activity so long as it is necessary to meet their needs. And since each school district has their own specific needs, the court stated that schools should have the flexibility to develop specific solutions. In addition, the court also cited precedent that indicated that courts should give substantial precedence to the decision of school districts and board as long as there is no abuse of discretion in their acts.

When deciding this issue, the court considered whether there was a direct conflict between the district zero tolerance regulation and the California statute (Section 48915(a)). The court reasoned that although the regulations were different concerning an administrator's discretion to not recommend expulsion, this difference did not indicate that the regulation was inconsistent with the aim of the statute. The Education Code itself did not require a school district to provide an administrator with the authority to suspend an expulsion charge; instead, it only required that an administrator recommend a student for expulsion if he/she committed an enumerated offense under Section 48915(c). The court added that school districts are only required to satisfy the minimum requirement of 'mandatory expulsion,' it was not limited from extending that same requirement to other less serious offenses. Therefore, no fatal conflict between the district's regulation and the statute was present in this case.

Furthermore, the court also reasoned that there was no violation of any procedural right since T.H. was afforded an expulsion hearing and all expulsion procedures were followed. In this case, the district's zero tolerance policy stated that when a principal recommends expulsion, the student is entitled to a full hearing which can then determine whether expulsion is warranted given the circumstances of the offense. Since the district's policy does not eliminate this procedural safeguard, the court stated that eliminating a school principal's discretion to suspend an expulsion does take away the student's right to challenge the charge at a hearing. Therefore, T.H.'s constitutional challenge was denied in this case.

The significance of T.H v. San Diego School District is that the decision resulted in an expansion of deferred discretion to school districts. Not only did that court rule that

Section 48915(a) did not require school districts to grant the discretion of not recommending expulsion, it also widened the spectrum of how much discretion school districts have in implementing even tougher regulations than California's disciplinary statutes. What this tells administrators is that they have the flexibility to recommend all types of Section 48915(a) offenses for expulsion without the need to apply leniency. It also tells administrators that they have the flexibility to view certain offenses like Section 48915(c) offenses so long as there are no procedural violations that deny the opportunity of an expulsion hearing. Furthermore, this ruling also indicated that school districts are allowed to go beyond the minimum state requirement. Since school districts only have to guarantee that all serious offenses under Section 48915(c) are recommended for expulsion, there are no limitations imposed on school districts that want to recommend expulsion for all types of offenses, even for those that fit under the category of Section 48900. The court in this case failed to realize that the issue was not whether procedural safeguards were in place, but instead whether it was 'safe' for schools to have too much discretion in determining how students can be removed from schools.

In *Fremont Union High School District v. Santa Clara Board of Education* (1991), the court expands the meaning of school grounds, which predefined the setting in which Section 48915(c) of the California Education Code could be subsequently applied. In *Fremont* (1991), Matthew was a student who attended one school but was caught in an altercation with another student while visiting another school. Matthew was later recommended for expulsion (from his school) after it was determined that he had a dangerous weapon in his possession (a stun gun) and used it against a student in another

school. However, Section 48900 of the California Education Code did not indicate whether a student had to commit the offense in his 'own' school for the law to apply.

In its discussion, the court indicated that this case was primarily a question of law since it was asked to interpret the language in Section 48900. The court dealt with the issue of what the Legislature intended with 'related to school activity or school attendance' and how that was to be applied to student behavior. In construing Section 48900, the court stated that if the language was clear and unambiguous, it was unnecessary for courts to indulge in constructing that language. And unless the party seeking an alternative construction of the language can show that "the natural and customary import of the statute's language is either repugnant to the general purview of the act, of for some other compelling reason, should be disregarded," the court would give effect to the language's plain meaning." (Fremont v. Santa Clara County Board of Education, 1991, p. 1186).

Matthew argued in this case that the wording 'related to school activity or school attendance' means that the student must have committed the offense on the student's 'own' school or school activity. However, the court contended that such interpretation would reconstruct the original meaning of the statute for which it was intended. The court reasoned that had the Legislature intended to follow Matthew's interpretation, it would have add it the possessive pronouns 'his' or 'her' or the word 'pupil's' to the language. But since the language only refers to 'school' and 'school-activity,' the word 'school' controls in the construction of the language. As a result, the court ruled that Section 48900 was applicable to all types of offenses under the statute that took place at any school or school-activity regardless of where the student attended. Even though this

construction could be interpreted broadly, the court explained that the statute's goal was to promote a safe and orderly educational environment.

The significance of this court case is the extent of school setting under California's disciplinary policies. Under Section 48900 of the California Education Code, the law not only states that offenses must take place on school grounds or school activity, but it can also take place anywhere where there is an association with the word 'school.' Note that Section 48900 also includes all offenses committed at school or school activity or on the way to and from school or school activity. Under *Fremont,* this means that a student can be considered for expulsion if he commits minor offenses that take place while on his way to another school's activity (i.e., a football game). Although Congress and the California Legislature intended to protect the integrity of school safety, the issue here arises when you apply *Fremont* in light of *T.H.* California Education Code Sections 48915(a) and (c) only require that all offenses be committed on school grounds or school activities; it does not include the language 'to and from school or school activity.' But under *T.H.*, school districts have the discretion of adopting policies that go beyond California's statutes as long as no procedural safeguards are implicated. This means that a school district can draft policies that also target offenses under Sections 48915(a) and (c) but which take place 'to and from school or school activity.' And this becomes even more broad when such activities can take place in any other area that is under the jurisdiction of any school. It is unclear whether Congress or the California Legislature intended to target serious offenses that go beyond school grounds. But under *T.H.* and *Fremont,* school districts are not prohibited from doing so.

### C. Analysis of Impact on Students

With California's zero tolerance policy in place, children have become more susceptible to criminalization in school settings. The lack of guidance and the broad discretion that administrators have in implementing sections of the California law minimizes the amount of procedural protection that children are entitled in a zero tolerance system. Although, courts stated that students have procedural safeguards during expulsion hearings and through school board reviews, courts did not consider reviewing the procedures used to target and apprehend possible offenders. Therefore, the problem lies not on whether students get a fair chance at an expulsion hearing, but rather whether zero tolerance policies offer a fair treatment of targeted students.

The criminalization of students under Section 48915(c) (including Section 48915(a) and Section 48900) can certainly have a tremendous effect on those who fit the common criteria of possible offenders under the law. Although zero tolerance policies were established with the intent to counter school violence, it has brought negative effects to the school environment because administrators are indirectly using discriminatory tactics that targets mostly non-white students. It comes to no surprise that administrators are pressured into using discriminatory practices to satisfy the elements of California's disciplinary law.

California's zero tolerance policy is a very complicated system that broadly defines the types of student behavior that merit recommendation for expulsion. However, this complex system also confuses administrators on how they should apply the law, especially when they cannot make the distinctions between minor and serious offenses. The problem is that when administrators are unable to construe definitions according to

the behavior of the student, there is a risk that innocent children may be misconceived as dangerous students. Most of the time, administrators will have to depend on conscious and unconscious beliefs to identify possible behavior that may be in violation of a section in the law. Unfortunately, when administrators fall on personal beliefs, they run the risk of incorporating self-constructed stereotypes. Therefore, administrators who believe that non-white children are culturally troublesome are most likely to target that population of students based on that misconception.

Since California Sections 48915(a) and (c) and Section 48900 contain wide array of offenses that are left for interpretation, it is common for administrators to develop profiles of students who commonly fit the criteria for those enumerated offenses. The purpose of profiling is to target students who are possible 'problem children' in order to prevent school violence from taking place. The issue with this tool is that it asks administrators to identify certain student behavior, and if they feel that what they are doing is not normal, they immediately flag it as risky behavior. Moreover, when administrators target a certain portion of the student population, it stigmatizes those students to believe that they are indeed 'troublesome children.' This forces students to abide by those strict set of behavioral guidelines that makes them subject to expulsion at more accelerated rates than those who are not profiled.

These types of 'targeting practices' can be associated with retributive and incapacitation methods of punishing student behavior. Retributive punishment is defined as giving people exactly what they deserve; that if a person commits a wrongdoing, that person should be punished as a result. (Center for Naturalism, 2005). Incapacitation, on the other hand, is literally defined as the deprivation of capacity to do something

(Merriam-Webster Dictionary, 2009). Both retribution and incapacitation are not necessarily tailored to the development status of the student, but instead are tailored to the offense specifically. As it is seen today, mandatory recommendations of expulsions like California's are not necessarily grounded on the basis of child-development. Zero tolerance policies are simply not geared towards helping an alleged offender become a better student and become a productive citizen in society. Instead, it is based on punishing an 'unwanted' class of students and removing them to improve the educational experience of other students.

The targeting, treatment, and exclusion of children have essentially led to the 'dumping' of an unwanted class of children into the hands of the law enforcement agencies. California law requires that schools refer students who commit serious offenses to these agencies; however, school districts are not prohibited from referring children for minor offenses that are cross-referenced in California's Penal Code (i.e., possession of drugs or paraphernalia). An increase in collaboration between schools and the juvenile justice system diminishes the traditional boundaries between these two institutions. However, when minor offenses are heard in court, and those offenses are those that could have been handled internally by school administrators, the question becomes whether law enforcement referrals are even necessary to minimize incidents of school violence.

This sort of school criminalization is the price many students must pay when administrators apply complex zero tolerance policies to make schools safer. But when children are targeted, profiled, punished, and removed from schools, the long-term consequences outweigh the benefits for safer schools. Children not only end up losing

the opportunity to an education and a better quality life; they are also forced to become part of a poor, uneducated society that increases the propensity of social crime.

# CHAPTER 5. CONCLUSION

Three main issues were analyzed in this study: (1) the language ambiguities in both the Gun Free Schools Act and California's zero tolerance policy; (2) the implications associated with enforcing these laws due to the present ambiguities; and (3) the adverse consequences that the interpretation and implementation of these laws have on students. To address these issues, administrators should act upon the shortcomings of the laws by employing practices that will minimize the negative effects of zero tolerance on students.

## A. The Role of the Administrator

The role that administrators play in enforcing the language of California's zero tolerance policy is significant. Although the role of educational administrators is to ensure a positive academic experience for all students, administrators often run the risk of relinquishing their administrative obligations to become enforcers of the law. It is important that administrators understand that the way they apply disciplinary practices can come with some serious consequences to students. Moreover, for administrators to apply the law adequately, they must be familiar with the law and understand what the law is actually asking them to do.

Administrators must understand that they have a moral responsibility to do what is best for the student in light of the academic goals and visions of the school. Clearly, if a law is ambiguous on its face, administrators cannot simply remove students outright;

they have the responsibility to work with the law to minimize all effects associated with its implementation. Administrators have the implied duty to determine whether their actions under the law are consistent with the initial purpose of the law. For this reason, they must be familiar with the language of the law and construct a moral and ethical approach to its application.

### B. The Law as a Moral Asset

In order for administrators to work with the language of the law, they must understand that the law can serve as a moral asset – an aid in making ethical decisions. (Wagner & Simpson, 2008). When administrators fail to recognize the law as a moral asset, they follow the law as an obligation rather than as a resource in improving the safety of their schools. Hence, administrators must compromise the needs of students with the mandates of the law, and they must look beyond the language of the law to find the appropriate way of applying the law. (Wagner & Simpson, 2008). If an administrator feels that a zero tolerance policy is difficult to implement due to its ambiguity, the administrator should assess the effects associated with the law and develop a plan to minimize those effects. An administrator should not implement the law 'as is' without first taking into account the possible consequences that may result from its application.

In order for administrators to see the law as a moral resource, they must first eliminate the idea that their role is only to implement the law word for word. California grants administrators discretion in determining which types of behavior should be recommended for expulsion, and this in turn gives administrators the opportunity to look beyond the language of the law and examine the circumstances of each of offense. Such discretion is apparent in those offenses where recommendation for expulsion is 'expected

unless inappropriate,' or outright 'discretionary.' Although administrators may feel that it is easier, and safer, to recommend expulsion for all types of offenses, administrators still have the moral responsibility of conducting individualized assessment of every offense in order to minimize erroneous application of the law. Administrators must understand that in relaying a 'get tough' message, they are not asked to relinquish their professional role as advocates of education; instead, they are simply asked to use proper discretion in applying the law to student behavior.

To benefit from the law as a moral asset, administrators cannot consider zero tolerance policies as mere disciplinary rules; they must understand that they are a series of legal rules that affect the way they identify and address student conduct and behavior. Since there is an ethical duty for administrators to do what is best for every student, they must look at the law with much more positivity. Administrators have to avoid "a negative self-fulfilling prophecy about the law's proper influence on educational and school ideals." (Wagner & Simpson, 2008, p. 138). Using their discretion not to expel students on a case-by-case basis, administrators can independently evaluate the severity of every offense, and assess the circumstances leading to the commission of every offense, before deciding to recommend expulsion for a student. This tool allows administrators the opportunity to analyze the elements of the law and approach student conduct with minimal consequences once those elements are applied.

For administrators to make good use of California's zero tolerance policy, they must learn to make individual assessments of every student behavior and make sure that such behavior fits within the meaning of the law. Since California law provides a limited guide of what types of behavior should be assigned to what specific levels of punishment,

administrators have the duty to make that discretionary determination. They must understand that merely following rules and categorizing all types of behavior as 'mandatory recommendation of expulsion' does very little to reduce school violence. Administrators have an ethical duty to serve the goals of all educational agencies and they must separate themselves from becoming law enforcement officials. California's zero tolerance policy portrays the need to deter students from engaging in violent behavior, but it is the administrator's duty to ensure that that the application of the law adequately carries the school's vision and goals (to provide students with the opportunity to have an education in a safe environment).

### C. Administrator's Duty to Respond to Shortcomings

California's zero tolerance policy is a response to the federal mandate that calls for a preventative measure to reduce school violence. Although the original policy sought to prevent violent acts that involved the use of firearms, the law did not consider the consequences that would result from such broad and extensive policy. California's zero tolerance policy not only punishes students who are apprehended bringing any type of dangerous weapon to school, but also targets any student who carries any artifact that could be considered a weapon, and any student whose misbehavior can be construed as dangerous to the school environment. As a result, California's disciplinary measures are much broader than 1994 Gun Free Schools Act, and can be very difficult to understand and enforce. Thus, administrators must identify any shortcomings in the law (i.e., any ambiguities) and should apply initiatives that can help apply the law with minimal interruption to a student's academic experience.

Administrators must be aware that California's disciplinary measures are constructed upon the need to deter students from committing any offense that compromises the safety of the school. Although, this would seem to be a proactive approach to control school violence, administrators must understand that harsh punishments for any type of behavior is just an easy way out of dealing with any student that may be labeled as 'disruptive.' Although some administrators may construe California's zero tolerance policy to indicate that they must target and identify all 'potentially dangerous individuals,' they must refrain from punishing students based on classifications or profiles that target mostly non-white students. (Hughes, 2005).

Administrators must be attentive to these shortcomings in the law because California's zero tolerance policy is literally up to interpretation. The way one administrator reads the policy, its classifications, and punishments can be interpreted differently by another administrator. And the way those interpretations are applied can certainly have long-term consequences on the academic future and livelihood of any student. Administrators have broad authority in determining which types of behavior can be recommended for expulsion and which types of behavior merits leniency in punishment. This broad authority gives administrators the ability to address any ambiguities in the law by properly assessing student conduct based on the elements of the law. Thus, administrators must not recommend expulsion outright before conducting such individualized assessment.

### D. Administrator's Duty to Consider Particular Elements of the Offense

Administrators must not feel obligated to recommend removal without proper assessment of the circumstances. They must first take into account the specific details of the offense, any knowledge of the alleged perpetrators, and any alternatives that can correct the behavior. Administrator must not assume that all students will commit the same type of offense in exactly the same manner. Students who commit offenses do so for diverse reasons and with differentiating motives. Administrators must be ready to factor in the circumstances leading to the alleged violation in order to protect students from discriminatory practices. This encourages administrators to consider structural factors, such as high rates of violence, social isolation, and lack of economic opportunities. (Hughes, 2005). Thus, administrators must realize that the law cannot be applied equally to all students and that individualized assessment in every case is a necessary tool.

Administrators must realize that punishment should be based on the particular elements of each offense, and a separate analysis of the student's conduct should be conducted individually to avoid unfair disciplinary actions. In California, such individualized assessment should be applied not only to firearm-related violations, but also to all enumerated offenses that can trigger a recommendation of expulsion. For this reason, when adjudicating an offense, "the offender's intent, knowledge-of-right-and wrong, health status, past record, and likelihood of committing future violent acts" are factors that must be assessed in conjunction to the elements and facts of the offense. (Murray-Thomas, 2006, p. 28).

Since California's zero tolerance policy targets students in a similar manner to the criminal justice system, administrators must look at 'intent' in their individualized assessment of an offense. As has been discussed, zero tolerance laws encourage administrators to apply strict punishment to student misbehavior in order to dissuade students from committing violent crimes in the future. (Kincheloe, Hayes, & Rose, 2006). However, unless administrators employ an 'intent' requirement, such policy would only mimic a strict-liability mechanism that is similar to California's penal code system. Although California courts have stated that students have sufficient procedural safeguards at expulsion hearings, the 'intent' element is necessary to prevent the unfair targeting of students, the disproportionate recommendation of punishments, and the undue stigmatization that children experience in the process.

### C. Final Remarks

This study guides administrators through the language of California's Section 48915(c) and the 1994/2001 Gun Free Schools Act. It not only makes administrators conscious of the ambiguities involved in the legal language, but also makes them aware of the flaws associated with the implementation of these laws and the consequences that result from such implementation. Conclusively, this study not only encourages that administrators retain their commitment to education by adopting equitable measures in enforcing the laws, but it also suggests that both federal and California laws require additional safeguards and limitations that can ultimately protect the academic well-being of every student. As is evident in this research, zero tolerance policies have evolved into a complicated system of discretionary measures that differ from Congress' initial intent.

It is imperative that administrators understand the language of the laws and employ initiatives that minimize the effects on students.

Ultimately, it is my recommendation that the educational system amends intervention programs that can provide an alternative to expulsion. Rather than implementing profiling practices to satisfy the 'get tough' message of zero tolerance policies, administrators must take the lead in implementing programmatic prevention efforts that can work with 'problem students' rather than removing them indefinitely. Proper training of teachers and administrators in dealing with troubled children and properly addressing differences in culture could also be beneficial. Conclusively, administrators must implement policies and/or regulations that can instruct teachers and school employees on how to apply zero tolerance policies effectively without interfering with the academic experience of their students.

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