Is Playground Bullying Really A Federal Case?

Prepared Testimony of

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Hearing on

Federal Enforcement of Civil Rights Laws to Protect Students Against Bullying, Violence and Harassment

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CHAIRMAN CASTRO, VICE CHAIRMAN THERNSTROM, AND MEMBERS OF THE COMMISSION:

It is a pleasure to be with you this morning. I must tell you, though, that I am a bit perplexed by the subject of today's hearing, as it belies a fundamental misunderstanding of the role of the national government in our constitutional system. There are lots of problems in society that are beyond the authority of the national government to address. The kinds of interactions between children on school playgrounds that have existed since we had schools would seem to be near the top of the list. And even if we could find constitutional authority for the federal government to intervene in this quintessentially local setting, do we really think that bureaucrats in Washington, D.C. should be crafting a national, one-size-fits-all policy on how to manage the interactions of children on the playground? Let's have a little more faith in our teachers on the ground than that. After all, if one of the benefits of our federal system is that the states and localities can serve as laboratories for new innovative solutions to society's ills, we should not be micromanaging their lab work as they seek ways to grabble with childhood bullying.

The misunderstanding of federal authority is evident from the opening sentence of the Commission's own Briefing Concept Summary for today's hearing, which states: "Acts of bullying, violence and harassment are reportedly pervasive in K-12 schools." Even if true, and with all due respect, that statement does not begin to establish the necessary premise for federal intervention. Rather, federal intervention is only warranted under the authority of the 14th Amendment to remedy violations of that Amendment, which speaks to state action, not private conduct. *South Carolina v. Katzenbach*, 338 U.S. 301, 326 (1966); *U.S. v. Morrison*, 529 U.S. 598, 620-21 (2000). Congress's

lawmaking power under Section 5 of the Fourteen Amendment "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). And when Congress seeks to act proactively to prevent potential harms, "there must be a congruence between the means used and the ends to be achieved." *Id*. at 530; *see also Morrison*, 529 U.S. at 625 (noting that there must be both "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

Federal intervention might thus be warranted if the assertedly pervasive acts of bullying, violence, and harassment were being perpetrated or facilitated by the school district itself, and the intervention was designed to remedy that unconstitutional state action. Yet even if that were the case—and neither the Commission's Briefing Summary nor the recent efforts by the Department of Education that led to it, appears to be aimed at any such concern—the description of prior federal interventions that have been deemed appropriate by the Supreme Court indicates a high threshold before Congress itself (much less an unelected administrative agency) can intrude on core state police powers. The Voting Rights Act of 1965 was upheld, for example, because it provided "remedies aimed at areas where voting discrimination has been *most flagrant*." *Katzenbach*, 383 U.S. at 315 (emphasis added). It sought to banish the blight of state-sponsored racial discrimination in voting that had "infected the electoral process in parts of our country *for nearly a century*." *Id*. at 308 (emphasis added). The Court has also approved "using strong remedial and preventive measures" where necessary "to respond to the *widespread and persisting deprivation of constitutional rights* resulting from this country's history of

racial discrimination." *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997) (citing *Oregon v. Mitchell,* 400 U.S. 112, 132 (1970)).

None of those preconditions are evident here. There is no indication that school districts have engaged in "widespread and persisting deprivation of constitutional rights," either through their own harassment of students or in the manner in which they have responded to student-on-student harassment. There is no hint that any such failure on the part of schools, if it exists at all, has been "flagrant" or long-standing. Indeed, the "Dear Colleague" letter sent last October from the Department of Education to school districts across the nation demonstrates just the opposite. In the letter, Assistant Secretary for Civil Rights Russlynn Ali praises state departments of education and local school districts for the steps they have taken "to reduce bullying in schools," describing the efforts as a "movement" that "reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students." It is impossible to tease out of that complimentary picture the kind of flagrant disregard of constitutional rights that is a necessary precondition for federal intervention under the Fourteenth Amendment. We're hardly witnessing a return of Bull Connor.

But the Department of Education further claims that a number of federal statutes enacted pursuant to the Spending Clause fully authorize federal intervention here. Although Congress's power to spend is not limited by its other enumerated powers, *South Dakota v. Dole* , 483 U.S. 203, 207 (1987), Congress may not use its spending power as a pretext to accomplish indirectly that which it cannot do directly. *United States v. Butler*, 297 U.S. 1, 74 (1936). The limits on Congress's regulatory authority under the

Fourteenth Amendment are therefore germane to the regulatory conditions it might impose on federal spending programs.

And if Congress cannot accomplish indirectly through federal funding that which it cannot do directly under the Fourteenth Amendment, it is even more clearly the case that an *administrative agency* cannot impose new conditions on the receipt of federal funding that are not authorized by law. The Department of Education seems to claim such authority when it cites *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 292 (1998) for the proposition that federal agencies can enforce requirements administratively that go beyond the standards for liability in private causes of action. An agency can impose regulations that are ancillary to the enforcement of a statute authorized by an enumerated power, such as rules requiring the reporting of certain data that is necessary to determine compliance with the underlying statute, but it cannot make up new prohibitions and substantive requirements that are not part of the relevant statute.

Thus, the Department's claim that the liability standards of *Davis* do not limit the terms of its funding contracts with school districts is highly misleading—at best. The latitude given to the agencies is narrow, and the deviations between the Department's "Dear Colleague" letter last October and the reasonable interpretation of the relevant civil rights statute are large, as is shown below. The Department may not think the Supreme Court's interpretation of Title VI, or Title IX, or Section 504, is protective enough of the rights at issue, but it has no conceivable basis to fundamentally alter the meaning of those statutes in the name of enforcing them.

As should be clear, none of the statutes cited in the "Dear Colleague" letter were passed with child-on-child playground bullying even in mind, much less out of a concern

about flagrant violations of constitutional rights by school officials in dealing with bullying. That alone makes it extremely problematic to extend those statutes to cover the child-on-child private conduct under review here.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, prohibits discrimination on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*., extends the same prohibition to discrimination on the basis of sex, and Section 504 of the Rehabilitation Act of 19733, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act of 19904, 42 U.S.C. § 12131 *et seq*, similarly extend that prohibition to prohibit discrimination on the basis of disability. All three statutes prohibit discrimination that is caused by the recipient of federal funding. *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-41 (1999). They do not reach child-on-child conduct except in the rare circumstance "where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities," and then "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id*, at 633.

Contrary to the assertion of the Department of Education in its "Dear Colleague" letter, the threshold for holding school districts liability for such "hostile environment" claims is much higher than mere negligence. The Department contends, for example (and without citation), that "[a] school is responsible for addressing harassment incidents about which it knows or *reasonably should have known.*" DOE Letter at 2 (emphasis added). The Supreme Court has explicitly rejected that standard, expressly noting in

Davis that it had "declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known." *Davis*, 526 U.S. at 642 (citing *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 283 (1998)). Instead, the Court has held that school districts can be liable "only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had *actual knowledge*," and then only where the district's "own deliberate indifference effectively 'cause[d]' the discrimination," "'cause[d] [students] to undergo' harassment" or made them "liable or vulnearable to it." *Davis*, 526 U.S. at 642-45 (citing *Gebser*, 524 U.S. at 290-91) (emphasis added).

The Department's discussion about the specific kinds of conduct that would trigger remedial action by a school district is also erroneous. "Harassing conduct may take many forms," it says, "including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating." But the Supreme Court has expressly disclaimed such conduct as a trigger for school district liability. "Courts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults," it noted in *Davis*. 526 U.S. at 651. "It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.* But "[d]amages are not available for simple acts of teasing and name-calling among school children, . . . even where these

comments target differences in gender" under Title IX (or race, color, or national origin under Title VI, or disability under Section 504). "Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect. *Id*. at 652. And the deliberate indifference response by the school district must be "systemic," not just with respect to individual instances of harassment. *Id.* at 652-53.

Finally, deliberate indifference is not proved simply by a school district's failure to take specific remedial action in response to child-on-child harassment. Those on the receiving end of children's antics have no "right to make particular remedial demands." *Id.* at 648. Neither Title IX, at issue in *Davis*, nor the other funding statutes relied upon by the Department "require funding recipients to 'remedy' peer harassment" or "to 'ensur[e] that ... students conform their conduct to' certain rules." The Court in *Davis* was quite clear: "Title IX imposes no such requirements." Rather, the school district's response is only actionable if it is "clearly unreasonable in light of the known circumstances." Absent that, "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Id.* at 648-49. What is true for the courts reviewing claimed violations of these statutes is doubly true for the Department of Education itself. Absent the kind of systemic and pervasive deliberate indifference by school districts that the Supreme Court has held to be required for school district liability, it is hard to fathom how the Department of Education could itself require what the courts, adjudicating claims under those statutes, cannot. Mandates for sensitivity training or other interventions, "not only for the perpetrators, but also for the

larger school community," do not remotely meet the "congruence" test mandated by the Supreme Court in *City of Boerne*, or afford to school administrators the disciplinary discretion mandated by the Court in *Davis*. Instead, such demands would appear to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

The Supreme Court has invalidated Acts of Congress that bore a closer relationship to unconstitutional conduct by state actors than the school-yard conduct motivating your hearing today. That is not to say that school-yard bullying is not a problem, or even that the problem is not getting worse (although that case has certainly not been made). But the constitutional issue turns on whether school districts are intentionally turning such a blind eye to any problem that does exist as to warrant intervention by the federal government. The evidence on that issue not only does not support federal intervention, but positively counsels against it. Let the school districts, their principals and their teachers do their jobs without being "second-guessed" by folks in Washington, D.C., thousands of miles away.