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## I. Introduction.

- A. Since the early 1990's, school discipline has been dominated by "zero tolerance" policies. Zero tolerance was initially implemented to reduce drug and alcohol use, but, since then, it has been implemented to maintain a safe and more positive learning environment. A zero tolerance policy applies a predetermined consequence, usually severe, without regard for the unique circumstances of a particular incident.
- B. The expected outcome of a zero tolerance policy is that students will be deterred from misbehaving while creating a more positive environment.
- C. Research has shown, however, that "schools with higher rates of school suspensions and expulsions appear to have less satisfactory ratings of school climate, less satisfactory school governance structures, and to spend a disproportionate amount of time on disciplinary matters." Russell Skiba et al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, A Report by the American Psychological Association Zero Tolerance Task Force, August 2006.
- D. The Wisconsin Department of Public Instruction identified a 350% increase in the number of expelled students between 1992-93 and 2007-08 (from approximately 400 students statewide to 1,400 students). 2009 DPI Memo on Expulsion and Suspension.
- E. Further, policies such as zero tolerance, which encourage or, in many cases, require expulsion, tend to result in other more serious consequences.
  - 1. Less gifted students, who are often the subjects of expulsion, fall further behind in school and are more difficult to educate upon returning to school.
  - 2. Studies have shown that African Americans may be punished more severely for fewer serious infractions; also, students with disabilities, especially with emotional and behavioral disorders, are punished disproportionately to their representation in the population. *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, A Report by the American Psychological Association Zero Tolerance Task Force, August, 2006.
  - 3. Expelled students often plague a community with crime and troublesome activities. Expelled students are also more likely to create an increased cost to society and an enhanced risk of criminal behavior. James A. Rapp, *Education Law* § 9.10(5)(c)(ii)(2008).

## II. Relevant Constitutional and State Law.

**A. Wisconsin's Constitution.** Under Wisconsin's Constitution students have a right to a public education. Further, they have a right to an education in the school district in which they reside. Wis. Const. art. X, § 3; Wis. Stat. § 121.77(1); *State ex rel. School District v. Thayer*, 74 Wis. 48 (1889).

**B. Student's Due Process Rights.** A student has a right to defend him/herself against charges of misconduct and require the administration to prove the charges against him/her prior to an order terminating his or her constitutional right to an education. Therefore, a voluntary agreement with conditions in lieu of expulsion or an agreement to withdraw from the school district result in the student giving up the right to defend him/herself and to prove his/her innocence.

1. The adult student or the parent/guardian of a minor student should provide "informed consent" when waiving the student's due process rights. This important right should be clearly identified, therefore, in the text of any voluntary agreement to withdraw or agreement in lieu of expulsion that is executed by the school district and adult student or parent/guardian of a minor student.

a. First, a statement, as follows, should be included in the agreement: "Whereas the Administration has conducted an investigation of the student's conduct and concluded that the student has engaged in misconduct that supports the student's expulsion from the school district pursuant to §120.13(1)(c)."

It is important that the school administration has conducted and completed an investigation that results in findings to support the conclusion the student engaged in the alleged misconduct and that the student violated one of the statutory grounds for expulsion sufficient to support a recommendation for expulsion at a hearing.

b. Second, there should be a paragraph stating that the student/parent acknowledges that he/she has a right to proceed with an expulsion hearing to challenge the findings, however, the student knowingly and voluntarily waives the right to an expulsion hearing. This should be in any agreement setting forth conditions on the student that permits him or her to remain in school or withdraw from school instead of facing an expulsion hearing.

**C. Unreasonable Searches and Seizures.** School administration may want to set forth conditions for a student's continued enrollment in lieu of expulsion that require the student to submit to random drug testing or searches of personal belongings without a reasonable suspicion by the administration that the student is in possession of items related to the search (and prohibited misconduct), such as drugs or weapons. There are Fourth Amendment rights related to unreasonable searches and seizures that may be implicated with such a requirement. U.S. Const. amend. IV. Consideration of the following is warranted:

1. Generally, a school official must have a reasonable suspicion that a student has engaged in a violation of school policy or the law, and that evidence of prohibited conduct is moderately likely to be discovered by a search, prior to searching a student at school. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. \_\_\_, 129 S.Ct. 2633 (2009) (school officials' search of student's backpack and outer clothing was reasonable under the facts of the case, but "strip search" of student's underwear violated the Fourth Amendment as unreasonable under the circumstances).
2. The U.S. Supreme Court has held that school officials may conduct random drug testing of students participating in extracurricular activities. *Veronia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). It has explained that school officials enjoy greater latitude regarding searches at school because of their obligation to ensure student safety, consistent with the *in loco parentis* doctrine. In *Acton* and *Earls*, the Court permitted random drug testing of students participating in extracurricular activities, in part, because such participation is a privilege, not a right. Students who desire to participate in extracurricular activities, therefore, waive their right to be free from suspicionless searches.
3. In *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7<sup>th</sup> Cir. 2000), The Seventh Circuit Court of Appeals, the federal appellate court that governs cases arising out of Wisconsin, upheld the constitutionality of random drug and alcohol testing of students obtaining driving permits to park on school property. Therefore, because parking on school property is a privilege, not a right, the students may waive their constitutional rights to be free from suspicionless searches.

4. Similarly, when the school administration agrees not to proceed with an expulsion hearing of a student that can terminate his or her right to an education, the student may voluntarily waive his or her right to be free from suspicionless searches while continuing to attend school in lieu of an expulsion.
5. The Board has the authority to place conditions on the student only during the period of expulsion; however, once the period of expulsion has expired, the Board may not place conditions upon the student for readmission. Therefore, voluntary agreements should be time-limited, as stated clearly in the agreement, including an agreement that the student will agree to and cooperate with suspicionless searches, such as random drug testing.

**D. Compulsory School Attendance.** Unless absent from school for an acceptable reason, or the student has graduated, any person having control over a child ages six to eighteen is obligated to cause the child to attend school regularly. Wis. Stat. § 118.15(1). Students must be enrolled in an educational program during a period of expulsion.

**E. Expulsion from School District.** No school board is required to enroll a student during the term of his or her expulsion from another school district. Wis. Stat. §120.13(1)(f).

### **III. Voluntary Withdrawal From School.**

**A. Student Withdrawal from School.** A student may voluntarily withdraw from a school.

1. Voluntary Withdrawal Agreements are disfavored by the “receiving” school district if a student who engaged in expellable conduct moves into another school district and is not bound by an expulsion order that would allow the receiving school district to prohibit his or her enrollment in the new school district.
2. A student, and his/her parent(s) if the student is a minor, may be interested in entering into a Voluntary Student Withdrawal Agreement prior to and without a decision on his or her expulsion. If the District desires to allow such an agreement, it must ensure that the student and his or her parent(s) provide informed consent to withdraw.
3. A school district may proceed to expel a student who voluntarily withdraws from school at his or her own initiative and without an agreement with the school district holding the expulsion hearing in abeyance.

**B. Enrollment in Another Education Program.** Even when a student is expelled from a school district, the student is still obligated to be enrolled in an educational program. Therefore, any agreement that the student may withdraw from a school district should require that the student show he or she is enrolled in another public school, private school, or has registered for home schooling with the Department of Public Instruction.

1. The school district continues to have an obligation to enforce the State's truancy law when a child is not attending school. There are some logistical and timing issues when considering whether to conduct an expulsion hearing because of the fifteen school-day suspension limitation under the expulsion law. This may create difficulty for a parent who is attempting to find and enroll the student in another education program. Here is one suggestion that parents consider in fulfilling their obligation to maintain their child's enrollment in school.
  - a. A student becomes truant when he/she is absent without an acceptable excuse for part or all of five or more days in a semester, and the days of suspension ordered by the Administration may not be counted as part of the five days; and
  - b. Parents may approve their child's absence from school for up to ten days in a school year if consistent with board policy and it is in writing in advance of the absence.

These considerations allow the parties to enter into a withdrawal agreement and fulfill the school district's obligation to enforce the truancy laws, while still allowing the parents sufficient time (fifteen days) to re-enroll the student in a different education program. Any withdrawal agreement may include a clause that, if there is no evidence of enrollment in another education program, the agreement will become null and void (which also means that the administration will proceed with an expulsion hearing).

2. Withdrawal agreements should include a provision that the student has submitted his or her notice of withdrawal from the school district in writing.

- C. Re-enrollment.** Without an expulsion order, a student who continues to reside in a school district retains a right to re-enroll after voluntarily withdrawing and to attend the school district where he or she resides. The following should be considered:
1. Include an explanation that the administration retains the discretion to trigger an expulsion hearing and will schedule such a hearing if the student attempts to re-enroll prior to an agreed upon time period.
  2. Optional provision: An expulsion hearing will be conducted if the administration knows and substantiates misconduct after withdrawal from the school (e.g., evidence from local law enforcement that the student was charged for possession of drugs).
  3. Optional provision: An expulsion hearing will be conducted if the school administration determines that the student seeks enrollment in another public school district.
- D. Firearm Possession.** Under federal and state law, when a student is accused of possessing a firearm, as defined by federal law, the Board of Education must conduct an expulsion hearing. The Board must expel the student for not less than a year if it concludes that the student did possess a firearm at school or while under the supervision of a school authority. Wis. Stat. §120.13(1)(c)2m. Therefore, neither a voluntary withdrawal agreement nor an agreement in lieu of expulsion may be used in such a case. Although a hearing must be conducted, state law allows individualized consideration by the Board of Education whether to expel and for how long.
- E. Optional Paragraph for Students with a Disability.** There are special federal and state statutory protections governing the rights of students with disabilities, and those must be considered when negotiating a withdrawal of a student with disabilities. 20 U.S.C. § 1400 *et seq.*
1. Provide the student and parents with a copy of the notice of their procedural safeguards and other rights under special education law to ensure they understand their rights; be mindful of the school district's obligations to provide educational services to special education students in order to avoid allegations that the district violated the student's rights.

2. It would seem that, if a special education student withdraws voluntarily, the district is not obligated to provide them with educational services. They are required to enroll voluntarily in a different education program. However, this has not been tested in the courts and might raise cautionary signs if the student continues to reside in the district and does not enroll in another education program. If there is no withdrawal agreement, and the student resides in the district, under the law, the special education student has a right to educational services during periods of expulsion.

#### **IV. Voluntary Student Agreements in Lieu of Expulsion.**

**A. Voluntary Student Agreement in Lieu of Expulsion** is an agreement that provides an alternative to the imposition of an expulsion if certain conditions are met. The student remains enrolled in the school district. Wis. Stat. § 118.15(1)(d) provides the authority for parents, or the child if the parent is notified, to request the school board to provide the child with program or curricular modifications. Additionally, Wis. Stat. § 118.153 provides for a pupil or the pupil's parent or guardian to request an alternative education program for children at risk between grades 5 to 12. Curriculum modifications, alternative education programs, behavior contracts, and other methods have been used in order for the student to avoid expulsion.

**B. Program or Curricular Modifications.**

Wis. Stat § 118.15(1)(d): Any child's parent or guardian, or the child if the parent or guardian is notified, may request the school board, in writing, to provide the child with program or curriculum modifications, including, but not limited to:

1. Modifications within the child's current academic program.
2. A school work training or work study program.
3. Enrollment in any alternative public school or program located in the school district in which the child resides.
4. Enrollment in any nonsectarian private school or program, located in the school district in which the child resides.
5. Homebound study.
6. Enrollment in any public educational program located outside the school district in which the child resides.

## C. Alternative Education Programs.

1. Alternative education programs are defined as an instructional program, approved by the school board, that utilizes successful alternative or adaptive school structures and teaching techniques, and that is incorporated into existing, traditional classrooms or regularly scheduled curricular programs or that is offered in place of regularly scheduled curricular programs. Wis. Stat. § 115.28(7)(e). These programs typically serve students who are labeled “at risk.”
2. Typically, there are three structures of alternative education programs:
  - a. Different classroom: separate room with separate teacher where additional services are provided (anger management, for example)
  - b. School-within-a-school: in a separate area or separate set of classrooms
  - c. Pullout program: either on-site or off-site so student is removed from the traditional school setting (a community center, for example).
3. One alternative program is a Cooperative Education Skills Standards Certificate Program, which is a “one-year, school-supervised, paid work experience for junior- and senior- level high school students. It is a partnership among business, industry, labor, and the school that provides students, based upon individual career goals, authentic experiences in the world of work combined with related classroom instruction.” <http://dpi.wi.gov/cte/pdf/coopguid.pdf>

The program is usually divided between classroom instruction related to the work being done and workplace learning. Successful completion leads to a certificate endorsed by the Department of Public Instruction, the Department of Workforce Development, the Wisconsin Technical College System, and business, industry, labor and education associations.

4. There is also the Cooperative Education Program, which is similar to the certificate program, except no certificate is given. This program involves three components: (1) classroom instruction; (2) on-the-job experience; and (3) connecting activities.

Students and teachers can follow a learning plan that they develop together. Such a plan would involve identifying the tasks and competencies in the workplace; identifying activities the student can do to demonstrate the competency; and determine the tasks the student is responsible for each grading period.

5. Work-based learning is another option. Since the student will be educated outside the traditional school setting, it is important that the school and the employer work closely in order to determine the policies and procedures. <http://dpi.wi.gov/cte/pdf/coopguid.pdf>
6. Youth Options Program: School districts are required by Wis. Stat. § 118.55(8) to provide information about the program to 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> graders annually. One part of the program allows students, with written consent from a parent or guardian, to apply to and attend a technical college to take one or more courses, if:
  - a. The student has completed 10<sup>th</sup> grade;
  - b. The student is in good academic standing; and
  - c. The student notifies the school board by March 1 if the student intends to enroll in the fall semester, and by October 1 if the student intends to enroll in the spring semester.
7. The School District and the student can also enter into a behavior contract. Instead of being expelled, the behavior contract can be implemented at school. The behavior contract could be developed by a teacher or principal, for example. This is frequently used for first time offenders or for misconduct that would not warrant expulsion.

#### **D. General Considerations.**

1. Conditions imposed on a student in the agreement should not be timeless, that is, imposed until the student graduates, particularly when graduation is years away. Include a clause that indicates what triggers the expiration of the agreement.

2. Include both the parents and the student (unless it is an adult student) in paragraphs that involve decision making, like waiving the right to an expulsion hearing or agreement on conditions. It is important that the student and the parent agree to the terms of the agreement. For example, the agreement could use the language “the Student and his/her parent(s) acknowledge the following.”
3. Implications: Administration needs to understand that if the student does not comply with the conditions of an agreement, it is willing to proceed to an expulsion hearing; that is, the Administration should be willing to take the student to an expulsion hearing, because it has determined that the student has engaged in an expellable offense. However, the administration may exercise some discretion with regarding to triggering a hearing.

**V. Imposed Conditions in Lieu of Expulsion.**

- A. The conditions imposed on a student in lieu of expulsion should relate to the offense, in a manner similar to the requirements for imposing conditions on students for early readmissions during the term of an expulsion order. Wis. Stat. § 120.13(1)(h)2.
- B. School Districts should utilize their mental health experts, such as school psychologists, counselors, and social workers, to research and develop discipline policies and behavior training techniques. *The National Association of School Psychologists, Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, [http://www.nasponline.org/resources/factsheets/zt\\_fs.aspx](http://www.nasponline.org/resources/factsheets/zt_fs.aspx).
- C. Effective alternatives should incorporate family and community involvement. The alternatives should address violence prevention, social skills training and positive behavioral supports, and early intervention strategies.
- D. Typical conditions for common offenses could include:
  1. Alcohol and drug assessment and compliance with treatment recommendations until terminated from treatment by the treating professional;
  2. Refrain from violence and violations of local, state and federal laws;
  3. Psychological evaluation, such as anger management, with fulfillment of any recommended treatment;

4. Community service, restitution and restoration;
5. A behavioral contract identifying specific problematic behavior, student requirements related to his/her behavior, and consequences (such as denial of right to participate in extra curricular activities); and
6. Written authorization for the release of records to the school district in order to substantiate with the treating professionals that the student has complied with all treatment recommendations and, as relevant, does not pose a risk of harm to him/herself or others at school.

## **VI. Examples of Alternatives to Expulsion Programs.**

### **A. First Offenders Program.**

Beloit School District has implemented a program for students who violate alcohol, tobacco, and other drug policies.

1. First offenders participate in Prime for Life education program, where the offenders receive support via assessment and counseling.
2. The Prime for Life program emphasizes risk assessment and reduction, along with sound decision-making.
3. Rate of second offenders is low, and there was a 70% decrease in expulsions from 2002-2003 to 2006-2007.

### **B. Abeyance Option.**

Green Bay Area Public School District has developed a program where students and parents agree to a certain set of specifications in order that the expulsion be held in abeyance, including counseling with an outside agency with follow-ups, and participation in the district's alternative education program.

1. The program is designed based on each student's behavioral history.
2. There are four areas of focus: academic, affective, vocational, and behavioral; there is also a community service component based on the individual's specific needs.
3. There was an 86% decrease in expulsions from 2001-2002 to 2007-2008.

### C. Pre-expulsion Conferences.

1. Hudson requires pre-expulsion conferences in lieu of referrals to the Board of Education for an expulsion hearing. The student can agree to a number of conditions, which are based on the offense.
  - a. Possible conditions that the student can agree to include:
    - i. Participation in an alcohol or other drug assessment or treatment program;
    - ii. Completion of a reflection worksheet;
    - iii. Participation in a mental health assessment, counseling, or therapy;
    - iv. Meetings with the school social worker;
    - v. Participation in a community mentorship program;
    - vi. Consent to random alcohol or drug tests and searches;
    - vii. Participation in an extracurricular activity;
    - viii. Development of a plan of success;
    - ix. Development of a plan for community service;
    - x. Participation in Youth Services Bureau Programs; and
    - xi. Restitution and apology.
  - b. Fifteen percent of students committing an expellable offense were expelled by the Board since the program started in 2006.
2. Portage High School has implemented the “Step System.”

When incidents occur outside the classroom, where the teacher’s disciplinary measures have failed, or when the infraction is of a serious nature, the incident is referred to the principal. Each action will be categorized in a step, which is based on the seriousness of the offense and the previous disciplinary record of the student. There are eight steps; the steps range from step one, requiring a conference with the principal, to step eight, which is a fifteen day suspension pending an expulsion hearing. The consequences increase with each step, and each infraction moves the student up at least one step. Good behavior allows the student to move down steps.

[http://www.portage.k12.wi.us/HighSchool/homepage/Student\\_Handbook\\_08-09.pdf](http://www.portage.k12.wi.us/HighSchool/homepage/Student_Handbook_08-09.pdf)

3. Stoughton has a similar program to that of the Hudson School District. Expulsion is held in abeyance if certain conditions are met. If one or more of the conditions are not met, then the Board of Education will hold an expulsion hearing.
  - a. The conditions may include:
    - i. A community-based psychological or anger-management or drug assessment;
    - ii. A demonstration of compliance with the assessment;
    - iii. Successful completion of classes or treatment, as recommended by the assessment;
    - iv. Submission to random drug screens;
    - v. Remaining on school grounds throughout the whole day or, alternatively prohibiting access to school grounds;
    - vi. Attending all classes;
    - vii. Following school rules;
    - viii. Parking privileges revoked; and
    - ix. Avoidance of similar misconduct for the remainder of time in the school district.
  - b. There has been an 83 percent reduction from 2001 to 2008.

**D. Second Chance Program.**

1. Janesville also has a “second chance” program whereby the Independent Hearing Officer holds the expulsion in abeyance, allowing the student to return to school under conditions of continuance.
2. Link Crew: the program connects incoming freshmen to juniors and seniors in high schools; minority-led program for male students.
3. Three charter schools, including one online and one for alcohol and other drug treatment.
4. Out of the 24 students who were offered a second chance, only one has been expelled and 11 remain under a condition of continuance.

**E. Restorative Justice Program.**

1. Oshkosh attempts to reduce the number of expulsions through a program where the offenders address the wrongdoing. The parties involved include the student who committed the offense, the victim, their families, and community representatives.
2. This program provides an opportunity for:
  - a. Support and justice for the victim;
  - b. A focus on solving problems and repairing harm;
  - c. The offender to repair the harm;
  - d. Respectful treatment;
  - e. Accepting responsibility for one's actions;
  - f. Changing behaviors rather than creating anger; and
  - g. Supporting positive behavioral decision-making.
3. The goal is to teach conflict resolution skills, and promote healthy relationships with peers, teachers, and the community.
4. The school district incorporates this program into homeroom everyday, so it is not just for those students who are on the verge of being expelled. This promotes a sense of belonging and support.
5. A sixth grade teacher explained that students with potential for behavior problems are able to “circumvent the problems and create solutions.” Kelly Akins & Lori Trowbridge, *The Power of Circling Restorative Justice at the Middle Level*, [http://www.oshkosh.k12.wi.us/site\\_uploads/uploads/Restorativ/Circle/barron\\_circling.PDF](http://www.oshkosh.k12.wi.us/site_uploads/uploads/Restorativ/Circle/barron_circling.PDF) (last visited June 12, 2009).

## VII. Special Considerations for Students with Disabilities.

**A. Discipline.** Three relevant sources of law govern discipline for students with disabilities:

1. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*
2. Chapter 115 of Wisconsin Statutes
3. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

**B. School Authority for Change in Placement.** Students with disabilities who engage in misconduct may be categorized into one of three different groups for the purpose of determining what authority the school has to change the student's placement:

1. Students whose misconduct is not a manifestation of their disability;
2. Students whose misconduct is a manifestation of their disability; and
3. Students whose conduct is of a specific type that falls under "special circumstances." 34 CFR § 300.530.

**C. Misconduct that is Not a Manifestation of the Disability.**

1. School personnel may remove a child with a disability to an alternative education setting, another setting, or suspend a student, consistent with the options used with all students, as long as it is not for more than ten consecutive school days, and for additional removals of not more than ten consecutive school days in the same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement under 34 CFR § 300.530(b)(1).
2. Alternatively, a change of placement is defined as a series of removals that constitute a pattern of removals. A pattern of removals is a change of placement when the following two conditions exist: (1) the series of student removals total more than 10 school days in a school year; and (2) factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another suggest that the administration has unilaterally changed the student's placement for disciplinary reasons.

- a. A manifestation determination is required when a student's removal is going to exceed ten consecutive school days (such as the period up to an expulsion hearing).
- b. The parent and LEA can agree to any change of placement as part of the modification of the student's individualized education program.

**D. Unilateral Removal of Student.** There are three circumstances where the district can unilaterally remove a student with a disability to an interim alternative educational setting for up to 45 days, regardless of whether the misconduct was a manifestation of the disability and without parental agreement:

1. The student carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a State or a school district;
2. The student knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substances, as defined by federal law, while at school, on school premises, or at a school function under the jurisdiction of a State or school district;
3. The student has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or school district. 34 CFR § 300.530.