ОРИГИНАЛ ТЕКСТА:

JUDICIAL ENFORCEMENT OF EDUCATIONAL SAFETY AND SECURITY: THE AMERICAN EXPERIENCE

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Abstract

While education is an American constitutional value, the opportunity to pursue an education – particularly to pursue a quality education – is meaningless unless the student is able to pursue his/her educational rights in an environment that is both safe and secure. If students are subjected to sexual and racial harassment, to physical violence, to bullying and intimidation, to a culture of illegal drugs, and/or other dangers, then learning cannot take place. Outstanding instructors, state of the art equipment, newly issued textbooks, small classes, and large financial expenditures are irrelevant to the child who is terror stricken by attending school. Thus, if the American constitutional value of education is to have any substantive meaning, the government must insure that there is a safe and secure learning environment.

This article focuses on the role of the American courts in enforcing educational safety and security. That is, this Essay explores the role of the judiciary in insuring that all children have a safe and secure environment in which to learn. Its central thesis is that the American courts – particularly the Supreme Court of the United States – have a mixed record in this regard.

Introduction

In America education is a constitutional value. Although education is not a fundamental right under the United States Constitution, every State Constitution has a provision mandating, at a minimum, that the State provide a system of free

public schools. Moreover, the Supreme Court of the United States has recognized that "education is perhaps the most important function of state and local governments" because “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” Indeed, the Court has stressed "the importance of education in maintaining our basic institutions . . .”

Though education is an American constitutional value, the opportunity to pursue an education – particularly quality education – is meaningless unless the student is able to pursue his/her educational rights in an environment that is both safe and secure. If students are subjected to sexual and racial harassment, to physical violence, to bullying and intimidation, to a culture of illegal drugs, and/or other dangers, then learning cannot take place. Outstanding instructors, state of the art equipment, newly issued textbooks, small classes, and large financial expenditures are irrelevant to the child who is terror-stricken by attending school. Thus, if the American constitutional value of education is to have any substantive meaning, the government must insure that there is a safe and secure learning environment.

This article focuses on the role of the American courts in enforcing educational safety and security. It explores the role of the judiciary in insuring that all children have a safe and secure environment in which to learn. Its central thesis is that the American courts – particularly the Supreme Court of the United States – have a mixed record in this regard. On the one hand, our highest court has done an outstanding job of removing sexual harassment from the schools. In the sexual harassment context, American law emphasises the rights of the victim and demands that the school restore a safe and secure educational environment. On the other hand, the Justices have made it difficult for school officials to remove students who are disruptive or engage in violence. In the disruptive and violent behaviour context, the American Constitution emphasises the rights of the accused student, rather than the victims of the behaviour.

In undertaking this examination, this Essay seeks only to illuminate and inform, it does not seek to prescribe a solution for the Republic of South Africa or any other nation. Just as the United States must look to its own unique constitutional heritage and political culture in order to fashion solutions to its problems, the Republic of South Africa must draw on the South African experience. Nevertheless, the experiences of America can provide a catalyst for uniquely South African responses. Moreover, the experiences of South Africa – that will be the dominant theme of this article – can inform and influence American responses.

The remainder of this article is divided into two parts. The first part discusses areas in which the American Supreme Court has been effective in

enforcing educational safety and security – the contexts of sexual harassment. The second part discusses the Court's ineffectiveness in enforcing educational safety and security – the contexts of disruptive and often violent students.

Sexual harassment

The United States Constitution does not explicitly prohibit sexual harassment in the education context or any other area. Nor does the United States have a national statute explicitly prohibiting sexual harassment in education. However, Title IX of the Education Amendments of 1972, which prohibits gender discrimination by any educational institution, public or private, that receives federal funds, has been interpreted as prohibiting sexual harassment. In Gebser v. Lago Vista Independent School District, 11 the Supreme Court applied Title IX to sexual harassment of a student by an instructor. A year later, in Davis v. Monroe County Board of Education, the Court extended that ruliong to sexual harassment of one student by another student.

The facts of both cases are tragic and demonstrate how sexual harassment can undermine or even destroy the ability of a child to learn. In Gebser a student in her eighth year of school (approximately thirteen years of age) joined a book discussion group led by Frank Waldrop, a teacher at the Lago Vista High School in Texas. Mr. Waldrop made suggestive comments during the discussion groups and continued to do so when he had Ms. Gebser in class during her ninth year of school. In the spring of her ninth year of school, Ms. Gebser and Mr. Waldrop began to have sexual intercourse. This relationship continued until the second semester of her tenth year of school when a police officer discovered them having sexual intercourse in a car. The police arrested Mr. Waldrop, the School District terminated his employment, and the State of Texas revoked his teaching license. A few months later, Ms. Gebser, through her parent, sued the school district for a violation of Title IX.

In Davis, a fifth-year female student (approximately age ten) had been subjected to a prolonged pattern of sexual harassment by a male classmate. The female student reported each incident of harassment to her mother and her teacher. The mother also contacted one of her daughter's teachers, who allegedly assured her that the school's Principal had been informed of the incidents. Later, even though she contacted another teacher after additional harassment had occurred in another class, the harassment allegedly continued. The mother claimed that eventually she spoke to the Principal, who asked her why her daughter “was the only one complaining” and reportedly said with respect to the male student, “I guess I'll have to threaten him a little bit harder.” Furthermore, several other girls in the class, who claimed that the male student had behaved in an inappropriate manner towards them, said that when they, along with the original student, sought

to speak to the Principal about their concerns, a teacher denied their request with the statement, “If [the Principal] wants you, he'll call you.” The original student's mother then filed suit on behalf of her daughter against the local school board and certain of its officials, seeking damages under Title IX. The mother claimed that after three months of harassment and notwithstanding these reports, no disciplinary action was taken against the male student. She stated that her daughter was not even permitted to change her seat even though she was seated next to the alleged harasser. She also asserted that at the time the incidents occurred the local school board had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue.

Both cases were decided in favour of the students and utilised the same legal standard. In order to recover damages for a violation of Title IX, a student must prove intentional discrimination. In the context of faculty-student sexual harassment, intentional discrimination by the school is demonstrated by showing that (1) an “appropriate person” actually knew of the conduct; and (2) the response of the school was deliberately indifferent. With respect to the first element – knowledge by an appropriate person – this means a school official “who at a minimum has authority to address the alleged discrimination and to institute corrective measures” on the school's behalf. In other words, “appropriate persons” are those who have the authority to address the misconduct by terminating or otherwise disciplining the offending party. As to the second element – deliberate indifference – this means that a school official knows of the conduct and, as a matter of official policy, does nothing. Consequently, the school effectively causes a continuing violation. In other words, liability is imposed when the school knows of the harassment and affirmatively chooses to do nothing.

When the person engaging in sexual harassment is a student, rather than an instructor, additional requirements are imposed. In Davis, the Court stressed that the language of Title IX, coupled with the requirement that the recipient have notice of the proscriptions under the statute, requires that recipients subjected to liability have substantial control over the harasser and the environment in which the harassment occurs. “Only then can the recipient be said to 'expose' its students to harassment or cause them to undergo it 'under' the recipient's programs.”

In reaching this conclusion, the Court relied in part on the requirement in Title IX that harassment occur under the operations of a funding recipient. The Court qualified the requirement involving control with respect to entities in higher education, commenting, “[a] university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy [citation omitted], and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.“

Furthermore, the Court imposed two additional conditions upon its test for peer sexual harassment that were not addressed in Gebser. One provides a defence if the recipient can show that its response to harassment was not "clearly unreasonable." The Court distinguished this from a "mere 'reasonableness' standard," stating that in an appropriate case, "there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as 'not clearly unreasonable' as a matter of law". The other condition, which is based on the attachment of Title IX to "actions that occur under any program or activity," requires that damages be "available only where behaviour is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." Finally, the Court sought to avoid an overly expansive application of its holding to common behaviour, particularly among children, involving such things as "simple acts of teasing and name calling." The Court also stressed that it did not contemplate or hold that a mere decline in grades is sufficient to survive a motion to dismiss. The Court attempted to provide some general guidance as to when gender-oriented conduct rises to the level of actionable sexual harassment by stating that it "depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved".

The Gebser-Davis standard is effective at deterring sexual harassment because it focuses on the rights of the student victim, rather than on the rights of the alleged harasser. Although there are other constitutional and statutory mechanisms to protect the rights of the harasser, the focus of Title IX is restoring a safe and secure educational environment. Indeed, the only way for a school to avoid liability is to do something in response to the allegations of harassment. Removing disruptive students The United States Constitution does not explicitly protect students from disruptive or violent behaviour by other students. Nor does the United States have a national statute explicitly guaranteeing students the right to be free from disruptive or violent behaviour. However, the Due Process Clause of the Fourteenth Amendment to the Constitution has been interpreted as providing certain protections to students who are accused of disruptive behaviour. Although these protections are far less than those given to criminal defendants in America, they are nevertheless extensive. "At the very least, when students are subject to the imposition of significant disciplinary penalties, they are entitled to notice and an opportunity to respond to a fair and impartial third party decision-maker".

This requirement to give accused students "procedural due process" flows from the Supreme Court's decision in Goss v. Lopez. Goss involved a group of students who were suspended for ten days for allegedly disrupting the educational environment. The Supreme Court held that the students had a constitutionally

protected “property interest” in continuing their public education. Thus, before they could be deprived of this interest for even ten days, it was necessary to give the students some sort of hearing. Following Goss, the lower courts extended the reasoning of Goss to transfers for disciplinary reasons and suspensions that were as short as three days. In the thirty years since, some of the courts, while still emphasising that accused students have fewer rights than criminal defendants, have recognised that students have a right to an attorney (advocate), to cross-examine witnesses, and to have a hearing before an impartial decision-maker who is not employed by or affiliated with the school.

The core holding and practical result of Goss and its progeny – a constitutionally protected property interest in education – makes it extraordinarily difficult to remove a disruptive or violent student. Even minimal suspensions require hearings before impartial decision-makers.

While the American courts generally side with the schools in any litigation over student suspensions or expulsions, the students do prevail on occasion – particularly if the schools fail to follow procedures mandated by the law. Consequently, American administrators who are concerned about the cost of litigation – both financial and otherwise – appear to be more reluctant to take decisive action. Moreover, in many, if not most instances, the disruptive students are allowed to return to the regular classroom after a short period. Furthermore, if the disruptive student has a disability, federal law will often restrict the school district's disciplinary options.

In sharp contrast, while the student accused of disruption or violence is receiving extensive due process protections and, if found guilty, only minimal punishment, little or nothing is done for the victims of the disruption. Their educational environment has been compromised, but they have received little or nothing to compensate for the harm. Indeed, in many instances, the students who harmed them will be returning to the classroom in a short period. In short, the constitutional standard, while beneficial to the accused student, is largely ineffective at preventing or remedying the disruptions.

The constitutional standard is ineffective because it focuses on the rights of the accused student, rather than on the rights of the students who have suffered because of the disruption. Although it is conceivable that the victims could have some sort of tort law remedy, the focus of the Constitution is insuring fairness to the accused student. The rights of the victims are largely, if not totally, ignored.

Conclusion

The American experience of judicial enforcement of educational safety and security is decidedly mixed. On the one hand, in some contexts – notably sexual harassment – the United States' judiciary has been effective. In the sexual harassment context, the law – Title IX – focuses on the victim of the harassment. If the school wishes to avoid liability, the school must take effective actions to investigate and stop the harassment. The rights of the accused harasser, while legally and constitutionally protected, are secondary to stopping the harassment. On the other hand, in other contexts – such as the removal of disruptive or violent students – the courts have been far less effective. In the disruptive or violent student context, the Constitution requires that the accused student receive adequate procedural protection. The fact that other students have suffered from the disruptive behaviour or the violence is largely unaddressed.

РЕФЕРАТИВНЫЙ ПЕРЕВОД ТЕКСТА

(по ключевым словам)

Ключевые слова: *education (образование), students (студенты, учащиеся), child (ребенок), teacher (учитель), educational rights (право на образование), constitutional value (конституционное значение), safe and secure learning environment (безопасность образовательного пространства), educational safety and security (безопасность образовательного процесса), sexual harassment (сексуальное домогательство), discrimination (дискриминация), violation (насилие), disruptive behavior (агрессивное (деструктивное) поведение.*

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ОБЕСПЕЧЕНИЕ БЕЗОПАСНОСТИ ОБРАЗОВАНИЯ В СУДЕБНОМ ПОРЯДКЕ: АМЕРИКАНСКИЙ ОПЫТ

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Аннотация

Так как образование в Америке является ценностью конституционного значения, возможность получения образования, особенно качественного, не

имеет смысла, если учащийся не может реализовать свое право на образование в безопасном образовательном пространстве. Если учащиеся подвергаются сексуальным домогательствам и расовым оскорблениям, физическому насилию и запугиванию, если их склоняют к употреблению запрещенных препаратов и другим опасным вещам, никакого обучения просто не может быть. Ни выдающиеся преподаватели, ни современное оснащение школы, ни большие финансовые вложения не будут иметь никакого значения, если ребенок охвачен страхом перед посещением школы. Таким образом, если американское образование, имеющее конституционное значение, должно иметь место быть, правительство обязано обеспечить безопасность образовательного пространства.

Введение

Эта статья посвящена роли американских судов в обеспечении безопасности образования. В статье изучается роль судебных органов в обеспечении безопасности детям той среды, в которой им предстоит учиться.

Сексуальное домогательство

В Дэвисе (Западная Вирджиния) учащаяся пятого класса (в возрасте около 10 лет) подвергалась длительному сексуальному домогательству со стороны одноклассника. Ученица сообщила об этом учителю и своей матери. Мать также вышла на связь с одним из учителей своей дочери, который якобы заверил ее, что директор школы был проинформирован о данных инцидентах.

Позднее, несмотря на то, что мать девочки поговорила с другим учителем после того, как в его классе также выявились случаи сексуальных домогательств, домогательства все равно продолжались. Мать утверждала, что в конце концов она связалась с директором школы, который задал ей вопрос относительно того, почему ее дочь «оказалась единственной, кто пожаловался». Как сообщается, мать сказала в отношении ученика с агрессивным поведением: «Думаю, мне придется самой им заняться». Кроме того, несколько других девочек в классе, утверждавших, что одноклассник вел себя с ними неподобающим образом, объяснили, что, когда они вместе с первой девочкой выразили желание поговорить с директором о своих проблемах, учитель предостерег их от этого, заявив: «Если [директор] захочет, он вас вызовет». После чего мать первой девочки подала иск от имени своей дочери против местного школьного совета и ряда его должностных лиц с требованием возмещения морального вреда в соответствии с частью IX государственного закона.

В Соединенных Штатах нет закона, принятого на национальном уровне, который бы прямо гарантировал учащимся право не становиться жертвами чьего-либо агрессивного поведения. Однако пункт четырнадцатой поправки к Конституции «О правовой процедуре» толкуется как обеспечивающий определенную защиту учащимся, обвиняемым в деструктивном поведении.

В то время как учащийся, обвиняемый в подобном поведении или в насилии, пользуется обширной правовой защитой и, в случае признания его вины, отделывается лишь минимальным наказанием, для жертв насилия не делается почти ничего.

Заключение

Американский опыт обеспечения безопасности и защиты образовательного пространства не является однозначным. С одной стороны, в некоторых случаях - особенно в случае сексуальных домогательств, судебная система США доказывала свою эффективность. В контексте сексуальных домогательств в государственном законе - части IX, внимание уделяется жертвам домогательств. Если администрация школы не желает быть привлеченной к ответственности, ей необходимо принять эффективные меры для расследования таких преступлений и их пресечения. Права преступника, хотя и защищены законом и Конституцией, являются вторичными относительно пресечения сексуальных домогательств. С другой стороны, в случаях отстранения от занятий учащихся с агрессивным поведением эффективность судебных органов была гораздо меньшей.

ABSTRACT

This article is devoted to the analysis of the problem of providing a safe educational space for students in high and higher schools in America in a judicial manner.

This article was written by William Tro, State Solicitor General of the Commonwealth (State) of Virginia).

The author believes that the main goal of the research is to identify the ways in which the American judicial authorities suppress the actions of students or teachers aimed at violence, discrimination or sexual harassment against other students.

In the abstract, the author describes a summary of the work.

The introduction presents a statement of the problem of ensuring the educational space safety of students in American educational institutions, and also indicates the role of the judiciary that ensures this safety.

In the main part of the work (Sexual harassment), the author analyzes cases of sexual harassment, intimidation, inducement to take illegal drugs, discrimination, violence and disruptive behavior on the part of both students and teachers of American educational institutions, and also considers in detail the methods, with the help of which the judicial authorities prosecute the perpetrators of these offenses. The author also dwells in detail on the analysis of the articles of state law, which are guided by the judicial authorities in ensuring a safe educational space.

In his research, the author uses such methods as the comparative method (compares the facts), the statistical method, the descriptive method.

In the conclusion of the article, he summarizes the results of the study, formulates the conclusion that a number of articles of state law regarding the prosecution of persons guilty of violent and disruptive behavior towards students in American educational institutions are very ambiguous in their content, which creates certain obstacles for the judicial authorities to ensure the safety of the educational space of students.