

NOMINATION

HEARING
OF THE
COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS
UNITED STATES SENATE
ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

GERALD A. REYNOLDS, OF MISSOURI, TO BE ASSISTANT SECRETARY
FOR CIVIL RIGHTS

FEBRUARY 6, 2002

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NOMINATION

TUESDAY, FEBRUARY 26, 2002

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 3:45 p.m., in room SD-430, Dirksen Senate Office Building, Senator Jeffords presiding.

Present: Senators Kennedy, Jeffords, Wellstone, Reed, Murray, Gregg, and Sessions.

OPENING STATEMENT OF SENATOR JEFFORDS

Senator JEFFORDS. [presiding]. The committee will come to order. I have been asked to start the hearing. Senator Kennedy will be here shortly, but I believe that it is appropriate that we move on.

As everyone knows, this is the hearing on the committee's obligation to ensure that every person who comes into a position of importance has been examined, to the extent that we can fully understand the views of the individual and their appropriateness for accepting the position.

We have, today, the hearing of Gerald A. Reynolds before this committee. Mr. Reynolds, we are pleased to have you with us. I know you have your family with you.

Mr. REYNOLDS. Yes, I do.

Senator JEFFORDS. Would you like to introduce them for everybody.

Mr. REYNOLDS. Yes. First, I would like to point out my lovely wife, and the noise-maker is my son, Ellison. [Laughter.] Unfortunately, I think that he is going to be somewhat disruptive, so we will probably have to ship him out sooner or later, but this is my daughter, Emma Marie.

Senator JEFFORDS. I am pleased to meet you.

Senator WELLSTONE. And she is going to be perfect, I can tell. [Laughter.]

Mr. REYNOLDS. Yes. She is 7 years old. This is my mother, Emma; my father, Arthur; my mother-in-law, Janet Marie. Who else do we have here? Oh, I almost forgot about you, my step-son, Ghani; also, the Key family over here; Aunt Jane, Uncle Man, Ray, Larry.

Senator JEFFORDS. Wow. OK. [Laughter.]

Mr. REYNOLDS. You asked. We have the Ethridge family in the back on the wall there. I neglected to reserve a seat for them. I apologize, Bill. I am sure that I have forgotten some other people, and I will hear about it later. Oh, Tony John, Bruce Anderson,

Angie. And since we are starting late, I will cut this off here. [Laughter.]

Senator JEFFORDS. You certainly have shown your energy in your ability to get people together. [Laughter.]

Before we begin I have a statement from Senator Kennedy. [The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

On behalf of the Committee, I welcome Gerald Reynolds and his family. Senator Gregg and I will make opening statements, and after hearing from the nominee we will proceed to questions.

The Assistant Secretary for the Office of Civil Rights is one of the key leadership positions in the Department of Education. Many of the most complex and important legal and policy matters are handled within the Office of Civil Rights. Whether its assessing the validity of the testing required under the new education bill or enforcing an array of civil rights laws like Title VI, Title IX, Individuals with Disabilities in Education Act, and the Rehabilitation Act, the Office of Civil Rights is on the front lines.

After reviewing Mr. Reynolds' record, I was struck by his lack of education policy experience and his longstanding hostility to basic civil rights laws @ which together raise legitimate questions about Mr. Reynolds' qualifications for the job and his commitment to enforcing and defending basic civil rights protections. These concerns are shared by a broad coalition of civil rights, womens', education, and disability groups who oppose his nomination.

I also have concerns about whether Mr. Reynolds has the temperament for this important position. Many of his writings are filled with inflammatory rhetoric. And his testimony at Bill Lann Lee's confirmation hearing was deeply troubling. Here is what Mr. Reynolds said about Mr. Lee:

"If confirmed as assistant attorney general [for civil rights], Mr. Lee's background suggests that no democratic principle, controlling legal authority, nor legal standard will prevent him from furthering his particular ideological agenda . . . Mr. Lee's conduct over a twenty-year period suggests that he has adopted the late Malcolm X's phrase: By any means necessary"

Ideological disagreements on issues are an important and necessary part of the confirmation process, but there is absolutely no place for the kind of merit less character assassination that Mr. Lee was subjected to by Mr. Reynolds.

Although I recognize that we will not agree on every issue, we do expect the Assistant Secretary for the Office of Civil Rights to come to the position with a sense of fairness, a firm understanding of education policy issues, and a genuine commitment to continuing the progress on civil rights that has been one of the nation's greatest achievements in recent decades. Now is no time for on the job training or turn back the clock on the progress we've made on civil rights.

Senator JEFFORDS. Senator, do you desire to have a statement?

**STATEMENT OF HON. CHRISTOPHER BOND, A U.S. SENATOR
FROM THE STATE OF MISSOURI**

Senator BOND. Mr. Chairman, thank you very much. If it is appropriate, I would like to address Mr. Reynolds' qualifications to you and the members of the committee and join in welcoming the largest delegation of Missourians I have seen this month. Needless to say, we in Missouri were very pleased and honored when, on September 25th, the President formally nominated Gerald Reynolds to be the Assistant Secretary for Civil Rights at the Department of Education. It is my honor and privilege to welcome Jerry Reynolds to our committee today.

I had the pleasure of meeting with him in October, and in that meeting he made it clear that he shares the President's commitment to closing the achievement gap and to providing every child in America access to a quality education. He is a skilled attorney who understands the fundamental role that the Office of Civil Rights plays in meeting those goals.

Jerry is a resident of Kansas City, MO, a top attorney for Kansas City Power & Light, our large public utility. His family is quite involved in our community. His 7-year-old attends a charter school in Kansas City, and his wife is president of the Parents Association, in which Jerry is also an active participant.

He has played a meaningful role in making Kansas City a better place in a number of ways. He's worked with KCP&L to strengthen the company's diversity efforts. He is a member of the Hyde Park Association, a neighborhood association dedicated to improving and preserving historic Hyde Park in Kansas City.

I also think he has the experience and the qualifications necessary to be an effective Assistant Secretary for Civil Rights. He has practiced law in both the corporate setting for KCP&L, as well as in a private law firm as a litigator. He has worked on education and civil rights issues for two Washington public policy organizations. As president of the Center for New Black Leadership, the CNBL, he placed a heavy emphasis on education policy. In fact, while at CNBL he spent half of his time on education issues.

He has a strong educational background as well, a graduate of Boston University School of Law. He served as an editor for the American Journal of Law and Medicine. His undergraduate degree is from the City University of New York, at York College. He grew up in South Bronx and Flushing, Queens, the son of a retired New York City police officer and attended public elementary and secondary schools there.

As I said before, he is a qualified and skilled attorney, with a longstanding interest in education and commitment to improving opportunities for America's students. He shares the committee's commitment to disadvantaged and minority children and understands the role the Office of Civil Rights plays in addressing those goals. He will be a key player on the team, whose goal is "No Child Left Behind."

While he was president of CNBL, he served as an advocate for community-based affirmative action programs that promote economic development of urban communities, provides students with improved test scores, and enhance employment skills when young people enter the workforce. He will seek to promote affirmative ac-

tion programs that are consistent with the U.S. Constitution and achieve the critical goal of affirmative access for all Americans.

Jerry told me supports Title IX. Several women in his family participate in athletics and therefore benefit from Title IX. His aunt, Theresa Wallace, was co-captain of a championship collegiate basketball team in 1982, the Georgia Southern Ladies Eagles, won the Southern Region.

The Office of Civil Rights, one of the leading civil rights enforcement agencies in the Government and one of the largest offices within the Department of Education, has now been without an Assistant Secretary for a year. Because of the needs of the Department for leadership and because of Mr. Reynolds' demonstrated skills and commitment to serve in this important post, I strongly urge the committee to take swift and favorable action on his nomination.

Senator JEFFORDS. Senator Gregg?

OPENING STATEMENT OF SENATOR GREGG

Senator GREGG. I thank Senator Bond for his introduction, Mr. Reynolds, and it is nice that you brought your family. I think that is excellent. They seem like quite a group here to support you.

I appreciate Senator Kennedy scheduling this hearing, although I wish it had been more prompt. As I understand, it has been almost 7 months since the administration sent your nomination up and almost 5 months since this committee has had your papers. So I do hope, as Senator Bond has mentioned, that we move promptly to your confirmation.

You bring to this position, the civil rights position, the type of background and strength which this position needs, which is a commitment, obviously, to fairness in our society, an understanding of the important role that things like affirmative action play and Title IX play, but more importantly the fact that we are in a transition as a society, constantly growing as a society and that we have to adjust to that transition and be sure that our laws today are applicable to our time today.

You have been an innovative thinker in a variety of areas and an advocate, and that is something I think we need in this position in order to make sure that people get fair play when they deal with the Department of Education and programs the Department of Education has jurisdiction over.

I know that you have got a lot of people who support you, and I wish to submit to the record a series of letters of endorsement on your behalf.

Senator JEFFORDS. They will be made a part of the record.

[The letters of endorsement were not received in time for printing, however they will be retained in the files of the committee.]

Senator GREGG. Thank you, Mr. Chairman.

We look forward to hearing your thoughts and ideas, and rather than listening to us, we would like to listen to you.

Senator JEFFORDS. You are on. Please proceed.

Senator BOND. If you will excuse me, I have gotten a call.

Senator JEFFORDS. That is fine. Thank you.

Senator BOND. Thank you, Mr. Chairman, Senator Gregg.

Senator JEFFORDS. It is a pleasure to have you before the committee. I know we had an opportunity to meet together, and I therefore am pleased to have you here for an opportunity to be able to express yourself on what you intend to do and why you should be allowed to do what you want to do, so please proceed.

STATEMENT OF GERALD A. REYNOLDS, NOMINATED TO BE ASSISTANT SECRETARY, OFFICE OF CIVIL RIGHTS, WASHINGTON, DC

Mr. REYNOLDS. Thank you, Senator Jeffords.

First of all, I would like to thank my home State Senator, Senator Bond, for that generous introduction. Senator Jeffords, Senator Gregg, and members of the committee, thank you for providing me with this opportunity to discuss my views on civil rights enforcement and educational issues. I am truly honored and humbled to be here.

I would also like to thank President Bush for honoring me with his trust and his confidence. He has given me an extraordinary opportunity to serve my country as guardian for civil rights for students across the Nation.

I would also like to thank my family. It is their guidance, support and love that has made all of my accomplishments possible.

I have provided a brief introduction, but if you do not mind, I would like to stay on my family a bit because they inform my views on civil rights, the lives that they have led in the South and in the North. Their experiences have shaped my views.

I have introduced my father and mother, Arthur Reynolds and Emma Reynolds Simon. They have been the greatest influences in my life. My father was raised in Jackson, SC, in the 1940s. Back then, blacks did not have much in the way of educational opportunities, but my father had a thirst for knowledge and a devotion to reading, a level of learning that he passed on to me. He made the most of what was available. I am proud to say that he eventually became a New York City police officer. He retired from Harlem's 28th precinct.

My mother, too, has overcome large hurdles in her life. The manner in which she has conducted her life has taught me the value of fighting for my beliefs.

My mother-in-law, Janet Marie Sloan, she was a retired nurse. Now she is a world-class grandmother.

Now, after my parents left the South, they initially settled in the South Bronx near my Aunt Jane and Uncle Man. They are over there. Aunt Jane, and Uncle Man, and two of her sons, James and Larry Key, are here today. James now works for the U.S. Customs Service. Prior to September 11th, he was stationed in lower Manhattan. On September 11th, he risked his life to protect others. In fact, the Customs Service has recognized James as a hero for his actions at 6 World Trade Center on September 11th. It has been said that a man realizes his liberty by sacrificing his private interests for the wider community. James is living proof of that, and I am honored that he is here today to support me.

Now, my wife. She is the most distinguished guest here. Without her, I would not be here today. She puts up with me, she keeps my life in order, and as I said, without her help and support, I

would not be here. She is a former Defense analyst, but she is now the chief executive officer of the Reynolds household. As well, she is the president of the Parents Association for Academie Lafayette, my daughter's school.

My children, you notice my noisy son, and I have introduced my daughter.

Senator Jeffords, Senators, when I think about my family, when I look at my children, it reminds me of why I am eager to serve as Assistant Secretary in the Department of Education's Office for Civil Rights. Quite simply, the Office protects our Nation's students, whether they are in first grade or graduate school, against the evils of invidious discrimination. Students have these protections because of the great works of civil rights organizations and many members of Congress.

These individuals and organizations played key roles in the enactment of civil rights legislation. Those laws marked a turning point in the life of the country and, more personally, a turning point in the lives of members of my family.

Senator Jeffords, Senators, Senator Kennedy recently joined with President Bush and Secretary Paige in providing leadership and the vision that led to the No Child Left Behind Act. The No Child Left Behind Act is the most sweeping reform of grade school education in the last 30 years. As President Bush said at the signing ceremony, bipartisan leadership demonstrates that honorable people can disagree, yet compromise, and come together for the good of our Nation's children. With this body's advice and consent, it is in that spirit that I intend to take up the task that President Bush assigned to me.

My passion for education comes not only from the influence of my family and my own life experiences, but also from my desire to see that others are afforded the same kinds of opportunities that I have enjoyed. To limit an individual's education is to limit his freedom. As president of the Center for New Black Leadership, I focus on the significant achievement gap between white students and black. I came to the conclusion that we need to expand the concept of civil rights so that it includes improving the quality of education for America's disadvantaged students.

My work at the Center for New Black Leadership led me to conclude that education is the answer to many civil rights issues. Education gives poor children the skills that they need to succeed in the marketplace. A sound education is the fastest, and sometimes the only, way out of poverty.

At the Center, I spent most of my time reviewing research literature, meeting with individuals who run schools and promoting education reform. I also learned a great deal from a broad range of experienced education reformers, from Republican Congressman J.C. Watts to Democratic former mayor of Baltimore, Kurt Schmoke, and former Congressman Floyd Flake.

After leaving the Center, I transitioned from being a public policy advocate to being a regulatory attorney. I understand quite clearly that those are two quite different roles. If I have the privilege of being confirmed, I am sure that the experience that I have had in these two distinct areas, as a public policy advocate and as

an attorney advising a client, will make me a more effective law-enforcement official in the Office for Civil Rights.

If confirmed, my primary mission as the head of the Office for Civil Rights will be to uphold the Constitution and enforce Federal civil rights laws. One of the most significant and, in my mind, successful civil rights laws has been Title IX, which prohibits schools that receive Federal funds from discriminating on the basis of sex.

Before Title IX, schools and universities could, and did, treat men better than women. Many high schools routinely shepherded girls into courses such as home economics and typing, while preparing boys for college and professional schools. This is inherently unfair. A system that distributes benefits and burdens on the basis of an individual's sex is a system that curtails freedom of choice.

If confirmed, another one of my important duties will be to ensure that students with disabilities receive appropriate services so that they can achieve academic excellence. If we fail to help students with disabilities achieve their potential in our schools, we will be responsible for limiting their opportunities in life. I, for one, do not want that responsibility.

Recently, I was horrified to learn how Freddy Ramirez was treated by a DC. public school. Freddy was a 9-year-old boy who was confined to a wheelchair. Because his elementary school had no accessible bathrooms, this young boy had to park his wheelchair at the door of the bathroom and then crawl across the filthy floor to reach a stall. This went on for 18 months until the school finally took action. These things must never be allowed. It is humiliating, and degrading and unworthy of a nation committed to civic equality. And more simply, how is this young boy supposed to learn effectively in this type of environment?

Congress enacted two landmark statutes, section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. I am strongly committed to these laws and to the President's New Freedom Initiative. In implementing the initiative, President Bush has instructed his administration to fully enforce civil rights laws protecting people with disabilities.

There is much work to do. Over 60 percent of all complaints filed with OCR concern disability-based discrimination. If confirmed, I will obey the President's directive and enforce these statutes to the letter so that kids like Freddy need face only the challenges of teachers and tests, not of getting to a bathroom stall.

If confirmed, I will vigorously enforce Title VI of the Civil Rights Act of 1964, which made the promise of the Fourteenth Amendment a reality, prohibiting discrimination based on race, color and national origin. The backlash against innocent Muslim and Arab students demonstrates the continued need for vigorous enforcement of our Nation's civil rights laws.

I join President Bush, Secretary Paige, and members of the Senate in their concern that the horrors of September 11th do not lead to mistreatment of Arab Americans. Racial discrimination and harassment have no place in our schools.

While president of the Center for New Black Leadership, I supported affirmative action programs that promoted economic development in communities, that provided quality education for dis-

advantaged students and that enhance employment skills for young people entering the workforce.

Along with President Bush and Secretary Paige, I support “affirmative access” for all Americans. If confirmed, I will seek to promote affirmative action programs that are consistent with the Constitution and that achieve the critical goal of leaving no child behind.

Senators, I want to thank you for providing me with this opportunity to speak with you today. I am honored that President Bush has nominated me to serve as Assistant Secretary for Civil Rights. If confirmed, I will uphold the Constitution and vigorously enforce the Nation’s civil rights laws. I am eager to begin that work, with the Senate’s consent, but for now, I look forward to your questions.

Thank you.

Senator JEFFORDS. Thank you for an excellent statement.

I would now like to ask some questions of you and start off with this one: What are your thoughts on discrimination issues facing students with disabilities? I know you went over this, but I would like you to concentrate on it again, in particular, with regard to section 504 of the Rehabilitation Act, the Americans with Disabilities Act, in other words IDEA, and how will you enforce both public and private schools’ compliance with 504 of the Rehabilitation Act, the Americans with Disabilities Act and, most importantly, IDEA?

Mr. REYNOLDS. Thank you, Senator.

That question is extremely important. As I mentioned in my statement, 60 percent of the cases at OCR involve disability-based discrimination. It is unacceptable. Because you have the misfortune of being disabled does not mean that you should be treated as a second-class citizen. We have a situation where 70 percent of disabled people are unemployed. I think that the reason that we have this high unemployment rate is that we have done a poor job of educating many of our disabled students. A sound education is the gateway to employment, and unless we do a better job, this horrendous unemployment rate is going to stay where it is today.

I think that there are many things that we can do at the Office for Civil Rights. We have the two statutes that you referenced, in addition to that, the Freedom Initiative that President Bush has promulgated.

It is important that schools across the country realize that they have a statutory obligation, and in my opinion, an ethical and a moral obligation to ensure that students with disabilities receive a free and appropriate education. And if I am confirmed, I will do everything within my power to ensure that the civil rights statutes are fully enforced so that they protect disabled students.

Senator JEFFORDS. I would like to pursue this area.

What are some of the civil rights problems students in this Nation are facing today, and how do you intend to eradicate these problems to ensure equal access to education of all students, and are there any proactive measures the Office of Civil Rights should take to ensure equal access?

Mr. REYNOLDS. Senator, there are many problems that we will have to confront, that we are confronting today. Unfortunately, rac-

ism and discrimination are still with us, discrimination based on age, based on sex, based on disability, that is still with us.

Some people may say that I have a dark view of man, but I think that these prejudices will stay with us, and that is why I believe that it is important that we realize that these enforcement actions, they are with us for the long haul. We must vigorously enforce all laws to ensure that we protect our students. I think that we all agree that this should not happen, at least most of us, but there are a handful of people who feel otherwise. And I think that it is the Government's responsibility, when people discriminate based on invidious grounds, it is the Government's responsibility to go in there and ensure that it does not happen.

Senator JEFFORDS. The Office of Civil Rights has the authority to withhold funding from institutions that violate Title IX. What remedial and affirmative actions would you deem appropriate to remedy discrimination on the basis of sex?

Mr. REYNOLDS. As I said in my opening statement, to distribute benefits and burdens on the basis of sex, that is the antithesis of freedom of choice. I think that women/girls should have the same opportunities as men and boys. I think that it is important that we have vigorous enforcement, and that includes taking affirmative steps to remedy any type of discriminatory conduct, that includes when there has been a finding of discrimination, that includes the use of racial classifications.

And those events where there has not been a finding of discrimination, I think that schools are free to take affirmative steps to improve access, to provide more opportunities to women and men.

Senator JEFFORDS. There has been some discussion regarding your views on the disparate impact theory of the civil rights laws. Could you please clarify your views on this subject. It is a little complicated one, I know, but go ahead.

Mr. REYNOLDS. Thank you, Senator. This is a wonderful opportunity. I have been cooped up for quite some time, unable to address these issues. So thank you for providing me with this opportunity.

The disparate impact theory, it is a very powerful tool for smoking out discrimination. It permits you to use statistical analysis to draw an inference of discrimination. OCR's regulations permit it, and if I am confirmed, we will continue to use that powerful tool, as well as all of the other tools that we have in our tool kit at the Office of Civil Rights.

Senator JEFFORDS. How would you enforce compliance with Department regulations which prohibit recipients of Federal funds from using criteria which have the effect of subjecting individuals to discrimination on the basis of race, sex or disability?

Mr. REYNOLDS. I will enforce all regulations vigorously. If we have a situation where a school has discriminated against a study, we are duty bound to use all of the tools in the tool kit to ensure that not only do these discriminatory actions stop, but that the effects from this discriminatory conduct is remedied.

Senator JEFFORDS. You have talked about ending racial preference programs. How will you enforce antidiscrimination laws and regulations in instances where there is a past history of discrimination?

Mr. REYNOLDS. The U.S. Supreme Court is clear on this issue. Where there has been a finding of discrimination, the use of racial classifications may be permitted. The standard is clear. It is the strict scrutiny standard that was articulated in Croson and the Adarand decisions. With that standard, if the State can show a compelling interest and also demonstrate that the means are narrowly tailored, then the use of a racial classification is permitted. That is the law, and that is what I will enforce.

Senator JEFFORDS. Senator Gregg?

Senator GREGG. Thank you, Mr. Chairman. I think those questions, first, they were an excellent series of questions, Mr. Chairman. I believe they addressed a number of issues which have been raised, and I thought the responses were even better.

I also note that I believe that Secretary Paige has sent us a response to a letter which you received from Senator Kennedy, which outlined a response to a letter which was sent out by the Leadership Conference on Civil Rights, which is a very good, in-depth explanation of your views in a number of areas, and especially the fact that you feel the Conference letter regrettably misrepresented your positions and inaccurately represented your positions in a variety of ways. So I would ask that that response be included in the record.

Senator JEFFORDS. Without objection.

[The letter of Secretary Paige was not received in time for printing, however it will be retained in the files of the committee.]

Senator GREGG. We have touched on a number of areas that you obviously feel strongly about. I did notice that, and I found the statement to be, on its face, a little hard to accept, but the letter from the Conference said, "In addition to Mr. Reynolds' all-out opposition to affirmative action, he put in direct conflict with carefully crafted policies that the Office of Civil Rights is charged with implementing.

In fact, that is not your position at all, is it?

Mr. REYNOLDS. No, it is not. Senator, I found the letter curious because my support for affirmative action, it is in my writings. Going back as far as, well, when I entered the public policy world, when I have discussed affirmative action, I have discussed it in various aspects, but it is clear from my writings that I support affirmative action policies.

Now I have made a distinction between affirmative action policies that use a racial classification. Even those are permitted under a limited set of circumstances; the standard that I articulated earlier, the U.S. Supreme Court strict scrutiny standard. But I support affirmative action, it is in my record, and I am somewhat surprised that someone would make the statement that I am an all-out opponent of affirmative action.

Senator GREGG. I noticed that they also said in this letter, and I found this to be even more surprising, that "He expressly denied that racism is a barrier to preventing African Americans from making progress." That is obviously not your position. I mean, you have already alluded to that in your opening statement, but you might expand on your thoughts in that area because, clearly, somebody has misunderstood your views.

Mr. REYNOLDS. Yes. I wish I had an opportunity to sit down with the authors of the letter because my view is clear from my writings, it is clear from my debates. I have a view of the world that some may view as somewhat dark. I believe that people will discriminate. I believe that they will always discriminate, and that is why I believe that we will always need vigorous enforcement of our civil rights laws.

Now I have mentioned barriers. In one article, well, actually several articles, I talked about the different types of barriers that blacks have confronted since we were brought here. Up until, gee, 30 years ago, we had a racial caste system in large parts of this country. It really did not matter how smart you were. It did not matter how industrious you were. Your skin color, my son's skin color, would determine his fate.

Now things have changed. That is not to say, though, that discrimination is no longer with us. In that article, I went on to talk about some of the current barriers that we are confronting. I talked about the poor quality of education in many urban centers. I talked about some regulatory barriers that make it difficult for black entrepreneurs to open up businesses. Here, in Washington, DC., I worked with a gentleman by the name of Taliq Gupta, who runs a place where he braids hair. They shut him down, and it was not justified. His business is thriving now, but that is an example of some of the new types of barriers that we must contend with.

That article in no way states that racism and discrimination is no longer with us. As I said earlier, it will always be with us. It is just, unfortunately, men will find reasons to hate each other.

Senator GREGG. You raised a really interesting issue which is, as we move into this century, what are the barriers which are really affecting people as they try to get ahead, and I think you are sort of pointing at education as being one of the key issues, one of the key areas in your going into the Education Department.

Maybe you could talk a little bit more about that, especially our urban school systems, and what is wrong, where is the problem. As you see it, how should we address those things?

Mr. REYNOLDS. Well, I do not believe in magic, but the closest thing that we have to magic is education. We could look at it from a number of angles. We could look at that unmanned drone that we are firing Hellcat missiles into Afghanistan. The basis of that is our educational system. But for the human capital that we have in this country that is augmented, that is nurtured in our educational institutions, we cannot do that.

Another area, we worry about Social Security. Now I have spoken to a number of economists, and the modeling that has been done does not assume that the residents of urban communities are going to earn high incomes. If we straighten out our school systems in urban and rural communities, that assumption then becomes inaccurate, and then that worry that we have over what to do with Social Security, that problem is pushed back a number of years, because the assumption is that many minorities in urban communities are not going to earn a lot of money.

We can do something about that because what you earn is highly correlated to your education. The more education you have, the

higher the quality of the education you receive, the more, well, the greater the opportunity that you will have to earn a high income.

So, I guess, a part of my approach, I was taught by a professor, Professor Rickman at Boston University.

Senator GREGG. A good school, by the way.

Mr. REYNOLDS. Yes, thank you.

Senator GREGG. A fine institution in a wonderful State. [Laughter.]

Mr. REYNOLDS. Yes, I have warm feelings for the State of Massachusetts.

He looked at the world, he viewed the world as this connected web, and I approach life that way myself. These problems are all connected. If we can solve the problems in our educational institutions, especially in our urban communities, there are so many positive things that will flow.

Right now we have a very disruptive debate over the propriety of racial preferences and higher education. If we straighten out our educational system and urban communities, that problem goes away. If we can increase the pool of highly qualified black applicants, the problem goes away.

While at the Center for New Black Leadership, one of the things I did, I just called around across the country and had Stanford 9 test scores sent to me from Detroit, Los Angeles, parts of New York, the South Bronx, Bed-Stuy, Washington, DC., and it is clear from these tests that we are doing a lousy job. We are failing black students across the country.

So, when I say that we have some additional barriers, some new barriers, I am not discounting discrimination. We need to vigorously enforce our antidiscrimination laws, but we also need to expand the problem because the problem is not merely discrimination now. I think that education is a problem in many urban communities. I think that we have some regulations that prevent black entrepreneurs from opening up businesses. That is a problem. So we need to step out of the box. We need to look at these problems in a fresh way.

Thank you for providing me with an opportunity to address that issue.

Senator GREGG. I think that was an excellent answer. I think my time is up. I do want to thank you for your presentation. I also want to thank your father for his years of service in the Police Department in New York City. I had the chance to be under his protection when I was in college. That was the 28th Harlem District.

Mr. REYNOLDS. Yes.

Senator JEFFORDS. Well, that is a real credit to him.

Senator GREGG. He got me through.

Senator JEFFORDS. Thank you.

Senator Wellstone?

Senator WELLSTONE. Thank you. First of all, let me thank you, Mr. Reynolds for being here.

When you talked about the whole question of disparate impact statement, you cited a law. I wonder what your own view is about disparate impact, in terms of how we evaluate laws and whether or not they are civil rights violations. Do you, yourself, philosophically support this standard?

Mr. REYNOLDS. Yes, Senator, I understand why some people have some questions. The disparate impact standard, again, it is a powerful tool for smoking out discrimination, and I think that we should use all of the tools in the toolbox. I think the misunderstanding occurred because in an article I discussed the misuse of statistical analyses. That is a different kettle of fish. There are standards for using statistics. There is a standard for properly using the disparate impact standard, and again there is no philosophical disagreement. I have no philosophical disagreement with using a disparate impact standard or any other tool that we have in the tool kit.

Senator WELLSTONE. Let me go through maybe an example of this whole question of the testing requirements in the education bill. If confirmed, what steps will you take to ensure that the new testing requirements—and we tried to make it as high a quality of testing as possible, in the education bill. Remember, we are going to now require that every school district test every child Grades 3, 4, 5, 6, 7 and 8—do not have a disparate impact on minority students?

Mr. REYNOLDS. Well, I congratulate Senator Kennedy and the President for coming together and putting political differences aside and enacting this historic piece of legislation.

I think that the testing component of the legislation is extremely important. It is a diagnostic tool that will help us identify problems. It is important that we catch our problems as early as possible and provide students with the help they need so that they can excel academically.

Now, once we fully implement the No Child Left Behind Act, and especially the testing component, I suspect that there are going to be disparities, statistical disparities on race. I do not think I am going out on a limb here. I think that we are going to see blacks and Hispanics not doing as well as whites and Asians.

Now I think that if the tests are properly constructed so that they measure what is taught in class, then under those circumstances, discrimination is probably not implicated. Now I hesitate because this type of determination requires all of the facts, and you provided me with a hypothetical, but at the end of the day, it is going to require a thorough examination of all of the facts surrounding a particular instance.

So I hope I have answered your question.

Senator WELLSTONE. Look, I appreciate your frankness. Actually, the Office of Civil Rights, under the Clinton administration, they issued a guidance, which is exactly what is called, for schools on the use of high-stakes testing. I guess my understanding is the guidance has been “archived” by the Department right now.

So I guess what I want to ask you is what you think about the guidance and whether or not you plan on using it to give school districts some direction. If done the wrong way, it will have a disparate impact. I mean, there is no question about it. So my question for you is, number one, why is the guidance archived, although that is not your decision; number two, are you familiar with it? Do you plan on using it? Do you plan on getting it out to school districts so they have some information as to how to make sure that we do not have testing that has this discriminatory impact?

Mr. REYNOLDS. Well, as I mentioned before, I have been somewhat, well, I have been holed up in a cocoon, unable to not only speak, but also consult with the career staff over at OCR. The reasons why it was archived, unfortunately, I do not know. Senator, I will look into that. I believe that a guidance will probably be issued. That guidance was probably prepared prior to the No Child Left Behind Act, and I think that it is important that we go over it carefully, that we examine it, and that we eventually issue some guidance so schools have a road map for testing students, for using diagnostic tools to measure, but doing so in a way that does not discriminate.

Senator WELLSTONE. Let me just ask you a last question. I appreciate your response.

So what you are saying is you have no familiarity with the guidance. You have not seen it; is that what you are saying?

Mr. REYNOLDS. Oh, no, I have seen the guidance.

Senator WELLSTONE. OK. Well, if that is the case, but then what you were saying is I have seen it, but I do not really know why it has been archived.

Mr. REYNOLDS. That is correct.

Senator WELLSTONE. But since you have seen it, my question then for you—I am not a lawyer. So I am doing cross-examination, and I would not know how to—but since you have seen it, do you intend to issue it and get it out to schools, school districts?

Mr. REYNOLDS. As I said before, I cannot make that determination without consulting with career staff. I need to sit down with them, and we need to go over the guidance together. We also need to go over the guidance with the No Child Left Behind Act in mind. And until that is done, I cannot say whether it will be issued in its current form, but I do suspect that some type of testing guidance will be issued by the Office of Civil Rights.

Senator WELLSTONE. My last question. Well, if the No Child Left Behind legislation is in contradiction to the guidance, we have got problems. Because the guidance is all about how to make sure that the testing is done in such a way that it does not have a disparate impact on “students of color” or on girls or you name it. So we have got something to work out here.

Let me ask you this: Do you believe that the testing systems on the State and local level should comply with the civil rights laws, such as Title VI of the Civil Rights Act of 1964, section 204 of the Rehabilitation Act, and Title IX of the education amendments of 1972?

Mr. REYNOLDS. I think any institution receiving Federal funds must comply with those civil rights statutes.

Senator WELLSTONE. And your position on Title IX, again? You said it earlier in testimony. I know you mentioned it. I come from a State which has a strong wrestling community. I am a strong supporter of Title IX, but I also think the wrestling community and others have raised questions about, “My God, all of these minor men’s sports have been eliminated, and they are trying to figure out something that can be done, I believe, in Title IX, but I am still looking for something that can be done—”

What is your position in relation to what some of these communities, like the wrestling community, have had to say on Title IX?

Mr. REYNOLDS. My position on Title IX, I am an enthusiastic supporter. I picked up the newspaper 1 day and discovered that I opposed it. That was news to me. I felt that maybe I had developed amnesia, so I went and reviewed all of my writings. I discovered nothing, and I recall never making a critical comment of Title IX.

Title IX, because of it, my aunt Terry, who is here somewhere, she received an athletic scholarship. She was a co-captain of the Lady Eagles. They won a championship in 1982, the Southern Regional championship, and I am glad to say I was there at that game. So I am an enthusiastic supporter of Title IX.

Now you mentioned the controversy involving, well, allegations. Some people feel that Title IX or the policy guidance is, it is enforced in a way that discriminates against certain male sports. Now I have heard allegations on both sides. I think that it is incumbent upon whoever sits in that job as Assistant Secretary to investigate these allegations, to see if it is true.

I have not had an opportunity to speak with career staff or to consult with athletic directors around the country and other involved parties so that I can collect the necessary data to arrive at an informed decision, but I assure you that if I am privileged to be confirmed, I will look into it.

Senator WELLSTONE. Thank you.

Senator JEFFORDS. Senator Murray?

Senator MURRAY. Thank you very much, Mr. Chairman. I really appreciate your holding this hearing today and giving us the opportunity to talk about some of the essential intersections of civil rights and education. I believe, like many committee members, that education is the cornerstone of our democracy, and a child's education is their chance to succeed in life. And I believe that guaranteeing every child, regardless of gender, race, religion, sexual orientation or disability, receives a high-quality education is really one of our most sacred responsibilities and privileges.

Our civil rights laws, although they are not perfect, represent our attempt to build a nation of equal opportunity, guaranteeing that every child has the chance to reach those dreams.

Mr. Reynolds, I really appreciate your appearing before the committee today and hope that, with this hearing, we can explore some of your essential understandings of this position and assess your ability to do the job.

First, I want to talk about your understanding of our civil rights laws, especially as they relate to education, not just the knowledge of the relevant statutes or court decisions or regulations and guidances, which I think is very impressive, but I think also your understanding of the history of these principles and the role they play in our society; and, second, how you plan to interpret and enforce those laws and regulations as they stand.

The reason those questions are critical is because those laws are more than words on paper or issues for debate here in the Senate. They really initiate real change and create real opportunities for Americans in all walks of life.

I remember, when I went to college, money was very tight. I do not know if I was a good enough athlete to ever win an athletic scholarship because I never had a chance to try. I played intramural sports in college because that was, as a woman, the only op-

tion I had, and there was not any others. I was pretty proud to watch the Olympic athletes this last few weeks and see us win 34 medals, with one-third of them being women.

And I think it is pretty clear that Title IX has increased women's access to scholarships, and coaching, and other opportunities to succeed. So I appreciate your answer to Senator Wellstone's question, but I think it is important to note that Title IX has really contributed to a dramatic increase in number of women competing in athletics, but there are a lot of side benefits to that too: better grades, women completing college, decreasing use of drugs, health care, a lot of things.

Some people have attacked the Title IX standard saying that it creates a quota and forces cuts in men's athletic programs and scholarships, and I am glad that Senator Wellstone did not go that far, but, Mr. Reynolds, I wanted to ask you today can you tell me what your understanding is of the three-part test under Title IX and its application under current law?

Mr. REYNOLDS. Senator, thank you for providing me with a second opportunity to address this issue. As I suggested in my testimony, freedom is important to me. I do not think anybody's freedom should be curtailed by invidious discrimination. It seems to me that the fact that you are a woman, the fact that you have a brown skin should be of no consequence. I know that that is a goal, and I know that some of us will fall far short of that goal, and that is why we need vigorous enforcement of our civil rights statutes, including Title IX.

I mentioned my aunt. She was the first college graduate in my family. Could the family have afforded to send her to college without that athletic scholarship? I doubt it. I think that a female athlete should be given the same privileges as male athletes. It is only fair. So—

Senator MURRAY. Do you know the three-part test, in terms of Title IX?

Mr. REYNOLDS. Yes, the first prong—well, the first safe harbor is the proportionality test. Basically, it requires that participation opportunities between male and females be proportionate to enrollment.

The second one, and these are safe harbors. A university, a school, any school would have an opportunity to demonstrate that it is not in violation of Title IX in other ways. These are merely safe harbors.

Senator MURRAY. So you do not see the three-part test as ever requiring a quota?

Mr. REYNOLDS. No. The way it is drafted, on its face, it does not require a quota.

The second test, you can demonstrate that you have not violated Title IX by showing a continuing history of program expansion, and the third prong is by showing that the athletic, well, the interests of the underrepresented sect is fully accommodated.

Senator MURRAY. So I am hearing you that you do not see Title IX as requiring a quota. You do see it as providing safe harbor provisions and that you do not agree with some people who say it has created quotas or created opportunities more for female than male athletes?

Mr. REYNOLDS. On its face, Title IX and the—well, the 1996 clarification that contains the three safe harbors is clarifying the 1979 regulation. Those two documents provide several ways for a school to comply with Title IX. I think it is important that we judge each allegation on its own merits. I should not make, and I will not make, any broad statements. I think that it is possible for a school to use a quota. In that instance, I think that that would implicate some legal problems, but the 1979 regulation and the 1996 clarification, on its face, does not require that schools set aside a set number of athletic spots or scholarships.

Senator MURRAY. I appreciate that response. Let me ask you one other question quickly. It is my understanding that following a 1990 court decision, Davis versus Monroe County Board of Education, clarifying that student-on-student harassment is illegal, OCR decided to update its 1997 sexual harassment policy guidance, and after extensive meetings with representatives from a wide range of organizations, comprehensive legal review by the Departments of Justice and Education, and appropriate public comment, the final guidance was announced in the Federal Register on January 19th of 2001.

Are there any parts of that guidance that you oppose or disagree with? And, if so, which parts?

Mr. REYNOLDS. At this point, I would have to say, gees, I have read it. It has been a while. Nothing jumps out at me, but again, just like the testing guidance, I think that I am going to have to sit down with career staff, consult with the relevant parties, including members of the Senate and see if that particular guidance will be issued in its current form.

It is possible that, after a review, that we may modify it, but at this point, I just do not know.

Senator MURRAY. Are there any modifications, in particular, that you are looking at?

Mr. REYNOLDS. No.

Senator MURRAY. Mr. Chairman, my time has run out. Thank you.

Senator JEFFORDS. Senator Reed?

Senator REED. Thank you very much, Mr. Chairman. Thank you, Mr. Reynolds, for your testimony today.

In response to a question from Senator Wellstone, you said that you do support the disparate impact standard when it comes to Title VI enforcement; is that correct?

Mr. REYNOLDS. Yes.

Senator REED. What would be the position of the Center for New Black Leadership with respect to the disparate impact standard?

Mr. REYNOLDS. Well, I served as president for the Center for New Black Leadership, and I also served on its board. I am no longer affiliated with the Center for New Black Leadership, so I cannot speak for the Center.

Senator REED. What was the position while you were president or on board there?

Mr. REYNOLDS. While I was president, the Center for New Black Leadership did no work involving that issue.

Senator REED. So there has been no position, either formally or informally, adopted by the Center for New Black Leadership with

respect to the standard, no discussions you are aware of? It was a nonissue while you were president?

Mr. REYNOLDS. You are referring to Title IX?

Senator REED. I am referring to Title VI.

Mr. REYNOLDS. Oh, I am sorry, disparate impact. No, there was no—discussions, yes; policy, no. Again, the disparate impact standard, it is a powerful tool. It is used in employment cases. It is accepted by courts. It permits you to draw—sometimes it is difficult to get direct evidence of discrimination. This tool permits you, if used properly, to draw an inference, and I support it.

Senator REED. One of the reasons why it is so critical is that, as you well know, under the Sandoval decision, that there is no private right of action in this Title VI litigation, so that it would be incumbent upon you, as the Director of this office, to initiate suits to vindicate the rights of thousands of Americans who do not have that right.

Mr. REYNOLDS. That is correct.

Senator REED. So this is not merely a technical sort of issue. Because as I think you pointed out, very seldom will you find a situation where someone says, I did not promote Jane or Johnny because of their race or because of their disability. It is not that clear cut.

Most of what you said in your testimony is that you will vigorously enforce the law, once there is a finding of discrimination. So the issue becomes how do you find discrimination, and that is where the disparate impact statement I think comes in. You seem to imply that your criticism of this standard previously has been misinterpreted. You were simply criticizing the statistical methods used to arrive at that; is that your position?

Mr. REYNOLDS. Senator Reed, when I mentioned the notion that we need a finding of discrimination, I did not use that phrase in the context of Title VI, it was used in the context of the use of a racial classification. The U.S. Supreme Court requires a finding of discrimination or has strongly suggested that a finding of discrimination is required before a State actor can use a racial classification. It was not in this context.

Senator REED. But going back to the context of Title VI, and thank you, the point is that you would have to, as the, in your proposed job, use the disparate impact standard. And the suggestion of your previous testimony is that you do not have any criticism with the standard, it is just the statistical manipulation to come up with the numbers. I do not want to put words in your mouth, but can you explicate that a bit?

Mr. REYNOLDS. Well, I support—well, as a lawyer, I think that we should use all of the tools in the toolbox, and, where appropriate, using disparate impact analysis is the only way to go or the best way to go. So there is no conflict between my views of Title IX, there is no philosophical objection to it. It is, as I said before, it is a powerful tool.

Senator REED. Have you criticized it in the past?

Mr. REYNOLDS. No.

Senator REED. I seem to have heard you, in your dialogue with Senator Wellstone, you said you criticized at least its application.

Mr. REYNOLDS. No, I—okay. Here is an example. If there is, say, in New York City, tugboat operators, over 90 percent of the tugboat operators in New York City's harbor are of Scandinavian descent. That is a statistic. Now, based on that, some people have concluded that discrimination has occurred. I think that that statistic may be grounds for an investigation, but standing by itself, I do not think that that necessarily means that discrimination has occurred.

There are statistical disparities all around us that may or may not mean that discrimination has occurred. When I criticized the use of statistics, that was the context.

Senator REED. It seems to me you say you are going to support the standard of disparate impact or look at disparate impacts in policies, and then you suggest that it becomes a statistical sort of device or at least statistical problems, not legal problems, but I thank you for your answers.

Senator JEFFORDS. Senator Sessions?

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Reynolds, on this question of affirmative action, and quotas, and outreach, and all of those different phrases we use, each one of them have a different meaning, and I think leads us to confusion.

Would you share with us where you stand on the question of quotas, as opposed to affirmative action, as opposed to affirmative outreach and how you see those terms, what you believe in and what you do not believe in.

Mr. REYNOLDS. Senator, you bring up a very important point. I think a lot of the disputes that take place occur because we fail to take the time to define our terms. The phrase "affirmative action" means anything to anybody. It is an empty vessel. You can pour into it what you will.

Quotas, that could be an affirmative action program. The U.S. Supreme Court has declared that to be illegal, and no one will admit to supporting quotas. You can have—

Senator SESSIONS. I think that is right. I do not think any people in the Senate will say they favor quotas. I do not think there is a single one that says they favor quotas, all right? And the U.S. Supreme Court, I believe, agrees with that, does it not?

Mr. REYNOLDS. Yes.

Senator SESSIONS. Then where do we go from there? What is the next step down in affirmative action?

Mr. REYNOLDS. OK. I want to start off by talking about my view. I think that it must include the vigorous enforcement of our anti-discrimination laws. The Government, in the main, should not be in the business of distributing benefits and burdens on the basis of race. I do not think employers should be in the business of distributing benefits and burdens on the basis of race or anyone who receives Federal dollars.

Now that is the foundation, but I think it is important that we start to build on top of that foundation, and we have already started. Because of Senator Kennedy's efforts, along with President Bush's, we have enacted historical educational reform legislation. Again, your ability to get a high-paying job is highly correlated with the amount of education you have received and the quality of education that you have received.

Now, in many urban communities, the students may get 12 years of education, courtesy of the Government, but we have to look at the quality of the education that these students receive. I am not satisfied with the quality of education. While I was at the Center for New Black Leadership, the Center was involved in raising money, scholarship money, for underprivileged kids to go to private schools. Now this information got out in the community, and I was inundated with mothers, grandmothers, aunts and fathers who were desperate to get their children out of failing schools.

Now I think that we need to expand our definition of affirmative action so that it includes improving the quality of education received by our students. I think that we also need to take a look at, again, regulatory—regulations. There is no reason why Taliq Gupta should have been, his establishment should have been closed down. He braided hair for a living. The State Cosmetology Board said that he could not do it. He is not using chemicals. If a woman does not like the product, she does not pay him. She takes it out, no harm, no foul. Yet, because of regulations that were enacted in a different area, these regulations were adopted to protect us from barbers who use chemicals, who used a scissors and other implements.

So I think that we need to revisit some of our regulatory laws to ensure that economic development in urban communities is not smothered. So that is a part of my vision of affirmative action.

Another example of affirmative action would be the use of racial classifications. As a general proposition, it is not permitted. It is permitted, under limited circumstances. The U.S. Supreme Court has declared that whenever the State uses a racial classification, that the State has to come up, has to demonstrate that there is a compelling State interest, and in addition to that, the State has to demonstrate that its plan is narrowly tailored.

Now I think that it is proper to use racial classification in a limited set of circumstances. It has to comply with constitutional requirements. So that is my thumbnail sketch of affirmative action.

Senator SESSIONS. Well, I thank you. I know my time has expired, and I just would say it is a delicate and important issue. How can we encourage and open doors for people who have had difficulty getting a fair chance in life, at the same time without violating the great principles of who is most qualified gets to be able to do the job or get on the baseball team or get the promotion at business. It is extremely complex. I think sometimes that someone may oppose one kind of quotas and be correct and be interpreted as opposing a lot of affirmative programs that are good.

Mr. REYNOLDS. That is correct.

Mr. Chairman, thank you.

Senator JEFFORDS. Senator Kennedy?

The CHAIRMAN. Thank you very much, Mr. Chairman. I apologize for being late for the hearing and will read over the testimony and the exchanges with our colleagues.

I want to congratulate you, Mr. Reynolds, for getting the nomination of the President for this position and for your impressive background. I have read through the resume, and it is an impressive one, and I think you are to be commended for that progress that you have made over the years.

The real question I think, for us on this committee, is how that background that has been very tied into economic development is really related to a central challenge that we are facing in this Nation, and that is improving the quality of education of children and ensuring that children are not going to be left out and left behind. That is the question about the qualifications that you have, which are ample and robust.

In a number of different areas, we have to ask ourselves whether you are the man for this particular job, and what in your background, what in your background makes you qualified for that, brings you with qualifications to this particular job, which is highly technical. It is not, generally, a broad-based kind of political judgment or a political decision, it is really a highly technical question that is very, very significant in importance to millions of children in this country, and not just to children of not only people of color, but to those with disability and also what you bring to this office in terms of understanding what we have tried to do with the President and the robust support of the members of this committee, in terms of the education reform. That is what I am very much concerned about in terms of your particular nomination. That is my primary concern.

If you are confirmed, as has been mentioned over the course of this hearing, you will be enforcing the Title VI, Title IX, Rehabilitation Act, Americans with Disabilities, all of which have been central, core issues this committee has been dealing with over the period of the time.

You will be responsible, as well, for—you were talking about the tugboats. I was remembering back the Wards Cove decision, which was directly related to some of the things that you were talking about, but that “ain’t” it. This is education, which you are up for, and that is what we are interested in finding out about, what in your background, other than getting briefed up, which I do not dismiss, on Title VI, IX, Rehabilitation, Americans with Disabilities Act, what is going to bring you to make sure that these testing provisions, which are complex and difficult, in understanding this, evaluating, measuring annual yearly progress, disaggregation of numbers based upon race and about progress that is going to be made, understanding about the tests, where they are related to State standards, how they are related to the kinds of quality issues that my good friend, Paul Wellstone, made to try and raise them so we are not getting off-the-shelf tests, what is the role of inadequate teachers in there, what is going to be the judgment made in terms of graduation rates, drop-out rates, school tests go up, drop-outs go up, what have we got in the school, and to know whether we are really going to give life to these questions.

The hate crimes prevention programs that are included in this, very important in terms of the after-school programs, single-sex provisions, that disabled students receive reasonable accommodations under the SEI. In looking at your resume, it does not appear that this education policy has been in these areas, and what work have you done over the period of the recent years in any of these areas, any of these areas?

Mr. REYNOLDS. Senator Kennedy, I will direct you, if you have my resume in front of you, I would direct you to the section Center for New Black Leadership.

While I was at the Center for New Black Leadership, I spent 50 percent of my time on educational policy. What I did there, I looked at research literature, I met with individuals who operate schools, I went to—

The CHAIRMAN. This is, just in fairness, this is New Black Leadership, this is from March of 1997 to August of 1998; is that correct?

Mr. REYNOLDS. Yes.

The CHAIRMAN. I am looking at the last 4 years, 1999, 2000, 2001, 2002, we have just passed, in the last 4 or 5 years. You are giving me now a reference. Your answer to my question about what, in your background, has been related to Title VI, IX, Rehabilitation, Americans with Disabilities, testing, hate crimes, after school, and now you are referring me to your resume and pointing out what you did in the New Black Leadership in 1997 and 1998.

Mr. REYNOLDS. That is where I would like to start.

The CHAIRMAN. All right.

Mr. REYNOLDS. While at the Center for New Black Leadership, I met with the pastor of Pilgrim Baptist in Brooklyn, I met with the pastor of the Christian Life Center in Brooklyn, I met with Congressman Floyd Flake, who is a pastor of Allen AME. All of these churches run schools.

There is a lot to be learned from going in and looking at these schools. I did that. I reviewed research literature. I sat down with experts in the field. I met with Nobel Laureate Gary Becker to discuss some of these issues.

Now what is not in my resume, Senator Kennedy, is the fact that once upon a time I was an education major in college. I was a student teacher. I had the privilege of going back to my alma mater, Jamaica High School, to work as a student teacher. I have been in the classroom.

Yes, you are right, these are technical issues. I am a regulatory attorney for Kansas City Power & Light Company. We do not go to court here. OCR, all of the enforcement actions occur in the regulatory environment. What I do for a living, I am senior regulatory counsel for Kansas City Power & Light Company. That is what I do, dealing with technical, difficult issues.

The CHAIRMAN. I do not question that you are an able, gifted, talented regulatory lawyer and that you do an outstanding job for the Power & Light Company. I do not just question. What I am interested in is what is in your background in terms of these pieces of civil rights legislation, which are at the heart of the challenges of discrimination in our schools. And your response, which you said would be just the beginning, talks about visiting with—I know Congressman Flake. I know the schools there, and the talking with a nobel laureate, you talked of that, and that you worked as a student teacher, I have got. That is your response as to what you have been doing in the last 4 years on the matters that I have just mentioned here that are really the heart of the enforcement of the program.

OK. Let me ask you this: What is your sense of the civil rights protection provisions in the newly enacted education bill? Does the civil rights provisions in the newly enacted education prohibit a religious organization receiving Federal funds from admitting students to an after-school program based upon their race, gender, religion or disability?

Mr. REYNOLDS. Senator, I would have to see all of the facts, but if a religious organization is receiving Federal funds, then without having all of the facts, my inclination is to say that that would be prohibited.

The CHAIRMAN. The civil rights protections, have you read these protections?

Mr. REYNOLDS. Yes.

The CHAIRMAN. Well, your assessment of them, the ones that have been read, that you read, that we passed in the law that are dealing with—you would obviously read them, in terms of the preparation for today, you would obviously read them and be familiar with them, and do you have any hesitancy about whether they would permit, in after-school programs based upon race, gender, religion or disability, whether they prohibit a religious organization receiving those funds from admitting students based upon the race, gender or religion?

Mr. REYNOLDS. If an institution is receiving, if any individual organization is receiving Federal funds, and again this is without having any facts of a particular case, this is a stripped-down hypothetical, and that is—

The CHAIRMAN. This is what we are trying to do, and I want to make it very clear, that is exactly what the purpose is. There should be no permission or use of Federal funds where you could get around that. If we did not draft it right, I would welcome the fact that you would say, "Well, it is not drafted because it has got loopholes in it," but we drafted it so it would not permit that.

And so I guess your answer is that is what the language says, that is the way I would read it. I do not want to put words in your mouth, but I want to give you the third opportunity to respond to it. This language is clear. We spent a lot of time on it. If you read the debates and the explanation by the managers of the bill, it is one of the most important parts of that whole legislation, one of the most important parts, and there should not be any question in your mind what we intended.

I agree there may be facts or other situations, but we are talking about reading language and understanding what we were attempting to do.

Let me say does the civil rights protection provisions prohibit discrimination in hiring for after-school programs based on race, gender, religion or disability?

Mr. REYNOLDS. My answer is the same.

The CHAIRMAN. I did not get it the first two times.

Mr. REYNOLDS. Senator, I believe that the answer is yes. Again, I hesitate because I do not feel comfortable, I do not feel that I can provide you with an informed decision unless I have all of the facts.

The CHAIRMAN. What would you want to do, what would be your own instruction to us, as somebody—would you come and say to us now, if you are going to pass a bill and you are going to provide

Federal funds, that you should not permit them to be used to be able to discriminate?

Mr. REYNOLDS. Senator, if I am a Senator, that would be my position. That is what I would fight for.

The CHAIRMAN. Well, that is what we have tried to do with the language. There was not any dispute, there is no difference in all of the members and their explanation of this provision. I want you to understand, as a lawyer reading it, whether you agree that it does or not, and I am troubled by your hesitancy in saying that that is the way I read it, Senator. That is the way we have explained it, the managers of it. That is the way we have explained it, the way the President has signed it, and we have got to be able to know that the person who is going to enforce it believes it too.

Mr. REYNOLDS. Again, Senator, I am not sure that we are in disagreement here. I am telling you that I believe that if you receive Federal funds, that racial discrimination is prohibited. I hesitate because, unlike the other civil rights statutes, that one has not been around a long time, and I have not had an opportunity to absorb it. Yes, I reviewed it, but I would feel far more comfortable if I had it in front of me, and I do not.

But I am telling you that I believe, without having it in front of me and without having any facts, that I believe that if you receive Federal funds, it is modeled like all of the other civil rights statutes that OCR has jurisdiction over, if—

The CHAIRMAN. Let me ask you, just as the Assistant Secretary for Civil Rights, would you vigorously enforce the statutes, case law, and policy guidance protecting the rights of LEP students, even if that means that some will receive the native language instruction?

Mr. REYNOLDS. I am duty bound to enforce all of the laws, all of the regulations and all of the policy guidance.

The CHAIRMAN. What is your—duty bound? I mean, yes, that is my—

Mr. REYNOLDS. I will enforce not only that provision, all of—

The CHAIRMAN. All I am saying is, if the statute says that the, as Assistant, would you enforce statutes, laws, policies protecting the rights of LEP students, even if it means that some receive native language instruction? I would think the answer is, yes, if that is what the statute says, then I would enforce it. If it does not say that, then we have a different issue.

Mr. REYNOLDS. If you would like, I will just answer with a yes.

The CHAIRMAN. Do not try and please me. Do not do this just to please me. I have been around here a while, and you do not have to do this just to please me. I want frank and candid answers. If you want to give them, you can give them, but do not pander to me.

Now the organization that you work for, the Center for Equal Opportunity, has opposed the use of native language in the instruction of LEP children. Do you share the organization's view on bilingual education?

Mr. REYNOLDS. No.

The CHAIRMAN. And have you ever discussed the Equal Opportunities Act of 1974 related guidance addressing the education of Limited English Proficient children with Linda Chavez?

Mr. REYNOLDS. It was probably Jorge Ansell, if I had a conversation about this issue. I had a limited role at the Center for Equal Opportunity, and it did not include bilingual education.

The CHAIRMAN. Just, finally, in your testimony before the committee, on Bill Lann Lee, this is what you said: "If confirmed as an Assistant Attorney General for Civil Rights, Mr. Lee's background suggests that no democratic principle, controlling legal authority, nor legal standard will prevent him from furthering his particular ideological agenda. Mr. Lee's conduct over a 20-year period suggests he has adopted the late Malcolm X phrase, 'by any means necessary.'"

What was the basis for that?

Mr. REYNOLDS. The basis of that was the Adarand decision. That was the trigger. Shortly before that hearing, the U.S. Supreme Court issued a new standard. It applied the strict scrutiny standard to the Federal Government. And during Assistant Attorney—

The CHAIRMAN. He indicated his support for it, that he would follow it.

Mr. REYNOLDS. During that hearing, Senator Hatch asked several times for Assistant Attorney General Lee to State the standard of Adarand case. His response was that racial preferences are permissible if conducted in a limited and measured manner.

Now I would submit that that is not the holding, that is not the standard in the Adarand decision. We have three standards for reviewing the constitutionality of statutes, and if not—

The CHAIRMAN. Let me just—okay, I will let, but this is one part. Is your answer based upon just the response to Senator Hatch about his lifetime of involvement and commitment in terms of advancing the cause of civil rights? You are telling us here today that your judgment and decision, where you said Mr. Lee's conduct over a 20-year period suggests he has adopted the late Malcolm X, this statement says 20-year period, "by any means possible."

Mr. REYNOLDS. In my testimony, I started out by saying that he was a fine man, that he was a fine litigator, that he was a very, very good advocate. What he did in courtrooms for 20 years, that is fine, in his capacity as an advocate.

However, in the capacity as Assistant Attorney General for Civil Rights, that is a different role, and the only thing that concerned me, well, the primary thing that concerned me was his willingness to apply the constitutional standard that was articulated by the U.S. Supreme Court in the Adarand decision, he was asked on several occasions, "What was the standard?" And his response was, "Racial preferences are permissible if conducted in a limited and measured manner."

Now this is no small fact here. This is extremely important. In the VMI case, the VMI case you had a State institution that discriminated against women.

The CHAIRMAN. There is, of course, a different standard on gender, is there not?

Mr. REYNOLDS. Yes, there is. And the point that I am making is, if I were before you and if I were asked, what is the standard in cases where a classification is used based on sex, and I replied to you that discrimination against women is permissible if it is conducted in a limited and a measured manner, then you would be

justified in being a little upset with me. Not only is that going to affect women, more importantly, that is not the standard articulated in the VMI case.

The CHAIRMAN. Mr. Chairman, my time has expired. As I understand it, the vote is——

Senator JEFFORDS. They are waiting for us.

Senator SESSIONS. Do you plan to return, Mr. Chairman?

Senator JEFFORDS. I am sorry?

Senator SESSIONS. Do you intend to return or not after this?

Senator JEFFORDS. The record will be kept open until Monday, but we will cease the hearing process at this time here.

Senator SESSIONS. If I could have 1 minute, do we have that much time or not?

The CHAIRMAN. I will hold it for you.

Senator SESSIONS. I trust you.

Senator JEFFORDS. OK. Go ahead, yes, please.

Senator SESSIONS. You know the Bill Lann Lee matter, it involved a pivotal issue. You are exactly correct. We had a lady here whose daughter, she was Chinese American, and worked to get in the school, and she was surprised when she made a good test score and did not get in. They told her too many Chinese. That is why her daughter did not get in, and she did not think that was right.

Mrs. Adarand testified in the committee, and I do agree with you that, as fine a person as Bill Lann Lee was, he was so determined in his view of how quotas or affirmative action should be interpreted that he did not recognize what the U.S. Supreme Court had said in Adarand and did not commit to adhering to it, at least according to the plain interpretation that should have been given to it. So I think that is why he was not confirmed and did not get a majority.

You were asked earlier about this question of disparate impact analysis, that a statistical finding, that a statistical finding, of a difference between the races in an analysis does not automatically mean the difference is due to discrimination; is that your view?

Mr. REYNOLDS. Yes, although I will say that a statistical disparity could be the basis for an investigation to determine if discrimination has occurred.

Senator SESSIONS. Well said. But just in itself, is that not what the courts say too?

Mr. REYNOLDS. Yes, this is not Jerry Reynolds' standard.

Senator SESSIONS. Right, this is what the law is today.

Mr. REYNOLDS. Yes.

Senator SESSIONS. So it is incumbent then, if the statistics do reveal some sort of discrimination or an analysis of these statistics uncovers a discrimination, it would be your duty in Civil Rights there to focus on that and determine whether any discrimination took place and to remedy that, would it not?

Mr. REYNOLDS. That is correct, Senator.

Senator SESSIONS. And would you be willing to do that and take action to remedy discriminations that are properly found, based on the facts in the law?

Mr. REYNOLDS. Senator, if I am privileged enough to be the next Assistant Secretary for the Office of Civil Rights, I assure you that I am going to use all of the tools in the tool kit. I mean, I——

Senator SESSIONS. I think you are right. I just wanted to bring that out because, look, we know, and you know, and I know, and most people that have been around here know there are some complex, big-time issues with regard to how these matters are decided, and we have to be very careful.

And there is a strong lobby for pushing the law beyond what it is today. And that means following Adarand, and following the disparate impact analysis and those kind of facts, and I think we want a lawyer in this position to be supervising many lawyers who have been there for a career in this Department. You will be hearing the briefings, and discussing the issues, and wrestling with them, doing your own research and analyzing and respecting the staff that is already there, but you will have the final decision because you have the confidence of the Secretary of Education and the confidence of the President of the United States; is that not correct?

Mr. REYNOLDS. Yes, I am—

Senator SESSIONS. That is the way I see it.

Mr. REYNOLDS. The Office of Civil Rights has some fine attorneys. I have only met with a handful of them. Unfortunately, I have not been able to get into the substance with them out of my respect for the Senate's advice and consent rule.

Senator SESSIONS. Having been in the Department of Justice and seeing how these matters go, it is usually 20 dozen memorandums written before it ever gets to you. The issues would be crystallized, and you will have the—you will be doing that, but you are not going to be trying cases all over America involving these issues.

Mr. REYNOLDS. That is correct.

Senator SESSIONS. Mr. Chairman, I guess our vote is about done. Thank you for staying. I am sure they would not call that vote if you are not there, and maybe you can—

Senator JEFFORDS. Thank you, Senator. You have been very helpful with your interrogation.

I want to thank the witness for your patience and your statements. I think you have given us all a much better idea on how to make up our minds and judgment. I just thank you.

[The prepared statement of Mr. Reynolds follows:]

PREPARED STATEMENT OF GERALD A. REYNOLDS

First I'd like to thank my home state senator, Senator Bond, for that generous introduction. Mr. Chairman, Senator Gregg, and members of the committee, thank you for providing me with this opportunity to discuss my views on civil rights enforcement, and educational issues. I am truly honored and humbled to be here. I would also like to thank President Bush for honoring me with his trust and confidence. He has given me an extraordinary opportunity to serve my country as a guardian for the civil rights of students across America. I'd also thank my family. Their guidance, support and love have made all of my accomplishments possible. Mr. Chairman, let me introduce some of my family.

My parents, Arthur Reynolds and Emma Reynolds Simon have been the greatest influences in my life. My father was raised in Jackson, South Carolina during the 1940s. Back then, blacks didn't have much in the way of educational opportunities, but my father had a thirst for knowledge, and a devotion to reading—a love of learning that he passed on to me. He made the most of what was available and I'm proud to say that he eventually became a New York City police officer. He retired from Harlem's 28th precinct. My mother too has overcome large hurdles in her life. The manner in which she has conducted her life has taught me the value of fighting for my beliefs.

Janet Marie Sloan, my mother-in-law and second mother, has joined us today. She was a registered nurse and is now a full-time grandmother.

After my parents left the South, they initially settled in the South Bronx near my Aunt Jane and Uncle Man. Aunt Jane, as well as two of her sons, James and Larry Key, are here today. James now works for the U.S. Customs Service. Prior to September 11th, he was stationed in lower Manhattan. On September 11th, he risked his life to protect others. In fact, Customs Service has recognized James as a hero for his actions at 6 World Trade Center on September 11th. It has been said that a man realizes his liberty by sacrificing his private interests for the wider community. James is living proof of that, and I am honored that he is here today.

The most distinguished guest here today is my wife, Renée. Without her I would not be here today. Renée is a former defense analyst. She is now the Chief Executive Officer for the Reynolds household. She also serves our community in Kansas City, Missouri as the President of the Parents Association for my daughter's school. Finally I'd like to introduce my children. My stepson Ghani is a high school history teacher in Baltimore, Maryland. His fiancée, Sarah McKittrick, also teaches in Baltimore. My daughter, Emma Marie, is a first grader at Académie Lafayette, a public charter school located in Kansas City, Missouri. The troublemaker on my wife's lap is my son Ellison.

Mr. Chairman, when I think about my family, and when I look at my children, it reminds me of why I am eager to serve as the Assistant Secretary in the Department of Education's Office for Civil Rights. Quite simply, the Office protects our nation's students—whether they're in first grade or in graduate school—against the evils of invidious discrimination. Students have these protections because of the great work of civil rights organizations, and many members of Congress—including some on this committee, including you Mr. Chairman—who played key roles in the enactment of civil rights legislation. Those laws marked a turning point in the life of the country, and, more personally, a turning point in the lives of members of my family.

Mr. Chairman, you recently joined with President Bush and Secretary Paige in providing the leadership and vision that led to the No Child Left Behind Act—the most sweeping reform of grade-school education in 30 years. As President Bush said at the signing ceremony, bipartisan leadership demonstrates that honorable people can disagree, yet compromise, and come together for the good of our nation's children. With this body's advice and consent, it is in that spirit that I intend to take up the task that President Bush has assigned me.

My passion for education comes not only from the influence of my family and my own life experiences, but also from my desire to see that others are afforded the same kinds of opportunities that I have enjoyed. To limit an individual's education is to limit his freedom. As President of the Center for New Black Leadership, I focused on the significant achievement gap between white and black students. I came to the conclusion that we need to expand the concept of civil rights so that it includes improving the quality of education for America's disadvantaged children.

My work at the Center for New Black Leadership led me to conclude that education is the answer to many civil rights issues. Education gives poor children the skills they need to succeed in the marketplace. A sound education is the fastest, and sometimes the only, way out of poverty. At the Center for New Black Leadership, I spent most of my time reviewing research literature, meeting with individuals who run schools, and promoting education reform. I also learned a great deal from a broad range of experienced education reformers, from Republican Congressman J.C. Watts to Democratic former mayor of Baltimore, Kurt Schmoke, and former Congressman Floyd Flake.

After leaving the Center for New Black Leadership, I transitioned from being a public policy advocate to being a regulatory attorney. I understand quite clearly that those two roles are very different. If I have the privilege of being confirmed, I am sure the experiences I have had in these distinct arenas—as a public policy advocate and as an attorney advising a client—will make me a more effective law enforcement official in the Office for Civil Rights.

If confirmed, my primary mission, as the head of the Office for Civil Rights will be to uphold the Constitution and enforce federal civil rights laws. One of the most significant, and in my mind successful, civil rights laws has been Title IX, which prohibits schools that receive federal funds from discriminating on the basis of sex.

TITLE IX

Before Title IX, schools and universities could, and did, treat men better than women. Many high schools routinely shepherded girls into courses such as home economics and typing, while boys were prepared for college and professional schools.

This is inherently unfair. A system that distributes benefits and burdens on the basis of an individual's sex is a system that curtails freedom of choice.

DISABILITY LAW

If confirmed, another of my duties will be to ensure that students with disabilities receive appropriate services so that they can achieve excellence in education. If we fail to help students with disabilities achieve their potential in our schools, we will be responsible for limiting their opportunities in life.

Recently, I was horrified to learn how Freddy Ramirez was treated by a DC public school. Freddy was 9 year-old boy who was confined to a wheelchair. Because his elementary school had no accessible bathrooms, this young boy had to park his wheelchair at the door of the bathroom and then crawl across the filthy floor to reach a stall. This went on 18 months until the school took action. These things must never be allowed. It is humiliating and degrading and unworthy of a nation committed to civic equality. And more simply, how is that young boy supposed to learn effectively in an environment like that?

Congress enacted two landmark statutes, Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. I am strongly committed to these laws, and to the President's New Freedom Initiative. In implementing that Initiative, President Bush has instructed his Administration to fully enforce the civil rights laws protecting people with disabilities.

There is much work to do. Over 60 percent of all complaints filed with OCR concern disability-based discrimination. If confirmed, I will obey President Bush's directive, and enforce these statutes to the letter, so that kids like Freddy need face only the challenges of teachers and of tests, not of getting to a bathroom stall.

TITLE VI

If confirmed, I will vigorously enforce Title VI of the Civil Rights Act of 1964, which made the promise of the Fourteenth Amendment a reality, prohibiting discrimination based on race, color or national origin. The backlash against innocent Muslim and Arab students demonstrates the continued need for vigorous enforcement of our nation's civil rights laws. I join President Bush, Secretary Paige, and members of the Senate in their concern that the horrors of September 11th do not lead to mistreatment of Arab-Americans. Racial discrimination and harassment have no place in our schools.

While President of the Center for New Black Leadership, I supported affirmative action programs that promoted economic development of urban communities, improved the quality of education for disadvantaged students, and enhanced employment skills for young people entering the workforce. Along with President Bush and Secretary Paige, I support "affirmative access" for all Americans. If confirmed, I will seek to promote affirmative action programs that are consistent with the Constitution and achieve the critical goal of leaving no child behind.

CONCLUSION

Mr. Chairman, I want to thank you and the members of this Committee for the opportunity you have given me to speak with you today. I am honored that President Bush has nominated me to serve as Assistant Secretary for Civil Rights. If confirmed, I will uphold Constitution and vigorously enforce this nation's civil rights laws. I am eager to begin that work with the Senate's consent; but for now, I look forward to your questions. Thank you.

Senator JEFFORDS. The hearing will be held open for the purposes of record until Monday at midnight. That does not mean anything to you, it means something for us. That means we can throw a bunch of paper at somebody, so do not worry about it.

Senator SESSIONS. Thank you, Mr. Chairman, and thank you, Mr. Reynolds.

Senator JEFFORDS. The hearing is recessed.

[Whereupon, at 5:16 p.m., the committee was adjourned.]