In Wisconsin Expulsions, We Don't Have to Leave Children Behind

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IN WISCONSIN EXPULSIONS, WE DON’T HAVE TO LEAVE CHILDREN BEHIND

I. INTRODUCTION

Michael is an eighth-grade student at a public school in Wisconsin and has never had any significant behavioral problems. He has always struggled in school, and two years ago the school district tested him to determine if he qualifies for special education, finding that while he may have difficulties in school, he does not qualify for special education. Because he struggles in class, other students tease him considerably. In a recent writing assignment, Michael wrote about making weapons and bringing them to school “to protect himself.” Upon reading the assignment, Michael’s teacher alerted the principal, who determined that Michael’s words were a threat and suspended him. A few days later, Michael and his parents receive notice of the principal’s decision that expulsion is necessary to ensure the safety of other students and that an expulsion hearing would take place in five days. Consequently, Michael and his parents are suddenly faced with the possibility that Michael may not be able to continue in the same school district, or even in any Wisconsin public school district, leaving them with the options of home school, private school, or correspondence school for Michael’s education. They cannot afford private school, and neither of Michael’s parents are able to adequately home school him. Moreover, they will likely be forced to navigate the expulsion process on their own because they cannot afford counsel to help them understand the process and argue their case before the school board. This scenario does not illustrate an exceptional circumstance, but rather, it illustrates a common reality for Wisconsin public school students facing expulsion and their parents.

In a time of heightened concern for school safety, school administrators feel a constant pull between the need to educate all children and the need to ensure a safe educational environment. When a student’s behavior disrupts the educational environment or threatens the safety of others, administrators have the responsibility to select the appropriate disciplinary measure, and expulsion is the harshest form of

student discipline available to administrators. Expulsion may remove a problematic student and consequently create a better learning environment for other children, but it also has the effect of "leaving behind" the expelled student.

The number of expulsions in Wisconsin public schools has increased significantly in the last several years. In the 1991–1992 school year, 405 students were expelled from Wisconsin public schools; in the 2005–2006 school year, 1,809 students were expelled from Wisconsin public schools. The rise in expulsions is due in part to the federal Gun-Free School Act and increased violence in schools, both of which resulted in the implementation of zero-tolerance policies. The rise in school expulsions is also attributable to the No Child Left Behind Act, which includes provisions that require schools to report violent behavior and sanctions schools that report too many instances of violent behavior.

As the number of expulsions increases, so, too, does the length of expulsions. In the 2000–2001 school year, 102 students were permanently expelled, and 221 students were expelled for more than one year. In the 2004–2005 school year, 136 students were permanently expelled, and 401 students were expelled for more than one year. In contrast, during the same five-year period, the number of students expelled for one year or less dropped by nearly 100 students.

Thus, the number of expulsions and the length of expulsions are on the rise, and at the same time, the laws in Wisconsin have the effect of

2. Amy Hetzner, For Many, Expulsion Is the End of School, MILWAUKEE J. SENTINEL, June 24, 2002, at 1B.
3. WIS. DEPT'F OF PUB. INSTRUCTION, WINSS SUCCESSFUL SCHOOL GUIDE: WHAT PERCENTAGE OF STUDENTS WERE SUSPENDED OR EXPELLED?, http://www.dpi.state.wi.us/sig/index.html (select "Data Analysis"; select "State Level Data"; select "What About Attendance and Behavior?"); select "What Percentage of Students Were Suspended or Expelled Last Year?"; select "Expulsions") (last visited June 18, 2008).
5. Hetzner, supra note 2.
6. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.). By removing problematic students from the classroom more readily, school administrators are better able to reduce the number of reportable incidents and decrease the possibility of sanctions under the No Child Left Behind Act. See Alexandra MacRae, Beyond the Point of No Return, CHRISTIAN SCI. MONITOR, Sept. 14, 2004, at 14.
8. Id.
9. Id.
abandoning expelled children for the duration of their expulsions because Wisconsin does not require school districts to provide alternative education programs to expelled students.

Because of the long-lasting, detrimental effects of expulsions, two changes to Wisconsin expulsion law are needed. First, students facing expulsion (and their parents) should not go through the expulsion hearings without the assistance of counsel, so when a family cannot afford counsel, the school district should be required to provide counsel to the student and his parents or guardian. Second, school districts should be required to provide alternative education to all expelled students. To facilitate these arguments, Part II examines current expulsion law in Wisconsin, specifically, expellable behavior, the expulsion process, and the effects of current expulsion law. Part III addresses the need to provide counsel to all students facing expulsion. Part IV then argues for alternative education programs and continuing education plans for expelled students, similar to programs mandated in other states—programs that have been contemplated by the Department of Public Instruction (DPI) but at the present time are merely recommended. Finally, Part V concludes that providing counsel for all expelled students will add greater fairness to the expulsion process and that the availability of alternative education programs for all expelled students will lessen the harmful effects of expulsion.

II. CURRENT EXPULSION LAW IN WISCONSIN

Wisconsin expulsion law stems from four sources: statutes, court cases, decisions of the DPI, and local school board policies. An understanding of the expulsion process in Wisconsin requires an examination of the way these entities intersect in an expulsion. The legislature, through statutes, provides the basic framework regarding expellable behavior and the expulsion process and gives school boards broad discretion to adopt and enforce rules regarding expellable conduct and expulsion hearings. The state superintendent, who oversees the DPI, is responsible for reviewing appeals of expulsion decisions. Courts can hear appeals of expulsion decisions that have
been upheld by the DPI. Finally, statutes and school district rules affect a student’s post-expulsion options.

A. Expellable Behavior

Expulsion is the harshest punishment schools utilize “because it involves long-term separation from the school district or, in some instances, permanent separation” from the school district. Because expulsion is a severe punishment that involves long-term or permanent separation from the school district, school districts utilize it only when severe consequences for the behavior are thought necessary, such as for repeated violations of school rules and for major infractions. When school principals or other administrators recommend expulsion, they do so because they have an interest in maintaining an educational environment that facilitates and encourages learning for all students. They make a recommendation to expel when they believe that a student’s conduct was serious enough to inhibit the achievement of the school’s educational goals. In some cases, such as when a student is in possession of a firearm, administrators must adhere to statutory mandates that an offense result in expulsion.

In Wisconsin, school districts have statutory authority to expel students for the following reasons: (1) repeated violation of school rules; (2) knowingly conveying a threat or false information regarding destruction of school property with explosives; (3) conduct while at school or under the supervision of school authorities that endangers the “property, health, or safety of others”; and (4) conduct not at school or under the supervision of school authorities that endangers the “property, health, or safety” of others at school, of school employees, or
of school board members for the district in which the student is enrolled. Expellable conduct that endangers the "property, health, or safety" of students, the school district, school employees, or the school board includes an array of offenses, including: possession or consumption of alcohol while at school or at a school-sponsored event; possession, delivery, or sale of controlled substances at school or at school-sponsored events; assault and battery; verbal assaults; burglary and theft; vandalism; and possession of weapons. The school board may also expel a student who is at least sixteen years old if the student’s conduct repeatedly disrupts the educational environment,

20. Wis. Stat. § 120.13(1)(c)(1). Under the statute, the expulsion should also further the interest of the school. Id.

21. The examples of conduct listed are in addition to possession of a firearm, which not only endangers the property, health, and safety of students, but also is expellable under a zero-tolerance policy requiring mandatory expulsion for possession of a firearm. Wis. Stat. § 120.13(1)(b)(a); id. § 120.13(1)(c)(2m).


23. Id. (citing In re Expulsion of Michelle R. by the Suring Pub. Sch. Dist., Decision and Order No. 126 (State Superintendent of Pub. Instruction Mar. 7, 1985) (consumption of alcohol); In re Expulsion of Evan D. by the Burlington Area Sch. Dist., Decision and Order No. 484 (State Superintendent of Pub. Instruction Feb. 18, 2003) (under the influence of alcohol)).

24. Id. (citing In re Expulsion of Brian C. by the Sheboygan Area Sch. Dist., Decision and Order No. 158 (State Superintendent of Pub. Instruction Sept. 9, 1988) (possession of a controlled substance); In re Expulsion of Jennifer L. by the Milwaukee Pub. Sch. Dist., Decision and Order No. 336 (State Superintendent of Pub. Instruction Sept. 15, 1997) (delivery, sale, or transfer of a controlled substance)).

25. Id. (citing In re Expulsion of Robert D., Jr. by the Sch. Dist. of Crandon, Decision and Order No. 138 (State Superintendent of Pub. Instruction May 21, 1986) (assault of a school official); In re Expulsion of Robert M. by the Sch. Dist. of Port Edwards, Decision and Order No. 114 (State Superintendent of Pub. Instruction June 7, 1983)).

26. Id. (citing In re Expulsion of Michael T. by Nicolet Union High Sch. Dist., Decision and Order No. 456 (State Superintendent of Pub. Instruction Mar. 4, 2002)).

27. Id. (citing In re Expulsion of Jesse F. by the Stanley-Boyd Sch. Dist., Decision and Order No. 189 (State Superintendent of Pub. Instruction Apr. 21, 1992); In re Expulsion of Ericka T. by the Milwaukee Pub. Sch. Dist., Decision and Order No. 455 (State Superintendent of Pub. Instruction Feb. 13, 2002)).

28. Id. (citing In re Expulsion of Michelle R. by the Suring Sch. Dist., Decision and Order No. 126 (State Superintendent of Pub. Instruction Mar. 7, 1985)).

29. Id. (citing In re Expulsion of Leslie F. by the Milwaukee Pub. Sch., Decision and Order No. 136 (State Superintendent of Pub. Instruction Mar. 3, 1986) (possession of a weapon at school); In re Expulsion of Antonio M. by the Kenosha Unified Sch. Dist., Decision and Order No. 176 (State Superintendent of Pub. Instruction Apr. 18, 1991) (possession of a weapon not at school); In re Expulsion of Demetris S. by the Milwaukee Sch. Dist., Decision and Order No. 194 (State Superintendent of Pub. Instruction June 8, 1992) (possession of a weapon on a bus)).
even if the conduct does not meet the other statutory criteria for expulsion.  

B. The Expulsion Process

The expulsion process has two parts: (1) the school district’s decision and recommendation to expel and (2) the due process that administrators and school boards must afford a student.

1. Decision and Recommendation to Expel

If, after reviewing a student’s behavior, a school administrator determines that expulsion is necessary and recommends such a consequence to the school board, the school board must determine whether the offense constitutes expellable conduct and whether, in view of that conduct, the interests of the school necessitate expulsion. The requirement that expulsion be in the interest of the school is not a substantial requirement for a school district to meet because it does not require findings of fact regarding the interests of the school. The school board must merely be “satisfied that the interests of the school are best served by an expulsion.”

In addition to the nature of the offense and the interest of the school, a school board may consider factors such as the egregiousness of the conduct, the student’s history of misconduct, the severity of the punishment, the degree to which the behavior disrupted other students’ learning, and the best interest of the student facing expulsion.

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31. The expulsion process is unique for special education students. The Individuals with Disabilities Education Act (IDEA) and Chapter 115 of the Wisconsin Code (its state equivalent) provide additional protections to special education students that regular education students do not receive. 20 U.S.C. §§ 1400–1487 (2006); Wis. Stat. § 115.762. Because special education students receive additional procedural protections and continued education after expulsion is mandated, this Comment does not address expulsion for special education students.
32. Berthelsen, supra note 22, at 141.
33. Id. at 144 (citing In re Expulsion of Todd N. by the Elmwood Sch. Dist., Decision and Order No. 477 (State Superintendent of Pub. Instruction Aug. 22, 2002)).
34. Wis. Stat. § 120.13(1)(c); see also Berthelsen, supra note 22, at 144 (citing In re Expulsion of Susan Marie H. by the Kenosha Unified Sch. Dist., Decision and Order No. 157 (State Superintendent of Pub. Instruction June 28, 1998); In re Expulsion of Todd N. by the Elmwood Sch. Dist., Decision and Order No. 477 (State Superintendent of Pub. Instruction Aug. 22, 2002)).
35. See Wis. Stat. § 120.13(1). Under the authority and discretion granted to local school boards, school boards are only required to follow the procedural mandates of the statute. Berthelsen, supra note 22, at iv.
However, the school board is not required to consider these factors, and it is the student's responsibility to present an argument based on these factors at the expulsion hearing. The school board's consideration of these factors, or lack thereof, is not reviewable on appeal.  

2. Procedural Requirements for Expulsion

Since the Supreme Court's 1975 decision in *Goss v. Lopez*, school districts must meet certain due process requirements before expelling a student. In *Goss*, students in Ohio who were suspended without a hearing filed suit to remove the suspension from their records. The Court held that when a state guarantees a free public education, the state cannot take away that right without a valid reason and without satisfying the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court further held that students cannot be denied a right to an education guaranteed by a state without a valid reason and without proper procedure.

In *Goss*, the Supreme Court addressed the Fourteenth Amendment's guarantee of due process as it relates to student liberty and property rights. After the Court determined that under the state constitution, students have liberty and property rights in the opportunity to receive a public education, it held that disciplinary measures must meet due process requirements which, at a minimum, in the school setting, means "notice and . . . some kind of hearing." The facts in *Goss* involved suspensions, but the Court also stated that for expulsions and long-term suspensions, more process might be required. Notice and a hearing, therefore, comprise the minimum amount of process required for expulsions.

36. The appeal to the Department of Public Instruction is limited to whether the school board followed procedural requirements. Racine Unified Sch. Dist. v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334, 339 (Ct. App. 1982). Moreover, matters not raised before the school board at the expulsion hearing cannot be raised for the first time on appeal. BERTHELSEN, supra note 22 (citing In re Expulsion of Tony R. by the Lake Geneva J1Sch. Dist., Decision and Order No. 259 (State Superintendent of Pub. Instruction Aug. 11, 1995)).

38. See id at 582–83.
39. Id. at 568–69.
40. Id. at 574.
41. See id.
42. Goss, 419 U.S. at 574.
43. Id. at 579 (emphasis added).
44. Id. at 584.
45. See id. at 579.
Like the state constitution at issue in *Goss*, the Wisconsin Constitution mandates a free public education; article X, section 3 directs the legislature to establish district schools that are as uniform as practicable and free to all children between the ages of four and twenty.\(^6\) This constitutional requirement creates liberty and property rights in education in Wisconsin, and under *Goss*, those rights cannot be denied without meeting minimal due process requirements.\(^7\) Moreover, the Wisconsin Supreme Court has classified the right to receive the education guaranteed by the state constitution as "fundamental."\(^8\) Thus, Wisconsin cannot deny this fundamental right to a free public education based upon allegations of misconduct unless it provides students with due process.\(^9\)

In Wisconsin, upon determining that expulsion is the appropriate form of discipline for a student, the school administrator begins the expulsion process by giving the student written notice of both the decision to expel and the hearing, and, if the student is a minor, the administrator must also provide notice to the student's parents or guardian.\(^50\) Notice of the hearing must be given at least five days before the hearing is to take place.\(^51\) The notice must include, among other things, the statutory or local rule the student allegedly violated, the conduct that allegedly violated the rule, the time and place of the hearing, and a statement that the hearing could result in expulsion.\(^52\) The notice must also include a statement that the student or, if the student is a minor, the student's parent or guardian, *may* be represented by counsel at the hearing.\(^53\) The student is not required to have counsel at the hearing, nor is counsel provided by the district.

Although hearings may be conducted by a hearing panel, a hearing officer, or the school board, they are usually conducted by the school board.\(^54\) At the conclusion of the hearing, the school board must first

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47. *Goss*, 419 U.S. at 579.
49. See *Goss*, 419 U.S. at 572; U.S. CONST. amend. XIV, § 1.
51. *Id.* § 120.13(1)(c)(4).
52. *Id.*
53. *Id.*
54. *Id.* § 120.13(1)(e). A school board may pass a resolution each year that allows the board to appoint an independent hearing panel or an independent hearing officer to conduct expulsion hearings and to make expulsion decisions. The hearing panel or officer must comply with a separate subdivision of statutes under section 120.13(e) that is nearly identical to the subdivisions applicable to school boards in expulsion hearings. *Id.*
decide whether the student did what she is alleged to have done and then must decide whether the student's conduct requires the punishment of expulsion.\(^{55}\) Also, the school board must keep and record minutes of the hearing.\(^{56}\) After the hearing, a written decision is entered.\(^7\) If the hearing is conducted by a hearing panel or a hearing officer, the school board must approve or deny any decision to expel within thirty days of the hearing.\(^{58}\)

If the school board determines that expulsion of the student is warranted, there is an opportunity for appeal to the DPI.\(^{59}\) However, the right to appeal is extremely limited because the DPI's review is restricted to whether the school board and administrators used proper procedure.\(^{60}\) In other words, the appeal is valuable only insofar as it provides an opportunity to examine whether the school district provided adequate notice and a proper hearing.\(^{61}\) The scope of the DPI review does not extend to whether the evidence showed that a student did or did not commit the act that resulted in expulsion or whether expulsion was the appropriate form of discipline.\(^{62}\)

C. Consequences of Expulsion

In Wisconsin, "[n]o school board is required to enroll a pupil during the term of his or her expulsion from another school district."\(^{63}\) In addition, Wisconsin's compulsory attendance law requires students to attend school between the ages of six and eighteen.\(^{64}\) Together, the two statutes mean that expelled students under age eighteen must continue their educations through private school, home school, or correspondence school.\(^{65}\) Even for expulsions for one year, a student

\(^{55}\) Alison Julien & Patricia Engel, School Expulsions: Not All Are Equal, Wis. LAW., Oct. 2001, at 11, 12.

\(^{56}\) Wis. STAT. § 120.13(1)(c)(3).

\(^{57}\) Id.

\(^{58}\) Id. § 120.13(1)(e)(3).

\(^{59}\) Id. § 120.13(1)(c)(3).

\(^{60}\) Racine Unified Sch. Dist. v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334, 339 (Ct. App. 1982).

\(^{61}\) See id.

\(^{62}\) See BERTHELSEN, supra note 22 (citing In re Expulsion of Andrew C. by the Milwaukee Pub. Sch. Dist., Decision and Order No. 386 (State Superintendent of Pub. Instruction June 11, 1999)).

\(^{63}\) Wis. STAT. § 120.13(1)(f).

\(^{64}\) Wis. STAT. § 118.15 (2005–2006).

\(^{65}\) Julien & Engel, supra note 55, at 12. This provision does not apply to special education students where additional laws apply. Schools are required to provide continuing
may be shut out of the entire Wisconsin public school system for the duration of the expulsion. For longer expulsions, the problem is even greater. A student’s expulsion can extend until the student is twenty-one years old, at which time the state no longer has an obligation to provide a free public education under the constitution. Consequently, an expulsion can effectively be a permanent separation from the state’s public schools.

When students are separated from the public school system, whether for expulsions of one year or for expulsions of a longer duration, and the compulsory attendance law requires students to be in school, families of expelled students have limited options. The options of home school, private school, or correspondence school are expensive and are a burden for parents to meet, especially for families living at or below the poverty level. Because expelled students are disproportionately from urban and minority families, their families statistically are unable to afford these options, making alternative education following an expulsion the only realistic option.

The burden on families to provide for the education of an expelled student under the current system is exacerbated by a declining percentage of expelled students without disabilities being offered post-

66. In Wisconsin, a school board has unlimited discretion regarding the duration of an expulsion. See Julien & Engel, supra note 55, at 12.

67. Id. The state constitution provides that a free public education must be made available to students between the ages of four and twenty. Wis. Const. art. X, § 3.

68. See Julien & Engel, supra note 55, at 12.

69. Id. For a recent example of the burden a student’s expulsion places on the student’s parents, see Susan Lampert Smith, Teen’s Expulsion Weighs Heavily on Parents, WIS. STATE J. (Madison, Wis.), Feb. 12, 2008, at A2. A middle school student was expelled and told she could apply in another district for open enrollment but later discovered that she would not be admitted until the following school year. Id. Her father then received a letter informing him that due to the state’s compulsory attendance law, he is responsible for ensuring that she receives some sort of schooling during the term of expulsion. Id. He was able to enroll her in a religious school but admits that he struggles to pay the tuition. Id.


71. Wis. Dep’t of Pub. Instruction, Offering Educational Opportunities to Expelled Students in Wisconsin 1 (2001) [hereinafter Educational Opportunities].

72. See Wis. Dep’t of Admin., Social, Economic and Housing Statistics: Poverty Status of Persons by Race in 1999 by Wisconsin Counties (2000), available at http://www.doa.state.wi.us/docs_view2.asp?docid=399 (stating that the percentage of nonwhite persons living below the poverty level is greater than that of white persons, especially in urban areas such as Milwaukee County).
expulsion services. While fewer students are being offered post-expulsion services, the number of students eligible to return to school who did return to school dropped from seventy-six percent in 2000-2001 to sixty-two percent in 2004-2005. In sum, while the term of expulsions lengthened, fewer expelled students were offered alternative education, and fewer expelled students returned to school after being expelled.

Fewer students returning to school means more dropouts, which is problematic not only for the individual students but for society as a whole: The skills taught in school are the "building blocks for a productive life," and a denial of a public education costs society in terms of crime and economic contributions. Nevertheless, thirty-eight percent of students who are expelled and are eligible to return to public school but who do not do so are not being permanently home-schooled, do not get their GEDs, and are not enrolled in private schools. Thus, the result of many expulsions is the end of a person's basic education.

73. Wis. Dep't of Pub. Instruction, WINSS Successful School Guide: What Happens After Students Are Expelled?, http://www.dpi.state.wi.us/sig/index.html (select "Data Analysis"); select "State Level Data"; select "What About Attendance and Behavior?"; select "What Happens After Students are Expelled"; show "Post Expulsion Services") (last visited June 18, 2008) [hereinafter Post Expulsion Services]. In 2000-2001, forty-nine percent of students were offered post-expulsion services; in 2004-2005, only forty-two percent of expelled students were offered these services. Id.

74. Students eligible to return to school are those students who are not permanently expelled. "Permanently expelled" means that they are expelled until they reach age twenty-one, when they no longer qualify for a free public education. See Wis. Const. art. X, § 3.

75. Wis Dep't of Pub. Instruction, WINSS Successful School Guide: What Happens After Students Are Expelled?, http://www.dpi.state.wi.us/sig/index.html (select "Data Analysis"); select "State Level Data"; select "What About Attendance and Behavior?"; select "What Happens After Students are Expelled"; show "Returns to School") (last visited June 18, 2008) [hereinafter Returns to School].

76. See text accompanying notes 2-3.

77. Tate v. Racine Unified Sch. Dist., No. 96-C-0524, 1996 U.S. Dist. LEXIS 22723, at *17-18 (E.D. Wis. Aug. 15, 1996); see also Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, Education and Correctional Populations 1 (2003), available at http://www.ojp.gov/bjs/pub/pdf/ecp.pdf ("About 41% of inmates in the Nation's State and Federal prisons and local jails in 1997 and 31% of probationers had not completed high school or its equivalent. In comparison, 18% of the general population age 18 or older had not finished the 12th grade.").

78. Hetzner, supra note 2. Even for students who do get their GEDs, their lifetime income is usually lower than that of students who earned high school diplomas. MacRae, supra note 6. Moreover, students who are not in school are more likely to smoke, use drugs and alcohol, carry a weapon, and be involved in physical altercations. Ctrs. for Disease Control and Prevention, Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School—1992, 43 MORTALITY & MORTALITY WKLY. REP. 129 (1994).

79. See Hetzner, supra note 2.
This result is due in part to the nature of expulsions, which pushes students away from the school environment and exacerbates the behavior the school aimed to correct with the expulsion.  

III. COUNSEL FOR STUDENTS FACING EXPULSION

Because of the significant potential for lifelong harm to the student, and to the community, when expulsions occur, school districts should provide counsel to all students facing expulsion, or to the student’s parents or guardian if the student is a minor. Presently, the student facing expulsion may be represented by counsel, but school districts are not required to provide counsel to the student. Therefore, unless the student’s family is able to afford counsel or obtain counsel on a pro bono basis, the student will not have the advice of counsel and will be forced to navigate the expulsion process alone.

The expulsion process can be complicated and difficult to navigate. Providing counsel would ensure that students and their parents understand the process and have a fair opportunity to present a case against the expulsion to the school board, thereby allowing for a greater degree of assurance that expulsion is the appropriate punishment before imposing a life-altering expulsion decision. This is especially important given the negative stigma the punishment of expulsion carries with it and the impact the expulsion will have on a student’s future.

Providing counsel to students and their families would level the playing field by giving families guidance and a resource for...
understanding the expulsion process. The school administration probably has an attorney to make its case to the school board, or, at least, a school official to serve as a "prosecutor." In addition, the school district normally has better access to evidentiary resources, including witnesses and the student’s academic and behavioral records, which gives the school district a significant advantage over the student in making arguments to the school board. The lack of counsel for students can result in missed opportunities to understand the process in general, object to or present evidence, and construct arguments using the law. At the most basic level, an attorney could help families by merely being familiar with the expulsion process and clarifying the process for the family. In addition to that basic level of assistance, the attorney could also obtain information the school district plans to use at the hearing and research information that may constitute a defense for the student. These functions are especially important because the student only has one opportunity to make a case against the expulsion as the DPI's review on appeal does not include whether the expulsion was warranted, whether the length of the expulsion is appropriate, or whether the evidence even supports a conclusion that the student committed the expellable behavior. Providing counsel to the student would, therefore, help to legitimize a process that currently seems unfair and unbalanced and ensure that all possible arguments against the expulsion are explored and made to the school board.

It would, however, be extremely costly to provide counsel for students facing expulsion, but this cost should be accepted as an aspect of the expulsion process in order to ensure that those students who are expelled are deserving of the punishment given and to ensure that their constitutional rights are protected. Moreover, the cost of providing counsel to ensure that expulsion is warranted should be weighed against the costs to the individual student and to the community. Many students do not return to school following an expulsion, and without a high school education, they will have lower incomes. There are also higher rates of delinquent activity among students who do not complete a basic education. School districts face constant budget pressures, so funds to provide counsel to all students facing expulsion will, admittedly, be difficult to find. However, the expense associated with providing

86. Julien & Engel, supra note 55, at 12.
88. See supra note 78.
89. Id.
counsel to a student facing expulsion is small compared to the lifelong effects the expulsion will have on the student as well as the costs of that expulsion to society.

Because of the potential effects of an expulsion, students and their families need to have someone to advocate for them and to ensure that the expulsion is indeed warranted. Providing students facing expulsion with counsel will allow that to happen.

IV. EXPULSION AND THE RIGHT TO A FREE PUBLIC EDUCATION

The United States Supreme Court said, in *Brown v. Board of Education*, that "[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." The two parts of this statement are especially applicable to the current status of expulsion law in Wisconsin. The state demonstrates its recognition of the importance of education by requiring that expelled students comply with the compulsory education law. At the same time, the difficulties expelled students face in complying with that law along with the state's failure to provide alternative education to all expelled students make it particularly difficult for expelled students to "succeed in life."

Expulsion jeopardizes the future education and the future in general of the student. In many instances, students facing expulsion are at-risk students who come from unstable homes or violent neighborhoods and would be better served by alternative methods of education as part of their expulsions, rather than no continued education provided by the state. When a school board determines that expulsion is warranted, the student deserves to continue to receive the free public education guaranteed by the state constitution. Currently, if a student is expelled, the student loses her opportunity for a free public education for an extended period of time.

The state of Wisconsin needs to adhere to its constitutional

91. See *Out-of-School Suspension and Expulsion*, supra note 70, at 1207 (stating that "children most likely to be suspended or expelled are those most in need of adult supervision and professional help") (citation omitted).
92. See supra notes 71–72 and accompanying text.
93. See *Wis. Const.* art. X, § 3.
obligation to provide a free public education to all students by providing alternative forms of education to expelled students. Because Wisconsin has a compulsory education law for children ages six to eighteen and because its expulsion laws require neither the expelling district to consider reinstatement of the student at any future time nor any other district to accept the expelled student during the term of expulsion, the legislature needs to require all districts to adopt alternative education policies and require that they be made available to all expelled students. If this action is not taken, expelled students will not receive the educational opportunities guaranteed by the state constitution when those educational opportunities have the potential to make students more productive members of society.

Some opponents of this idea might argue that when a student's behavior is so egregious as to warrant expulsion, that student foregoes his right to a free public education. But those students who are expelled become adult citizens who must compete in society without the benefit of a complete education. When students are young enough to receive a free public education pursuant to state law, the state needs to utilize that opportunity to educate them and to correct any behavior problems they might have. While student behavior may sometimes warrant expulsion, for the good of society and for the benefit of those misbehaving students, the operative policy should not be expulsion and subsequent denial of all forms of educational services from the state, which is what the current DPI regulations and statutes permit.

In 1996, the Wisconsin State Superintendent’s Expulsion Task Force recognized the harm caused by expulsion and subsequent denial of all forms of educational services from the state. It recommended that post-expulsion services be made available to all expelled students and that individual education plans be developed for each expelled student.

94. Id.
97. Currently, only some expelled students in Wisconsin have opportunities for alternative education during the term of their expulsions. Some school districts, pursuant to the DPI’s recommendation to provide alternative education programs, have developed programs for expelled students. EDUCATIONAL OPPORTUNITIES, supra note 71, at 8. For example, Waukesha public schools provide academic assistance to every expelled student in the district in a variety of forms, ranging from tutoring to placement in alternative programs. Hetzner, supra note 2. The Appleton School District also provides an alternative program to expelled students through after-school instruction. EDUCATIONAL OPPORTUNITIES, supra note 71, at 14.
98. EDUCATIONAL OPPORTUNITIES, supra note 71, at 4.
Four years later, beginning in the 2000–2001 school year, a state law made available a discretionary grant program to fund alternative education for expelled students.\textsuperscript{99} Despite the 1996 recommendation and the subsequent authorization of grant money for alternative education programs, the number of students who were offered post-expulsion services and the number of eligible students not returning to school after being expelled declined.\textsuperscript{100} Today, twelve years after the recommendation by the State Superintendent’s Task Force, and as the aforementioned decline continues,\textsuperscript{101} post-expulsion services still are not made available to all expelled students. The study conducted by the DPI and its recommendation that alternative education be made available to all expelled students was a step in the right direction, but until those programs are mandated by the legislature, not all districts will implement them, and the problems the recommendation sought to remedy will go uncorrected.

Consequently, the Wisconsin legislature needs to take a more aggressive stance and statutorily require all districts to provide alternative education opportunities to all expelled students. Unlike Wisconsin, other states have responded to the need to provide alternative education to expelled students.

Nebraska, for example, statutorily requires all school districts to make educational services available to expelled students.\textsuperscript{102} The Nebraska statute defines and sets requirements for alternative education programs,\textsuperscript{103} and if a district does not have an alternative education program, it must develop and maintain a plan to continue the student’s education throughout the term of the expulsion.\textsuperscript{104} Nebraska’s statute, as well as similar statutes in other states, ensures that expelled students do not lose all educational opportunities during the term of their expulsions because they continue to receive academic instruction. The law in Nebraska also removes the burden on parents to provide private education, correspondence school, or home schooling; it recognizes that

\textsuperscript{99} Id. at 7. Wisconsin Act 9 authorized the DPI to administer grant awards to districts for the development of educational programs for expelled students. Wis. Stat. § 115.366 (2005–2006); Educational Opportunities, supra note 71, at 7.

\textsuperscript{100} Post Expulsion Services, supra note 73; Returns to School, supra note 75.

\textsuperscript{101} See supra note 73 and accompanying text.


\textsuperscript{103} Id.

\textsuperscript{104} Id.
private school may not be a realistic option and that home schooling and correspondence courses may not be as effective as an education that provides regular contact with certified teachers.

Nebraska’s statute mandating alternative education for expelled students is quite similar to the recommendation made by the State Superintendent’s Task Force. Indeed, the DPI discussed Nebraska’s statute in a 2001 study of expulsions in Wisconsin. However, the DPI has yet to mandate that school districts provide alternative education programs for expelled students, nor has the Wisconsin legislature enacted a law requiring school districts to offer alternative education to all expelled students.

To further illustrate comparable laws of other states, in Colorado, at the parent’s request, a district must provide an expelled student with “any educational services” the school board determines are appropriate, which shall be “designed to enable the student to return to the school in which he or she was enrolled . . . , to successfully complete the GED, or to enroll in a nonpublic, nonparochial school or in an alternative school.” Similarly, in Connecticut, local and regional school boards must offer alternative education to expelled students. Nebraska, Colorado, and Connecticut, like Wisconsin, have constitutional provisions for free public education. However, unlike Wisconsin, these states do not ignore their obligation to provide all students with a free public education by requiring, rather than merely recommending, that all school districts have alternative education opportunities for expelled students.

105. EDUCATIONAL OPPORTUNITIES, supra note 71, at 5–6.
107. CONN. GEN. STAT. § 10-233d(d) (2002). This requirement applies unless the student is between ages sixteen and eighteen and was expelled for possession of a firearm or distribution of a controlled substance at a school-sponsored event or on school grounds. CONN. GEN. STAT. § 10-233d(e). Connecticut also offers greater protection than Wisconsin offers to expelled students by permitting other school districts to adopt the expelling district’s decision to expel the student only after holding its own hearing to determine whether the student’s conduct would have resulted in expulsion within its own school district. CONN. GEN. STAT. § 10-233d(g). Even if the other district determines that it would have expelled the student, it must provide the student an opportunity for alternative education. Id.
108. NEB. CONST. art. VII, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1.
109. Not all states that require school districts to provide alternative education to expelled students do so because of statutory mandates. West Virginia, for example, requires school districts to provide alternative education for expelled students as a result of a West Virginia Supreme Court case, which held that the state’s constitutional guarantee of a free public education required that such opportunities be made available to expelled students. Phillip Leon M. v. Greenbrier Co. Bd. of Educ., 484 S.E.2d 909, 911 (W. Va. 1996). Failure to
The Wisconsin legislature needs to alter the state's expulsion law by requiring all school districts to maintain alternative education programs for expelled students and by requiring school boards to include individual continuing education plans for the duration of the expulsion period in all expulsion orders. The guidance and monitoring that result from these two requirements will help to ensure that a student's educational needs are met throughout a term of expulsion, which could potentially lessen the harmful consequences of expulsions. Specifically, students would maintain contact with the school district, allowing their education to continue in some form throughout the term of the expulsion. In addition to preventing the student from falling behind both academically and developmentally, this continued contact with the school district would decrease the likelihood that the expelled student will not return to school following his expulsion.

V. CONCLUSION

Expulsion is a life-altering consequence. Expulsion decisions are often made when the expelled student did not have the assistance of counsel, and they result in the loss of an opportunity for a free public education for an extended period of time. The effects of losing that opportunity are significant for both the individual student and the entire community. Before a school board issues an expulsion order, the student should be provided counsel by the school district to explain the expulsion process and to argue on the student's behalf at the hearing before the school board. Additionally, an expelled student's poor choices should not result in the loss of the student's right under the state constitution to all educational services from the state for the duration of the expulsion, so the state legislature needs to enact a law requiring all districts to provide alternative education to expelled students.

Returning to the opening scenario involving Michael, it is likely that he would be expelled by the school board for the expression in his writing assignment. School boards and administrators will likely take the perceived threat seriously and determine that expulsion is appropriate because the statement demonstrates Michael's potential to endanger the health and safety of other students. Michael's family, without the money to pay for an attorney to inform them of Michael's rights and to help them navigate the expulsion process, will have to do so was a violation of the state constitution. Id.

110. Small, neighboring school districts should, however, be permitted to jointly provide these services.
make an argument against the expulsion to the school board on their own. If, however, the school district were to provide them with counsel, they would have an objective person to explain their rights to them as well as have a better chance of ensuring that expulsion is an appropriate punishment and that the expulsion is for an appropriate length of time. Additionally, students like Michael cannot afford to miss a significant portion of the school year without risking lifelong academic and social harms. Because his parents may not be able to provide adequate home schooling or pay for a private school, he will lose the educational opportunity he needs. If, however, the law mandated that all school districts provide an alternative education option to all expelled students, Michael would be able to continue his education in a school environment, enabling him to continue to make academic progress, whereas expulsion, without more, would have the effect of leaving him behind.

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