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SCHOOL DISCIPLINE AND THE FUNDAMENTAL RIGHT TO EDUCATION: THE CONSTITUTIONAL INADEQUACIES OF WISCONSIN'S EXPULSION LAWS

*Maria M. Lewis, J.D., Ph.D. Candidate**

I. INTRODUCTION

In 2011 the Wisconsin Supreme Court was asked in *Madison Metropolitan School District v. Circuit Court for Dane County* whether a district court has the authority to order a school district to provide educational services to an expelled student who has been adjudicated delinquent.¹ In a narrow holding, the court determined that the district court had exceeded its authority by ordering “a school district to provide alternative educational services to a juvenile who has been expelled from school . . . but is still residing in the community.”² Following this decision, the State Bar of Wisconsin published an article titled “School Districts Need Not Provide Alternative Education to Expelled Students.”³ This assertion overstates and consequently inadequately portrays the court’s holding. In fact, the question regarding a student’s legal right to alternative education was not directly before the court in *Madison Metropolitan School District*.⁴

In order for the Wisconsin Supreme Court to sufficiently determine a student’s right to post-expulsion services, it is

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¹ *Madison Metro. Sch. Dist. v. Cir. Ct. for Dane Cnty*, 800 N.W. 2d 442, 442 (Wis. 2011).

² *Id.* at 459.

³ Joe Forward, *School Districts Need Not Provide Alternative Education to Expelled Students*, St. B. Wis. (2011), <http://www.wisbar.org/newspublications/pages/general-article.aspx?articleid=4709>.

(“The majority concluded that while school districts may be encouraged to provide alternative education to expelled students, certain provisions of the Juvenile Justice Code do not override the District’s explicit authority to expel students and refuse further educational services.”).

⁴ *Madison*, 800 N.W. 2d 442.

necessary to explore the origin of the right to an education in the state of Wisconsin. A thorough examination would include an analysis of the state constitution and its relationship to the state's expulsion laws—an analysis that was absent from the court's opinion in *Madison Metropolitan School District*. Instead, the court focused its attention on the district court's authority to compel a school district to provide educational services to a student who had been lawfully expelled, which was an appropriate focus in light of the questions it was asked to answer.⁵ Consequently, the Wisconsin Supreme Court left the following separate but related questions unanswered:

1. Are Wisconsin statutes that allow for permanent expulsion constitutional under the state constitution?
2. When, if at all, are students entitled to post-expulsion services or alternative education in the state of Wisconsin?
3. If Wisconsin expulsion statutes are found to be unconstitutional, in what ways can the state legislature modify the state's expulsion laws so that they are supported by the state constitution?

This article seeks to answer each one of these questions through a comprehensive examination of relevant federal and state law. This article will begin with an in-depth discussion of *Madison Metropolitan School District*, placing particular emphasis on the court's understanding of school districts' authority to expel students. The second section of this article will discuss relevant federal and state law, including the federal and state constitutions, which will demonstrate that Wisconsin's expulsion laws fail to meet the high standard to which they must be held. After establishing the inadequacy of Wisconsin's expulsion laws, the third section of this paper will be devoted to providing examples of analogous case law in other states to further illustrate the legal infirmities of Wisconsin's expulsion laws and to provide a basis for potential revisions. The fourth section will discuss some ways that the Wisconsin state legislature could amend the statutes to reflect the legal importance of education in the state of Wisconsin. The fifth and final section will provide guidance to administrators who wish to expediently correct the problem at the local level.⁶

⁵ *Madison*, 800 N.W. 2d 442.

⁶ It is important to note that although significant research demonstrates the value of educational interventions and strategies that seek to prevent or correct behavioral problems that lead to expulsions, such strategies are outside the scope of

The purpose of this article is to encourage a closer look at the important role that the status of education as a fundamental right⁷ should play in assessing the constitutionality of Wisconsin's expulsion laws. It is important to note that the goal is not to challenge Wisconsin school districts' authority to expel students. Rather, the objective is to engage in the type of robust legal analysis that is necessary to justify a violation of a fundamental right, such as education in the state of Wisconsin. This analysis will expose the deficiencies in Wisconsin's expulsion laws and, in turn, the need for revisions that strike a balance between a student's right to an education and school district authority to discipline students for behavior that threatens school safety or significantly interferes with the school district's educational mission.

II. MADISON METROPOLITAN SCHOOL DISTRICT

In order to reach its final decision in *Madison Metropolitan School District*, the Wisconsin Supreme Court relied on district court opinions, statutory construction, and the authority of the Wisconsin Department of Public Instruction (DPI), the state's education agency, to determine that the circuit court exceeded its authority when it attempted to force Madison Metropolitan School District (MMSD) to provide educational services to a student who had been legally expelled.⁸ The state constitution is a foundational source of authority in the creation of a student's right to education, though the court failed to consider it in its decision.⁹ Instead, the case focused on the Juvenile Justice Code and its relationship to districts' statutory authority to expel students.¹⁰

Both the Juvenile Justice Code and its relationship to statutory authority are undoubtedly important to analyzing the facts before the court in *Madison Metropolitan School District*, but they ultimately fall short of resolving the question over the

this article. Instead, this article assumes that decision makers have exhausted these options.

⁷ *Vincent v. Voight*, 614 N.W. 2d 388 (Wis. 2000);

⁸ *Madison*, 800 N.W. 2d.

⁹ *Id.*

¹⁰ *Id.* at 449.

relationship between the state's expulsion laws and the fundamental right to an education. Nonetheless, the case has been understood by some to mean that school districts are under no legal obligation to provide educational services upon expulsion.¹¹ The following analysis will explain why such an interpretation of *Madison Metropolitan School District* is misguided insofar as it overstates the question before the court and reaches an erroneous conclusion without engaging in the kind of rigorous analysis that is necessary to resolve such an important legal question.

A. *Facts and Procedural History*

On June 5, 2009, M.T., a fifteen-year-old student at the time, brought nine bags of marijuana to Madison East High School.¹² As a result, M.T. was arrested and charged with possession of marijuana with intent to deliver.¹³ Finding that the conduct was sufficient to meet the statutory requirements for expulsion, an independent hearing officer issued an order granting the school administration's request for expulsion to last three semesters.¹⁴ After one semester, M.T. was eligible for reinstatement, provided that he met certain conditions.¹⁵ The District Board of Education approved the order.¹⁶ A separate proceeding began on July 9, 2009. The judge assigned to the case ordered the Dane County Department of Health and Human Services (DHS) to provide a predisposition report, which according to Wisconsin statutes must include "[a] plan for the provision of educational services to the juvenile, prepared after consultation with the staff of the school in which the juvenile is enrolled or the last school in which the juvenile was enrolled."¹⁷ Despite DHS's recommendation that M.T. attend school, the school district refused.¹⁸ The school district even refused to provide materials for home schooling.¹⁹

¹¹ Forward, *supra* note 3.

¹² *Madison*, 800 N.W. 2d at 445.

¹³ *Id.*

¹⁴ *Id.* (Under Wis. Stat. §120.13(1)(e), as an alternative to general procedures, a school board has the authority to appoint an independent hearing officer to make determinations regarding expulsions.)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* (citing Wis. Stat. § 938.33(1)(e).)

¹⁸ *Id.*

¹⁹ *Id.* at 446.

After multiple unsuccessful attempts to reach an agreement between the judge, DHS, and the Madison Metropolitan School District (MMSD), the judge issued an order that required the school district to provide M.T. with educational services.²⁰ MMSD agreed to provide ten hours a week of direct instruction, which was consistent with the judge’s order that the services be “not less than those provided in the Dane County Juvenile Detention Center.”²¹ After its motion for reconsideration was denied, the school district appealed.²² On appeal, the court of appeals vacated the circuit court order that required MMSD to provide educational services.²³

B. Analysis

The primary legal question before the Wisconsin Supreme Court was as follows: Did the district court act within its authority when it ordered that MMSD to provide alternative educational services to a student who had been expelled from school?²⁴ In order to answer this question, the court first discussed the legal authority under which school districts can discipline students.²⁵ The court held that Wisconsin Statute §120.13(1)(c)1 grants Wisconsin school districts express authority to expel students from school.²⁶ Although the term “expel” is not defined in Wisconsin Statute §120.13,²⁷ the court relied on the state education agency’s longstanding interpretation of school districts’ obligations, finding that “a school district bears no responsibility for providing an education to expelled students.”²⁸ In other words, expulsion means to expel students from *all* educational services.

²⁰ *Id.* at 447.

²¹ *Id.*

²² *Id.* at 448.

²³ *Id.* (Specifically, the court of appeals granted MMSD’s writ of prohibition, which required MMSD to satisfy five criteria “(1) an appeal would be an utterly inadequate remedy; (2) the duty of the circuit court is plain; (3) its refusal to act within the line such duty or its intent to act in violation of such duty is clear; (4) the results of the circuit court’s action would not only be prejudicial, but also incur extraordinary hardship; and (5) the request for relief was made promptly and speedily.” *Id.* at 457.).

²⁴ *Id.* at 444.

²⁵ *Id.* at 449–51.

²⁶ *Id.* at 449.

²⁷ WIS. STAT. §120.13

²⁸ *Madison*, 800 N.W. 2d at 450 (citing Burlington Area Sch. Dist., 149 F. Supp. 2d 665, 668 n.3 (E.D.Wis. 2001)).

In fact, the court went so far as to accept as law the state education agency's conclusion that "a failure to provide such alternative education is not a violation of an expelled student's constitutional rights."²⁹ The court *presumed* the constitutionality of the state's expulsion laws in order to reach its final decision. Specifically, the court stated that "[i]n general, expulsion from a Wisconsin public school district removes a pupil's right to receive a free public education from any Wisconsin public school."³⁰ This blind acceptance without proper corresponding legal analysis disregards a vital legal question and improperly bestows upon the state education agency the authority to determine the reach of the state constitution—a responsibility that should be left to the courts.

The circuit court based its position on the authority granted to it through the Juvenile Justice Code.³¹ The Wisconsin Supreme Court found that although the circuit court had the authority to order the student educational programming under Wisconsin Statute 938.34(7d), such authority is not so far reaching that it permits the court to order a school district to provide the programming.³² In the end, the court held that the circuit court exceeded its statutory authority when it ordered MMSD to provide post-expulsion services.³³

The narrative of *Madison Metropolitan School District* demonstrates that it is not advisable to treat the case as though it stands for the assertion that Wisconsin school districts are unequivocally not required to provide post-expulsion services. Related but distinct from the narrow question before the Wisconsin Supreme Court, a comprehensive analysis of the state's obligation with regard to education requires an in-depth examination of the relationship between the state's expulsion statutes and the fundamental right to education under the State Constitution. This rigorous analysis exposes the inadequacies of Wisconsin's expulsion laws. As the following sections demonstrate, there are several

²⁹ *Id.* at 451 (citing *C.M. v. Kenosha Sch. Dist. Bd. of Educ.*, Superintendent of Pub. Instruction Decision and Order No. 616 (Apr. 17, 2008)).

³⁰ *Id.* at 451 (citing Wisconsin Department of Public Instruction, Answers to Frequently Asked School Discipline Questions, <http://dpi.wi.gov/sspw/pdf/schldscplnqa.pdf>).

³¹ 1995 WIS. ACT 77.

³² *Id.* at 453.

³³ *Id.*

ways the Wisconsin State Legislature can amend its expulsion laws to correct the statutes' current constitutional flaws. Mandating the provision of post-expulsion services, at least in most circumstances, is just one approach that the Wisconsin state legislature can take to achieve compliance with the state constitution. Before reaching the policy alternatives, however, it is first necessary to lay out the legal foundation for the insufficiency of Wisconsin's expulsion laws as they exist today.

III. RELEVANT FEDERAL AND STATE LAW

In *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court determined that children do not have a right to an education under the U.S. Constitution.³⁴ Nonetheless, in *Goss v. Lopez*, the court held that students are entitled to due process under the 14th Amendment when education has been deemed to be a statutory right as it was in Ohio.³⁵ In *Goss*, nine students were suspended for up to ten days without a hearing.³⁶ The Court held that “[h]aving chosen to extend the right to an education to people of appellees’ class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.”³⁷

The Court determined that students facing suspension were entitled to “some kind of notice” and “some kind of hearing.”³⁸ Although the Court was dealing primarily with suspensions shorter than ten days, the Court did state that more robust procedures may be required in the case of long-term suspensions or expulsions.³⁹ As such, the severity of disciplinary action, combined with the state-designated right to education, served as the foundation for the Court’s analysis in *Goss*.

Though the U.S. Supreme Court has determined that education is not a fundamental right under the U.S.

³⁴ 411 U.S. 1 (1973).

³⁵ *Goss v. Lopez*, 419 U.S. 565 (1975).

³⁶ *Id.* at 568.

³⁷ *Id.* at 574.

³⁸ *Id.* at 579.

³⁹ *Id.* at 584.

Constitution,⁴⁰ the Wisconsin Supreme Court has deemed education to be a fundamental right in the state of Wisconsin.⁴¹ Article X, section 3 of the Wisconsin State Constitution states that “[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.”⁴² The Wisconsin Supreme Court’s discussions about and ultimate definition of students’ right to an education have occurred in the context of school finance litigation where the court has examined the state legislature’s obligations under the state constitution.⁴³ The most recent case was *Vincent v. Voight*, decided in 2000.⁴⁴ In *Voight*, the plaintiffs challenged Wisconsin’s finance system under the state constitution’s uniformity clause of the education article and the state’s equal protection clause, arguing that the system failed to equalize educational funding provided to districts throughout the state.⁴⁵ The Wisconsin Supreme Court held that the school finance system violated neither of the constitutional provisions.⁴⁶ From the court’s perspective, the funding system supplied adequate funding to provide a basic education to students across the state.⁴⁷ Funding disparities were attributed to districts raising revenue above the amount guaranteed by the state.⁴⁸

On the issue of equal protection, the court analyzed the appropriateness of applying the standard of strict scrutiny.⁴⁹ The court reasoned that it is proper to “apply a strict scrutiny review of a statute when the legislative classification interferes with a fundamental right or is created on the basis of a suspect criterion.”⁵⁰ However, relying on *San Antonio v. Rodriguez*, the *Voight* court drew an important distinction between “the

⁴⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁴¹ *Vincent v. Voight*, 614 N.W. 2d 388 (Wis. 2000); WIS. CONST. art. X, § 3.

⁴² WIS. CONST. art. X, § 3.

⁴³ *Buse v. Smith*, 247 N.W. 2d 141 (Wis. 1976); *Kukor v. Grover*, 148 Wis. 2d 469 (Wis. 1989).

⁴⁴ *Vincent v. Voight*, 614 N.W. 2d 388 (Wis. 2011).

⁴⁵ *Id.*

⁴⁶ *Id.* at 396.

⁴⁷ *Id.* at 408.

⁴⁸ *Id.* at 413.

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *State v. Annala*, 168 Wis. 2d 453, 468 (1992)).

fundamental right to an equal opportunity for a sound basic education under art. X, § 3 and the wealth-based arguments” made by the plaintiffs.⁵¹ The court recalled its reasoning in *Kukor v. Grover*, where it “concluded that a rational basis standard should be applied ‘because the rights at issue in the case before the court are premised upon spending disparities and not upon a complete denial of educational opportunity within the scope of art. X.’”⁵² Although the court decided to apply the rational basis test in *Voight*, its analysis is particularly important to the discussion of Wisconsin’s expulsion laws because it implies that a more rigorous standard would be appropriate in instances involving a complete deprivation of educational opportunity—which is the case for expulsions.⁵³

Furthermore, the court held that students have a “fundamental right to an equal opportunity for a sound basic education.”⁵⁴ The court specifically described that right as being one that “will equip students for their roles as citizens and enable them to succeed economically and personally.”⁵⁵ The court stated

[t]he legislature has articulated a standard for equal opportunity for a sound basic education in Wis. Stat. §§ 118.30(lg)(a) and 121.02(L) (1997–98) as the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and for them to receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language, in accordance with their age and aptitude.⁵⁶

Expulsion without educational services, especially in the case of permanent expulsion, undoubtedly interferes with a

⁵¹ *Id.* at 414.

⁵² *Id.* (citing *Kukor v. Grover*, 148 Wis. 2d 469, 498 (Wis. 1989)).

⁵³ To apply a rational basis review in the context of school expulsion risks rendering the characterization of education as a fundamental right to an equal opportunity to a sound basic education meaningless. If a rigorous standard such as strict scrutiny is improper in the context of school finance litigation, as the court found in *Voight* and in situations where disciplinary action results in a complete deprivation of educational services, it is difficult to imagine a realistic set of facts in which education’s fundamental status in the state of Wisconsin would have more than a purely theoretical value as it relates to asserting that right.

⁵⁴ *Vincent v. Voight*, 614 N.W.2d 388, at ¶ 87. (Wis. 2011).

⁵⁵ *Id.*

⁵⁶ *Id.*

student's ability to "succeed economically and personally"⁵⁷ and permits districts, and therefore the state, to abandon their constitutional obligations to students throughout the state of Wisconsin.

A. *Wisconsin Statutory Authority*

Wisconsin statutes grant school districts express authority to expel students.⁵⁸ The duration of a students' expulsion can be permanent; no other school district is required to enroll an expelled student while that student is under an expulsion order.⁵⁹ Behaviors that constitute expellable conduct are extremely important to Wisconsin students' access to education. Unfortunately, the expulsion statutes fail to account for the severe impact that such a decision can have on a student's future. According to the statute, students face the possibility of expulsion if the school district finds the following:

[R]epeated refusal or neglect to obey the rules, or finds that a pupil knowingly conveyed or caused to be conveyed any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives, or finds that the pupil engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others, or finds that a pupil while not at school or while not under the supervision of a school authority engaged in conduct which endangered the property, health or safety of others at school or under the supervision of a school authority or endangered the property, health or safety of any employee or school board member of the school district in which the pupil is enrolled, and is satisfied that the interest of the school demands the pupil's expulsion.⁶⁰

Although some of the grounds for expulsion are fairly

⁵⁷ *Id.*

⁵⁸ WIS. STAT. § 120.13.

⁵⁹ WIS. STAT. § 120.13(1)(f).

⁶⁰ WIS. STAT. § 120.13(1)(c)(1). (Furthermore, even if the conditions are not met under this section, students 16 and older can be expelled if the student "repeatedly engaged in conduct while at school or while under the supervision of a school authority that disrupted the ability of school authorities to maintain order or an educational atmosphere at school or at an activity supervised by a school authority and . . . is satisfied that the interest of the school demands the pupil's expulsion." WIS. STAT. § 120.13(1)(c)2.)

specific, “repeated refusal or neglect to obey the rules”⁶¹ is an all-encompassing stipulation that permits expulsion in circumstances that may not meet the rigorous standard to which a fundamental right such as education is held. “The rules” implies *any* rules, thus permitting a school district to permanently deprive a student of his or her right to an education based on an arbitrary determination.⁶² While there may be rare instances where a complete deprivation of a student’s right to education is legally justified in light of serious safety concerns,⁶³ the inclusion of expulsions for benign behaviors fails to meet the rigorous legal standard applied in cases involving a fundamental right.

It is important to note that the authority to deny enrollment to a student who has been expelled only applies to students who have been expelled by a *public* school.⁶⁴ A reasonable explanation for the distinction between public and private schools is as follows: the obligation to provide an education rests upon the state. Therefore, only a public school can take away the public right to an education. Nonetheless, students who have been expelled from a private school are entitled to public education, no matter how serious the offense that motivated the exclusion may have been.⁶⁵ In essence, two students may face different consequences for committing the same offense, one in a private setting and the other in a public setting. One of the students may be deemed to be too dangerous (public school student who is left without an education) while the other must be provided an education (private school student who is provided a public education). This irrational outcome indeed weakens the argument that previously expelled students present such a danger to the school district that educational services simply cannot be provided.

As stated above, in cases involving a fundamental right, a

⁶¹ Vincent v. Voight, 614 N.W.2d 388, at ¶ 80. (Wis. 2011).

⁶² See *id.*

⁶³ For example, Wisconsin Statutes require expulsion for “not less than one year” for possession of a firearm. WIS. STAT. § 120.13(1)(c)(2)(m).

⁶⁴ WIS. STAT. § 120.13(1)(f).

⁶⁵ Wisconsin Department of Public Instruction, Answers to Frequently Asked School Discipline Questions, <http://dpi.wi.gov/sspw/pdf/schldscplnqa.pdf>.

standard of strict scrutiny applies.⁶⁶ Strict scrutiny requires that the action be narrowly tailored to meet a compelling state interest.⁶⁷ In the context of school discipline, the state certainly has a compelling state interest in maintaining a safe educational environment that is unhampered by serious disruptions. Applying strict scrutiny, Wisconsin statutes, as written, violate the state constitution insofar as they allow for expulsion without services for offenses that cannot be justified in light of the nature of the right to education in the state of Wisconsin.

An example will help to illustrate the breadth of the law and, in turn, the constitutional violation.⁶⁸ In 2006, a student was expelled for refusing to cover up a tattoo that was offensive and violent in nature.⁶⁹ Under the law as it is written, a school district is free to expel this student permanently without educational services. In regard to the school district's interest in maintaining a safe environment, a tattoo by itself is not violent. Therefore, the law is overbroad in that it permits expulsion for offenses that do not meet the government's safety interest. Even granting for the sake of argument that the compelling state interest portion of the strict scrutiny analysis is met for such an offense, permanent expulsion without services for failure to cover up a tattoo fails to meet the narrow tailoring portion of the analysis. There are other less restrictive means for the state to achieve its intended goal of providing a safe environment that allows students to learn. Alternative educational programming and conditional reinstatement provide some potential options. Although appeal to the state superintendent is available to students facing expulsion, substantive questions regarding the severity of the disciplinary

⁶⁶ *Voight*, 614 N.W. 2d at 413; *see also* *State v. Annala*, 168 Wis. 2d 453, 468 (1992).

⁶⁷ *Monroe Cnty. Dep't of Human Servs. v. Kelli B.*, 678 N.W. 2d 831, ¶ 17 (Wis. 2004).

⁶⁸ *See also* Gilbert J. Berthelsen, *Wisconsin Expulsion Digest*, Wisconsin Association of School Boards, *available at* https://www.wasbmemberservices.org/websites/wsaa/File/wi_expulsion_digest_2010.pdf (last visited Aug. 28, 2013).

⁶⁹ H.H. by the West Allis School District, (571) April 21, 2006. *See* Gilbert J. Berthelsen, *Wisconsin Expulsion Digest*, Wisconsin Association of School Boards, *available at* https://www.wasbmemberservices.org/websites/wsaa/File/wi_expulsion_digest_2010.pdf (last visited Aug. 28, 2013).

measures is not within the state superintendent's authority.⁷⁰ Therefore, if procedural requirements are met and the actions fall within the easily achievable statutory requirements, appeal to the state superintendent is futile.

B. *Education in the State of Wisconsin*

A broad examination of the status of the law as it relates to the provision of educational services further emphasizes the inadequacies inherent in Wisconsin's expulsion laws. Taking the state's Juvenile Justice Code and federal special education law into consideration, only a narrowly defined group of students are excluded from educational services in the state of Wisconsin. In tandem with Wisconsin educational statute §120.12(18), Wisconsin Statute §938.34 ensures educational programming for children who have been adjudicated delinquent.⁷¹ This decision to provide children who have committed serious offenses with an education reinforces the state's prioritization of education. Furthermore, federal special education law guarantees that students with disabilities receive educational services upon expulsion.⁷² Consequently, both the Juvenile Justice Code and federal special education law stress the importance of providing educational services with limited interruptions, an outcome that stands in stark contrast to students who fall outside these categories. This categorization ultimately excludes them from state-provided educational services for an indefinite period of time.

Taken as a whole, the state of Wisconsin abandons a

⁷⁰ Roy H. by the Blair School Dist., (159) Sept. 26, 1988 (p.11); Douglas S. by the Neenah School Dist., (162) May 23, 1989; Kristin J.P. by the Mukwonago Area School Dist., (185) Feb. 21, 1992 (p. 12). See Gilbert J. Berthelsen, *Wisconsin Expulsion Digest*, Wisconsin Association of School Boards, https://www.wasbmemberservices.org/websites/wsaa/File/wi_expulsion_digest_2010.pdf (last visited Aug. 28, 2013). See also Wisconsin Department of Public Instruction, *Answers to Frequently Asked School Discipline Questions*, p.9, <http://dpi.wi.gov/sspw/pdf/schldscplnqa.pdf>.

⁷¹ WIS. STAT. §938.34. Furthermore, juveniles who are tried and sentenced as adults also have educational services available to them in adult prisons. See Wisconsin Department of Corrections, *Opportunities and Options Resource Guide*, Jan. 7, 2011, www.wi-doc.com/index_adult.htm.

⁷² 20 U.S.C. § 1412 (1)(A). See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446 (stating that students with disabilities are entitled to a free appropriate public education even while under an expulsion order).

narrowly defined group of students without educational services—students without disabilities who commit offenses that are not quite serious enough to warrant involvement with the juvenile justice system but sufficient to meet the ambiguous standard for expulsion under the state’s expulsion laws. A system that permits arbitrary exclusion from educational services, made possible through Wisconsin’s broadly written expulsion laws, undermines the state’s longstanding commitment to education that gave rise to education being deemed a fundamental right. It is difficult to imagine how such an outcome meets even the less demanding standard of rational basis review, which merely requires the court to determine whether the law “rationally furthers a purpose identified by the legislature.”⁷³

C. *Relevant Expulsion Case Law in Wisconsin*

Wisconsin state courts have not addressed the constitutionality of the state’s expulsion laws. However, in an unpublished opinion, the United States District Court for the Eastern District of Wisconsin held that “[d]enying a child an opportunity for an education is the most onerous penalty society can impose. Unlike incarceration which ends, permanent expulsion shackles the student with the chains of ignorance.”⁷⁴ That case involved a student, R.T., who injured another student with a knife, requiring 300 stitches.⁷⁵ Initially R.T. was suspended.⁷⁶ The juvenile court found that she was delinquent and ordered that she be sent to a juvenile detention facility.⁷⁷ She was later transferred to a residential home.⁷⁸ While R.T. was in the residential home, the school district held an expulsion hearing in which the hearing officer determined that expulsion was the appropriate punishment.⁷⁹ The court opinion noted that the hearing officer did not make a finding as to whether R.T. was a threat to other students or employees.⁸⁰

⁷³ *Voight*, 614 N.W. 2d at 413 (citing *State v. Annala*, 168 Wis. 2d 453, 468).

⁷⁴ *Tate v. Racine Unified Sch. Dist.*, No. 96-C-0524, 1996 U.S. Dist. LEXIS 22723 (U.S. Dist. Ct. for the E. D. of Wis. Aug. 15, 1996).

⁷⁵ *Id.* at 3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 4.

⁸⁰ *Id.*

This was an important factor in the court's analysis because R.T.'s attorney argued that "she had been rehabilitated."⁸¹ Because the school district ignored mitigating evidence, particularly R.T.'s evidence of rehabilitation, the court determined that R.T. sufficiently established a likelihood that the school district violated R.T.'s procedural due process rights.⁸² Specifically, the court stated, "[t]he State of Wisconsin thinks the right to an education is so important that it has enshrined it in the State Constitution. The District may not ignore this right; and the United States Constitution requires that the District provide due process before denying R.T. that right."⁸³

Furthermore, the court directed the school district to provide R.T. with substantive due process.⁸⁴ Specifically, the court ordered that the school district hold a reinstatement hearing to determine whether or not R.T. continued to present a threat to students and teachers in light of her good behavior during her time in the juvenile justice system.⁸⁵ The court went so far as to argue in favor of finding alternative means to provide educational services in the event that R.T. remained a safety threat.⁸⁶ Specifically, the court ordered that the school district provide homebound instruction "or any other option that provides her an education" under such circumstances.⁸⁷ Permanent deprivation of educational services in this case, the court determined, would be arbitrary and capricious.⁸⁸

The Court of Appeals for the Seventh Circuit reached the opposite conclusion in *Remer v. Burlington*, where the court rejected a substantive due process claim in a superficial examination that took up no more than a half of a page of analysis.⁸⁹ Similar to *Madison Metropolitan School District*, the court in *Remer* failed to address the relationship between the fundamental right to an education and the state's expulsion

⁸¹ *Id.* at 5.

⁸² *Id.* at 10.

⁸³ *Id.* at 18.

⁸⁴ *Id.*

⁸⁵ *Id.* at 18–19.

⁸⁶ *Id.* at 19.

⁸⁷ *Id.* at 20.

⁸⁸ *Id.*

⁸⁹ *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007 (7th Cir. 2002).

laws.⁹⁰ Instead, in what appeared to be an insignificant afterthought, the court summarily upheld the expulsion of a student who was permanently expelled in an effort to maintain a safe learning environment.⁹¹ As such, no court has directly addressed the constitutionality of the state's expulsion laws or examined whether expulsion without services is permissible when the offense relates to a benign refusal to follow the rules rather than a drug or weapons offense.

Recognizing the draconian nature of Wisconsin's expulsion laws, Disability Rights Wisconsin filed a lawsuit against Oregon School District in February 2012 challenging the constitutionality of the statutory provision that allows school districts to reject enrollment of a student who has been lawfully expelled by another school district.⁹² While this case is still early in the litigation process, it has the potential to work its way to the Wisconsin Supreme Court, where the court will be faced head on with a question that it was able to avoid in *Madison Metropolitan School District* in 2011.

IV. RELEVANT CASE LAW FROM OTHER JURISDICTIONS

Although Wisconsin case law on this topic is limited, analogous case law from other states demonstrate the need for change in Wisconsin. In particular, relevant case law from additional states illustrates the significance of the state's education clause in the resolution of a student's right to post-expulsion services. Specifically, these cases reinforce the importance of the characterization of the right to an education in the contest over students' entitlement to educational services upon expulsion. This section will discuss cases from five other states to further expose the inadequacies of Wisconsin's expulsion laws and to provide insight into ways in

⁹⁰ *Id.*

⁹¹ *Id.* at 1014.

⁹² Patricia L et al vs. Oregon Sch. Dist., 2012CV000452 (Dane Cnty Cir. Ct. Dec. 17, 2012), *available at* <http://wcca.wicourts.gov/courtRecordEvents.xsl?jsessionid=0ECBD95A061E91D50E534C24839ABBEF.render6?caseNo=2012CV000452&countyNo=13&cacheId=80E76408839904630741E1042C3B15A9&recordCount=27&offset=3&linkOnlyToForm=false&sortDirection=DESC>. The case was dismissed and the plaintiffs have appealed the lower court's decision, 2013AP000293 (Dane Cnty App. Ct.), *available at* <http://wscca.wicourts.gov/caseDetails.do?caseNo=2013AP000293&cacheId=CB562B5A1885CE5AFF044EBC498828CC&recordCount=1&offset=0>.

which Wisconsin can repair its legal defects. As the following analysis will show, the outcome of relevant case law depends upon the legal standard that the court applies, the duration of the expulsion in question, and what constitutes an expellable offense under the law.

A. *The Right To An Education Extends To Alternative Education Or Post-Expulsion Services*

The case that most closely resembles *Madison Metropolitan School District* is *State ex rel. G.S.*, a case out of New Jersey.⁹³ Although a lower court opinion, its analysis is particularly instructive. The facts involved a student who participated in a false bomb threat that led to his expulsion from his school district.⁹⁴ Through juvenile proceedings, the court ordered probation conditions that included regular school attendance and a high school diploma.⁹⁵ The expulsion order itself was not under review.⁹⁶ Instead, the court was interested in whether a student who has been legally expelled from his school is nonetheless entitled to public education of some sort.⁹⁷ Unlike *Madison Metropolitan School District*, the court in *G.S.* relied on the state constitutional right to education to inform its legal analysis.⁹⁸ Reaching the opposite result of the Wisconsin Supreme Court, the New Jersey court determined that “expulsion of an adjudicated juvenile by his local school board does not sound the death knell for his constitutional right to receive alternative education in another setting.”⁹⁹ The court considered the fact that students who commit the most serious offenses are provided an education in juvenile detention centers.¹⁰⁰ The legislature had even passed a law that required the provision of alternative education for “juveniles who had been adjudicated delinquent and placed on probation for [incidents involving] possession or use of a firearm,” an action which the court attributed to a recognition of the state’s

⁹³ *State ex rel. G.S.*, 330 N.J. Super. 383 (Ch. Div. 2000).

⁹⁴ *Id.* at 386–87.

⁹⁵ *Id.* at 386–87.

⁹⁶ *Id.* at 388.

⁹⁷ *Id.* at 388–89.

⁹⁸ *Id.* at 392.

⁹⁹ *Id.* at 394.

¹⁰⁰ *Id.* at 393.

obligation to provide an education.¹⁰¹

Similarly, juveniles in Wisconsin who commit serious offenses receive an education in an alternative setting under the Juvenile Justice Code.¹⁰² Consequently, the status of the law in Wisconsin permits students who commit the most serious and dangerous offenses to receive an education while students who commit less serious offenses face the possibility of exclusion from educational services entirely. This discrepancy arguably fails to meet even a rational basis.

B. Provide Post-Expulsion Services For All But The Most Serious Offenses

By comparison, in *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, the West Virginia Supreme Court carved out a narrow exception to the constitutionally granted right to education.¹⁰³ The case analyzed the Productive and Safe Schools Act of 1995, which required removal from school for up to 12 months for students who brought weapons to school.¹⁰⁴ The court determined that mandatory expulsion was facially constitutional in light of safety concerns and to create a sufficient deterrent.¹⁰⁵ The court found

in all but the most extreme cases the State will be able to provide reasonable state-funded educational opportunities and services to children who have been removed from the classroom by the provisions of the Safe Schools Act in a safe and reasonable fashion. Under such circumstances, providing educational opportunities and services to such children is constitutionally mandated.¹⁰⁶

This decision to create a narrow exception marked a change in the court's prior stance, which, until *Cathe A.*, implied that students were entitled to services in *all* cases.¹⁰⁷

To reach its decision, the court applied a strict scrutiny standard.¹⁰⁸ The court warned against a "constitutionally infirm" conclusion that the state is under no obligation to

¹⁰¹ *Id.*

¹⁰² WIS. STAT. § 938.34(7d) (2012).

¹⁰³ *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 490 S.E.2d 340 (1997).

¹⁰⁴ *Id.* at 344.

¹⁰⁵ *Id.* at 348.

¹⁰⁶ *Id.* at 351.

¹⁰⁷ *Phillip Leon M. v. Greenbrier Co. Bd. of Educ.*, 484 S.E.2d 909 (1996).

¹⁰⁸ *Doddridge*, S.E.2d at 346-47.

provide any education to all students facing expulsion under the Productive and Safe Schools Act.¹⁰⁹ On the contrary, the state remained convinced that there were likely factual circumstances that may require the provision of educational services even under the Productive and Safe Schools Act.¹¹⁰

Wisconsin's expulsion statutes would not pass constitutional muster under the standard applied in *Cathe A*. If the court in *Cathe A* failed to find that the temporary interruption of services for all students who bring a weapon to school fulfills the standard of strict scrutiny, it is difficult to see how permanent expulsion for even minor offenses can be legally justified in Wisconsin, where, similar to West Virginia, strict scrutiny is the appropriate legal standard.¹¹¹

C. Place Limitations On The Duration Of Expulsions

Some states have determined that the right to education does not extend to students facing expulsion. Nonetheless, these cases are beneficial to a thorough analysis of Wisconsin's expulsion laws because they illustrate the severity of Wisconsin's laws as compared to other states. Consequently, the factual distinctions reinforce the need for Wisconsin to change its laws both from a legal and policy perspective.

For example, in a recent case involving a student who was given a semester long suspension for fighting, the North Carolina Supreme Court held that even though students have a statutory right to alternative education, this right is not guaranteed under the state constitution.¹¹² Finding that strict scrutiny unnecessarily infringes on the decision-making authority of administrators and rational basis review fails to adequately protect students from arbitrary decisions, the court applied intermediate scrutiny.¹¹³ Accordingly, in order to satisfy the legal standard for a denial of services in North Carolina, administrators "must articulate an important or significant reason for denying students access to alternative education."¹¹⁴ The court reasoned that this standard allows

¹⁰⁹ *Id.* at 350.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *King v. Beaufort Cnty. Bd. of Educ.*, 704 S.E.2d 259 (2010).

¹¹³ *Id.* at 263–65.

¹¹⁴ *Id.* at 265.

school districts to strike a balance between school safety and the right to educational services.¹¹⁵

Similarly, the Wyoming Supreme Court found that students were not entitled to educational services for the duration of their yearlong expulsion.¹¹⁶ However, the short-term nature of the expulsion was an important factor in the court's analysis. In fact, Wyoming statutes permitted a maximum expulsion of one year;¹¹⁷ therefore, students were not denied *all* educational opportunity. According to the court, “[t]he fundamental right to an opportunity for an education does not guarantee that a student could not temporarily forfeit educational services through his own conduct.”¹¹⁸

Both of the cases described above involve fact situations that address expulsion for a year or less. This factual distinction is significant for the purpose of legal analysis. In Wisconsin, the constitutional deprivation of educational services is severe. There is no statutory limitation on the length of expulsions.¹¹⁹ There is no requirement for conditional reinstatement.¹²⁰ School district discretion is virtually unfettered.¹²¹ School districts are permitted to expel students for repeated violations of any school rule if “the interest of the school demands pupil’s expulsion”—a standard that is not defined in the law.¹²²

V. POLICY ALTERNATIVES IN WISCONSIN

None of the cases from other jurisdictions mentioned above analyzed the constitutionality of *permanent* expulsion, as is permissible in Wisconsin. The severity of Wisconsin’s expulsion statutes, combined with the nature of the right to education in the state of Wisconsin, requires the state to modify its statutes. Thus, in order to be consistent with its fundamental right to education, the state of Wisconsin has at least three types of revisions at its disposal:

¹¹⁵ *Id.*

¹¹⁶ RM v. Washakie Cnty. Sch. Dist. No. One, 102 P.3d 868 (Wyo. 2004).

¹¹⁷ *Id.* at 871.

¹¹⁸ *Id.* at 874.

¹¹⁹ WIS. STAT. §120.13.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² WIS. STAT. §120.13(1)(c).

(1) First, the Wisconsin State Legislature could limit the scope of the law and what is deemed to be an expellable offense. Through the use of more specific language, the legislature will reserve expulsion only for cases that meet the standard of strict scrutiny, thereby eradicating the constitutional vulnerability of the overly broad language that the current version of the law utilizes.

(2) Second, the Wisconsin State Legislature could place limitations on expulsion orders. These modifications would minimize the educational deprivation, thereby making the argument for a constitutional violation much less compelling.

(3) Third, the Wisconsin State Legislature could require that school districts provide educational services upon expulsion. The arguments set forth in this article are centered on the idea that students in Wisconsin are being denied their fundamental right to an education. By providing services for all students, the state legislature will address the problem at its core.

Each one of the suggestions described above has benefits and limitations. The following section will discuss each alternative in greater detail. It is important to note, however, that the best solution may be a combination of the options described below.

A. *The Use of More Specific Language*

Wisconsin statutes permit permanent expulsion for breaking *any* school rules,¹²³ a result that cannot be justified from either a legal or policy perspective. As a threshold concern, and in addition to legal concerns regarding permanent expulsion addressed earlier in this paper, expelling students to the street can have serious societal costs.¹²⁴ As such, circumscribing behaviors that warrant expulsion is a critical part of developing expulsion statutes that are prepared to defend against legal and policy challenges. In general, loosely

¹²³ WIS. STAT. §120.13(1)(c).

¹²⁴ Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039 (2001); HARVARD UNIV., ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 1 (2000), available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/>.

delineated authority has the potential to lead to extreme inconsistencies in implementation, oftentimes in ways that lead to disciplinary responses that are disproportionate to the offenses committed.¹²⁵ Furthermore, a significant amount of research demonstrates that many students are facing expulsion for non-safety related reasons.¹²⁶ A recent study conducted in Texas, a state that requires the provision of alternative education to expelled students, found that out of a sample including 928,940 students, 92.5% of disciplinary actions were a result of discretionary decisions based on code of conduct violations.¹²⁷

Moreover, the flexibility that is written into Wisconsin's law as it stands today has the potential to lead to extreme disparities in discipline patterns depending on a student's race, sex, socioeconomic status, or disability category. The Texas study referenced above found that students of color were proportionately disciplined, as compared to their Caucasian classmates, for offenses that required mandatory removal (e.g., drug or weapons offenses), while students of color were disproportionately disciplined for offenses that allowed for discretionary responses.¹²⁸ Undeniably, disparities in discipline are not limited to Texas; in Wisconsin, students with disabilities are disciplined more often than students without disabilities,¹²⁹ students of color are expelled more often than their Caucasian classmates,¹³⁰ and male students are expelled

¹²⁵ Russell J. Skiba & M. Karega, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, in HANDBOOK FOR CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES 1063-89 (Carolyn M. Evertson & Carol S. Weinstein eds., 2006).

¹²⁶ *Id.* at 1068-69.

¹²⁷ TONY FABELO, MICHAEL D. THOMPSON, MARTHA PLOTKIN, DOTTIE CARMICHAEL, MINER P. MARCHBANKS III & ERIC A. BOOTH, *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 36-37 (2011). Only 5% were related to infractions that were defined in state statutes, although considerable discretion still rested in the hands of school district administrators. Less than 3% were related to offenses that warranted mandatory expulsion under state law.

¹²⁸ *Id.* at 43.

¹²⁹ Specifically, in 2010-2011, .22% of students with disabilities were expelled. That was double the percentage of students without disabilities who were expelled. Wisconsin's Information Network for Successful Schools (WINSS), *What percentage of students were suspended or expelled?*, <http://data.dpi.state.wi.us/Data/Expulsions.aspx?OrgLevel=st&GraphFile=E'PULSION S&S4orALL=1&SRegion=1&SCounty=47&SAthleticConf=45&SCESA=05&Qquad=attendance.aspx&Show=COMM&RevExp=4&Group=Disability> (last visited Aug. 27, 2013).

¹³⁰ In particular, in 2010-2011 the demographic breakdown for expulsions were

more often than female students.¹³¹ These disparities can have serious consequences and undoubtedly interfere with students' equal opportunities for a sound basic education "that will allow them to succeed economically and personally,"¹³² as required by law.

Consequently, expulsion in the State of Wisconsin could be reserved to objectively serious offenses. To demonstrate the potential for constitutionally infirm outcomes, it is helpful to return to the example from an earlier section in this article in which a student was expelled from a school district because he refused to cover up tattoos that the school board found to be offensive.¹³³ Whether the student in this case received permanent expulsion for this offense is inconsequential. Instead, the example demonstrates that school districts are free to expel students for offenses that fail to meet the constitutional standard. A denial of educational services for such an offense could not possibly meet the standard of strict scrutiny. Furthermore, the state has found that two acts of defiance are sufficient to meet the "repeated refusal or neglect to obey the rules" under Wisconsin's expulsion statutes.¹³⁴ These examples illustrate the types of expellable offenses that have the potential to permanently alienate students from the public school system.

as follows: American Indian or Alaska Native: 0.16%, Asian .05%, Black or African American .60%, Hispanic/Latino .15%, Native Hawaiian or Other Pacific Islander .17%, White .07, Two or More Races .10%. Wisconsin's Information Network for Successful Schools (WINSS), *What percentage of students were suspended or expelled?*, <http://data.dpi.state.wi.us/Data/Expulsions.aspx?OrgLevel=st&GraphFile=E'PULSION S&S4orALL=1&SRegion=1&SCounty=47&SAthleticConf=45&SCESA=05&Qquad=attendance.aspx&Show=COMM&RevExp=4&Group=Disability> (last visited Aug. 27, 2013).

¹³¹ In 2010–2011, .19% of male students were expelled, while .07% of female students were expelled. Wisconsin's Information Network for Successful Schools (WINSS), *What percentage of students were suspended or expelled?*, <http://data.dpi.state.wi.us/Data/Expulsions.aspx?OrgLevel=st&GraphFile=E'PULSION S&S4orALL=1&SRegion=1&SCounty=47&SAthleticConf=45&SCESA=05&Qquad=attendance.aspx&Show=COMM&RevExp=4&Group=Disability> (last visited Aug. 27, 2013). Further exacerbating the problem is the fact that the history of superintendent expulsion decisions perpetuates these disparities by discouraging local decision makers from considering the consistency in application. *See, e.g.*, Nicole R. by Arcadia School Dist., (580) Nov, 20, 2002; Benjamin Z., by the Marinette School Dist., (507) March 1, 2004. Specifically, the decisions support school districts' decisions to ignore treatment of other students since expulsion decisions should be conducted on a case-by-case basis.

¹³² Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2011).

¹³³ H.H. by the West Allis School District, (571) April 21, 2006.

¹³⁴ Russell T. by the School District of Tigerton, (99) June 17, 1982.

In response, the state legislature has the option to reserve expulsion for *serious* threats to school safety and *serious* disruptions to the school day. In Connecticut, for example, all students are entitled by law to an in-school suspension, as opposed to an out-of-school suspension for violations of the school code, except in those circumstances where the student continues to be a threat to him or herself or others.¹³⁵ Wisconsin could apply a similar approach to all disciplinary actions. Although district-level discretion should be preserved when appropriate, discretionary decision-making that implicates constitutional guarantees should not be viewed lightly. Taking into account the fact that education is a fundamental right in the state of Wisconsin, expulsion for a violation of *any* school rule is a constitutionally impermissible use of district-level discretion.

It is important to note the potential downfalls of this approach to statutory modification; for example, using language that is too precise may interfere with school districts' ability to meet their immediate safety concerns. Flexibility allows school districts to address the wide range of concerns that it faces every day. This paper began by stating that the goal was not to challenge school districts' authority to expel students. However, the goal of more explicit language would not be to infringe upon district authority but to restore the constitutional guarantees that the state promised when it deemed education to be a fundamental right.

B. Limitations on Expulsion Orders

A second alternative is for the state legislature to place restrictions on expulsion orders. In a few of the cases described above, courts analyzed statutes that placed limitations on the duration of expulsions. Similarly, one available option for Wisconsin would be to place parameters on expulsions by delineating the duration of expulsions. In 2005–2006, 1810 students were expelled in Wisconsin. Of those 1810 students, 1184 were expelled for less than a year, 462 were expelled for more than a year and 164 were permanently expelled.¹³⁶ If the

¹³⁵ An Act Concerning In-School Suspensions, 2007 Conn. Acts 07-66, 126 (May 30, 2007). Although the law relates to suspensions, the decision to exclude students from school only under circumstances that present a safety threat is can be applied to expulsions as well.

¹³⁶ Wisconsin's Information Network for Successful Schools (WINSS), *What*

legislature were to adopt an approach that limits expulsion to one year, for example, students would be free to return to school following their expulsion. A temporary interruption in services would make it possible for students to receive their constitutionally guaranteed right to an “equal opportunity to a sound basic education.”¹³⁷

Alternatively, the legislature has the option to require reinstatement. This option could take a variety of different forms. One approach would be to remove the statutory provision that permits school districts to deny enrollment to students who are under an expulsion order in any other school district in the state.¹³⁸ However, safety concerns would still need to be accounted for under this approach. Therefore, it may be advisable to combine this option with some of the options described below.

A second approach would be to require school districts to reinstate students, without placing time constraints on when that reinstatement must take place. Considerable discretion would be left to districts to assess their needs under this option. On the other hand, too much discretion in regard to the duration of an expulsion order increases the possibility for constitutional violations. Requiring conditional reinstatement plans may also be a consideration under this approach or as a separate third approach.¹³⁹ With regard to time constraints, the legislature could adopt a fourth approach which would require school districts to revisit students’ cases periodically to ensure that the concerns present at the time of expulsion continue to be relevant. Upon reviewing evidence, the state could require school districts to readmit students.¹⁴⁰ This approach would

happens after students are expelled?
<http://data.dpi.state.wi.us/Data/ExpLength.aspx?OrgLevel=st&GraphFile=GETSERVICES&S4orALL=1&SRegion=1&SCounty=47&SAthleticConf=45&SCESA=05&Qquad=attendance.aspx&Show=COMM&RevExp=4&Group=AllStudentsFAY&CompareTo=CURRENTONLY>

¹³⁷ *Voight*, 614 N.W.2d at 396–97.

¹³⁸ WIS. STAT. § 120.13(1)(f) (2013).

¹³⁹ Although Wisconsin statutes currently permit conditional reinstatement and early reinstatement under WIS. STAT. § 120.13(1)(h) (2013), such actions are not required.

¹⁴⁰ The state legislature might consider adopting a special provision for students who are transitioning from the juvenile justice system. Under such circumstances, a state agency has deemed the student sufficiently rehabilitated, a determination that should be accorded substantial weight in deciding whether a student continues to

likely work best when accompanied by greater guidance as to what the statute means when it states that the “interest of the school demands the pupil’s expulsion.”¹⁴¹

One strength of these options is that they limit the interruption in educational services, which minimizes concerns over constitutional violations. On the other hand, the removal of school district discretion that occurs when limiting the duration of expulsions may prove to be dangerous if a student is still not ready to return to a traditional learning environment. This is particularly the case under circumstances where the legislature mandates a particular maximum for expulsion. However, reinstatement plans reestablish local discretion by allowing school districts to address needs and concerns specific to a given situation.

C. Provision of Educational Services Post-Expulsion

The third alternative relates to the provision of educational services upon expulsion. Similar to requirements imposed upon the state in regard to students with disabilities, the Wisconsin legislature could require school districts to provide educational services to all students, even those individuals facing expulsion. Under this alternative, the state has at least two options: (1) to provide alternative educational programming in school district facilities, or (2) to provide educational services through other means.

In 2010–2011, 74.3% of students without disabilities who were expelled were not offered post-expulsion services for the duration of their expulsion.¹⁴² The percentage has seen a steady incline since 2005–2006, when the percentage of students without disabilities who were not offered post-expulsion services was 43.2%.¹⁴³ These statistics are in sharp contrast to DPI policy, which encourages school districts to provide alternative education to students facing discipline. The state has the choice to reserve exceptions for students whose presence poses a threat to safety under either one of these options. However, in light of the fact that federal special

present a threat to school safety.

¹⁴¹ WIS. STAT § 120.13(1)(c)(1) (2013).

¹⁴² Wisconsin’s Information Network for Successful Schools (WINSS), *What happens after students are expelled?*, <http://wisedash.dpi.wi.gov/Dashboard/portalHome.jsp>.

¹⁴³ *Id.*

education law requires the provision of post-expulsion services for students with disabilities, the argument that a general education student's behavior is so severe that safety concerns *necessitate* a complete termination of services seems much less compelling.

One potential downfall of this approach, depending on how it is structured, is that the availability of alternative education may encourage the use of disciplinary exclusion from the traditional academic setting. This concern is particularly important because it has the potential to lead to segregated learning environments for students with disabilities, students of color, and male students. As such, emphasis should be placed on expulsion as a last resort and patterns should be monitored. Nonetheless, providing educational services to all students is the most reliable way to avoid a constitutional violation.

VI. ACTING IN THE ABSENCE OF STATUTORY CHANGE

Although the focus of this article is state-level action, concerned school leaders need not wait for the state legislature to act. No legal barrier prohibits school districts from providing greater protection than is provided under the current statutory scheme. Each of the alternatives and their corresponding options could be implemented at the district level. In fact, some school districts have already exercised this authority in creating alternative education programs and alternative schools.¹⁴⁴

VII. CONCLUSION

Education was deemed a fundamental right in the state of Wisconsin due to its paramount importance. Unfortunately, the state's expulsion laws do not reflect such an esteemed status and face a serious risk of being found unconstitutional. This article began with three questions that remain unanswered in the wake of *Madison Metropolitan School District*.

The first question asked if Wisconsin statutes are

¹⁴⁴ WIS. DEP'T OF PUB. INSTRUCTION, ALTERNATIVES TO EXPULSION: CASE STUDIES OF WISCONSIN SCHOOL DISTRICTS (2009), available at <http://sspw.dpi.wi.gov/files/sspw/pdf/expulsionalts.pdf>.

constitutional under the state constitution. This article has demonstrated that Wisconsin statutes are unconstitutional in that they allow for expulsion without services under circumstances that fail to meet the rigorous legal standard. In fact, contextual evidence demonstrates that the laws fail to meet even a rational basis standard.

The second question asked when, if at all, students are entitled to post-expulsion services or alternative education in the state of Wisconsin. At the very least, students facing expulsion are entitled to an education in cases when the student does not present a serious safety threat or a serious interference with a school district's ability to educate students. Arguably, educational services can even be provided under these circumstances, although potentially through alternative means.

The third question asked the ways that the state legislature can modify the state's expulsion laws so that they are consistent with the state constitution. As this article has argued, the Wisconsin state legislature can revise the statutes through the use of more specific language, by placing limitations on expulsion orders, and by providing a means for students to receive an education upon expulsion (see Appendix A). In the absence of such legislative action, the State of Wisconsin will continue to undermine *Voight's* constitutionally guaranteed commitment to "a sound basic education . . . that will equip students for their roles as citizens and enable them to succeed economically and personally."¹⁴⁵

¹⁴⁵ Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2011).

APPENDIX A

	Alternative 1	Alternative 2	Alternative 3
	Scope of the Law	Limitations on Expulsion Order	Educational Services Upon Expulsion
Option 1	Use more specific language that: –Narrows the definition of expellable offenses –Defines “interest of the school demands the pupil’s expulsion”	Limit duration of expulsions	Require post-expulsion services: –For all students –For all students except those whose presence threatens safety
Option 2	Remove provision that allows school districts to expel student for any school rule and replace it with stronger language	Require reinstatement –Remove provision that permits school districts to deny enrollment for students under expulsion order –Require conditional reinstatement	Require alternative education: –For all students –For all students except those whose presence threatens safety

*The appropriate solution may be a combination of these alternatives or options