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The extension of fourteenth amendment due process rights to students in the public schools is a relatively recent phenomenon in educational law. In contrast to the earlier emphasis upon student responsibilities, there is now an increasing recognition of student constitutional rights.1 In Washington, legislation and administrative rules promulgated by the State Board of Education have conferred the basic protections of constitutional due process upon pupils from kindergarten through high school.2 This note will discuss the effect of these enactments on the rights of students and on the educational environment in Washington. Following an examination of the Washington regulatory framework, three areas will be discussed: (1) the significance of the Washington method of establishing student rights primarily by administrative rules; (2) the constitutional requirements of procedural due process in the educational setting; and (3) the effect of the administrative rules on the doctrine of in loco parentis in Washington.

I. WASHINGTON FRAMEWORK

In 1971, the Washington Legislature, despite the absence of court action, enacted the following statute to deal with the due process rights of Washington public school students:

The state board of education shall adopt and distribute to all school districts lawful and reasonable rules and regulations prescribing the substantive and procedural due process guarantees of pupils in the common schools.


3. WASH. REV. CODE § 28A.04.132 (1974). U.S. CONST. amend. XIV, § 1, requires: "[No state shall] deprive any person of life, liberty, or property, without due process of law . . . ." Procedural due process generally relates to the mechanism by which rights are fairly enforced, i.e., notice and hearing, right to cross-examination of witnesses and the right to counsel. Substantive due process is a somewhat more difficult concept that bears upon the protections for the individual from governmental interference. The substantive rights set forth in the Bill of Rights, such as the first amendment, serve as limitations on the substance of governmental regulation. See generally E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).
Except for the requirements of lawfulness and reasonableness, the legislature did not describe in any detail the student rights to be protected.

In May 1972, the State Board of Education promulgated rules applicable uniformly to all common school pupils in kindergarten through grade 12 and to all conduct in school or school-related activities. The rules specify substantive due process rights to be accorded students and provide in detail the procedural guarantees applicable when sanctions for rule violations are imposed. Local school boards retain the power to write their own rules of conduct and to adopt procedures for imposing minor discipline upon students.

A. Substantive Rights

The rules accord Washington students substantive rights including equal educational opportunity without discrimination based on race, religion, national origin, economic status, sex, pregnancy, marital status or previous arrest or incarceration. In addition, pupils have the rights of free speech, assembly and press, the right to petition the government for redress of grievances, the right to be secure from unreasonable searches and seizures and the right to due process of law prior to the deprivation of any educational opportunity. Finally, the rules

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4. WASH. AD. CODE § 180-40-065 (1972). The Board stated that the underlying concern of the rules was:

[E]ach pupil should clarify his [or her] basic values and develop a commitment to act upon these values within the framework of his [or her] rights and responsibilities as a participant in the democratic process.

Id. § 180-40-060.

5. Id. § 180-40-007.

6. No pupil shall be expelled, suspended or disciplined in any manner for the performance of or failure to perform any act not related to the orderly operation of the school or school-sponsored activities or any other aspect of the educational process.

Id. § 180-40-110.

7. Id. § 180-40-085. The rules do not affect residual state and federal constitutional rights. Id. § 180-40-105. This provision is analogous to the ninth amendment to the United States Constitution which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In this fashion, the rights enumerated in the rules cannot be interpreted as the only rights open to students. The other rights and protections of the state and federal constitutions are also available for students.

8. See id. § 180-40-100.

9. Id. §§ 180-40-095(1)-(3). The rights enumerated in this section parallel those contained in various portions of the federal constitution. See U.S. CONST. amends. I, IV & XIV.
recognize the educational opportunity provided by the state as a basic right which cannot be deprived without due process.\textsuperscript{10}

\textbf{B. Procedural Rights}

The rules specify the authorities responsible for discipline, the procedure for discipline, the penalties that may be imposed and their effect on the student's educational credit and record. Three major types of discipline are authorized: expulsion, suspension and "disciplinary action." Expulsion, "the denial of the right of school attendance for an indefinite time period,"\textsuperscript{11} may follow if a student violates the school district's written rules of conduct and if all other means of securing proper conduct have failed.\textsuperscript{12} Suspension is the denial of the right to attend school for a period in excess of 3 days, but not more than two consecutive weeks in the case of elementary students, or 90 days in the case of secondary students.\textsuperscript{13} Suspension may result if a student fails to comply with state or local law, the written rules of the state and district school boards or the reasonable discipline of school authorities.\textsuperscript{14} Finally, "discipline" is any other form of corrective action including, but not limited to, removal from school for a maximum of 3 days.\textsuperscript{15} Any teacher or administrator may discipline a student for disorderly conduct as long as the punishment is not unreasonable.\textsuperscript{16}

Formal procedures are required for hearings in which suspension or


\textsuperscript{11} \textit{Id.} § 180-40-070(1).

\textsuperscript{12} \textit{Id.} § 180-40-085. Section § 180-40-115 requires local school districts to establish rules for readmission of expelled students.

\textsuperscript{13} In addition, a secondary student may not lose more than one semester's credit during a school year. \textit{Id.} §§ 180-40-070(2)(a)-(b).

\textsuperscript{14} \textit{Id.} § 180-40-080. Only school authorities can suspend a student. Any violation of state and local law will not constitute grounds for suspension; § 180-40-110 restricts suspension authority to conduct "related to the orderly operation of the school or school-sponsored activities or any other aspect of the educational process."

\textsuperscript{15} \textit{Id.} § 180-40-070(3).

\textsuperscript{16} Only designated school authorities may take this action. \textit{Id.} § 180-40-090. \textit{Commentary, supra} note 2, indicates that "designated school authorities" for purposes of this section include teachers, principals or authorities designated by the local school board. \textit{Id.} at 1. Although such personnel may remove a student from a class or all classes for up to 3 days at a time, their authority is restricted such that a student may not be excluded as a disciplinary measure for more than 6 days in any one semester nor prevented from accomplishing an academic grade advancement or graduation requirement. \textit{Wash. Ad. Code} § 180-40-070(3) (1972). The rules also set a maximum period of 40 minutes for after-school detention. \textit{Id.} § 180-40-050.
expulsion is a possible sanction. A student and his or her parents must be provided advance written notice of the hearing specifying proposed sanctions and the student's procedural rights. The student and/or parents waive the formal procedural rights found in the rules if they fail to reply in writing within 5 days to the charges of the school district; they must state whether a hearing will be requested, whether the pupil will have the representation of counsel and whether an open or closed hearing will be requested.

The student is entitled to a hearing before an impartial decision-maker who must make written findings of fact and conclusions. The student has access to all relevant written materials and exhibits prior to the hearing. A tape-recorded or verbatim record of the proceeding must be made by the school district. The pupil is entitled to be represented by counsel, to present his or her version of the facts and to introduce evidence and cross-examine witnesses. The pupil and/or parents may appeal an adverse decision to the

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17. WASH. AD. CODE § 180–40–140.
18. Id. § 180–40–140(2).
19. Id. The waiver provisions may be inadequate to satisfy due process requirements. A knowing waiver of the right to a hearing in regular expulsion-suspension proceedings or emergency proceedings is not well-served by rules which provide that a failure to respond to a mailed notice from the school district within a few days constitutes waiver of the procedural rights of the student. A more demanding standard for waiver to safeguard the procedural rights of the student is required. The United States Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." See also Singer v. United States, 380 U.S. 24 (1965) (waiver of a trial by jury must be in writing with approval of court and consent of prosecutor); Henry v. Mississippi, 379 U.S. 443 (1965) (waiver of objection to illegal evidence by failure to raise the objection contemporaneously in state court); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (waiver of fourth amendment rights); Von Moltke v. Gillies, 332 U.S. 708 (1948) (strong presumption against waiver of right to counsel). In this regard, some type of return of the notice by the student or his/her parents indicating whether the hearing right would be exercised could be employed by the local school board. Similarly, if personal service of the notice is utilized, a return could also be required to ensure that the notice reached the affected persons.

The rules fail to specify when, after the occurrence of a rule infraction, the notice must be sent to the student or his/her parents. Lengthy delays in hearing availability will subject subsequent disciplinary action to possible court challenge. See note 59 infra.

Finally, the rules neglect to treat situations in which the views of the parents and the student as to the hearing are in conflict. The student, as the person most directly affected by the discipline, should have the pre-eminent right to decide whether a hearing is desired.

21. Id. § 180–40–140(3).
22. Id. § 180–40–140(4).
23. Id. § 180–40–140(3). Washington allows a student to be represented by counsel but does not require the appointment of counsel. The cases involving a right to
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local school board within five school days of the hearing.\textsuperscript{24} The local board ruling, in turn, can be appealed within 30 days to the superior court in the county in which the school district is located.\textsuperscript{25}

In situations involving emergencies or minor sanctions, these procedural requirements are abandoned for speedier and less formal methods. In emergency situations where the district superintendent or his or her designee reasonably determines that a pupil is a danger to him or herself, other pupils, the staff or the educational process, the pupil may be suspended without a hearing for a period not to exceed 10 school days.\textsuperscript{26} There is a substantial threat of abuse of this interim suspension power by school authorities: they determine, subject only to the requirement of reasonableness, (1) whether an emergency exists and (2) whether the student constitutes a danger to the parties listed.\textsuperscript{27} Danger is undefined, apparently involving some unspecified harm to persons or “the educational process.”\textsuperscript{28}

Local school boards are encouraged to develop their own disciplinary measures at a level short of “disciplinary action,” e.g., short suspensions or classroom corrective actions, and are permitted to create advisory boards composed of students, parents, teachers and administrators. Such boards are empowered to prescribe limited, reasonable counsel for indigents in criminal cases may be persuasive in compelling the appointment of counsel for indigent students in school disciplinary proceedings in Washington. In Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court held that an indigent must be provided with counsel in felony cases. Similarly, in Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court held that an indigent must be provided with counsel in misdemeanor cases in which imprisonment is a possible sanction. \textit{But see} Madera v. Board of Education, 386 F.2d 778 (2d Cir. 1967), in which the court held that a pupil suspended by a principal and not represented by counsel at a subsequent guidance conference was not deprived of due process rights.

The right to counsel for indigent students in disciplinary proceedings is justifiable on policy grounds. Disciplinary proceedings take on characteristics of criminal proceedings in that sanctions are imposed on individuals, and the equal protection analysis of the criminal right to counsel cases may therefore be applicable: Once the right to counsel is generally available to pupils, indigent students or parents cannot be deprived of the protection of counsel. Frequently, indigency is related to lack of education; uneducated, poor people may be unable to present an adequate defense for their children and counsel may be essential for the articulation of a case for a child in the disciplinary process. \textit{Cf.} Gideon v. Wainwright, \textit{supra}; Griffin v. Illinois, 351 U.S. 12 (1956); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972); \textit{In re} Gault, 387 U.S. 1, 36 (1967).

\textsuperscript{24} \textit{WASH. AD. CODE} § 180–40–140(5) (1972).
\textsuperscript{25} \textit{Id.} § 180–40–155.
\textsuperscript{26} \textit{Id.} §§ 180–40–130(1)–(2) (1972). A hearing must be scheduled within 3 school days of a request by the suspended student. \textit{Id.} § 180–40–130(2). Waiver of this right is discussed at note 19 \textit{supra}.
\textsuperscript{27} \textit{Id.} § 180–40–130(1). \textit{See} note 68 \textit{infra}.
\textsuperscript{28} \textit{See} \textit{WASH. AD. CODE} § 180–40–130(1) (1972).
punishment and recommend suspension or expulsion in individual cases, although the local school boards can set aside or modify their decisions. The rules also create an informal conference procedure which may be initiated by an aggrieved person subsequent to a disciplinary action other than suspension or expulsion.

II. THE SIGNIFICANCE OF THE WASHINGTON SYSTEM

A. Washington Method of Adoption of Due Process Rules for Public School Students

Washington's choice to adopt due process rules for public school students by means of a broad statute and specific administrative rules is advantageous in several ways. First, the rules establish the general outline of the disciplinary process and thereby reduce the disparities in student rights enjoyed among districts and avoid the uncertainties of extensive litigation in this sensitive area.

Second, by relying on administrative rules promulgated by the State Board of Education, the legislature utilized the Board's expertise and its access to educational and legal advice. This administrative process encourages close cooperation and consultation between educational and legal authorities; administrative rulemaking serves to produce rules that are suitable and enforceable in the educational setting and that satisfy judicial concepts of due process under the fourteenth amendment. Pursuant to its statutory authority, the Board held sectional meetings throughout the state to gain the insight and experience of educators and school administrators in the school disciplinary process prior to adopting the present rules.

Third, the Washington scheme also permits local school boards to participate in the establishment of due process rules for public school students by authorizing local boards to adopt limited disciplinary rules and general rules of conduct for the schools of their area. Local school boards are encouraged to limit the discretion of educational

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29. Id. § 180-40-120; Commentary, supra note 2, at 3.
30. Id. § 180-40-125. The informal conference procedure permits parents or students to question the school authority in charge of the procedure and also allows them to make a formal protest to the local school board.
31. See note 2 supra.
33. Local school boards are encouraged to limit the discretion of educational
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boards' knowledge of local conditions is utilized and the tradition of local control of school-related activities is preserved within the framework of statewide rules.

Finally, the fact that the State Board of Education promulgated concrete rules has lent legitimacy to student rights and should prompt strict compliance among the state's educational personnel.\(^3\)

Some jurisdictions, Oregon for example,\(^35\) have joined Washington in providing due process to public school students by means of a broad statute and specific administrative rules. Elsewhere, four other methods of achieving due process safeguards for students have emerged.

B. Other Methods

1. Statutory due process schemes

A number of states have adopted procedural and substantive due process rights for students by statute. To guard against statutes so general that court intervention to clarify them is necessary,\(^36\) these statutory schemes should include, at a minimum, procedures by which the school may discipline unruly or disruptive students. Simultaneously, the statutory schemes should provide for local action as Washington has done in its rulemaking approach. California is an example of a state satisfying due process by explicit statutory safeguards.\(^37\)

personnel by adopting written regulations more extensive than those mandated by the State Board. WASH. AD. CODE § 180–40–065 (1972); Commentary, supra note 2, at 3. They may "make reasonable rules and regulations bearing a real and substantial relationship to the direct preservation of their own, their fellow pupils' or the public's health and safety or for the maintenance of the educational process." WASH. AD. CODE § 180–40–100 (1972).


37. See CAL. EDUC. CODE §§ 10601–10611 (West 1975). For example, the California statutes provide for suspension by teacher for good cause for a limited time period (1 day) upon report to the principal. A parent-teacher conference must follow. The statutes define good cause, id. § 10601.6; establish the grounds for suspension, id. § 10602; set the duration of suspension, id. § 10607; provide for notification of disciplinary proceedings to the student's parents, id. § 10607.8; allow the student to appeal the decision of the local board to a county board of education, id. § 10608; and provide for free expression by students, id. § 10611.
while Arizona has only enacted a very general statutory system that has already required judicial clarification.\footnote{38} The legislative approach to due process rules for students may result in rules which fail to respond to the needs of participants in the educational disciplinary process. While the education committees of the legislature may have expertise in the constitutional requirements of due process in the public schools, the legislature itself may lack familiarity with the educational and disciplinary setting and may enact statutes that result in rules so inflexible that the experience and requirements of different types of local school districts are not considered. In addition, inadequate attention to local views may build resentment among educational personnel, resentment manifested in opposition to or frustration of the rules.\footnote{39} The rulemaking process adopted in Washington is more flexible and attentive to the independent authority and expertise of local school boards in the discipline of pupils.

2. Statutes requiring local action

Some jurisdictions, in particular Montana,\footnote{40} have delegated to local school boards the responsibility to define the authorities and procedures under which school discipline is administered. Local boards may consider local conditions such as population density, costs, degree of urbanization and student needs in determining the scope of due process rights for students. Such a system risks disparities in student rights among districts and may result in the violation of student rights when a local board inadequately provides for substantive or procedural guarantees. A further complication is that smaller school

\footnote{38. \textit{Ariz. Rev. Stat.} §§ 15–204,–442 (1971) are the sole statutory provisions in Arizona concerning student due process rights. \textit{Id.} § 15–204 provides only that educational authorities may suspend for good cause upon report within 5 days to the local school board; § 15–442 provides simply that a school board may expel a student for misconduct. In \textit{Kelly v. Martin}, 16 Ariz. App. 7, 490 P.2d 836 (1971), the court upheld the constitutionality of Arizona’s general expulsion statute but found it necessary to stipulate that notice and hearing, right to counsel and the right to cross-examine witnesses must be provided prior to expulsion.}

\footnote{39. \textit{See note 68 infra.}}

\footnote{40. \textit{Mont. Rev. Code Ann.} § 75–6311 (1971) provides: The trustees of the district shall adopt a policy defining the authority and procedure to be used by a teacher, superintendent or principal in suspending a pupil and to define the circumstances and procedures by which the trustees may expel a pupil. Expulsion shall be a disciplinary action available only to the trustees. \textit{See also Conn. Gen. Stat. Ann.} § 10–221 (1949).}
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districts may simply choose to forego the added expense of administering rules that confer rights upon students.41

3. Court-mandated rules formulated and adopted by local educational systems

In response to litigation challenging state laws or particular disciplinary actions, some courts have compelled local school boards to adopt rules that provide substantive and procedural due process.42 Although the factors of compulsion and haste may affect the quality of regulations thus engendered, the courts recognize local values by this method of deferring to local judgment:43

School administrators are free to adopt regulations providing for fair suspension procedures which are consonant with the educational goals of their schools and locality. There is no one way to insure fairness in the suspension process. The choice of the best procedures for a particular school system should be left to the school officials charged with the administration of that school system.

4. Systemic changes formulated and ordered by the courts

A final method of adopting due process guarantees to public school students is for the court itself to prescribe specific rules and regulations. For example, the United States District Court for the Western District of Missouri adopted minimal substantive and procedural

41. See letter from Gary M. Little, General Counsel for Seattle Public Schools, to author, Sept. 4, 1974, on file with Washington Law Review. Mr. Little commented: It is my opinion that the rules serve a valuable purpose in protecting the rights of students, but I feel that they are probably not enforced in many school districts, and indeed to do so in some of the smaller school districts would be a burden.


43. Lopez v. Williams, 372 F. Supp. 1279, 1302 (S.D. Ohio 1973), aff’d sub nom. Goss v. Lopez, 95 S. Ct. 729 (1975). In Lopez, the appellee students’ class action was successful in challenging their summary suspensions by a principal for 10 days. Local school boards may not only be compelled to adopt rules conforming to due process requirements, but may also be subject to damages or injunctions, as provided in 42 U.S.C. § 1983 (1970). The Supreme Court held explicitly in Wood v. Strickland, 95 S. Ct. 992 (1975), that school board members could be liable for damages to students who can demonstrate that their constitutional rights were intentionally violated by school action.
guidelines for pending student discipline cases.\textsuperscript{44} No code of conduct was adopted,\textsuperscript{45} but procedural safeguards including notice, hearing and decision based on substantial evidence were required of school systems in cases of expulsion or lengthy suspension. Similarly, in \textit{Mills v. Board of Education},\textsuperscript{46} the Federal District Court for the District of Columbia ordered the immediate adoption of procedural and substantive due process rules developed by the court in close consultation with the parties to the action contesting school disciplinary procedures and the treatment of handicapped students.

The court order approach is subject to the criticism that the courts are intruding in an area in which they possess little expertise; courts certainly understand the scope of procedural and substantive due process rights, but lack intimate knowledge about the educational setting. Court orders may fail to consider the need for less formal rules in certain aspects of educational discipline. In addition, courts are theoretically restricted by the judicial process to orders affecting the parties to the litigation.\textsuperscript{47} Rules and regulations of regional and statewide application may have to await class action litigation.\textsuperscript{48} The pos-

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\textsuperscript{45}. In fashioning the order, the court utilized briefs and arguments from civil liberties, governmental and student organizations concerned about procedural due process rights for students. \textit{Id}.
\textsuperscript{47}. For an examination of the theoretical basis of the common law system that limits judicial action to the parties before the court, see \textsc{B. Cardozo}, \textsc{The Nature of the Judicial Process} (1921); \textsc{K. Llewellyn}, \textsc{The Bramble Bush} (1960). More complicated forms of action such as the class action have made possible judicial orders affecting greater numbers of individuals.
\textsuperscript{48}. Class action litigation, \textit{i.e.}, a suit by a person or persons as representatives of a larger class of individuals with a shared interest, is possible under \textsc{Fed. R. Civ. Pro.} 23 and its Washington procedural counterpart, \textsc{Wash. Civ. R. Super. Ct. 23}. A significant number of the school discipline cases have been brought as class actions. For example, in Fujishima v. Board of Education, 460 F.2d 1355, 1360 (7th Cir. 1972), the court held that three students challenging a district rule on campus distribution of literature met the test of a class action:

Here the requirements of Rule 23(a) are satisfied because the number of Chicago high school students makes joinder impracticable, the question of law is common to the class, the claims of plaintiffs are typical of the class and plaintiffs have fairly and adequately protected the interests of the class. Not all courts, however, are as willing to permit students to bring class actions. In \textit{Fielder v. Board of Education}, 346 F. Supp. 722, 727 (D. Neb. 1972), the court held that student plaintiffs failed to adequately define the class affected and that five expelled students who constituted the class were not so numerous as to make joinder impracticable. \textit{Fielder} and similar cases indicate that strict judicial examination of the class may limit the usefulness of the class action as a means of securing regional or statewide rules.

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sibility that educational personnel may resist and resent due process rules for students created by court order is also present.49

C. Variations in Procedural Due Process

The fifth and fourteenth amendments to the United States Constitution protect a person from the denial of life, liberty or property by the federal and state governments without due process of law.50 Due process is a flexible concept involving a balancing of governmental and individual interests.51 In his concurring opinion in Joint Anti-Fascist Committee v. McGrath, Justice Frankfurter suggested criteria for fixing the scope of procedural due process in individual cases:52

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

More recently, in Goss v. Lopez,53 a case involving the summary suspension of Ohio public school students for 10 days, the United States

49. See text accompanying note 68 infra.
50. U.S. Const. amends. V, XIV.
52. 341 U.S. 123, 163 (1951). In Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970), Justice Brennan suggests, however: "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."
53. 95 S. Ct. 729 (1975). In a vigorous dissent, Justice Powell, joined by the Chief Justice and Justices Rehnquist and Blackmun maintained that the majority opinion will result in unprecedented judicial intrusion into the educational process.
Supreme Court held that students are entitled to due process in disciplinary proceedings resulting in suspension. The Court indicated that before a student may be suspended, school authorities must provide to students:

1. oral or written notice of the charges;
2. explanation of the evidence possessed by the authorities; and
3. opportunity to defend against the charges in a hearing.

Two essential features of any due process analysis in the educational setting are the type of discipline inflicted and the age or educational attainment of the student.

1. Type of discipline

In the past, courts did not recognize a federal constitutional right to education, but found that access to public education which the state

He suggested that the majority had misread the requirements of due process particularly since the 10-day suspension at issue had merely a de minimis effect on a student's educational interest. He forecast that the Court will face an unending number of educational administration problems; the Court, he stated, should not have upheld the lower court decision requiring notice and hearing in school disciplinary matters because the entire problem is beyond the ability of the Court, because teachers do not need undue judicial interference in their traditional role, and because Ohio procedures for more serious deprivations such as expulsion were constitutionally adequate. *Id.* at 742 n.4.

It is difficult to understand the fears of the dissenters when the Washington system is compared to the requirements of due process set forth in the majority opinion. Washington certainly has more extensive procedural protections for students. In a letter to the author, *supra* note 41, Gary M. Little, General Counsel for Seattle Public Schools, indicated that there are over 100 hearings per school year in Seattle alone under the Washington rules. The school system does not appear overburdened by these procedural rules and a case involving student due process under these rules has never even reached the appellate courts of this state.

54. In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1972), Justice Powell stated for the majority:

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a state's social and economic legislation."

In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), however, the Court noted that education is essential to success in modern life:

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

chose to offer constituted such a significant and desirable feature of American society that it was a property interest that could not be impaired without due process of law. Where the state constitution guaranteed a student's right to an education, or the state constitution or statutes required school attendance, courts were even more willing to find that a student's interest in a continued education was "property" or "liberty" so as to merit protection under the due process clause of the fourteenth amendment. In Goss v. Lopez, the United States Supreme Court adopted this reasoning and held that because Ohio chose 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...".

The scope of the procedural protections available to a student who has been disciplined or faces disciplinary action varies with the seriousness of the proposed sanction. Where the punishment involved is expulsion, i.e. exclusion of students from school attendance for an indefinite period of time, courts have not hesitated to require formal hearings with substantial procedural guarantees.

Where the punishment is suspension, i.e. exclusion from school for a limited period, earlier courts disagreed upon how many days of suspension were required before due process rights arose. In Pervis v. LaMarque Independent School District and Murray v. West Baton

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55. Constitutional or statutory provisions of this type make school attendance a substantive right granted by the state to all citizens and, absent due process of law, that right cannot be deprived by state action. See, e.g., Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972), in which the court held that exclusion of students from school without hearings violated procedural due process particularly because school attendance was required by the state constitution.

56. 95 S. Ct. 729 (1975).

57. Id. at 736.


60. 466 F.2d 1054 (5th Cir. 1972).
Rouge Parish School Board, the Fifth Circuit Court of Appeals stated that a hearing was essential to students suspended for 3 months and a potentially unlimited period, respectively. In contrast, the United States District Court for the Central District of California held in Baker v. Downey City Board of Education that two students suspended for 10 days and removed from student offices were not denied due process of law even though they were not afforded hearings on guilt prior to the imposition of the penalties.

The Supreme Court decision in Goss that students cannot be summarily suspended from school for 10 days without a hearing and notice of the charges against them clarifies this dilemma significantly. At a minimum, due process requirements attach for suspensions of 10 days duration:

A short suspension is of course a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

The Washington rules provide for a single type of proceeding in both expulsion and suspension cases. Nonetheless, suspension is defined as exclusion from school for more than three days, and the rules still permit a student to be removed from attendance for periods of three days or less without the full, formal hearing under the "discipline" provision. Presumably, the distinction between "suspension" and shorter exclusions from school relieves local boards and the courts of the difficult issue of deciding at what precise number of days a suspended student must be accorded full due process safeguards.

61. 472 F.2d 438 (5th Cir. 1973).
63. 95 S. Ct. at 737 (citation omitted). By implication, as the dissenters suggest, see note 66 infra, the reasoning of the majority could apply to suspensions of even shorter periods: A suspension of a single day could be a serious event in the life of a child and the property and liberty interests of the child that the majority found present in a 10-day suspension would be equally present at the shorter suspension.
64. See text accompanying note 15 supra.
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The distinction, however, does not clearly resolve the constitutional issue. A 3-day suspension does not differ in any meaningful fashion from a 4-day suspension, but greater procedural safeguards are available to the Washington student in the event of imposition of the latter punishment. In both instances, the right to attend school is adversely affected. A more conceptually sound rule, one that would avoid the rather unproductive court inquiry into the point at which due process rights arise, would require that wherever the right to attend school is affected in any fashion, regardless of the duration of the suspension, the procedures outlined in W.A.C. § 180-40-140 should apply; i.e., any suspension of 1 day or longer should merit an appropriate hearing.

The Washington rules also recognize that there are emergency situations in which immediate suspension of students, pending a later hearing, is permitted. Although there is potential for abuse of this rule by school administrators who define the emergency and characterize particular student behavior as dangerous, the rule appears to be constitutionally valid. For example, in Black Coalition v. Portland

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65. Washington guarantees citizens the right to education, see WASH. CONST. art. IX, §§ 1 & 2, and compels school attendance. WASH. REV. CODE § 28A.27.010 (1974). See also WASH. AD. CODE § 180-40-075 (1972) (attendance rights and responsibilities). WASH. CONST. art. IX, § 1, in fact states:

It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Id. § 2 adds inter alia:
The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established.

66. This is substantially the effect envisioned by the dissent in Goss:

It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.

95 S. Ct. at 741. For the majority view that prompted this statement, see text accompanying note 63 supra.

67. See text accompanying notes 26–28 supra.

68. See text accompanying note 26 supra; Glaser & Levine, Bringing Student Rights to New York City's School System, 1 J. LAW & EDUC. 213 (1972). The authors note that in New York City schools, educators forcefully resisted the imposition of student rights legislation upon the city schools. Administrators either ignored the rules entirely or defined disciplinary action under the emergency procedures. A 1971 study by the New York Civil Liberties Union found that in 77% of the suspension cases studied, no emergency existed and students were expelled for reasons such as truancy, tardiness or chewing gum. Notice was frequently inadequate, and hearings were frequently delayed or not held at all. In 20% of the cases, parents never received notification of the suspension or the hearing. The suspensions were for longer periods than allowed by statute and reasons for the suspensions were seldom detailed. Id. at 225–26.
School District No. 1, the Ninth Circuit Court of Appeals upheld the interim suspension of students allegedly guilty of assaults on fellow students on the grounds that their continued presence in class would not be conducive to the educational environment and that hearings would be available soon after the suspensions.

An additional form of discipline is not addressed in the Washington rules. Although Washington has procedures pertaining to the transfer and reclassification of handicapped students, disciplinary reclassifications and transfers of nonhandicapped students, items which merit specific rules and procedures, are not treated. Often, transfer to a different type of school or educational program adversely affects the student by stigmatizing the child as a "discipline problem" requiring unusual supervision. Failure of the Washington rules to consider this area will likely result in litigation to determine the applicability of the

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69. 484 F.2d 1040 (9th Cir. 1973). Emergency suspension procedures were also upheld in Black Students v. Williams, 470 F.2d 957 (5th Cir. 1972) and Wise v. Savers, 345 F. Supp. 90 (E. D. Pa. 1972).

70. See Wash. Rev. Code § 28A.27.010 (1974) (attendance exemption for the handicapped); § 28A.13.060 (appeal from local board exclusions); §§ 28A.13.070(6)–(7) (authority to Superintendent of Public Instruction to hear appeals and to establish substantive and procedural rules); Wash. Ad. Code § 392–45 (1972) (classification system); id. § 392–45–185 (procedural rules for handicapped students). Handicapped children are defined as:

those children in school or out of school who are temporarily or permanently retarded in normal educational processes by reason of physical or mental handicap, or by reason of social or emotional maladjustment, or by reason of other handicap, and those children who have specific learning and language disabilities resulting from perceptual-motor handicaps, including problems in visual and auditory perception and integration.


71. Expulsion, suspension, reassignment or transfer of children labeled "behavioral problems, mentally retarded, emotionally disturbed, or hyperactive" without a hearing has been held violative of due process:

Not only are plaintiffs and their class denied the publicly supported education to which they are entitled[,] many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination [or] classification into a special program.

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various procedural guarantees to such transfer and reclassification cases.\textsuperscript{72}

The Washington rules likewise fail to outline a procedure by which corporal punishment may be administered. Corporal punishment is more fully treated in Part II—D \textit{infra}.

2. \textit{Age or educational level}

The Washington rules have eliminated the distinctions in procedural safeguards based on the age or educational level of students. The extensive procedural protections are applicable uniformly to all common school students from kindergarten through grade 12.\textsuperscript{73} Supporters of the view that due process rights should vary by age or educational level base their view upon the assumptions that younger children are entitled to fewer rights and that, impliedly, younger children do not need due process protections at all.\textsuperscript{74} Children should not have constitutional rights intended for adults, as the dissent in \textit{Goss} suggests: "[T]he Court ignores the expertise of mankind, as well as the long history of our law, recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults."\textsuperscript{75} In contrast to the limited regard

\textsuperscript{72} See, e.g., \textit{Webster v. Perry}, 367 F. Supp. 666 (W.D.N.C. 1973) (challenge to the constitutionality of a North Carolina statute which permitted school officials to classify certain students as uneducable and expel them); \textit{Hunt v. Wilson}, 72 Misc. 2d 360, 339 N.Y.S.2d 287 (Sup. Ct. 1972) (challenge to suspension and reassignment of students without a hearing to a tutoring center which was deficient in educational facilities).

\textsuperscript{73} \textit{WASH. AD. CODE} § 180-40-007 (1972).

\textsuperscript{74} Courts have been quite forthright in distinguishing between the rights of college students and high school students. For example, in \textit{Boyd v. Smith}, 353 F. Supp. 844, 848 (N.D. Ind. 1973), the court stated: [T]he Seventh Circuit has emphasized that "greater flexibility may be permissible in regulations governing high school students than college codes of conduct because of the different characteristics of the educational institutions, the differences in the range of activities subject to discipline, and the age of the students." \textit{See also} Wright, \textit{The Constitution on Campus}, 22 \textit{VAND. L. REV.} 1027 (1969); Comment, \textit{Dismissal of Students: "Due Process,"} 70 \textit{HARV. L. REV.} 1406 (1957). Similarly, courts have attempted to disparage due process rights for students by comparing college students to very young children:

It is obvious that the means utilized to determine the necessity for suspension from a campus of a college student may and should be quite different from those used by a principal in deciding whether to spank a grade school youngster. \textit{Glaser v. Marietta}, 351 F. Supp. 555, 558 (W.D. Pa. 1972).

\textsuperscript{75} 95 S. Ct. at 744 (Powell, J., dissenting) (emphasis in original).
for due process challenges by younger children evidenced by the dissent in *Goss*, the Supreme Court in *Tinker v. Des Moines Independent School District*\(^7^6\) implicitly recognized that the age of the student in a disciplinary setting is not a crucial factor for the exercise of constitutional rights when it upheld on-campus symbolic political expression by children of various ages. Such an outlook is also apparent in the Court's treatment of procedural rights for disciplined students in *Goss*\(^7^7\).

The Washington rules have, in effect, extended these Court rulings to the exercise of a broad range of rights by children of all ages in the common schools. The rules represent recognition of the fact that younger children, who may not be able to comprehend the effects or purposes of punishment and who may not be able to respond effectively to disciplinary action alone,\(^7^8\) may need the protection of due process rights to safeguard a precious educational interest as much as or more than older students.\(^7^9\)

### D. In Loco Parentis and Corporal Punishment

The doctrine of *in loco parentis*\(^8^0\) has been utilized in many Amer-

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\(^{76}\) 393 U.S. 503 (1969). The logic of *In re Gault*, 387 U.S. 1 (1967), that the fourteenth amendment is available to protect the constitutional rights of minors in the juvenile court system, is also applicable. See note 96 infra.

\(^{77}\) See text accompanying note 53 supra.

\(^{78}\) It has been suggested that the stigma of school-related discipline is particularly unhealthy where the grounds for disciplinary action are poorly articulated and the official school attitude toward students is an autocratic one. Ladd, *Allegedly Disruptive Student Behavior and the Legal Authority of School Officials*, 19 J. PUB. LAw 209 (1970).

\(^{79}\) In support of a reversal of the traditional approach to varying due process standards for students of different educational levels, it has been suggested that:

1. public school attendance is a more valuable interest than is university attendance and as such should receive greater protection;

2. a college student is more capable of making his or her own defense and is therefore in less need of counsel than is a public school student; and

3. public school children are often inarticulate and unable to make a defense for themselves which further supports the proposition that public school children should have counsel in the disciplinary process.


\(^{80}\) BLACK'S LAW DICTIONARY 896 (4th ed. 1968) defines *in loco parentis*: "In the place of a parent; instead of a parent; charged, fictitiously with a parent's rights, duties, and responsibilities." See 1 W. BLACKSTONE, COMMENTARIES *453:

He may also delegate part of his parental authority, during his life, to the tutor or school master of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.
ican jurisdictions to justify the infliction of corporal punishment upon students.

The teacher's authority is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority. One of the most sacred duties of parents is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubborness, to quicken diligence, and to reform bad habits; the power to administer moderate correction, when he [or she] shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of [parental] duties and in the exercise of these delegated duties, is invested with [parental] power.

Thus, corporal punishment has been tolerated as a proper educational method so long as it is reasonably employed for educational objectives.

These definitions appear to encompass the traditional common law view of the doctrine. See State v. Pendergrass, 19 N.C. 365 (1837).

81. See, e.g., Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954) (a teacher stands in loco parentis and has authority to administer moderate corporal punishment); Martin v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944) (teacher stands in loco parentis to children and may administer corporal punishment, if without malice or excess, for the good of the child); Sheehan v. Sturges, 53 Conn. 481, 2 A. 841 (1885) (teacher must consider the nature of the offense, age, size, sex and apparent powers of endurance of the pupil in administering corporal punishment); Cooper v. McJunkin, 4 Ind. 290 (1853) (teacher held liable for assault where child was bruised and cut in the face by corporal punishment).

82. There are two other potential justifications for corporal punishment of students: (1) implied or express consent of the child or parent to the discipline; and (2) statutory provisions. Note, Right of a Teacher to Administer Corporal Punishment to a Student, 5 Washburn L.J. 75 (1965). However, each of these rationales for corporal punishment rests upon a similar theoretical basis, i.e., that the student, without his or her personal consent, is subjected to physical discipline from school authorities acting in the manner of or under the authority of parents or public bodies. Consent of the child when given under duress does not detract from the discretion of the educator administering the punishment. Comment, The Birch Rod, Due Process, and the Disciplinarian, 26 Ark. L. Rev. 365 (1972).

83. This note will treat corporal punishment as any type of physical punishment used by teachers, administrators or other school personnel in the disciplining of pupils.


85. Presently, only New Jersey confines the use of corporal punishment by statute to a narrow range of exceptional circumstances. See Comment, The Birch Rod, Due Process, and the Disciplinarian, 26 Ark. L. Rev. 365, 374 (1972). An educator may use "reasonable and necessary" force in the following situations:

1. to quell a disturbance, threatening physical injury to others;
2. to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
3. to defend one's self; and
4. to protect other persons or property.

such as corrections for rule violations in the classroom or self-protection of teachers.\textsuperscript{86}

The Washington Supreme Court has considered \emph{in loco parentis} only tangentially in school tort cases, but it has accepted the traditional view of that doctrine.\textsuperscript{87} More importantly, Washington's corporal punishment statute,\textsuperscript{88} still in effect although it predates the adoption of the State Board of Education rules, embodies an \emph{in loco parentis} approach to defining the permissible scope of authority for school officials over students. Students are required to obey the rules and regulations of the schools and respect the authority of teachers.\textsuperscript{89} Certified personnel may utilize corporal punishment to restrain or correct children if such discipline is reasonable and moderate\textsuperscript{90} and is administered in the presence of other certified personnel.\textsuperscript{91}

The Washington corporal punishment provisions are subject to challenge on several grounds. First, they are unduly vague; they fail to provide guidance to teachers as to when corporal punishment may be applied or to establish student safeguards against arbitrary physical punishment. The standards "reasonable and moderate" or "excessive and unreasonable" lack content, and no case law exists to explain these terms.

\textsuperscript{86} See, e.g., Ware v. Estes, 458 F.2d 1360 (5th Cir. 1972) (corporal punishment by school officials without or contrary to parental permission; one plaintiff knocked unconscious by an assistant principal when he directed an obscenity at that administrator); Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973) (challenge to corporal punishment by 12-year-old who was punished with a belt for having admitted to sending a "dirty" note to a classmate and by a student who was allegedly struck across the face by a math teacher when he questioned a disciplinary decision); Sims v. Board of Education, 329 F. Supp. 678 (D.N.M. 1971) (corporal punishment for possession of a template taken from a crafts class in violation of district rules); Simms v. School District, 13 Ore. App. 119, 508 P.2d 236 (1973) (teacher used physical force to eject a violent and disruptive student with poor behavior record from the class). The courts upheld the corporal punishment in each instance finding that reasonable corporal punishment regulations did not violate any constitutional rights.


\textsuperscript{88} WASH. REV. CODE § 9.11.040(4) (1974) exempts teachers and school personnel from assault liability where they administer reasonable and moderate corporal punishment.

\textsuperscript{89} WASH. AD. CODE § 180-40-080 (1972).


\textsuperscript{91} WASH. AD. CODE § 180-44-020(1) (1965). Abuse of a child by excessive or unreasonable punishment is a misdemeanor. WASH. REV. CODE § 28A.87.140 (1974).
Second, the doctrine of *in loco parentis*, resting on the notion that pupils possess few rights independent of their parents and that those rights are surrendered at the schoolhouse door, is undermined both by the rules promulgated by the State Board of Education and decisions of the United States Supreme Court. The Board rules clearly express a state policy to limit the discretion of school officials in the educational disciplinary process. The corporal punishment statutes appear to violate the spirit and underlying rationale of the rules both as to substance and procedure.\(^9\) Corporal punishment has been challenged on due process and eighth amendment\(^8\) grounds in other jurisdictions with little success.\(^4\) However, the clarity of the policy underlying the Washington rules, to remove discipline from the discretion of school authorities and place it within the framework of legally enforceable rules,\(^9\) indicates that a student challenge to corporal punishment on due process grounds may be on stronger footing in this jurisdiction.

The doctrine of *in loco parentis* also conflicts with Supreme Court decisions holding that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."\(^9\) The presence of children in the educational environment does not justify the imposition of controls upon students that would not be placed upon individuals in society generally:\(^9\)

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect . . . .

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\(^9\) See note 2 *supra*.

\(^8\) U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

\(^9\) A constitutional challenge either on due process or eighth amendment cruel and unusual punishment grounds was unsuccessful in any of the cases cited in note 86 *supra*. For a review of corporal punishment challenges on grounds that such punishment, viewed as an evolving standard of civilization and human decency, see Note, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 583 (1971).

\(^9\) See note 2 *supra*.

\(^9\) *In re Gault*, 387 U.S. 1, 13 (1967). The *Gault* Court penetrated the "treatment veil" of the juvenile court system to insist that youth offenders did not surrender constitutional rights upon entry into that system. The "educational veil" for educational institutions is analogous.

The Court's decisions in Tinker v. Des Moines Independent School
District,98 In re Gault99 and Goss v. Lopez100 express the doctrine that
children possess full constitutional rights of adults even in a special
institutional setting.101 Even in prisons corporal punishment involves
a deprivation of liberty which is impermissible absent fourteenth
amendment protections.102

It is thus advisable that provisions relating to corporal punishment
be included within the Washington disciplinary rules. Attention should
be given to the circumstances under which corporal punishment may
be used, the permissible degree of force and the parties that may ad-
minister such punishment. Provision for the use of corporal punish-
ment in emergency situations, such as self-protection of teachers, is
necessary, but the rules should specify that corporal punishment is the
most drastic disciplinary alternative open to educators and that it
should be utilized as a last resort and only in situations set forth in the
rules. Additionally, some type of post-punishment conference or
hearing between educational personnel and the student and his or her
parents is desirable. Such a conference must occur after the punish-
ment has been administered, but is necessary to acquaint more fully
the students and parents with the reason for the punishment and to
provide discussions to ensure that such punishment will not be needed
again. Inclusion of corporal punishment within the Washington rules
would lend some predictability to that aspect of the disciplinary
process and would tend to protect students against arbitrary discipline
or errors of school officials.

III. CONCLUSION

The Washington due process rules for public school students should

99. 387 U.S. 1 (1967); see note 96 supra.
100. 95 S. Ct. 729 (1975).
101. In contrast, searches of student lockers for evidence by police with the con-
sent of school administrators have been upheld on in loco parentis grounds. See, e.g.,
People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967); People
102. United States v. Jackson, 235 F.2d 925 (8th Cir. 1956). The court held that
dismissal of a complaint for failure to state a federal case was erroneous in the case of
a prisoner to whom corporal punishment was administered by a guard. The fourteenth
amendment applied to a prisoner: "He still has his right to be secure in his person
against unlawful beating done under color of law wilfully to deprive him of . . .
[his fourteenth amendment] right . . . ." Id. at 929.
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serve as a model for school authorities in other states both for the method by which they were adopted and for their extensive procedural and substantive rights for students. The rules grant full constitutional rights to children in the educational environment without respect to age. The intent of the State Board of Education is to confine the discretion of educational personnel in the disciplinary process within bounds set by written rules and regulations. The prevailing Washington practices of corporal punishment and disciplinary transfer and reclassification, both of which are forms of discipline based on the discretion of the educators, are in apparent disharmony with the state educational policy enunciated in the rules and may be expected to be challenged.

Washington has chosen by administrative action to emphasize student rights in the educational process. The close cooperation of local school boards with the State Board of Education in the adoption of the rules may serve to substantiate and strengthen those rights in the eyes of educators who must respect and enforce them. Nevertheless, careful attention to the enforcement of constitutional due process rights for disciplined students will be necessary in order to ensure that the rules are properly implemented at the local level.

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