

DEPARTMENT OF EDUCATION AND  
DEPARTMENT OF LABOR NOMINATIONS

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

FIRST SESSION

ON

EXAMINING THE NOMINATIONS OF KENNETH L. MARCUS, OF VIRGINIA,  
TO BE ASSISTANT SECRETARY FOR CIVIL RIGHTS, AND JOHNNY  
COLLETT, OF KENTUCKY, TO BE ASSISTANT SECRETARY FOR SPECIAL  
EDUCATION AND REHABILITATIVE SERVICES, BOTH OF THE DEPART-  
MENT OF EDUCATION, AND SCOTT A. MUGNO, OF PENNSYLVANIA, TO  
BE AN ASSISTANT SECRETARY, AND WILLIAM BEACH, OF KANSAS, TO  
BE COMMISSIONER OF LABOR STATISTICS, BOTH OF THE DEPART-  
MENT OF LABOR

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DECEMBER 5, 2017

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# C O N T E N T S

## STATEMENTS

TUESDAY, DECEMBER 5, 2017

Page

### COMMITTEE MEMBERS

|   |    |
|---|----|
| Alexander, Hon. Lamar, Chairman, Committee on Health, Education, Labor, and Pensions, opening statement ..... | 1  |
| Murray, Hon. Patty, a U.S. Senator from the State of Washington, opening statement .....                      | 4  |
| Murphy, Hon. Christopher, a U.S. Senator from the State of Connecticut .....                                  | 20 |
| Collins, Hon. Susan M., a U.S. Senator from the State of Maine .....  | 22 |
| Isakson, Hon. Johnny, a U.S. Senator from the State of Georgia .....  | 26 |
| Franken, Hon. Al, a U.S. Senator from the State of Minnesota .....  | 28 |
| Cassidy, Hon. Bill, a U.S. Senator from the State of Louisiana .....  | 30 |
| Hassan, Hon. Margaret Wood, a U.S. Senator from the State of New Hampshire .....                              | 32 |
| Casey, Hon. Robert P., Jr., a U.S. Senator from the State of Pennsylvania .....                               | 34 |
| Whitehouse, Hon. Sheldon, a U.S. Senator from the State of Rhode Island .....                                 | 36 |
| Baldwin, Hon. Tammy, a U.S. Senator from the State of Wisconsin .....   | 37 |
| Kaine, Hon. Tim, a U.S. Senator from the State of Virginia .....  | 39 |
| Warren, Hon. Elizabeth, a U.S. Senator from the State of Massachusetts .....                                  | 41 |

### WITNESSES

|  |    |
|--|----|
| Statement of Kenneth Marcus, nominated to be Assistant Secretary for Civil Rights, Department of Education, Leesburg, VA .....   | 7  |
| Prepared statement .....   | 9  |
| Statement of Johnny Collett, nominated to be Assistant Secretary for Special Education and Rehabilitative Services, Department of Education, Georgetown, KY .....          | 10 |
| Prepared statement .....   | 12 |
| Statement of Scott Mugno, nominated to be Assistant Secretary of Labor for the Occupational Safety and Health Administration, Department of Labor, Moon Township, PA ..... | 13 |
| Prepared statement .....   | 14 |
| Statement of William Beach, Ph.D., nominated to be Commissioner of Labor Statistics, Department of Labor, Alexandria, VA .....   | 15 |
| Prepared statement .....   | 17 |

### ADDITIONAL MATERIAL

|   |     |
|---|-----|
| Statements, articles, publications, letters, etc. |     |
| Burned—A Journal Sentinel Watchdog Report .....   | 52  |
| Letters of Support for Kenneth Marcus .....       | 134 |
| Letters of Support for Johnny Collett .....       | 151 |
| Letters of Support for Scott Mugno .....          | 158 |
| Letters of Support for William Beach .....        | 168 |

### QUESTIONS AND ANSWERS

|   |     |
|---|-----|
| Response by William Beach to questions of:<br>Senator Alexander ..... | 173 |
|---|-----|

IV

|   | Page |
|---|------|
| Response by William Beach to questions of—Continued |      |
| Senator Scott .....                                 | 173  |
| Senator Young .....                                 | 173  |
| Senator Murkowski .....                             | 174  |
| Senator Murray .....                                | 175  |
| Senator Whitehouse .....                            | 178  |
| Senator Warren .....                                | 179  |
| Senator Kaine .....                                 | 180  |
| Response by Johnny Collett to questions of:         |      |
| Senator Murray .....                                | 181  |
| Senator Sanders .....                               | 191  |
| Senator Casey .....                                 | 192  |
| Senator Bennet .....                                | 193  |
| Senator Whitehouse .....                            | 194  |
| Senator Murphy .....                                | 195  |
| Senator Kaine .....                                 | 195  |
| Senator Hassan .....                                | 197  |
| Senator Hatch .....                                 | 197  |
| Senator Collins .....                               | 198  |
| Response by Kenneth Marcus to questions of:         |      |
| Senator Murray .....                                | 198  |
| Senator Sanders .....                               | 207  |
| Senator Casey .....                                 | 208  |
| Senator Bennet .....                                | 210  |
| Senator Whitehouse .....                            | 211  |
| Senator Baldwin .....                               | 212  |
| Senator Murphy .....                                | 213  |
| Senator Warren .....                                | 213  |
| Senator Kaine .....                                 | 218  |
| Senator Hassan .....                                | 220  |
| Senator Murkowski .....                             | 220  |
| Senator Hatch .....                                 | 221  |
| Response by Scott Mugno to questions of:            |      |
| Senator Murray .....                                | 222  |
| Senator Whitehouse .....                            | 230  |
| Senator Baldwin .....                               | 230  |
| Senator Warren .....                                | 231  |
| Senator Hatch .....                                 | 235  |

**DEPARTMENT OF EDUCATION AND  
DEPARTMENT OF LABOR NOMINATIONS**

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**Tuesday, December 5, 2017**

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

The Committee met, pursuant to notice, at 10 a.m. in room SD-430, Dirksen Senate Office Building, Hon. Lamar Alexander, Chairman of the Committee, presiding.

Present: Senators Alexander [presiding], Isakson, Collins, Cassidy, Young, Murray, Casey, Franken, Bennet, Whitehouse, Baldwin, Murphy, Warren, Kaine, and Hassan.

OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

This morning, we are holding a confirmation hearing on Ken Marcus, nominated to serve as Assistant Secretary for Civil Rights at the Department of Education; Johnny Collett, nominated to serve as Assistant Secretary for Special Education and Rehabilitative Services at the Department of Education; Scott Mugno, nominated to serve as Assistant Secretary of Labor for Occupational Safety and Health at the Department of Labor; Dr. William Beach, nominated to serve as Commissioner of Labor Statistics at the Department of Labor.

Senator Murray and I will each have an opening statement, and then we will introduce the nominees. After their testimony, Senators will each have an opportunity to ask the nominees 5 minutes of questions.

We have a competing hearing today with the Appropriations Committee on these same issues. We are both Members of the Subcommittee and Senator Murray is the Ranking Member, so for some of this time, we will be going back and forth.

In a hearing in 2014, I had this exchange with the former Assistant Secretary for Civil Rights at the Department of Education, Catherine Lhamon.

“Alexander: Ms. Lhamon, you talk about something called guidance, and I have here about 66 pages of guidance under Title IX. Do you expect institutions to comply with your Title IX guidance documents?”

“Lhamon: We do.”

“Alexander: You do? What authority do you have to do that? Why do you not go through the same process of pub-

lic comment that the [Department of Education] is going through under the Clery Act?"

"Lhamon: Well, we would if there were regulatory changes."

"Alexander: Why are there not regulatory changes? You require 6,000 institutions to comply with this, correct?"

"Lhamon: We do."

The problem with that exchange is that guidance documents are not law.

Laws are created by this Congress, or in some cases, the Department of Education may issue regulations within the authority that Congress has granted, and an agency must follow proper procedures that include public comment when it issues regulations.

Public comment is especially important when issues are complex and have a great deal of difference of opinions. This certainly is true on the issue of the standard of proof colleges must use when investigating allegations of sexual misconduct.

In April 2011, the Education Department had issued guidance under Title IX that told colleges for the first time the standard of proof that must be used when investigating these allegations.

I was glad to see Secretary DeVos end this overreach and recognize the difference between the law and guidance, and announce that the Department will conduct the proper public rulemaking process to hear from students, college administrators, and others to help schools protect the safety and rights of all students.

The Office for Civil Rights has the important responsibility of ensuring that Title IX and other civil rights laws, and the protections they provide to all students, are fully enforced.

If confirmed, Mr. Marcus, I hope you will also recognize the difference between the law, which is binding, and guidance, which is not.

Mr. Marcus, you have a deep understanding of civil rights issues, having founded the Louis D. Brandeis Center for Human Rights Under Law and having served as Staff Director of the United States Commission on Civil Rights for 4 years. You also led the Office for Civil Rights at the Department of Education under President George W. Bush for a period of time when it did not have a confirmed official in that office.

I have letters from 13 individuals and organizations who support your nomination to lead the Office for Civil Rights, including the Hillel organization, the largest Jewish campus organization in the world. That organization said to us, "Mr. Marcus has been a long-time champion for civil rights and for college students. We have worked personally with him on several campuses across the country in response to specific issues of bigotry and discrimination, and we have found him to be extremely skilled and knowledgeable in civil rights laws. Mr. Marcus has been a true leader in fighting discrimination."

I ask unanimous consent to insert the letters into the record, which they will be.

The CHAIRMAN. You were nominated on October 30. On November 8, the Committee received your Office of Government Ethics paperwork, including your public financial disclosure and ethics

agreement. On November 28, we received your Committee paperwork.

Now, Mr. Collett, five organizations support your nomination as a result of your long history in special education.

I ask consent to insert those statements and letters into the record, which they will be.

The CHAIRMAN. Mr. Collett, you have been a high school special education teacher. You have served as Director of the Division of Learning Services at the Kentucky Department of Education. Your current role is Director of Special Education Outcomes at the Council of Chief State School Officers.

You also previously served on the Board of Directors of the National Association of State Directors of Special Education. The Association applauded you for having, "Worked with stakeholders in the disability community at the local, state, and national levels."

You were nominated on November 16. On November 28, the Committee received your paperwork. On November 29, we received your Office of Government Ethics paperwork, including your public financial disclosure and ethics agreement.

Today, we also are considering two nominees for the Department of Labor.

The first is Scott Mugno, to serve as Assistant Secretary of Labor for Occupational Safety and Health at the Department of Labor.

The position is especially interesting to me because in the early 1970's, my father received a call from Tennessee Governor Winfield Dunn, who asked him to be a Commissioner on the first Tennessee Occupational Safety and Health Review Commission. At the time, my dad was the safety director at the smelting plant in Alcoa, Tennessee.

I grew up seeing my father's pride when the plant went a long number of days without an accident, which instilled in me the importance of workplace safety.

You can imagine, therefore, I have a lot of respect for your experience at FedEx, where you currently serve as the Vice President for Safety, Sustainability, and Vehicle Maintenance for FedEx Ground in Pittsburgh.

You have held legal positions at FedEx Express, Westinghouse, and the U.S. Army JAG Corps.

Of special note, you have had the good judgment to live in Memphis for 18 years—

[Laughter.]

The CHAIRMAN —where you and your wife raised your two daughters.

You were nominated on November 1. On November 13, the Committee received your paperwork; on November 14, your Government Ethics paperwork, including your public financial disclosure and ethics agreement.

Mr. Mugno, I have two letters and statements from five organizations in support of your nomination that I would like to have included in the record, and I ask consent that they be included.

The CHAIRMAN. Finally, as Commissioner of Labor Statistics, Dr. Beach, you will oversee the Bureau that is responsible for collecting and publishing the data that tells us how our economy is doing, including the unemployment rate and changes in consumer prices.

As fewer people have landlines, and more use cell phones and social media to communicate, it is getting harder to reach people in order to obtain these figures.

There is also the challenge of how do you engage with the public on these important figures without seeming like we are cherry picking the best results?

Data itself is nonpartisan, and at the Bureau, you will be leading an agency that collects data and does not make policy.

I hope you will have an opportunity at this hearing to tell us how you plan to adapt to these challenges when you release the data gathered through the Household and Community Surveys.

Dr. Beach, you are well equipped to lead this organization and meet these challenges. You have been Chief Economist for the Senate Budget Committee from 2013 to January 2016. You were Director at the Center for Data Analysis at the Heritage Foundation prior to that. Currently, you are Vice President for Policy Research at the Mercatus Center at George Mason University.

You were nominated on October 24. On October 28, we received your Ethics paperwork. On November 21, we received your Committee paperwork.

Dr. Beach, I have received three letters of support for your nomination that I would like to have included in the record, and they will be.

The CHAIRMAN. Thanks to all of you for your willingness to serve. I look forward to hearing from our nominees.

Senator Murray.

#### OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Well, thank you very much, Chairman Alexander.

Thank you to all of our nominees for being here and for your willingness to serve in these important roles at the Department of Education and Labor.

You all will be responsible for fighting for our students, our workers, and our families even as we have watched this President actively working to undermine the middle class' access to opportunity and their financial security.

For me, one of the most appalling ways President Trump has damaged our country is when it comes to civil rights and undermining the rights and safety of women, people of color, and people with disabilities.

First of all, this should not be a surprise. There are some areas where President Trump has broken his promises. I will talk about those in a bit. But this is one where he has actually kept them.

This is a President who kicked off his campaign by calling Mexicans criminals, who called for a ban on all Muslims coming to America, who openly ridiculed a journalist with a disability, who has openly demeaned women, who defended white supremacists rallying in Charlottesville by saying they were, quote, "Many fine people among them," and sadly more.

This is an Administration that has worked every day to implement the vision of their leader, especially in education, rolling back protections for transgender students, revoking Title IX guidance that protects women and helps bring perpetrators of sexual assault

to justice, halting investigations into systemic discrimination, and again, the list goes on.

Two of the nominees here today to lead the Office for Civil Rights and the Special Education and Rehabilitation Services will be in a position to continue those appalling policies, make them worse, or work with us to begin to reverse the damage. I am looking forward to hearing more today about which direction they plan to go.

Now, those are some of the promises that President Trump kept, but now, let us talk about some of the promises he has broken.

After more than a year on the campaign trail of telling workers he would put them first, the Trump administration has done the exact opposite and prioritized corporations' profits over their employees.

He has refused to defend an Obama administration overtime rule that would have ensured four million people, who work more than 40 hours a week, are paid what they deserve.

He allowed companies to continue to receive Federal contracts paid with taxpayer money regardless of a company's record on wage and safety violations.

He has weakened health and safety protections for our workers, opening the door for companies to put their employees' lives and livelihoods at risk to maximize profits.

Instead of using empirical data to make decisions about the economy, he has denied facts and, at times, lied about our Nation's job numbers.

These positions within the Department of Labor, the Occupational Safety and Health Administration, and the Bureau of Labor Statistics Commissioner cannot continue this harmful pattern and must, instead, rely on data for accurate information to prioritize workers and our middle class.

There is a lot at stake here and I would like to go through what I would like to hear from each of you today.

First, Mr. Marcus, you have been nominated to lead the Department of Education's Office for Civil Rights. OCR describes their mission as to, quote, "Ensure equal access to education and to promote educational excellence throughout the Nation through vigorous enforcement of civil rights."

Unfortunately, this Administration has been moving in the opposite direction, and I have made it very clear, I believe the current Acting Assistant Secretary, Candice Jackson, should be removed from her position.

Not just because of the callous, and insensitive, and egregious comments she made regarding sexual assault on college campuses. But also because of the way she has worked to narrow the role of that office, back away from progress made to protect transgender students, take away tools and resources it has to protect students, and move it away from that core mission I just stated.

I am very glad Secretary DeVos decided to nominate someone else to replace Ms. Jackson. However, the Department has refused to answer our inquiries on a number of troubling civil rights decisions including the decision to guidance that clarifies transgender students' rights.

Mr. Marcus, you and I both share the goal of halting discrimination on the basis of race, ethnicity, or religion on college campuses,

which is certainly an issue OCR will face in light of increased incidents of hateful rhetoric and violence occurring on campuses and in schools.

However, I do have concerns about your ability to stand up to President Trump and DeVos, and do the right thing for our students, which is something I plan to ask you about today.

Second, Mr. Collett, during her confirmation hearing in this very room, Secretary DeVos did not seem to understand that IDEA is Federal law and thought that states should get to decide whether or not they are living up to the promise of IDEA.

The role you have been nominated for is responsible for improving education and employment opportunities for students with disabilities. However, during your time at the Kentucky Department of Education, the state was actually criticized for allowing frequent use of seclusion and restraint in schools often used on students with disabilities. Only after public outcry and work from the Protection and Advocacy Agency did Kentucky take steps to address that.

Additionally, you told my staff, you support Secretary DeVos' privatization agenda, which includes a \$20 billion school voucher program proposal. Voucher proposed programs do not support all of the needs of students with disabilities.

I hope to hear from you today whether you will be willing to commit to protecting students and to standing up to the Secretary if she creates confusion or takes misguided steps for students with disabilities.

Mr. Mugno, OSHA's mission statement is to, quote, "Assure safe and healthful working conditions for working men and women by setting and enforcing standards, and providing training, outreach, education, and assistance."

As a member of the Chamber of Commerce's leadership, you fought against new OSHA safety rules and led efforts to undermine their enforcement abilities. During your time at FedEx, there have been a number of employee deaths, including just 2 weeks ago on Thanksgiving.

I am concerned about your record that stands against everything OSHA should stand for. I have major concerns about whether you will stand up to workers or side with corporations, and I will ask you about that today.

Finally, Dr. Beach, President Trump not only routinely ignores factual information and spreads misinformation, but has explicitly questioned the validity of BLS jobs numbers when they were not in his favor.

If, or when, the economy begins to decline, I hope you will not succumb to political pressure and put data and statistics ahead of the President's ego.

Students, workers, and families are counting on all four of you to stand up to the President and harmful policies. I look forward to hearing from each of you today on whether or not you plan to do that.

As the Chairman indicated, we both have competing hearings today. I am the Ranking Member on an Appropriations Committee that is meeting right now too. I have read all of your statements

and I will go down to the Committee hearing, and come back in time for questions.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murray.

I am pleased to welcome our four nominees. I thank you for offering to serve our country. Each nominee will have up to 5 minutes for summarizing your remarks, and then we will go to a 5 minute round of questions.

I have introduced each of the nominees pretty well in my opening statement, so I will do it briefly now.

Ken Marcus is the first nominee. He is joined today by his wife and daughter, and other members of his family. We welcome you, as we do other family members today.

As President and General Counsel of the Louis D. Brandeis Center for Human Rights Under Law, Mr. Marcus has worked to accomplish the Center's mission of, "Advancing the civil and human rights of the Jewish people and promoting justice for all."

Johnny Collett's wife, Jennifer, is with him today. We welcome you. Mr. Collett's current role as Director of Special Education Outcomes, the Council of Chief States School Officers has given him many opportunities to focus on helping states improve outcomes and set high expectations for students with disabilities.

Joining Scott Mugno today are his wife and mother, and other members of this family. Welcome to you.

Mr. Mugno has worked for FedEx since 1994 and held a variety of positions working to ensure workers' safety. During his time at FedEx, Mr. Mugno has twice received the company's highest honor, the Five Star Award for his safety leadership.

Our last nominee is William Beach. He is joined today by friends in the audience. Welcome to all of them.

Like I said in my opening statement, Dr. Beach has a wealth of experience in economics and data analytics.

Welcome to all of our witnesses.

Mr. Marcus, you may begin your testimony.

#### **STATEMENT OF KENNETH MARCUS**

Mr. MARCUS. Thank you.

Mr. Chairman, Ranking Member Murray, and Members of this Committee.

It is an honor to appear before you today as the nominee for the position of Assistant Secretary for Civil Rights, U.S. Department of Education. I would like to thank President Trump for nominating me and Secretary DeVos for her support.

I am also grateful for the hardworking professionals with whom I had the opportunity to work during my prior tenure with the U.S. Department of Education's Office for Civil Rights. They have dedicated themselves to the principle of equal access to education and to promoting educational excellence through vigorous enforcement of civil rights.

Finally, I would like to acknowledge my gratitude to the teachers, mentors, colleagues, family and friends who have helped me along the way, especially my wife Stephanie and daughter Shoshana who, as you indicated Mr. Chairman, are both here with

me today, together with my sister Bonita Moore and her husband Garrett Moore.

At her confirmation hearing, Secretary DeVos described her view that, "Every child in America deserves to be in a safe environment that is free from discrimination." She has subsequently emphasized that, "Educational institutions have a responsibility to protect every student's right to learn in a safe environment and to prevent unjust deprivations of that right."

I share those objectives, and it would be a great honor to join Secretary DeVos at the Department of Education and work to carry them out.

Should I be granted the honor of confirmation to the position of Assistant Secretary for Civil Rights, I would bring to the position legal, management, and civil rights experience developed over a 25-plus year career as a civil rights lawyer, university instructor, think tank executive, former Education Department employee, and most recently, as Founder and President of the Louis D. Brandeis Center for Human Rights Under Law.

While I was delegated the authority of Assistant Secretary for Civil Rights, OCR issued policy guidance reminding universities and colleges, as well as public elementary and secondary school leaders, of their obligation to establish Title IX grievance procedures and coordinators.

This was important because we had found in the course of our compliance reviews that several recipients were failing to secure the rights of their students under Title IX.

OCR also issued policy guidance, during my tenure, clarifying the rights of Jewish, Sikh, Muslim, and other religious minority students from discrimination on the basis of their ethnicity or national origin. No student at a federally assisted school or college should face this form of discrimination or harassment. This is a subject on which I have continued to dedicate a significant portion of my time since leaving the Government.

In addition, working with OCR's career professionals, I expanded OCR's program of proactive compliance reviews.

For example, I devoted considerable effort to a nationwide enforcement initiative to ensure that racial and ethnic minority students and English language learners were not inappropriately placed in special education programs that were unsuitable to their needs. We were particularly concerned that some of these children simply lacked access to research-based reading programs, and their inability to read led to erroneous placements for them.

I also oversaw a nationwide enforcement initiative to eliminate barriers to access for post secondary students with disabilities. Areas of focus for these compliance reviews included accessibility to residence halls, classrooms, and academic buildings.

I am honored by the possibility of returning to public service, because I can think of no higher calling than to enforce the principles of equal justice, and to provide greater opportunities for students across this great country.

If my nomination is confirmed, I would approach this position with abiding respect for OCR; with deep respect for the agency's role, responsibilities, and limitations within the constitutional structure; and with profound appreciation of the weighty respon-

sibilities that come with serving our Nation’s families, children, and learners in this way.

I would work to strengthen OCR, to preserve civil rights, to seek equal justice for all, to respect the rule of law, and to promote public confidence. The Members of this Committee are critically important partners in pursuing those goals.

Again, I thank you for considering my nomination, and for giving me the opportunity to appear before you. I look forward to answering any questions that you might have.

[The prepared statement of Mr. Marcus follows:]

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PREPARED STATEMENT OF KENNETH MARCUS

Chairman Alexander, Ranking Member Murray, and Members of this Committee: It is an honor to appear before you today as the nominee for the position of Assistant Secretary for Civil Rights, U.S. Department of Education. I would like to thank President Trump for nominating me and Secretary DeVos for her support.

I am also grateful for the hardworking professionals with whom I had an opportunity to work during my prior tenure with the U.S. Department of Education’s Office for Civil Rights (OCR). They have dedicated themselves to the principle of equal access to education and to promoting educational excellence through vigorous enforcement of civil rights.

Finally, I would like to acknowledge my gratitude to the teachers, mentors, colleagues, family, and friends who have helped me along the way, especially my wife Stephanie and daughter Shoshana, who are both here with me today, together with my sister Bonita Moore and her husband Garrett Moore.

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If my nomination is confirmed, I will approach this position with abiding respect for OCR; with deep respect for the agency's role, responsibilities, and limitations within the constitutional structure; and with profound appreciation of the weighty responsibilities that come with serving our nation's families, children, and learners in this way. I will work to strengthen OCR; to preserve civil rights; to seek equal justice for all; to respect the rule of law; and to promote public confidence. The Members of this Committee are critically important partners in pursuing those goals.

Again, I thank you for considering my nomination and for giving me the opportunity to appear before you. I look forward to answering any questions that you might have.

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The CHAIRMAN. Thank you, Mr. Marcus.  
Mr. Collett, welcome.

#### **STATEMENT OF JOHNNY COLLETT**

Mr. COLLETT. Chairman Alexander, Ranking Member Murray, and Members of the Committee.

I am humbled by the President's nomination and grateful for the Secretary's trust. If confirmed by this Committee, I am eager and excited to serve the millions of children, youth, and adults with disabilities in our country as the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

I am thankful for the support that this nomination has received from many national organizations, former colleagues, teachers, principals, parents, and families who work every day to improve outcomes for individuals with disabilities.

I want this Committee to know that I hold that in trust and will work as hard, as strategically and as collaboratively, as possible to ensure that we deliver on the promises that we have made to children, families, and individuals with disabilities in this country.

The mission of the office for which I have been nominated is to, "Improve early childhood, educational, and employment outcomes and raise expectations for all people with disabilities, their families, their communities, and the Nation." This mission is consistent with what I believe. It is consistent with how I have led and it is consistent, frankly, with who I am.

Before I get into other comments that I am thankful to share with you today, I would like to tell you about an encounter that I had recently in a store in our hometown.

While in a checkout lane, I heard someone call my name from across the store. I turned and immediately recognized the individual as one of my former students. We shared updates about our lives, and just generally got caught up, and had a brief conversation.

But when I got in the car, I mentioned something to my wife that I would like to share with this Committee today at the beginning of these proceedings.

What stood out to me the most about seeing my former student is that he appeared happy, proud of what he had accomplished, and clearly confident about his future.

Now, I expect that we will talk about a number of things today, and I am looking forward to responding to your questions. But I want to be honest about something from the beginning.

Regardless of the particular matters that we will discuss or the specific issues at hand, the lens through which I will seek to process, and understand, and respond to your questions will be that of the child, the student, the adult with a disability, and what will ensure that they have an equitable opportunity to be successful.

While it is true that we all, individually and as a Nation, have a stake in the success of children, youth, and adults with disabilities, no one has more of a stake in their lives than they do. This will be my lens today, and each day that I serve in this role, if confirmed.

Before I began my career as an educator, I was a church pastor for 10 years. While a different role, to be sure, during those years. I believe that is where my commitment to individuals, their particular strengths and needs, and the supports that we could help them achieve the success that they envisioned were really firmly established. This commitment continued to be shaped as I began my public education career.

I came into the teaching profession through an alternative route. In fact, I began my career as a teacher as an emergency certified teacher. I quickly achieved full certification and have continued since then to be guided by a growing, and what has become an intense, focus on individuals with disabilities and their families. Their strengths, their needs, and how we best support them to achieve the outcomes that we, and most importantly they, envision.

I am proud of the work I did as a high school special education teacher in Kentucky, the work I then had the pleasure to lead as the State Director for special education in Kentucky, and the work I have most recently led as Director for Special Education Outcomes at the Council of Chief State School Officers.

But if I may, Mr. Chairman, what I am most proud of is to be my wife's husband, my children's father, my parents' son, and my brother's brother. From my view, the extent to which I have been, or will be, successful will be measured most importantly by my faithfulness to God and, as a result, my faithfulness to them.

Through all of the work I have been honored to lead, I have demonstrated a commitment to raising expectations and improving outcomes for individuals with disabilities and their families. Collaborating meaningfully and effectively with any and all who have a stake in their success. If confirmed, I will continue to demonstrate these commitments.

To summarize, while the challenges and opportunities we face are complex, my philosophy is pretty simple. I believe that all children, youth, and adults with disabilities in this country deserve an equitable opportunity to be successful.

But there is only one way for all to mean "all". The only way for all to mean "all" is that it has to mean "each". To ensure that each child, and each youth, and each adult with a disability has equitable access to the opportunities they need to be successful, requires that we must have different, deep, and sometimes difficult conversations.

Perhaps I am being naive, but I believe we can do that, and do it effectively, in service to individuals and families across this country.

It is my view that the kids we run into at the store, or wherever, deserve nothing less from the adults who are charged with their care and the ones who have promised to help prepare them for life after they leave our systems of education.

Thank you for your time, and thank you for the opportunity to be here, and I look forward to answering your questions.

[The prepared statement of Mr. Collett follows:]

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PREPARED STATEMENT OF JOHNNY COLLETT

Thank you, Chairman Alexander, Ranking Member Murray, and Members of the Committee. I am humbled by the President's nomination and grateful for the Secretary's trust. If confirmed, I am eager to serve our Nation's millions of children, youth, and adults with disabilities and their families as Assistant Secretary for the Office of Special Education and Rehabilitative Services (OSERS).

I am thankful for the support this nomination has received from many national organizations, current and former colleagues, teachers, principals, parents and families who work every day to improve outcomes for individuals with disabilities. I hold this in trust and will work as hard, as strategically, and as collaboratively as I can to ensure that we deliver on the promises we have made to individuals and families in this country.

The mission of the office which I have been nominated to lead is to "improve early childhood, educational, and employment outcomes and raise expectations for all people with disabilities, their families, their communities, and the Nation." This mission is consistent with what I believe, how I have led, and, frankly, who I am.

Before I get into other comments that I'm thankful to have the opportunity to share with you today, I would like to tell you about an encounter I had recently at a local store in our hometown. While in the check-out lane, I heard someone call my name from across the store. When I turned, I immediately recognized the individual as one of my former students. We shared updates about our lives, and had a good, though brief conversation. When I got in the car, I mentioned something to my wife that I would like to share with you at the beginning of these proceedings. What stood out the most to me about seeing my former student that day, is that he appeared happy, proud of what he had accomplished, and clearly confident about his future.

Now, I expect that we will talk about a number of things today, and I'm looking forward to responding to your questions. But I want to be honest about something from the beginning . . . Regardless of the particular matters at hand or the specific issues that we may discuss, the lens through which I will process and respond to your questions will be that of the child, the student, or the adult with a disability, and what will ensure that they have an equitable opportunity to be successful. While we all—individually and as a nation—have a stake in the success of children, youth, and adults with disabilities, no one has more of a stake in their success than they do. This will be my lens today, and each day that I serve in this role, if confirmed.

Before I began my career as an educator, I was a church pastor for about 10 years. While a different role, to be sure, it was during those years that my commitment to individuals, their particular strengths and diverse needs, and the supports that would help them achieve the life they envisioned, was firmly established. That commitment continued to be shaped as I began my career in public education. I came into the teaching profession through an alternative route. In fact, I began my education career as an emergency certified teacher. I quickly achieved full certification and have continued since then to be guided daily by a growing and intense focus on individuals with disabilities and their families, their strengths and needs, and how we best support them to achieve the outcomes that we, and most importantly they, envision.

I'm proud of the work I did as a high school special education teacher, the work I then had the pleasure to lead as the state director for special education in Kentucky, and the work I have most recently led as the director for special education outcomes at the Council of Chief State School Officers. But, if I may, what I am most proud of is to be my wife's husband, my children's father, my parents' son, and my brother's brother. From my view, the extent to which I have been, or will be successful, will be measured most importantly by my faithfulness to God and, as a result, my faithfulness to them.

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To summarize, while the challenges and opportunities we face are complex, my philosophy is pretty simple. I believe that ALL children, youth, and adults with disabilities in this country deserve an equitable opportunity to be successful in school and beyond. But there is only one way for all to mean "all". For all to mean ALL, it has to mean EACH. To ensure that each child, each youth, and each adult with a disability has equitable access to the opportunities, resources, and supports they need to be successful, requires that we must have different, deep, and sometimes difficult conversations. Perhaps I'm being naive, but I believe we can do that, and do it effectively, in service to individuals with disabilities and their families.

It is my view that the kids we run into at the store, or wherever, deserve nothing less from the adults who are charged with their care and who have promised to help prepare them for life after they leave our system of education.

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The CHAIRMAN. Thank you, Mr. Collett.  
Mr. Mugno, welcome.

#### STATEMENT OF SCOTT MUGNO

Mr. MUGNO. Thank you, Mr. Chairman, Ranking Member Murray, and distinguished Members of the Committee.

I appreciate your valuable time in conducting this hearing.

It is an honor to be here as President Donald J. Trump's nominee for Assistant Secretary of Labor for the Occupational Safety and Health Administration. I thank the President for the nomination and Secretary Alexander Acosta for his recommendation and support.

Of course, I thank my family members, friends, and colleagues who are here today or watching today's hearing for their support and love.

In particular, with me here today is my best friend and wife of 34 years, Sharon Bedell Mugno. Our life's journey has been amazing and much of that is because of her. Our two daughters and son-in-law were unable to attend today, but Madeline and Will Boulware and Kaitlin Mugno are watching and here in spirit.

Nothing was going to stop Marilyn Mugno, my mother, from traveling from Cape Cod to be here today. I want to thank my sister Cheryl Mugno and brother-in-law William Trompeter for ensuring Mom traveled here safely, as well as both of them being here to support me today. Additionally, I am also pleased that their son, my nephew Luke Trompeter, could be here.

I am also grateful for the support and love of my sister Denise Dorado, Sharon's parents, Alice and Bob Bedell, as well as the guidance from my cousin, Colonel Howard Wayne Crawford, Jr., U.S. Army Retired, all who are watching today.

Finally, I have no doubt Anthony Mugno, Jr., Tony, my father, is watching from above and is very proud today as well.

Many have asked me why I am interested in this position. The answer is easy. First, is to serve my country again. I did so in my career in the U.S. Army Judge Advocate General's Corps. That service launched me on the successful career path that brings me here today.

Should I be confirmed, this tour of duty will allow me to give back to my country using all the experiences it gave me the opportunity to have over the years.

Second, in the safety profession, there is no higher calling and few higher positions than this one. The opportunity to fulfill OSHA's mission to assure safe and healthful working conditions for all working men and woman is an honor and noble work.

If confirmed, I will work hard every day, side by side with the best safety professionals at America's ultimate safety department, OSHA, to fulfill that important mission.

Safety professionals, regardless of what sector they come from, all have the same goal: safety. The discussions or debates on how to reach that goal can, at times, lead some to believe one side or another does not believe in the goal. Nothing could be further from the truth.

A top priority of mine is to lead and facilitate transparent discussions between those safety professionals in our mutual quest to fulfill the goal.

I also want to assure you my experiences have given me a fairly rounded view of the safety arena.

For instance, I fully respect the role organized labor has played in the safety arena over its history. In my first safety position with the FedEx organization, my safety team and I worked with the Flight Safety Department and the Pilot's Union to address and resolve hazardous materials issues. We also worked with them on infectious disease prevention and control during the 2009 pandemic.

This collaboration and mutual respect is vital to making America's workplaces safe.

Last, when I was in college and before I went to law school, I worked in Macy's Department Store in Queens, New York. I belonged to Local 1-S, AFL-CIO and for the better part of my last year there, I was the Shop Steward for the department. Yes, I wrote grievances and some of them for safety.

As the discussions I have had with some of you last week revealed, the issues are many, they are diverse and as we all know, the resources limited. If I am given the opportunity to serve, I look forward to working with all of you, and Secretary Acosta, to make the workplace a safer and healthier place while always abiding by the OSHA mission and its laws.

I look forward to your questions, and I again thank you for this opportunity today, Mr. Chairman.

[The prepared statement of Mr. Mugno follows:]

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PREPARED STATEMENT OF SCOTT MUGNO

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I look forward to your questions and I again thank you for this opportunity today.

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The CHAIRMAN. Thank you, Mr. Mugno.  
Dr. Beach, welcome.

#### **STATEMENT OF WILLIAM BEACH**

Dr. BEACH. Mr. Chairman, Ranking Member Murray, and Members of this Committee.

Let me join all of the nominees who have come before you in thanking this Committee for inviting me here today. I am honored that the President nominated me for this position of public trust. I thank the President for the nomination and Secretary Alexander Acosta for his recommendation and support.

I admire, as all of you do, the Bureau of Labor Statistics and I join you in the common cause of defending its independence and its integrity.

BLS continues to be the preeminent source for workforce, price, and productivity data. Much of the private and public sectors require this information to function well, if to function at all. Markets trade on BLS information, policymakers change laws based on their data, and businesses arrive at crucial decisions using the statistical products that BLS produces.

How would I approach this position, should I be confirmed?

I come to this nomination with a long public record of policy research. Underlying this record are principles that have guided my career. These principles, I submit, are more important and relevant to the position to which I have been nominated than most of the essays and projects that bear my name.

I can state these principles in the form of three commitments.

First, a commitment to discovering and developing high quality data to understand better the economic and social worlds.

Second, a commitment to building innovative statistical and model-based tools that advance our understanding of how public policy affects social and economic activity.

Third, a commitment to defending our public data systems through objective analysis and transparency.

First, I maintain a commitment to discovering and developing high quality data. As everyone here knows, the economic and social world does not deliver a package of data to us each day attached with a note, "Here is everything you need today to understand what is going on."

Rather, we have to work hard to find the right and reliable data for making sense out of what would otherwise be a chaos of incomprehensible activities.

I have argued many times that the National Income and Product Accounts, and the labor and price data bases of the Bureau of Labor Statistics are among the 20th century's greatest inventions. Together they constitute our national economic accounting system, a true national treasure, and they reliably provide invaluable information to private and public decision makers struggling to draw insights from social and economic activity.

Note, however, that this accounting system is entirely an invention of the human mind. None of this exists in nature. Economists, statisticians, sociologists, and other professionals have had to discover the data, defend their insights in ruthless peer review, and find funding to sustain what they have discovered.

Second, I maintain a commitment to building analytical tools that will give policymakers better and timelier insights on how policy change might affect economic activity. Data alone tells us little about economic and social relationships around us.

For example, the Census Bureau produces amazing data on the dynamics of business formation, on the creation and closing of businesses, and the jobs created and lost in those businesses.

However, the information collected does not tell us how business and job change rates affect Government revenues, the output of the economy, or the productivity of labor. These relationships can be captured only in simple, and sometimes complex, models of economic activity.

Finally, I am committed to defending our public data systems. For the handful of people who have followed my work on public

data, I am hopefully known for advancing tough standards of transparency and disclosure.

For example, I began work on public disclosure of Federal outlays and grants years before Senators Obama and Coburn led the successful effort to create USASpending.gov.

I supported nonpartisan efforts for the passage of the Data Act. When I served on the Republican staff of the Senate Budget Committee, I worked with Senator Murray's office to advance the Evidence-Based Policymaking Commission Act of 2015.

I have even flustered successive directors of the Congressional Budget Office by my critique of their failure to disclose their work adequately.

If confirmed, I will work hard to advance the integrity of the Bureau, continue its legacy as a preeminent source of public data, and maintain the neutrality and objectivity that is indispensable to our Nation's growing economy.

I thank you, again, for the opportunity to appear before you and to briefly describe the commitments that would guide my tenure as Commissioner of the Bureau of Labor Statistics.

Mr. Chairman, I look forward to your questions.

[The prepared statement of Dr. Beach follows:]

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PREPARED STATEMENT OF WILLIAM BEACH

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- Commitment to building innovative statistical and model-based tools that advance our understanding of how public policy affects social and economic activity.
- Commitment to defending our public data systems through objective analysis and transparency.

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Finally, I am committed to defending our public data systems. For the handful of people who have followed my work on public data, I am hopefully known for advancing tough standards of transparency, disclosure, and non-partisanship. For example, I began work on public disclosure of Federal outlays and grants years before Senators Obama and Coburn led the successful effort to create USASpending.gov. I supported non-partisan efforts for passage of the Data Act, and, when I served on the Republican Staff of the Senate Budget Committee, I worked with Senator Murray's office to advance the Evidence-Based Policymaking Commission Act of 2015. I have even flustered successive directors of the Congressional Budget Office by my critique of their failure to disclose their work adequately.

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I thank you, again, for the opportunity to appear before you and to briefly describe the commitments that would guide my tenure as Commissioner of the Bureau of Labor Statistics.

I look forward to answering your questions.

The CHAIRMAN. Thank you, Dr. Beach.

Thanks to each of you for your willingness to serve, and your broad backgrounds, and the letters of support from so many different organizations that I have put into the record.

We will now begin a 5 minute round of questions and I will begin it.

Mr. Marcus, the Title IX guidance that the Department of Education issued in April 2011 established preponderance of the evidence as the standard of proof for cases of campus sexual misconduct.

Would you agree that complex and important issues like that should be defined by Congress or through a rulemaking instead of through guidance?

Mr. MARCUS. Yes, sir.

The CHAIRMAN. What is the appropriate role of guidance? What is the difference between guidance—you referred to a couple of times in your testimony—and rulemaking or a law passed by Congress?

Mr. MARCUS. Well, yes, sir.

Congress passes the laws. Executive agencies, like the Office for Civil Rights, may have delegated authority to supplement that with regulations under the Administrative Procedures Act and other statutes.

There are occasions, however, when agencies like the Office for Civil Rights have the discretion to issue guidance materials like "Dear Colleague," letters that do not change the law in any way.

The CHAIRMAN. Are they binding on—

Mr. MARCUS. No, sir.

The CHAIRMAN —the 6,000 colleges and universities?

Mr. Collett, what is your view of the difference between guidance and rulemaking?

Mr. COLLETT. Thank you, Mr. Chairman, for the question.

With respect to guidance, I think guidance provides an opportunity to clarify something that is in a statute or a regulation, and not to impose new requirements.

The CHAIRMAN. Is the guidance binding?

Mr. COLLETT. No, sir.

The CHAIRMAN. Mr. Mugno, is the guidance binding?

Mr. MUGNO. Thank you, Mr. Chairman.

Guidance is guidance. Rules are rules. Laws are laws. Guidance should only be used to understand those rules.

The CHAIRMAN. Mr. Mugno, OSHA exists to help ensure safety for 130 million workers at over eight million work sites. You have 2,100 inspectors.

I am intrigued by OSHA's Voluntary Protection Program which Senators Enzi and Bennet have introduced legislation to expand.

That seems to me to be a good way to get OSHA out of the business of playing "got you" with 130 million workers at eight million work sites by creating an environment in most of the sites of cooperatively working together to create safe workplaces, and then focusing your inspectors on the higher risk work sites.

What is your view of legislation like that offered by Senators Enzi and Bennet to expand the Voluntary Protection Program?

Mr. MUGNO. Thank you, Mr. Chairman.

The opportunity with expanding the Voluntary Protection Program, other compliance assistance programs that expand the knowledge about compliance with OSHA's regulations, as well as just improving safety and health in the workplace is an excellent way to expand OSHA's mission.

It should not be viewed as mutually exclusive from the other tools in the toolbox such as enforcement and standards setting. Again, to your point, is a wonderful way to get the most and most efficient methods out of OSHA to expand compliance and safety.

The CHAIRMAN. Will you make it a priority of yours to consider expanding the Voluntary Protection Program as a way of creating safer workplaces?

Mr. MUGNO. If confirmed, sir, I will certainly consult with the Secretary, as well as the career OSHA staff, on how to make that expansion better.

The CHAIRMAN. Mr. Mugno, in 2015, OSHA drafted an internal memo that instructed safety and health inspectors to look for joint employment relationships between franchisees and franchisors when determining responsibility for health and safety violations.

It appeared to be a lot like language from the NLRB General Counsel's brief on how to show joint employer status. That memo was never finalized.

Do you think it is a good use of time for OSHA health and safety inspectors to be determining whether a franchise franchisee and franchisor are joint employers?

Mr. MUGNO. Thank you for the question, Mr. Chairman.

OSHA, as you may know, has long had a multi-employer work site doctrine in conducting its inspections and citations. It seems

to have worked very well for over the decades, and therefore I think OSHA addresses that issue very well through that doctrine.

The CHAIRMAN. I am about out of time, but I wanted to say to Dr. Beach, I enjoyed our discussion. I want to respect the 5 minute time, and I will submit this question to you.

But you have two different ways of computing whether people have jobs in the workplace. The household survey, I have always thought, is one that we paid too little attention to, and I hope you have ways in mind to give it more publicity.

Do you want to try to answer that?

Dr. BEACH. I look forward to your question, Mr. Chairman.

It is such fine work that is done by the people at BLS and there is always room for improvement, of course, in the work that they do.

I look forward to answering your question.

The CHAIRMAN. Well, thank you, Dr. Beach.

Senator Murphy.

#### STATEMENT OF SENATOR MURPHY

Senator MURPHY. Thank you, very much, Mr. Chairman.

Thank you for your focus on this issue of the difference between guidance and regulations. I agree that there is a significant difference, but let me speak in defense of guidance.

We often pass statutes here that are often very difficult for schools, and school districts, and states to unpack. Guidance, while we recognize that they are different than regulations, often provides some help to states to understand how to comply. This Department actually has used non-binding documents in order to help states comply with the law.

While this Secretary may have rescinded some of the guidance, this Secretary has offered templates to states to comply with ESSA that is in the same vein as the guidance, giving states a indication as to what they should do and what they should not do in complying with the law. But I think the distinction between regulation and guidance is important.

I want to ask our nominee to OCR a few questions to follow-up on our meeting privately. I really appreciate, Mr. Marcus, your time with me.

We talked a lot about school discipline, and so, I wanted to follow-up on that conversation and ask you a simple question to begin with.

If there is a disparity in how African-American children are being disciplined in a particular school or school district, as compared to how white children are being disciplined, would that be legitimate grounds for an OCR complaint or an OCR investigation?

Mr. MARCUS. Thank you, Senator. I certainly also enjoyed the opportunity to meet with you and some of your colleagues during office visits.

In general, the answer is yes.

Senator MURPHY. It is important to talk about this subject because nationally 5 percent of white students are suspended or expelled from schools in this country compared to 16 percent of black students.

Students with disabilities represent 25 percent of students who are referred to law enforcement because of in-school behavior even though they are only 12 percent of overall student population.

I would argue that we have a school discipline crisis in this country when it comes to the treatment of groups of students that are offered protection by your office. I appreciate your recognition that this is an important subject to look into.

If there was a school district that was suspending or expelling five times as many black students for the same set of behaviors compared to white students, can you perceive any legitimate reason for that disparity?

Mr. MARCUS. Thank you, Senator.

Let me say that if even one child is punished because of their race or punished worse because of their race, I believe that to be a significant concern.

Now, if the numbers are as significant as you just described, I would consider that to be the grounds for asking some very tough questions.

Senator MURPHY. You and I had this discussion, and I will just share my view with you.

I do not believe there is any legitimate explanation. I believe that kind of disparity in the treatment of African-American children would be, on its face, a violation of Federal law.

Even if you did not find a smoking gun—in which an administrator admitted that they had an intentional policy of targeting black children—on its face, that kind of disparity would be a violation of the Federal law.

Do you agree with that statement?

Mr. MARCUS. Senator, I believe that disparities of that size are grounds for concern. But my experience says that one needs to approach each complaint or compliance review with an open mind and sense of fairness to find out what the answers are.

I will tell you that I have seen what appeared to be inexcusable disparities that were the result of paperwork errors. They just got the numbers wrong.

Senator MURPHY. That is something different.

Mr. MARCUS. I think one needs to find out what is happening, and if there is discriminatory conduct, there needs to be consequences.

Senator MURPHY. Let me ask one final question.

Right now, your Department, and the Department collects data from schools generally on the issue of civil rights compliance, but specifically in the last several years on data related to school discipline. It is the only way that you would be able to find out if there are disparities.

Do you see any reason to change that data collection practice? Would you see any reason that you would not require schools to, at the very least, submit data to your office on school suspension and discipline rates?

Mr. MARCUS. Senator, I think that you are referring to the so-called CRDC data collection. I have worked with that data collection in the past. I have used it. I have found it valuable and important.

Under my direction, the Louis D. Brandeis Center for Human Rights Under Law in the past did recommend changes, specifically to expand, in certain respects, data; not in respect to discipline per se, but in general.

I do not have any changes in mind. I would be open if people have recommendations for improving it.

Senator MURPHY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murphy.

Senator Collins.

#### STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman.

Mr. Mugno, in a 2006 edition of "Business Insider," you made a comment that employers, quote, "Have to look harder at the employees in order to further improve workplace safety."

I know that some people have taken that comment out of context to suggest that you were attributing employee injuries to activities that were off the work site.

Could you explain to the Committee and clarify exactly what you meant by that comment?

Mr. MUGNO. Well, thank you, Senator, for that question. I appreciate the opportunity to clarify.

What I meant with that comment has only proven to be more true as the years have passed since then. What we see, well, let me start here.

If safety were a sport, it is a team sport. Everybody involved in trying to improve safety and health in the workplace has to have skin in the game, if you will, to continue with the sports metaphor.

What we were seeing then, and what we have been seeing even more in the last few years, has been some of the issues that employees bring into the work site, into the workplace themselves. Not necessarily activities that are outside, but their health and their condition.

I see quite a few medical events, if you will, come onto the work site because of whatever their condition may be and in treating that.

Obviously, keeping yourself fit in those things, especially when you are in a job that may be physical in nature, like some of the jobs are where I work, that is what is critical to that. That is what we are trying to look at.

These health and wellness programs that we see are being offered by other sectors in our company, like the human resources, can help address those issues. Then ultimately, in my opinion, make the workplace safer and healthier.

Senator COLLINS. Thank you.

Mr. Marcus, there has been a lot of discussion and debate over the status of the 2011 Title IX "Dear Colleague" letter that was issued by the Department of Education regarding sexual violence on campus.

Regardless of the status of that letter, colleges and universities must still comply with the robust requirements of the Clery Act and Title IX regulations that ensure that institutions of higher education work to prevent and respond to allegations of campus sexual assault.

In September, Secretary DeVos announced that the Department is going to undertake a public notice and comment process, that has been referred to previously, to replace the Obama administration's 2011 "Dear Colleague" letter.

That letter has been heavily criticized by the American Bar Association's Criminal Justice Task Force on College Due Process Rights and Victims Protections, as well as by the American College of Trial Lawyers, and they suggested alternatives to ensure due process.

The problem is that no timetable for the regulatory process has been established. I think many of us that are concerned about the legitimate criticisms of the guidance that have been raised by legal organizations, but it also is concerning that the process seems to be in limbo.

Do you know what the timetable is for going through the regulatory process and coming up with regulations rather than guidance?

Mr. MARCUS. Senator, I share your concerns about that particular statute and that area of the law.

I do not know the timetable. I do not believe that it has been announced by the Department, nor am I privy to internal conversation within the Department.

Senator COLLINS. I hope that once you are confirmed, and I assume that you will be confirmed, that you will make it a priority to get that process going. I do think it should be done through regulation, but we need to get going.

Mr. Collett, when I talk to school administrators in my state and ask them, "What is the single greatest impact that the Federal Government could have on your ability to provide a good education to all students?"

Invariably they tell me it would be for the Federal Government to pay its promised share of IDEA for special education for children with special needs. The Federal Government has never lived up to the promise that was made in the mid 1970's when this landmark law was passed.

Do you agree that this would make a difference for every school district?

Mr. COLLETT. Thank you, Senator. I appreciate the question.

I think when you were talking about that and asking that question, my mind went back to when I was in the classroom, and all the other teachers I have seen since. How, even to the extent that they may not feel like and believe they have the resources that they need, how they work every day on behalf of children and families that they serve.

I am grateful for teachers and leaders across the country who are working with what they have every day to make sure they can improve outcomes for children.

I am eager, and would look forward to the opportunity, if confirmed, to have conversations with the Secretary to work, obviously, with our Office of General Counsel and legislation—

The CHAIRMAN. I am going to try to keep, we are well over time here.

Mr. COLLETT. Yes, thank you. Thank you, Mr. Chairman.

The CHAIRMAN. I am going to try to—

Senator COLLINS. If I could have an answer for the record that is more direct on that question, I would appreciate it.

Senator COLLINS. Thank you.

The CHAIRMAN. Thank you, Senator Collins.

Senator Murray.

Senator MURRAY. Well, thank you very much.

Mr. Marcus, I will start with you.

As I mentioned in my opening remarks, President Trump kicked off his campaign disparaging Mexicans, talked about profiling Muslim Americans, made comments about women that I will not repeat in this room.

Given that President Trump has nominated you to serve as the top civil rights official at the Department of Education, I do want to ask you this, and I would appreciate a yes or no response.

Do you support President Trump's record on discrimination, women's rights, and civil rights? Yes or no.

Mr. MARCUS. I believe in strong civil rights protections for all of those groups, Senator.

Senator MURRAY. Well, that was not a yes or no. Let me ask it another way.

Can you name a single example of something President Trump has said or done when it comes to discrimination, or women's rights, or civil rights you disagree with that has moved our country in the wrong direction?

Mr. MARCUS. I could not say, Senator.

Senator MURRAY. You do not have an answer to that.

Okay. Let me ask you another question.

I have been concerned about the direction the Office for Civil Rights has taken under the leadership of President Trump, and Secretary DeVos, and Candice Jackson so far this year, especially when it comes to protecting the rights and safety of women and LGBTQ individuals.

So far this year, Secretary DeVos has eliminated the requirement that staff inform the D.C. office of sensitive cases involving sexual violence complaints. She has rescinded guidance on sexual violence that had helped our survivors actually come forward.

She ended the practice of consistent, systemic investigations to root out whether or not an individual complaint is a sign of a bigger problem.

She supported cutting the OCR budget, and reducing OCR staff and appointed staff who fought against expanded protections for survivors of campus sexual assault. In fact, the bipartisan independent U.S. Commission on Civil Rights announced an investigation because of a, quote, "Dangerous reduction in civil rights enforcement."

Now, you have previously led OCR, and so I hope you have some thoughts on how OCR should run in order to ensure that all of our students can obtain an education safely and free from discrimination. I want to ask you.

Will you commit to continuing to make a list of campus sexual assault and sexual harassment cases available to the public?

Mr. MARCUS. Thank you, Senator.

No, I cannot commit and let me tell you why.

During the time that I was in that position, the practice that was used then, universally recommended by career professionals, was to make that information available only at a later part in the process and there were reasons they had for that.

I understand that there are people who are urging different positions. I can commit to you that I would listen very carefully to the arguments in both of those directions before making a decision.

Senator MURRAY. Do you agree that revoking the 2011 campus sexual assault guidance was appropriate?

Mr. MARCUS. Yes, Senator.

Senator MURRAY. You do. Well, that guidance was really key to helping survivors come forward. It made clear the schools' obligations under existing laws, and I am really concerned that the Department is now sending a signal to schools that sexual assault will not be taken as serious.

Do you commit to coming before this Committee next year to update us on the steps the Department is taking to address campus sexual assault and sexual harassment?

Mr. MARCUS. Senator, first of all, let me say that I consider sexual assault on campus to be a matter of very grave seriousness and one on which there should be clear law. I would be—

Senator MURRAY. But if the guidance and the Department's attitude is that, "Do not come forward because the right will not be on your side," it will mean that fewer people will make comments, and women will be left to silence.

Mr. MARCUS. Senator, in answer to your question, if invited to appear, I would certainly be honored to appear.

Senator MURRAY. Well, Mr. Chairman, I hope that does occur.

I just have 50 seconds left. I want to ask Mr. Mugno, during your two-plus decades with FedEx, you have consistently opposed stronger safety and health protections for workers. There are a number of examples.

In 1995, you opposed the application of stronger respirator standards; 2000, against the OSHA ergonomic standards. The list goes on.

You serve as Chair of the Chamber of Commerce Labor Policy, an OSHA Subcommittee, which has a long record of opposing OSHA health and safety regulations.

I wanted to ask you, can you name a single rule proposed by OSHA that, during your career, you support in order to improve or enhance worker safety?

Mr. MUGNO. Thank you for the question, Senator.

If we wrote comments against an OSHA particular rulemaking, it had to do with the fact that we did not feel it was efficient or effective.

Senator MURRAY. But I was asking you to tell me anything that you supported.

Mr. MUGNO. So in not writing comments, I would argue that those were things that, obviously, we thought were well worth it.

Senator MURRAY. But you did not write any comments supporting them.

Mr. MUGNO. That may be the case, Senator. I do not recall.

Senator MURRAY. Thank you.

The CHAIRMAN. Thank you, Senator Murray.

I am now going to call on Senator Isakson, but I wanted to thank Senator Collins, who has agreed to chair the hearing while I go to the Senate Appropriations Committee hearing on Health and Human Services.

Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman.

Following up on Senator Murray's questions, Mr. Mugno, I would like to follow-up, if I could.

Is it not true that one of the largest variable expenses that a company like yours, FedEx, or one in my state, UPS, and others would run into would be violations of safety which cause their workers' compensation and other benefits to go way up in cost, costing them more money to do business and less money to make a profit?

Mr. MUGNO. Thank you, Senator, for the question.

That would be true. That and the consequences from a violation of that sort, which is why companies such as the ones that you mentioned, invest considerably in their safety programs to prevent such things and keep their workplaces safe.

Senator ISAKSON. Is it not true that most of your managers and responsible management personnel in your company is the No. 1 issue and No. 1 responsibility of safety in one form or another?

Mr. MUGNO. Absolutely, sir. In the organization I currently sit in, our philosophy is both one of safety above all, as well as a PSP philosophy or People-Service-Profit.

Take care of the people, they will take care of the service, it will bring the profits. Yes.

Senator ISAKSON. Have you ever seen a case where you found FedEx to see OSHA as an enemy or a friend?

Mr. MUGNO. I would always say they were an ally. Like I mentioned earlier, if safety was a sport, it would be a team sport. OSHA has much to bring to the table as well. Granted, they have enforcement powers in that, which are needed in some cases for other actors.

Senator ISAKSON. My point is I visited a UPS site recently, a UPS headquartered in my state. Fred Smith, your President, is a great leader in the logistics business.

But the No. 1 focus they do at their rallies are to give out 30-year, accident-free awards to employees who have gone 30 years without an accident where anyone was injured.

In my experience, most of the awards go out in your type of company, go out to people who are practicing good safety and good safety results.

Is that not true?

Mr. MUGNO. That is true, Senator.

Recognition for good, safe behaviors that, I think, is also vital in preserving and sustaining safety in these workplaces.

Senator ISAKSON. My only other point is that most of the good changes in safety policy in companies come when OSHA and the companies work together voluntarily to find new ways to improve safety on the work site, rather than react to an accident that happened some time in the past.

Is that not true?

Mr. MUGNO. That is true, sir, but it is also worth working with OSHA when those defining events, unfortunately, happen and making sure, working together, they do not occur again.

Senator ISAKSON. Thank you very much.

Dr. Beach, I follow statistics very closely and a lot of the things we do in Washington are governed by statistics. We pass a lot of laws that pass out benefits to American citizens or workers that are indexed to a determination that you will end up making in your responsibility.

One question I asked you when you came to my office, and I want to repeat and ask it here, to get it on the record.

Do you think it would be a good idea to substitute CPI, Chained CPI for CPI in the calculation of many of our benefits?

Dr. BEACH. Thank you, Senator. That was a good question when you asked me then. It is a good question now.

I really have not made up my mind on the Chained CPI. There is an abundant literature out there about pluses and minuses on the Consumer Price Index and it seems to point in the direction of some needed improvements.

The person who had the job of the Commissioner of Labor Statistics last, Erica Groshen, has co-written an article focusing on the shortcomings of the CPI. I think we would be guided by research.

I do think that the CPI sample size needs to be significantly increased. That has a budgetary effect, but I think it would make the CPI, as currently calculated, very successful.

I am going to, if confirmed, I am eager to get a briefing on all of those things. As I say, I have not quite made my own mind up on the Chained CPI.

Senator ISAKSON. Well, my only comment on that is that as we progress with technology and with distance commuting for workers with computer commuting, and all the new modern workplace that we have, it is going to be harder and harder to determine what those numbers are rather than easier.

We are going to need an academician, like yourself, leading up that agency. I am pretty glad you want to do so.

Dr. BEACH. It is. Now, a 30-year critique of the CPI and many changes have been made that have significantly improved it.

It is so central to our entire economy. It is part of the basic infrastructure we have, and we need to make it as good as possible.

Senator ISAKSON. Real quickly, because I want to get this question in.

Now, Mr. Collett, I have a real affinity for people named Johnny, so we are glad to have you here.

Congratulations on your appointment.

Mr. COLLETT. Thank you.

Senator ISAKSON. I also have an affinity for people who teach special education. I married a lifetime special education teacher.

I spent most of my time as the Chairman of the State Board of Education trying to reform a lot of Georgia's policies and practices in terms of teaching special education students and students with disabilities.

Senator Murray, in her comments at the introduction, pointed out that Kentucky has had a case, I think she referred to, where

they had a high number of restraint complaints against them for their special needs.

Do you know what those restraint complaints were in the State of Kentucky?

Mr. COLLETT. I am not sure, particularly, if you are referring to restraints, seclusion, or something else, in terms of Senator Murray's opening remarks.

Senator ISAKSON. She may follow-up. She is Chair of the Committee, she may follow-up on that, but my only reason for bringing that up is a lot of times the special education classroom or environment—it is really more of an environment than a classroom—is dramatically different depending on the disability, the student, their abilities, behavior, all those types of things.

A lot of things get labeled or misconstrued to be confinement or some other type of treatment, when it is really isolation for a specific reason that might be due to discipline and not be due to the educational process.

In your job with the Department of Education, it is going to be critically important that we make sure we are well defined in those situations. We do everything we can to give the maximum amount of flexibility we can for special education teachers to teach in the best mode they find it to deliver a quality education to the student given the disabilities of that student.

That is not a question. That was a statement that I wanted to get in the record.

Thank you. Congratulations on your appointment.

Mr. COLLETT. Thank you, Senator.

Senator COLLINS [presiding]. Thank you, Senator.

Senator Franken.

#### STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Madam Chair.

Mr. Marcus, LGBT students deserve to learn in an environment free from discrimination and they deserve to be treated with dignity and respect. But far too often, LGBT kids, particularly transgender kids, endure harassment and discrimination. When that happens, those students are deprived of an equal education.

It is unfortunate that the Trump administration scrapped guidelines written by the Obama administration that instructed schools on how to protect transgender students under Title IX. But rescinding the guidance did not change the law and it did not take away students' rights.

Mr. Marcus, Title IX protects these students and the Department of Education should enforce it.

If confirmed, your role will be to serve as the chief legal advisor on civil rights and to guarantee equal access to education for all students.

If a transgender student files a complaint under Title IX alleging unequal access, will your office do its job and investigate the case?

Mr. MARCUS. Senator, I agree with you that all students, including all transgender students, deserve equal access to education and should not be harassed and bullied.

If I should be confirmed, and OCR receives a complaint from a transgender student, under Title IX we would receive the complaint and enforce applicable law.

Senator FRANKEN. Okay. You will investigate it?

Mr. MARCUS. Investigation has changed from time to time. We would investigate if the complaint meets the standards for investigation.

Senator FRANKEN. Okay. Thank you.

Mr. Collett, under the Individuals with Disabilities Education Act, IDEA, schools are required to identify and evaluate students with disabilities, and then schools have to provide special education services such as speech therapy or counseling that are tailored to the individual needs of the students with disabilities. You, of course, know that.

However, most states do not require private schools to uphold IDEA for students with disabilities when they are using a voucher to go to a private school.

A recent GAO report found that many parents have no idea that they are giving up these rights when they use a voucher for a student with a disability and that is because the private schools do not tell them. In fact, 83 percent of students with disabilities, who are enrolled in a voucher program, were provided no information or were given the wrong information about the changes in their IDEA rights.

This really concerns me, especially because Secretary DeVos has been pushing to expand voucher programs for years.

Mr. Collett, given your experience working on behalf of students with disabilities, are you concerned about students with disabilities losing their rights under voucher programs?

Mr. COLLETT. Senator, thank you for the question.

My role would be to uphold the law and as you rightly pointed out, the Individuals with Disabilities Education Act makes a distinction between students who are in public schools who have a right to a free, appropriate public education in the least restrictive environment with all the rights accorded thereof.

Students who are placed by their parents in public [sic] schools under IDEA under current law, do not have a right to, an individual right to a free, appropriate public education. I would uphold the law.

Now, with respect to do I have a concern about any child who is not progressing the way that we, and most importantly, they envision.

But my role, and I would discharge it faithfully, is to uphold the law.

Senator FRANKEN. Okay. But how would you ensure that the families of students with disabilities have accurate information about losing their IDEA rights when they participate in voucher programs? How would you do that?

Mr. COLLETT. Yes, thank you. Thank you for the question.

I am familiar with the GAO report that you are referencing, and I am familiar with the recommendations that it makes in terms of the recommendation for Congress to act, but also a recommendation for the Department to do some review.

I would be very eager and open to the opportunity to talk with the Secretary, if confirmed, and to work with whomever, whoever has a stake in this to see how best the Department should respond to this recommendation.

Mr. FRANKEN. You would commit to doing that?

Mr. COLLETT. Commit to working with the Secretary to understand how best the Department should respond to the recommendation. Yes, sir.

Senator FRANKEN. Okay. Well, the commitment I would like to hear is that you will do everything you can to make sure that parents who are getting vouchers to go to a private school understand what their rights are before they exercise the use of that voucher to go to a place where maybe their kid is not going to get what he or she needs.

Thank you.

Mr. COLLETT. Thank you.

Senator COLLINS. Senator Cassidy.

#### STATEMENT OF SENATOR CASSIDY

Senator CASSIDY. I thank you all.

Mr. Collett, nice to see you yesterday, and just to follow-up on what we spoke of yesterday and, indeed, I had a conversation with Senator Franken about some of the same topics.

I am going to play off of this with you, Mr. Marcus. Okay. By the way, Brandeis was a big Kentuckian, so I feel like I got the Kentucky bench down there.

Mr. Collett, Children First wanted to read, then read to learn. Now, the issue I have with children with dyslexia, they are not screened at Grade One. They are screened at Grade Three at which time they have not learned to read, but they are taking a standardized test at Grade Four.

It is program failure because they have not learned to read and they have not been screened for that to that point.

I guess I am asking you to confirm that if you are confirmed, you will take the positions to influence the policies and programs at the Department so that these 20 percent of the children in our school system, who are dyslexic, are not left behind because of a delay in screening and a delay in intervention.

Mr. COLLETT. Thank you, and it was a pleasure to meet with you in your office. You were very gracious.

I think my record shows this and I believe that folks would speak to that who know me and have worked with me.

Certainly, if confirmed and have an opportunity to serve in this role, what I have been committed to and will continue to be committed to is supporting the timely and appropriate identification of students with disabilities, including students with dyslexia.

Senator CASSIDY. Leading to the next question.

If a child is in a special intervention program and in full disclosure, my wife has a public charter school for children with dyslexia, which is a concentration of children who cannot read. If you cannot read at Grade Three, they send you here, which means that it is a concentration.

Now, if you compare the school system, this school against all other schools, they cannot read. Of course, they are going to do poorly on standardized testing.

My point being, it would be a better control not to compare against the gifted and talented school, but rather, against themselves. Had they made progress between the time the interventions began and when they are actually tested? Make sense?

I guess what I am asking the Department, if they can focus on, how do we come up with a screening system in which we are measuring progress? Not the kind of blunt instrument we have now, where children in one school are compared to children at another school, kind of ignoring the fact that maybe that one school is there specifically for folks with cognitive or some other disability.

Even though I am expressing it poorly, I think you know what I am saying.

Mr. COLLETT. Yes, sir.

Senator CASSIDY. Any thoughts on that?

Mr. COLLETT. Well, I think to follow-up on what I mentioned in your office yesterday.

I would look forward, and be very open to, conversations about that, and I appreciate your recommendation of what the Department could think through. If given the opportunity to serve in this role and within, if it were to be within my purview in the Office of Special Education and Rehabilitative Services, I would look forward to the conversation and follow-up.

Senator CASSIDY. Mr. Marcus, I am not a lawyer, so you will, perhaps, dispute what I say and I will have to defer to you.

But if you look at the IDEA, it includes specifically, I am reading this, "Disorders included, such term include such conditions as perceptual disabilities," blank, blank, blank, "Dyslexia," and going on.

Now, again, about 80 percent of children with disabilities are dyslexic. Now, I have been reviewing the Endrew F. case against the Douglas County school board that the Supreme Court unanimously said that the school board had to do more than a *de minimis* effort to address the child's issue.

When we have had previous panels, I have asked if school systems have screened for dyslexia. With a few exceptions, New Hampshire under Governor Hassan, screens now universally, but most states do not screen for dyslexia.

What they are intervening with, an RTI, Response To Intervention, is an 8-week course which the best literature shows that outside of highly controlled situations does not work.

Looking at the Endrew F. case, which seems to make this a civil rights case, IDEA says that the schools shall do something more than *de minimis* intervention and knowing that most states are not even screening, much less intervening with vigor.

My question for you is, what do you see the role of DOE's civil rights division in terms of making sure that school boards are compliant and doing something more than a *de minimis* intervention?

Mr. MARCUS. Thank you, Senator. That is a complex question and certainly an important one.

I have to say to start with that it is my understanding that responsibility for administering the IDEA has been imposed on the

Office of Special Education and Rehabilitative Services rather than the Office for Civil Rights.

However, some of the same or similar questions can arise under either the Rehabilitation Act or, perhaps, Title II of the ADA. OCR does have jurisdiction over those provisions, but they have different definitions than under IDEA.

That is very complicated.

I am afraid, Senator, I do not know what the best way of dealing with that is. It seems to me that if we had that issue, that might implicate issues under both IDEA and also other provisions within OCR, it might make sense to coordinate within the Department on it, and we would have to give some deference to the departmental experts on IDEA who are within the so-called OSERS division.

Senator CASSIDY. I am out of time, but I appreciate the answer. I look forward to working with you both because, again, it affects 20 percent of the children in our population. If we are not addressing it now, hopefully, we can change it with this Administration.

Thank you all.

Senator COLLINS. Senator Hassan.

#### STATEMENT OF SENATOR HASSAN

Senator HASSAN. Thank you, Senator Collins.

Good morning to the nominees. Congratulations on your nomination and congratulations to your families too because it takes all of you to serve together, and we appreciate all of the family members here very much.

To Mr. Collett, as you know, more than 20 years of educational research shows that when students with disabilities are educated in the same classroom as their peers, both the students with disabilities and those without disabilities do better academically, socially, and behaviorally.

This has been a major focus of the U.S. Department of Education for years, and something Congress reinforced in ESSA by requiring states and schools to do three things. Provide students the accommodations they are entitled to, improve the conditions for learning at that school, and limit the number of children being taught to the lower, simplified alternate standards and tested using the alternative assessments.

If confirmed, will you commit to work with your colleagues at the Department of Education to ensure that states implement ESSA in a way that is consistent with the letter and intent of ESSA regarding children with disabilities?

Mr. COLLETT. Thank you, Senator, for the question.

Yes, I would look forward to working with the Office of Elementary and Secondary Education and will commit to upholding the law as written by Congress.

Senator HASSAN. Well, thank you.

I would add my comments to Senator Collins. I think it would be great if the Federal Government lived up to its commitment of funding because I think that would enable local school districts to have the kind of staff and personnel that can help with true classroom integration and best practices.

I wanted to touch on another issue that we are now seeing with ESSA on one particular ESSA requirement is that states separate

out data by demographics of students, who historically have required additional supports, in the education setting. These subgroups include English language learners, low income students, and students who experience disabilities.

Under this requirement, a few states have created so-called super subgroups by combining two or more groups together.

In addition, a few states have chosen to not use subgroup performance in school reading at all, which is a clear violation of the law.

The use of these so-called super subgroups and, in some cases, not utilizing subgroup performance metrics when determining targeted schools, may lead to students who experience disabilities to not be accurately identified. In turn, not receive the supports they need, and supports they are eligible for under the law.

Can you assure us that you will stand up for students who experience disabilities by asking states to disaggregate subgroup data in their state plans, and to use these data as required by law?

Mr. COLLETT. Thank you, Senator, for the question.

With respect to the ESSA plans, and obviously I am not in a position at the Department where I am aware of deliberate conversations that may or may not be occurring around evaluation of ESSA plans that have been submitted.

I know that the Secretary has clearly committed that she will approve plans that comply with the law.

Senator HASSAN. Right.

Mr. COLLETT. I am not in a position to be able to say, or speculate, how I might, not knowing the details of the particular deliberations that are occurring.

Senator HASSAN. I am sorry to interrupt, but can you understand that if you are lumping children with disabilities with other subgroups, and just measuring the progress of those subgroups, that you cannot then distill how the children with disabilities themselves are doing? If you are not measuring that, you are not holding schools accountable to how they are doing in terms of educating children who experience disabilities.

Is that a fair statement? Do you agree with that?

Mr. COLLETT. I certainly agree that it is very difficult to chart a course forward if you are not sure of where you are.

Senator HASSAN. Right.

When a school district used to say, in my state, "Well, we just cannot educate children who experience disabilities," which sometimes they would say because it is too hard.

I would be able to say because of some of the ways we measure data in New Hampshire, "Actually, there is a school just like yours with children who experience disabilities just like yours who is doing a really good job. Maybe you can share best practices."

It is really important to have this data.

I want to move onto one other question before my time is up.

The Fair Labor Standards Act authorizes employers, and this is for you, Mr. Collett, to pay sub-minimum wages to workers who experience disabilities. Oftentimes, this type of employment occurs in a secluded environment known as a sheltered workplace.

In 2015, with the support of the New Hampshire business community, New Hampshire was the first state to eliminate the pay-

ment of sub-minimum wage. There have been efforts in Congress to end this practice.

If confirmed, you will have oversight of rehabilitation services, which provides support to individuals who experience disabilities in navigating employment opportunities and in the workplace. Currently, we have regulations that prohibit sub-minimum wage placements to qualify as a successful employment placement.

If confirmed, will you work to support and expand competitive, integrated employment for individuals who experience disabilities and will you oppose payment of the sub-minimum wage?

Mr. COLLETT. Thank you for the question. I will be brief in my response.

I have a record of standing up for kids, standing up for individuals with disabilities. I believe in competitive wages. I believe in integrated settings.

With respect to the Rehab Act, as amended by WIOA, I will certainly uphold the law.

Senator HASSAN. Thank you very much.

Mr. COLLETT. Thank you.

Senator HASSAN. Thank you, Senator Collins.

Senator COLLINS. Thank you.

Senator Casey.

#### STATEMENT OF SENATOR CASEY

Senator CASEY. Thank you.

I first wanted to thank the witnesses for appearing today, obviously, but also for your commitment to this process which, I know, is a long, difficult process. I want to thank your families for making that same commitment.

Mr. Mugno, because you are Pennsylvania residents, I should be directing some question to you, but I am going to have to wait because I have someone else on the panel I have to ask some questions to. But we welcome all of you.

Mr. Marcus, I wanted to start with you on a really difficult topic for the country, and that is campus sexual assault, which has been for many years at epidemic levels. I should say the failure to address it for a lot of years is really an insult to the country and a betrayal. For many years, both parties did not do enough on this issue.

We made some progress a couple of years ago when we were re-authorizing the Violence Against Women Act. My legislation, the Campus SaVE Act, was passed as part of that, which required campuses, universities, and colleges to do a lot more than they had been doing. That was an advancement, but frankly, we have to do more.

Part of that is not simply the statutory or legislative work. It is obviously going to involve agencies of the Federal Government; in particular, the Department of Education.

I wanted to ask you about one part of this challenge, which is to make sure that information is available.

Back in 2014, the Department's Office for Civil Rights published a list of colleges and universities with open Title IX compliance regarding campus sexual harassment and assault.

In previous administrations—meaning before the Obama administration and that would include the time when you were serving President Bush’s Administration—this information was not made publicly available. Releasing this information shined a light on how pervasive sexual violence is on college campuses.

I know that Senator Murray has raised this issue already with you today, but I want to make sure that I am clear with regard to your views, as well as how you would proceed, if you were to be confirmed.

I guess first, a two-part question. Your views on this increased transparency, which I think was a tremendous advancement brought about by the last Administration.

If confirmed, would you commit to ensuring this data continues to be made publicly available?

Mr. MARCUS. Thank you, Senator Casey.

I would certainly commit to looking at the question carefully, and I can tell you some of the considerations I would have in mind. There are, I think, at least three possible avenues that I have heard described.

First, there is the approach of providing that information only at a later stage. That is the approach that was used during my prior tenure.

There are arguments for that including, in particular, the question about whether it could facilitate more and more effective resolutions with institutions.

Second, there is the argument that these cases should be treated differently and transparency should be provided earlier.

Some of the arguments for that include that it helps shine a spotlight on these issues, which encourages greater public awareness.

Then there is a third argument, which is that all of the cases before OCR should be treated the same way and all should have this transparency, both for greater public awareness and for equity.

I hear all of those arguments. I do not believe that I can, from the outside, fully assess all of them.

For example, I would need to know more, I think, about the experience of OCR at achieving resolutions and making a change during this period.

I cannot assure you what my answer would be, but I could assure you that I would look at it carefully, with an open mind, and assess each of the arguments.

Senator CASEY. Well, I appreciate that because I hope that what you would not end up supporting is a backtracking, and in light of, part of your answer with regard to other related issues.

I know, I am over time. I will send you a note regarding the same questions in the context of disability, race, and religion, but I know I am out of time.

[The following information can be found on page 208 in the appendix.]

Senator CASEY. Thanks very much.

Mr. MARCUS. Thank you.

Senator COLLINS. Thank you.

Senator Whitehouse.

## STATEMENT OF SENATOR WHITEHOUSE

Senator WHITEHOUSE. Thank you, Chairman.

Dr. Beach, you come to us today with a long record of work for the Mercatus Center and the Heritage Foundation, two groups which have been extensively funded by the fossil fuel industry and by right wing, climate-denying foundations.

For instance, the Heritage Foundation has received \$780,000 directly from Exxon Mobil since 1998. Exxon Mobil, of course, still fights climate action here in Congress.

Greenpeace says the Heritage Foundation received over \$5.7 million from Koch Brothers related foundations between 1997 and 2015.

The Conservative Transparency project says that Heritage received \$25 million in funding from the climate-denying Sarah Scaife Foundation.

Similarly at Mercatus, the Mercatus Center has received at least \$10.4 million from Koch Brothers related foundations.

The Mercatus Center at George Mason University received at least \$330,000 directly from Exxon Mobil since 1998 and Mercatus has received over \$10 million from something called Donors Trust. Let me first ask you.

Do you know what Donors Trust is?

Dr. BEACH. Thank you, Senator.

I do not know what Donors Trust is.

Senator WHITEHOUSE. Do you know if they have any business?

Dr. BEACH. I do not know anything about Donors Trust.

Senator WHITEHOUSE. Has anyone in the time that you were serving as the Vice President for Policy Research at the Mercatus Center disclosed to you that they were donors to the Mercatus Center through Donors Trust?

Dr. BEACH. No, they have not.

Senator WHITEHOUSE. For the record, Donors Trust is a group that has no business purpose whatsoever. Its function is to launder the identities of donors that wish to give to organizations, but do not wish to have the organization tainted by the identity of the donor. Therefore, it is prominently used by climate-denying and fossil fuel interests to fund their front groups.

The reason that I ask these questions, Dr. Beach, is that back when we were looking at the Lieberman-Warner Climate Security Act and other climate-related legislation.

Dr. BEACH. Yes.

Senator WHITEHOUSE. You were at the Heritage Foundation Center for Data Analysis, which did a report looking at compliance and energy cost increases, doing a cost-benefit analysis, in theory, of that legislation.

That report was, in fact, used by the fossil fuel industry to oppose that legislation, was it not?

Dr. BEACH. I think I recall it was, yes.

Senator WHITEHOUSE. Yes, indeed.

Was that report ever subjected to peer review?

Dr. BEACH. Yes, Senator.

Senator WHITEHOUSE. Really?

Dr. BEACH. Yes, Senator.

Senator WHITEHOUSE. Okay. My information is that it was non-peer reviewed.

Dr. BEACH. The most important pieces that came out of the Center for Data Analysis, I always made sure that they were given a peer review.

Senator WHITEHOUSE. You mean scientific peer review or just—

Dr. BEACH. No, this was in—

Senator WHITEHOUSE —in the ordinary sense of the term? Right?

Dr. BEACH. Thank you. This was an econometric study. We used the Global Inside model, which was in widespread use throughout the Federal Government, to look at what would changes to carbon tax levels mean for consumer prices, investment, and so forth.

Senator WHITEHOUSE. Let me push this off to a question for the record, then, and we will ask you any question for the record exactly what the peer review steps were for this report and by whom.

Did that report on the Lieberman-Warner Climate Security Act take into account any health or climate benefits from regulating carbon emissions?

Dr. BEACH. Senator, we believed that the benefits are embodied in the way the model evaluates costs.

If you have cleaner energy, for example, you would have lower household costs for certain things, healthcare, for example. Your cars might cost a little bit more. The way that our—

Senator WHITEHOUSE. Your testimony to us is that your report on the Lieberman-Warner Climate Security Act does quantify the health or climate benefits of carbon emissions reduction?

Dr. BEACH. Senator, let me clarify.

We were specifically interested in what would happen to household costs, business costs if the legislation became law.

Senator WHITEHOUSE. Okay. Well, we will follow-up.

In your testimony, you said that you support the ruthless process of peer review, but our information is that this report was never subjected to peer review.

You have said that you support neutrality and objectivity, but I do not believe you quantified the health or climate benefits, and we can explore that further in questions for the record.

Finally, you say you stand for tough standards of transparency and disclosure, but for years, your organization has been funded by an organization devoted to identity laundering, which seems contrary to that.

Senator WHITEHOUSE. My time has expired, I am sorry to say.

Senator COLLINS. Senator Baldwin.

#### STATEMENT OF SENATOR BALDWIN

Senator BALDWIN. Thank you, Madam Chair.

I would like to thank all of the witnesses for being here and your willingness to be engaged in public service.

I would like to take my 5 minutes to discuss an issue that I have been working on very hard for the past year, and it concerns me deeply.

It deals with the investigation into a barrel refurbishing company, Mid-America Steel Drum, with operations in the State of Wisconsin.

It has been investigated for various violations including the dangerous mixing of unknown chemicals and their improper transportation and disposal.

OSHA and other agencies are investigating, and while I do not have the time during this 5 minute block to go into all the details about the risks to which this company has exposed its workers and its community, I do ask unanimous consent, Madam Chair, that articles, from the "Milwaukee Journal Sentinel" summarizing the investigations, be entered into the record.

Senator COLLINS. Without objection. So ordered.

[The following information can be found on page 51 in the appendix:]

Senator BALDWIN. Thank you, Madam Chair.

Mr. Mugno, in April, OSHA cited Mid-America Steel Drum for 15 serious violations at its Milwaukee facility. The violations included the mixing of unknown reactive chemicals and exposing employees to reactive chemical hazards.

Audio recordings of the Corporate Safety Manager, provided by a whistleblower, suggested the violations were willful. However, OSHA declined to cite the company for willful violations claiming the recordings, just 2 years old, could not be included as part of the current investigation.

This was in spite of the fact that the recording showed that the current violations were the same ones that OSHA had previously called on the company to fix 2 years prior.

The Milwaukee facility received only a \$108,000 fine from OSHA and this fine could be reduced during negotiations.

Mr. Mugno, my interactions with OSHA throughout this process have given me the impression of an agency that is hesitant to use its statutory authority to issue willful violations and full fines to protect workers and to incentivize employers to comply with the law.

As Administrator of OSHA, how will you address this issue?

Mr. MUGNO. Thank you for the question, Senator.

Unfortunately, I am not familiar with that particular case and that incident. I look forward to reading the record and those things that have just been admitted into the record on that.

Should I be confirmed, I would certainly look into talking with the career professionals at OSHA to learn the details and the decisions that were made in that process.

But without further details and not knowing exactly what has been done to this point, I am a little bit limited in what I can answer you on.

Senator BALDWIN. It is a little frustrating because I know we submitted these materials in preparation of your hearing so that you would have a chance to be briefed on them or read them yourself. I am sorry.

I am going to ask some general questions surrounding this case, then, should you be confirmed, but it is disappointing that you are not more familiar with it.

Mr. Mugno, the details of the Mid-America Steel Drum case would never have come to light if it were not for the actions of a whistleblower. He was a safety consultant at the company.

Unfortunately, Occupational Safety and Health Act's whistleblower protections, they are woefully outdated at this time and might not protect him from retaliation. Certainly, they are outdated in comparison to more recent statutes in other agencies.

Mr. Mugno, do you commit to studying the current gaps in Occupational Safety and Health Act's whistleblower protections and reporting back with your findings to this Committee in order to work together to improve whistleblower protections for workers?

Mr. MUGNO. Senator, I would be glad to, should I be confirmed, glad to consult with these career officials and experts in that arena for a whistleblower protection.

I will tell you that as far as the whistleblower protection program as a whole that OSHA runs for several different statutes, as you pointed out, I am not necessarily familiar with all of them.

However, to the ones that you just pointed out, I will certainly be willing to look at it along with OSHA, the Secretary's office, and conferring with you as to what we find, again, should I be confirmed.

Senator BALDWIN. If confirmed, will you commit to working with me and my staff to prioritize this investigation at the agency?

Mr. MUGNO. Senator, I would certainly look into looking at all those types of situations because I think, based on what I have heard from you describe today, there are concerns there and I would like to make sure that they are addressed across the board.

Senator BALDWIN. My time has run out.

Senator COLLINS. Thank you.

Senator Kaine.

#### STATEMENT OF SENATOR KAINE

Senator KAINE. Thank you, Madam Chair.

Thanks to all the witnesses.

I am a University of Missouri grad, and Dr. Beach, good to see you, a Mizzou grad.

I am also a Kansan. I have never been on a panel, seen a panel with two Washburn grads on it, so this is interesting, but I am going to direct most of my questions to Mr. Marcus.

Mr. Marcus, I appreciated our conversation yesterday. One of the things we talked about, and it has been raised a little bit earlier, is this question of within OCR how disparate impact or disparate statistical outcomes will be analyzed to determine a potential civil rights violation.

I would just like to summarize the conversation we had yesterday and have you correct me if I get it wrong. I generally feel like we were in pretty much agreement.

If you see widely disparate statistics around something like discipline or assignment of students to special education—where minority kids are being treated different than Caucasian kids, for example—you and I both agree that those disparate statistics should, at a minimum, cause you to dig in further and try to determine what is the cause of the disparity.

If there is an neutral reason offered to explain—reason or reasons—offered to explain the disparity, it is important to then dig in and first decide whether the reason is, in fact, accurately offered or was it, in fact, a pretext that is really covering up something else that is going on.

Even if there is a legitimate, neutral factor, you then get to a third question of whether there would be an appropriate, in your case, sort of educational objective within the OCR's mission that could accomplish the same objective without leading to the disparities.

That has been the way the OCR has approached disparate impact type analysis in the past and it is consistent with Federal case law.

I gather from our discussion yesterday that you would continue to analyze disparate impact type complaints in the same way, should you be confirmed to the position.

Do I fairly summarize our discussion?

Mr. MARCUS. I think you do, Senator.

Now, the one thing I would add is that there was a question raised in Federal case law after the Sandoval decision. I think because of that Supreme Court case, civil rights lawyers are often careful to see whether one can provide additional evidence of different treatment, which is often a way of protecting a case or a finding.

But I think that your discussion was accurate.

Senator KAINE. Good. Thank you for that.

The second thing I want to ask you about is a case that you and I talked about yesterday which is a case in Virginia that has been a painful one and that really gets at critical civil rights issues and also freedom of speech issues.

There is a faculty member at Virginia Tech—the Brandeis Center has been involved in this case and I want to chat about it—a faculty member at Virginia Tech, whose social media presence was investigated by students in the faculty member's class, and the students came to believe that social media presence established that he was a white supremacist.

The student went to the Virginia Tech administration and tried to complain. This is a faculty member that teaches a required freshman composition course. There is some significant suggestion that after the student's complaint, she was very unhappy with the University's response to it.

The faculty member, or folks connected with the faculty member, even online encouraged some harassment of the student, harassment by calling her, even encouraging some supporters to potentially commit physical violence against her.

The Brandeis Center laudably, I think, helped the student out and weighed in with the administration of Virginia Tech and said, "You have to take this seriously." White supremacy is wrong. Neo-Nazi ideas are wrong. Especially in an educational environment having somebody with those views who is offering a required class, students might have to take this class who are Muslim students, or Jewish students. The Brandeis Center laid it out.

I just would like you to tell the Committee a little bit about why the Brandeis Center thought that was such an important matter

to get involved in and why the white supremacist views of this faculty member were something you found so anathema to the educational mission of the institution.

Mr. MARCUS. Well, thank you, Senator.

We were pleased to have some involvement in the case. We had been approached, I believe, by an attorney who was representing at least one of the students or more of the students, but did not have expertise in this area.

I found the case to be not only important, but shocking because it reflects what appears to be a growth in extreme white supremacists and even Neo-Nazi activity, which we have been following to some extent on the Internet and in social networks. But we were appalled to see it in someone who was an instructor at a public university.

Of course, I personally, am appalled to see it in the Commonwealth of Virginia because I live there.

Senator KAINE. You live there.

Mr. MARCUS. But the Louis D. Brandeis Center found it important to speak out against the growth of Neo-Nazism and white supremacy.

Senator KAINE. While we could get into it, I do not have time to get into challenging questions about the academic freedom of a faculty member to advance controversial views. That freedom notwithstanding, it should be a burden on the leadership of the university, or any institution, to call out white supremacy and Neo-Nazism for what it is.

Essentially, is what you asked the university to do in this case. Correct?

Mr. MARCUS. Correct. That is my view and the view of the Louis D. Brandeis Center.

Senator KAINE. Great. Thank you.

Thank you, Madam Chair.

Senator COLLINS. Thank you.

Senator Warren.

#### STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Madam Chairman.

Mr. Marcus, if confirmed, you would be responsible for protecting the civil rights of American students at a time when Nazis and white supremacists are marching across college campuses with tiki torches, and many young people are literally afraid to go to school because of the hateful climate that has been fostered by Donald Trump.

If confirmed, will you commit to fully enforcing civil rights laws and protecting all students from discrimination and harassment?

Mr. MARCUS. Yes.

Senator WARREN. Good.

I just want to find out a little more detail about what that commitment means to you, and I thought we might go through a few situations.

Mr. MARCUS. Okay.

Senator WARREN. Let us start with an easy one.

Say there is a school district that has some mostly white schools and some mostly black schools. Let us say that the mostly black

schools have less experienced teachers, teachers with fewer qualifications. Those schools have fewer books. They have fewer computers in the library, fewer AP courses available.

By any objective measure, those schools have clearly been short-changed.

If confirmed, would your Office step in to protect the civil rights of that district's black students?

Mr. MARCUS. If I were confirmed, I would ensure that any complaints alleging violation of Title VI would be reviewed.

Senator WARREN. Mr. Marcus, I do not want to start a dance here.

This is a set of facts. They come to you in your position if you are confirmed. My question is, are those facts adequate? Will you step in to protect the civil rights of the district's black students?

Mr. MARCUS. Senator, I would certainly hope to be able to provide protection for the civil rights of those black students to the extent possible under law.

Senator WARREN. But that is the question I am asking, how you see this. You are allowed to answer hypotheticals here, so this one should be easy. A yes or a no.

Would you step in on those facts or not?

Mr. MARCUS. I appreciate that, Senator. But unfortunately, in my experience the cases that OCR deals with are much more complicated.

Senator WARREN. You do not think that is enough evidence, what I have just said?

Mr. MARCUS. I think I would need to look at it very carefully.

Senator WARREN. Mr. Marcus, we have to move on, but I actually started with an easy one.

Last year, the Office for Civil Rights investigated exactly that situation in Toledo, Ohio and it forced the school district to ensure that students have equal resources. That is the job of the Civil Rights Division at the Department of Education, the job that you are asking for here.

Let me try another one.

Given the climate of fear and uncertainty that Donald Trump has created for DREAMers, if a school said, "We are happy to enroll all 5 year olds in kindergarten, but kids who cannot prove that they are citizens will be barred at the door."

Would your office step in to protect the civil rights of those students from discrimination?

Mr. MARCUS. Well, to my ear, Senator, that sounds like a violation of the law, but I do not know whether it would be a violation of one of the laws over which OCR has jurisdiction.

There are certain rules here that would fall under the equal protection clause. We would step in, if I were confirmed, if there is a violation of one of OCR's statutes.

Senator WARREN. I am a little surprised to hear you split it that way.

The Supreme Court ruled in "*Plyler v. Doe*" that this type of discrimination would clearly be an unconstitutional violation of the 14th Amendment.

Are you saying that your office would not step in to enforce that?

Mr. MARCUS. Well, Senator, I suppose there is a question about the jurisdiction of the Department of Education to deal with issues under the equal protection clause.

But generally speaking, the Office for Civil Rights has jurisdiction over statutes like Title VI that has not, to my knowledge, been granted the authority to enforce the equal protection clause per se.

Senator WARREN. I am shocked by that answer.

The job that you are applying for here is to enforce civil rights protections and to be the advocate in the Department of Education for exactly that job. You can say if you think you need help from Department of Justice in that.

It would be a perfectly reasonable answer to say, "I will bring in the Department of Justice and we will work together on this." But the idea that you would—

What I am hearing you say is, "I would take a pass on this," or might take a pass, gives me a great deal of concern.

I have just given you two hypotheticals. I am going to do more in writing.

[The following information can be found on page 213 in the appendix.]

Senator WARREN. I want to be respectful of the time here, but I do not think we need someone in this position whose view of civil rights enforcement is to do as little as possible to protect as few students as possible.

I think that would be bad for students overall and with Betsy DeVos as Secretary of Education, I think it would be even worse.

Thank you, Madam Chairwoman.

Senator COLLINS. Did you want to respond, Mr. Marcus?

Mr. MARCUS. If I may, Madam Chair.

Senator COLLINS. Yes.

Mr. MARCUS. Thank you.

Thank you, Senator Warren, for those questions. I would like to clarify because if confirmed, my position would be the opposite.

My position would be that I would want to ensure that the Office for Civil Rights enforces civil rights laws to the maximum extent permissible within the law.

Now in the hypothetical that you mentioned, it seems to me that there may or may not be a situation in which the Department of Justice has a role in these. That would not be my call.

It is my understanding that when the Department of Education interacts with the Department of Justice, it is typically through the Office of General Counsel.

Now, if the Office of General Counsel had an issue with justice that pertains to civil rights, I would certainly be pleased to work with colleagues to sort out what the appropriate steps should be.

Senator WARREN. If I could, just for a few seconds, and I recognize we are over time here, Madam Chair.

But this is my concern. These positions are positions of judgment and what we are really looking for is, what is your inclination here?

Is your inclination to say, "I want to go in. I want to raise this set of issues?" Ultimately to say, "I am willing. I recognize a court may have to decide this at some point, but I see my job as to act on behalf of the students."

I have given you two cases that, I think, legally are quite clear. What I am hearing from you is that you are tepid on this and that just gives me concern in this space.

I should quit.

Thank you, Madam Chair.

Senator COLLINS. Thank you, Senator.

I was intending to adjourn the hearing now, but I first want to check with the Ranking Member to see if those on the democratic side desire a second round of questions.

Senator MURRAY. I did have a second round and I am not sure anybody else did. Senator Hassan?

Senator COLLINS. Okay.

Senator MURRAY. Fair enough.

Senator COLLINS. Then sadly, panel, I regret to inform you that we will be having a second round of questions.

Mr. Marcus, let me start with a quick question for you.

In March, every Member of the Senate—the entire Senate, we hardly agree on anything—but the entire Senate came together and signed a letter to the Justice Department, the Department of Homeland Security, and the FBI urging action in response to threats that were being made against Jewish community centers, Jewish day schools, and synagogues.

I know that in your current role at the Brandeis Center, you have been a leader in combating the rise of anti-Semitism on college campuses.

What goals do you have for the Office of Civil Rights with respect to addressing all hate motivated crimes and conduct involving or taking place at schools and institutions of higher education?

Mr. MARCUS. Thank you, Madam Chair.

Thank you, in particular, for indicating both that the Louis D. Brandeis Center has had a particular mission that I have been honored to serve, but that if I were confirmed for this position at the Office for Civil Rights, that is an agency with a different and much broader mission.

If I were confirmed to that position, I would work to strengthen the civil rights protections of all students, and that includes stronger and more effective enforcement. It can include clearer policy. It can include more effective or greater technical assistance to recipient institutions. It can include, more broadly, working with career staff to make sure that the process is run better, more effectively, and more forcefully.

Senator COLLINS. Thank you.

Senator Murray.

Senator MURRAY. Thank you very much.

In 2004, this Committee changed the Individuals with Disabilities Education Act to require states to examine whether they put significantly more students with disabilities, or students of color, into special education, segregated settings, or whether they disciplined some groups of students more than the others.

Yet 11 years later, the GAO found that inconsistencies allowed some states to continue those harmful and discriminatory practices. GAO recommended the Department, and I want to quote, “Develop a standard approach for defining significant disproportionality to be used by all states.”

That is why I praised the Department of Education when it issued a final rule that required all states to act by 2019—fifteen years, by the way—after this became a requirement in the law.

I was deeply disappointed by reports that Secretary DeVos is considering stalling again this implementation of this rule.

Mr. Collett, I wanted to ask you. One of the most important jobs of the Assistant Secretary is to advocate for children with disabilities and their families. I want to ask you.

If you are confirmed, will you commit to fight efforts by Secretary DeVos and the Trump administration to delay or rollback that important regulation?

Mr. COLLETT. Thank you, Senator, for the question.

I am familiar with the situation. Of course, I am grateful that within the Individuals with Disabilities Education Act that you referenced, there are requirements that states have to look at those data and make decisions based on inappropriate or disproportionate disciplinary actions, or placement, or identification, as you mentioned.

We have protections in IDEA.

Senator MURRAY. Are you going to fight rolling that back again or delaying it again?

Mr. COLLETT. I will uphold the protections in IDEA and to the extent that this is a part of any agency, the Department of Education's response to the executive order about regulatory review, it would be inappropriate for me to comment on that.

Senator MURRAY. I would find it appalling if, after 15 years, you were delaying it.

I have also been disappointed by this Administration's implementation of the Every Student Succeeds Act and the Secretary is not enforcing all the law's requirements.

IDEA and ESSA require the assessment of all students. ESSA clarified that no more than 1 percent of students may be assessed using the simplified alternate assessment for students with the most significant cognitive disabilities.

Now this is important because this assessment usually determines the rigor of instruction students get. But now we are seeing, as states submit their plans, we have seen them ask for a waiver from that requirement.

Now, the assistant secretary advises the secretary on issues pertaining to students with disabilities, and this is clearly an issue that cuts across both IDEA and ESSA.

Will you commit to standing up to the Secretary and telling her that waiving this requirement will lower expectations and hurt the future of these children?

Mr. COLLETT. Thank you, for the additional question.

One of the things that I think, and I am confident that the Secretary of Education would expect me to do in advising her is to advise her based on my knowledge, based on my skills, based on my dispositions, and values, and how I have led.

I assure you, and commit to you, and every Member of the Committee, that every day, I will advise her consistent with the law and consistent with how I have led, what I believe, and standing up for kids and what is best for kids.

One of the things that I would highlight, Senator, if I may, is throughout my career and I mentioned again in my opening remarks, I talk every day, multiple times a day about having high expectations and ensuring appropriate supports for each child. That includes students with significant cognitive disabilities.

Senator MURRAY. Okay.

Mr. COLLETT. I would. I am always in favor of, and will advise the Secretary accordingly with respect to high expectations for each student and appropriate supports.

Senator MURRAY. Okay. Well, let me just say this.

We know that there are about one-half percent of students with the most significant cognitive disabilities in every state. 1 percent is more than adequate. It is really important that you stand up for those students whose future, too often, is foreclosed on by low expectations at a very young age.

I want to say one other thing for the record for this Committee about the Secretary's waiver authority.

Yes, ESSA maintains the Secretary's waiver authority. However, one of the reasons Senator Alexander and I worked together to pass ESSA was to end administering Federal education law by waiver.

ESSA has only begun to be implemented and allowing states to waive core accountability requirements, like this 1 percent cap, before any state has even implemented these core requirements, I believe is not in keeping with the intent of reauthorizing the law, and it is not right for our Nation's children.

Thank you, Madam Chair.

Senator COLLINS. Thank you.

Senator HASSAN.

Senator HASSAN. Thank you, Madam Chair.

Senator Warren has a markup to go to, so if we can go out of order, that would be great.

Senator COLLINS. Yes.

Senator WARREN. Thank you.

Thank you very much, Senator Hassan.

Thank you, Madam Chair.

Since the Occupational Health and Safety Administration was created in 1970, deaths and serious injuries at work have come down by 65 percent. Even so, more than 3 million people are seriously injured and more than 4,800 workers are killed every year on the job.

OSHA's budget is so tight now that they have only enough people to inspect workplaces in America once every 150 years. That is why deterrence is so important.

One way to deter companies from cutting corners and endangering workers is to hold employers, who violate safety laws, personally accountable for the deaths of their workers.

Mr. Mugno, if you are confirmed to run OSHA, will you commit to pursuing criminal penalties, including jail time, for employers who willfully violate health and safety laws and end up killing an employee?

Mr. MUGNO. Thank you for the question, Senator.

If the circumstances are right, the elements are met, in consultation with the Solicitor's Office of the Department of Justice, yes. I

have talked to the Secretary about that and I know that he feels the same way under those circumstances.

Senator WARREN. I think it is very important.

Another way, let us talk about another way to deter companies from taking dangerous shortcuts on worker safety is to publicize fines and penalties.

Now, during the Obama administration, OSHA issued a press release on an inspection if it resulted in violations and penalties over \$40,000. OSHA issued about 400 press releases a year based on their enforcement actions during the Obama administration.

After President Trump's inauguration, OSHA stopped issuing these enforcement releases almost entirely. In the first 10 months of this Administration, OSHA has issued just 36 of these releases.

Mr. Mugno, will you commit to reinstating the deterrence policy of issuing press releases for major violations?

Mr. MUGNO. Thank you, Senator.

Being a nominee, I am not sure what went into the decisions in prior administrations or the current administration.

But what I would do is, once confirmed and in there, I would consult with those career experts as to what the criteria is, and why did they do that, and how do they do that. I would be interested in finding out where we set that.

I do agree that communication of these types of events has an advantage in others knowing what is happening out there. I think that is why this is critical and to find out what the right criteria is.

Senator WARREN. Mr. Mugno, I am not asking about what is the policy of others. I am asking about your policy. Surely, you have thought about this. You are asking to be confirmed in this role and I just want to know your policy, how you see it in terms of publicizing when employers have been found in violation, significant violation, of health and safety laws.

Mr. MUGNO. I understand, Senator.

Senator WARREN. What is your policy?

Mr. MUGNO. Again, I think communication of these types of items is—

Senator WARREN. Your policy is you will commit, then, to publish this information?

Mr. MUGNO. Again, I would like to find out what the correct, the elements they already use in order to make that threshold.

You, yourself, mentioned that there was a \$40,000 threshold before. I am sure there was one before and those are the things I want to learn about should I be confirmed.

Senator WARREN. You have no policy other than to learn the policy of others?

Mr. MUGNO. Yes.

Senator WARREN. Companies that skirt safety rules should be punished to the fullest extent of the law, but companies that hold Federal contracts paid for with taxpayer dollars should be held to an even higher standard.

Mr. Mugno, do you agree that the Department of Labor should not contract with companies that have violated health and safety laws?

Mr. MUGNO. I believe—

Thank you for the question, Senator.

I believe it is important to look at what those violations are and what the criteria for those are in that sense.

Senator WARREN. Is that a no?

Mr. MUGNO. It is not a no, sir.

Senator WARREN. Is it a yes?

Mr. MUGNO. Senator, it is about looking at what the whole context of that employer is about in that situation,

Senator WARREN. The whole context is employers who have violated health and safety laws, and that those employers should still be eligible for Federal contracts at the Department of Labor?

Mr. MUGNO. Again, I believe that the criteria there are very critical as to how that works.

Senator WARREN. Let me ask another question.

Will you commit to informing the agency's contracting officers of all OSHA violations for the companies that the Department contracts with?

Mr. MUGNO. Senator, I do not know how that is done today, but I will certainly look, worth looking into should I be confirmed and get in there.

Senator WARREN. I am not asking is it worth looking into. I am asking if you will commit to at least give the information to the contracting officers that those companies are in violation of current health and safety laws.

Mr. MUGNO. Again, Senator, I just do not feel I have enough facts to give you that.

Senator WARREN. I take that as a no.

Thank you.

Senator Murray [presiding]. Senator Hassan.

Senator HASSAN. Thank you very much, Senator Murray.

Again, panel, thank you, and I know I am between you and the end of the hearing. I wanted to start with a question to you, Mr. Marcus.

On June 8, Acting Assistant Secretary Jackson released an internal memo which directed regional offices to no longer do a 3-year look back on data to determine whether the complaint at issue before OCR is part of a systemic institutional violation.

The memo went so far as to specify that the Office of Civil Rights may only apply a systemic or class action when the complaint allegations themselves raise systemic concerns.

But many times individuals bringing complaints forward are not familiar themselves with facts that would support an allegation of a systemic violation. As a result, may not specify those concerns in their claim. They may also be unaware of the legal basis for such a complaint.

This is common for complaints under the Americans with Disabilities Act in Section 504 of the Rehabilitation Act, for example.

Do you agree with Acting Assistant Secretary Jackson that the onus of whether a systemic complaint is brought forward should be on a claimant?

Mr. MARCUS. Thank you, Senator.

I believe that there is a role for systemic investigations, just as there is a role for individual investigations, and that the decision should be made on, backed by a fact specific case by case basis.

I do think that there are times when an individual investigation should be turned into a systemic investigation. Moreover, I think that there is a role for systemic compliance reviews to be initiated by the Department.

Senator HASSAN. Well, thank you, and I look forward to your commitment, then, to reviewing this internal document and reporting to the Committee with your findings and any proposed changes, because I do think that this is the type of discretion OCR has.

when a complainant does not know about other facts that would lead to a systemic violation finding, I think it is really important that the Department have the discretion and flexibility to look for that and help make change for the people you are trying to protect.

Does that make sense to you?

Mr. MARCUS. It does, Senator. Thank you.

Senator HASSAN. Thank you.

Mr. Mugno, strong and targeted enforcement by the Labor Department not only saves lives, but also saves valuable resources for employers. A substantial body of empirical evidence demonstrates that OSHA inspections reduce injury rates at inspected workplaces and lowers workers' compensation costs to the tune of billions of dollars annually.

The Federal Occupational Safety and Health Administration has about 45 percent fewer inspectors than it had in 1980 when the workforce was almost half of current levels.

In 2015, New Hampshire had only 7 OSHA inspectors to oversee safety and health at 50,000 work sites. With these numbers, it would take OSHA 122 years to inspect every workplace in New Hampshire just once. That means that OSHA agents are forced to triage the workplaces they inspect.

First of all, do you think OSHA should target inspections to the most dangerous workplaces or the most dangerous industries?

Mr. MUGNO. Thank you, Senator, for the question.

Yes, if we can make more efficient and effective inspections on those areas where we think that we can reduce fatalities and injuries the most, we should.

Senator HASSAN. Okay.

Will you commit to pushing for greater enforcement resources to ensure safe workplaces?

Mr. MUGNO. If confirmed, that and the other tools that, I think, will ensure compliance, and spread and sustain safety and health. If I recall correctly, in the current budget, enforcement did get an increase in funding.

Senator HASSAN. Well, I would look forward to working with you on that.

Finally, I want to circle back, Mr. Collett, to you because I want to give you an additional chance to talk about this issue of notification to families of students with disabilities when they are themselves using a publicly funded voucher to place a student who experiences disabilities in a private school.

You very compellingly spoke about your student focused approach to everything you do, and I appreciate that very, very much.

It seems to me that when we have Secretary DeVos and the President talking about taking \$20 billion of Federal education dollars and investing it in largely unaccountable voucher programs

and voucher schools that a student-centered approach would require that those voucher schools, those private schools give, at least, notice to the students that they will lose their rights under IDEA if they come to that school.

Can you comment on that a little bit further because your answer earlier about this left something to be desired from my perspective?

Mr. COLLETT. Thank you, for the opportunity, Senator, to respond a bit further and to clarify.

It concerns me anytime a parent, any parent would feel like they did not have the information they needed to make an informed choice.

Senator HASSAN. Let me just stop you there.

Mr. COLLETT. Sure.

Senator HASSAN. It is not just about an informed choice. It is about giving up somebody's rights under the law.

We are talking about a voucher program that, if implemented, will undermine public schools across this country. Public schools are accountable under the law to make sure that each kid, including kids who experience disabilities, gets a free and appropriate education.

That under current and under the current interpretation by this Administration, that right will evaporate once a student and family takes those voucher dollars, which are often public state dollars, and goes to a school, even if the school has marketed to the student with a disability.

Now, all of a sudden, 6 months, a year in a child's life when they are in a school that does not have the tools to educate them is a huge length of time.

What I am looking for and, I think, what the Committee is looking for is a commitment that if this voucher program is going to go forward that you all will stand up and insist that private schools, at least, tell kids that they are losing their civil rights under the law if they go there.

Mr. COLLETT. Thank you.

It is my understanding—and if my understanding is incorrect, I always look forward to learning—but it is my understanding that the Department does not have the authority to tell states and require states to provide that information to parents.

That is my understanding. Again, I am happy to learn if that is different.

Senator HASSAN. I am over time, and I appreciate the Chair's indulgence here, and your patience.

Mr. COLLETT. Sure.

Senator HASSAN. What I would like to do is ask a question on the record.

What I am looking for is the Department to say to states that are doing voucher programs that they have to at least provide this notice.

My guess is that you all can figure out a way under the law to do that.

Thank you.

Mr. COLLETTE. Thank you.

Senator MURRAY. Thank you very much, Senator Hassan.

Thank you to all of our witnesses.

If Senators wish to ask additional questions of the nominees, questions for the record are due by five o'clock, Thursday, December 7.

For all other matters, the hearing record will remain open for 10 days. Members may submit additional information for the record within that time.

Senator MURRAY. The next meeting of this HELP Committee will be a hearing Thursday, December 7 at 10 a.m. on the implementation of the 21st Century Cures Act.

Thank you all for being here today.

This Committee stands adjourned.

**Articles Submitted for the Record**  
**Senator Tammy Baldwin**  
**HELP Committee Hearing on EED and DOL Nominations**  
**Tuesday, December 5, 2017**

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**Burned -- A Journal Sentinel Watchdog Report**

Chemicals left in barrels leave workers and neighborhoods at risk

By Raquel Rutledge and Rick Barrett of the Milwaukee Journal Sentinel  
Feb. 15, 2017

Nothing on the outside of the industrial building on Cornell St. offers any clue about what's going on inside.

The sign that says "Mid America IBC" doesn't suggest "hazard."

Residents living in the modest homes across the street would have no way to know that the facility — which recycles and refurbishes large chemical containers — was endangering workers in the plant and exposing the neighborhood to harm.

They had no way to hear what the man inside was saying.

It was Oct. 6, 2015, and the man — whose name is Steele Johns — was escorting a team of safety consultants through the plant in a small industrial stretch on Milwaukee's north side.

The advisers were brought in for a confidential consultation to help the company comply with federal safety regulations and minimize insurance liabilities.

Johns is a safety manager for a division of Greif Inc., a \$3.3 billion industrial packaging company that entered the business of reconditioning plastic containers and 55-gallon steel drums in 2010. He was telling the consultants he was worried — extremely worried — about several things, especially the unknown nature of the chemicals in the drums.

"When you look at the hazard potential here, they could blow up and kill eight people in a heartbeat," Johns said.

It wasn't a hypothetical threat. A drum exploded in the face of a worker at another Milwaukee area plant, now a sister facility of the Cornell St. operation. The worker, Charles Duggan, was doing what he did most every day: Capping a drum full of unknown chemicals. He was killed almost instantly. He was 23.

Yes, that was a long time ago — 1984. What's unsettling, Johns told the consultants, is that the dangerous procedures haven't changed. And workers are still getting injured.

"You'd think that this would be a big priority to never, ever, ever, ever, ever do that again," he said. "But it's not. And that's the frightening part."

As for the federal agency responsible for workplace safety, Johns said, “Nobody knows this place is on the map.”

The Milwaukee plant was among six drum reconditioning facilities Johns and the consultants were examining: three Mid-America Steel Drum plants in the Milwaukee area, plus others in Indianapolis, Memphis, Tenn., and Arkadelphia, Ark.

All are operated by a joint venture called Container Life Cycle Management — or “Click’m.” Greif is the majority owner of CLCM, which employs about 270, and has also assembled a network of independent reconditioners spanning more than two dozen cities across the United States, Canada and Europe.

Johns told the consultants that he had been trying to make safety improvements at the CLCM facilities for several years, but that corporate executives and plant managers did not take him seriously.

They know the procedures are a “travesty waiting to happen,” he said, but their attitude remained: “I don’t want anybody to see this. I don’t want anybody to know.”

At 61, having spent much of his career as a paramedic in San Diego, Johns understood the safety business. Before joining Greif in 2011, he was an environmental, health and safety manager at Goodrich Corp. for about 10 years.

Johns confided in the consultants his fear of what could easily happen as employees commingled random chemicals from containers brought in for scrapping or reconditioning.

“One of these days ... that mother is going to blow up,” he said of a collection container. “And when that happens, everybody is going to be sorry.

“But we knew it from the beginning.”

What Johns didn’t know was that one of the safety consultants was recording the conversation.

Greif Inc. is headquartered on a parklike campus in Delaware, Ohio, just north of Columbus.

For most of its history, the company focused on barrel and drum manufacturing. In 2010, it expanded into the drum recycling and reconditioning business, offering its customers the ability to “cut their environmental impact.” For Greif, it opened the door to additional revenue.

Greif established a majority ownership in CLCM, a limited liability company formed through joint ventures with the six facilities.

And it launched EarthMinded Life Cycle Services, a network of independent drum reconditioning companies across the world.

As new reconditioning facilities joined the network, Greif praised the additions, announcing: “Each leader in the network was chosen based on expertise, environmentally responsible practices, reputation and commitment to satisfying the customer.”

But an investigation by the Milwaukee Journal Sentinel has uncovered another side to Greif's CLCM operations. The findings back up what Johns told the consultants and reveal other troubling details about the business:

- Practices at the six facilities have resulted in workers suffering chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.
- The operations have caused at least one big fire — heavily damaging the Indianapolis facility while endangering nearby residents and firefighters.
- Plants have been cited repeatedly by regulators for dumping too much mercury in the wastewater and toxic emissions into neighborhood air. At the Milwaukee plant, the safety manager and workers said chemical residue was washed down a floor drain.
- Greif's executives knew of environmental risks in the industry and structured CLCM in a way that could shield the publicly traded Greif from civil liabilities. Executives told financial analysts in 2010 that "those risks were very real," and that the company was protected in part by "contractual arrangements."
- Government agencies entrusted with protecting workers and the public have been ineffective, significantly reducing fines and failing to address egregious hazards. Such has been the case for decades, long before Greif entered the drum recycling business.

In the final months of 2016, for example, workers at several CLCM facilities were wearing dust masks, if any respiratory protection at all. Such masks do not filter out dangerous gases. The U.S. Occupational Safety and Health Administration had ordered the Oak Creek plant where Duggan was killed to implement a respirator program back in 1978.

The Journal Sentinel findings are based on 16 hours of audio recordings of managers and workers inside the plants; hundreds of pages of documents, including safety audits from private consultants, injury reports, federal and state regulatory records, lawsuits and fire investigations; and interviews with recent workers and industry experts.

Greif executives told the Journal Sentinel they recognized the CLCM facilities had "lacked compliance with Greif's global safety standards." But they said the company had since ordered "significant changes" to address operational and safety issues, spending \$1 million on improvements last year. The company also said it fired a manager at the Milwaukee plant for "repeated policy violations."

OSHA opened an inspection at that plant in October. It has not been completed.

A company spokesman declined requests for interviews. In response to written questions, a spokesman wrote that the Journal Sentinel's findings were outdated and that many improvements to the plants were made in 2016. The company declined to allow reporters inside the plants to see any safety improvements in action. The audio recordings of plant managers occurred between October 2015 and September 2016.

Greif provided the Journal Sentinel with a statement from Johns, who said he was unaware he was being recorded and that the information he provided to the safety consultants was “open” and “factual” so they could identify opportunities for improvement.

“A look back at the facility from September of 2015 to today shows a vastly different picture,” the statement from Johns says. “While there continues to be room for improvement in our programs, our employees work in safe conditions with good training and proper equipment to perform their tasks. ... Far from being a story of failure, this is a story of success.”

Over months of recordings, including a final one five months ago, Johns repeatedly said that improvements weren’t being made fast enough.

The company did finally adopt a monthly training program, Johns said in September. But the plant managers were still “not listening to me,” he said. He reiterated how he had informed them three years earlier that the situation was “scary” and that they were sending out hazardous waste they said wasn’t regulated. Johns said it was still going on and he “guarantees” that the materials actually are regulated as hazardous.

He said he planned to crack down on safety meetings.

“I’m just tired of it,” he said.

Will Kramer didn’t set out to be a safety consultant.

He initially wanted to go to the U.S. Naval Academy or work in intelligence for the U.S. State Department.

Growing up in Madison, Kramer said, his parents instilled in him early on the importance of doing what’s right over worrying about what others think of you.

When it came to politics — with one parent a Rush Limbaugh Republican and the other a Michael Moore Democrat — Kramer was raised to think for himself.

At 17, he insisted on wearing an American flag headband in a high school cross country race, despite rules prohibiting multicolored headwear. It was 2001, a few days after the Sept. 11 terrorist attacks, and he wanted to show his patriotism.

He was disqualified.

Kramer went to college at the University of Wisconsin-Stevens Point, where he double majored in political science and public administration.

Soon after graduation, he landed an internship with the U.S. Senate Special Committee on Aging, then-headed by Herb Kohl, a Wisconsin Democrat. Later he was hired as an associate investigator for the panel. His assignments included nursing home safety, prescription drug costs and problems with medical devices.

Kramer worked under chief investigator Jack Mitchell, best known for his role investigating the tobacco industry with help from whistle-blower Jeffrey Wigand. From Mitchell, Kramer heard

about the toll whistle-blowing can take on those who feel compelled to do it: Health problems, stress, emotional and sometimes financial ruin.

He never imagined that 10 years later, at 32 years old with a wife and three young boys to support, he'd feel obligated to blow a whistle himself.

But as he listened to what Johns was saying about Greif's facilities, and saw on his visits what appeared to be violations of environmental laws and serious threats to workers and nearby residents, he decided he had to do something.

He secretly hit "record" on his iPhone.

The birth of the 55-gallon steel drum — U.S. Patent No. 808,327 — coincided with the increase in demand for oil in the early 1900s.

It was the work of Henry Wehrhahn, a Brooklyn native who aimed to perfect earlier iterations, from the clay vessels used by early civilizations to wooden barrels commonly used for centuries.

Wehrhahn worked for Iron Clad Manufacturing. His boss was a trailblazing investigative journalist-turned-inventor, best known for her work exposing abuses in mental hospitals in the late 1800s.

Elizabeth Jane Cochran Seaman — pen named Nellie Bly — had married into the steel business and turned to Wehrhahn to design a large container with a longer lifespan than wood, one that wouldn't leak.

After several attempts, Wehrhahn succeeded and in 1905, Bly acquired the patent for the steel drum. Wehrhahn moved to Milwaukee to take a top position at a steel tank company.

More than 110 years later, the blueprint for the 55-gallon steel drum remains largely the same.

Plastic drums have since entered the market and are growing in popularity, as are larger 275-gallon square containers.

Companies across the globe use the containers to move everything from antifreeze to aftershave. About half the materials transported are considered hazardous.

More than 20 million new plastic and steel barrels were manufactured in 2015; even more — about 27 million — were processed for reuse or scrapping.

The trade group that represents the drum reconditioning industry, the Reusable Industrial Packaging Association, says it's impossible to say for certain exactly how many companies are in the business. As of December, the organization had 64 members managing about 117 facilities in the U.S.

All pledge to adhere to guiding principles that include making "health, safety, and environmental considerations a priority" in all processes.

The trouble starts before used drums arrive at the refurbishing plants.

Instead of shipping empty drums to be refurbished or scrapped, companies of all kinds sometimes send containers with potentially dangerous chemical waste left sloshing in the bottoms.

By federal regulation, drums are considered “empty” if they contain an inch or less of hazardous residue that cannot be removed by pouring, pumping or other normal means, such as being turned upside down. The 1-inch rule is aimed at accommodating gooey, viscous substances that are difficult to remove.

Why would a company send out drums for reconditioning or recycling when unused chemicals remain?

Sometimes it’s just a matter of hurried workers not taking the time to get that last few gallons from the drums or containers. An electric pump can drain a 55-gallon drum in a matter of minutes, but insiders say the flow of chemicals sometimes slows as the pump gets close to the bottom, and workers don’t always want to wait to finish the job.

So much is wasted, industry insiders have called the remaining chemicals the “\$1 billion inch.”

Some companies knowingly ship containers with an inch of liquid — unloading their waste an inch at a time — to avoid hazardous waste disposal costs, industry insiders say.

Chaime Schmeier, a plant manager at the north side Milwaukee facility, told Kramer and other safety consultants that he had asked for Brenntag — one of CLCM’s largest customers and the world’s largest chemical distributor — to be told to rinse the residue from drums containing acids, peroxides and other hazardous substances before sending them to his plant.

“I want those f\*\*\*\*\* rinsed,” he said in one of the recorded conversations. “But they won’t do it. They ain’t rinsing nothing. ... Those things are wicked.”

Federal regulations require companies shipping hazardous chemicals to clean containers before they send them as empties.

At times, companies disregard the rules altogether and send refurbishing plants what industry insiders refer to as “heavies.” These are barrels that contain more than an inch of liquid or residue. Sometimes much more.

Reconditioning plants are supposed to refuse heavies and have them sent back to the companies that shipped them — and Greif officials maintain this is what they do. Most reconditioning plants are not permitted or equipped to handle hazardous waste.

But the Journal Sentinel found CLCM plants haven’t always returned the barrels. When trucks roll up to the docks with a few heavies mixed in the load, workers have typically gone ahead and processed them, according to interviews with workers, OSHA reports and audio recordings from Kramer.

A supervisor at a plant in Memphis — recorded in September — said the only time his team rejects a drum is if it's too heavy for anybody to pick up and move.

“We get some that are, you know, more than an inch that we just, you know, pick up together and dump it up in a tote, let it drain ... whatever,” the supervisor said.

Former employees who recently worked at plants in Milwaukee and Arkansas told the Journal Sentinel they did the same.

And OSHA documents from 2010 confirmed the practice at the plant in Indianapolis.

Federal inspectors who visited the facility “observed multiple totes” with as much as 3 inches of liquid. Inspectors found that a “large percentage” of the chemicals in the plant were toxic liquids such as hydrofluoric and hydrochloric acids, sodium hydroxide, ammonia, diacetyl, acetone, benzene, nickel and formaldehyde.

Once the heavies hit the dock — whether they contain hazardous material or not — the threat escalates.

John Mateljan worked at the north side Milwaukee plant in 2015. His primary job was to cut up plastic containers for scrapping. Before he could cut one, he poured off whatever chemicals were left into a 275-gallon collection container.

The process was the same no matter what was in the containers, Mateljan said. Workers didn't separate corrosives from flammables, acids from bases, or take proper precautions to prevent volatile chemical reactions. Most of the time, Mateljan said, workers had no idea what chemicals they were handling and mixing.

Often the labels were old or illegible. In some cases, the drums weren't labeled at all.

The U.S. Department of Transportation division responsible for overseeing the shipping of hazardous materials rarely tests chemicals to ensure drums and other containers are properly labeled.

The division doesn't have a budget for chemical testing. The average fine paid for violations in 2015 was \$7,822, according to department data.

Greif officials say their employees are well-trained and know the proper procedures for dealing with unlabeled and mislabeled drums.

Safety experts familiar with the industry say unlabeled drums with unknown chemicals should always be treated as hazardous.

Tony Rieck, a 25-year veteran of the workplace safety industry, put it this way:

“It's OK to assume that something is dangerous,” said Rieck, president and CEO of T.R. Consulting Group in Colorado Springs, Colo. “It's never OK to assume that something is safe.”

But that wasn't the approach at the Cornell St. plant in Milwaukee, according to Mateljan and others.

Mateljan, 29, recalled one instance when he poured liquid from a drum into the collection container and a horrible smelling orange cloud filled the plant.

“I was like, ‘What the hell is going on in here?’” he told the Journal Sentinel.

The workers went outside for about a half an hour while the air cleared, he said.

Another time, he was using a shop vac to suck the contents out of a drum, a common practice at the plant. He stepped away to use the restroom and when he returned, the vacuum was smoking. The mixture inside was boiling.

He said workers would regularly set smelly drums outside to let the chemicals evaporate into the air or simmer down before pouring them into a collection container. The plant manager called those containers “stinkers.”

Mateljan left his job after he broke his arm in a forklift accident at the plant. He said a good friend of his who still works there is having serious and worsening breathing problems that he suspects are from chemical fumes. Mateljan said he has taken his friend to the hospital several times.

“I tell him ‘What’s more important, your health or the money?’ He wants to get out of there but he wants to still get paid.”

Workers at the Milwaukee plant said they typically earn about \$12 per hour.

Luis Hernandez worked at the same Milwaukee plant for more than a year. He left in July after an injury when a saw fell on his knee and medical tests showed that something was wrong with his liver.

“I felt really bad, really lethargic all the time,” said Hernandez, 23, adding that he’s never been a smoker or drinker.

Hernandez graduated from the University of Wisconsin-Madison in 2015 and said he worked at the plant, close to where his family lives, to save money to go to graduate school.

He complained to OSHA last year about the commingling of chemicals and the lack of an eyewash station. He said the company put in the eyewash station only after he formally complained. But, he said, OSHA didn’t do anything about the mixing of chemicals.

Hernandez, like Schmeier, said that Brenntag shipped the “most disgusting things” rather than empty barrels to the refurbishing plants.

“And since they were a really loyal customer ... (CLCM) would take everything from them,” he said.

A Brenntag representative said nobody from Mid-America has contacted the company about any problem with the drums sent for recycling and/or refurbishing.

“IT IS THE POLICY OF Brenntag Great Lakes to adhere to the U.S. Environmental Protection Agency’s definition of an empty drum/container within our operations,” Chad Royer, vice president of operations, wrote in an email to the Journal Sentinel.

“However, in the interest of safety, we will be reaching-out to Mid-America to discuss this allegation.”

Employees at the plant in Indianapolis, which Greif’s joint venture had just acquired, told an OSHA inspector in 2010 that they mixed together “every type of chemical known to man” and had seen all kinds of reactions, such as smoke, crackling, spattering and bubbling of liquids.

While there, the inspector witnessed a smoking chemical reaction and saw fumes from hazardous substances being blown in an employee’s face.

The inspector himself reported suffering “severe headaches, nausea and dizziness” that “did not subside for several hours” after he left the area. In addition he experienced “what appeared to be a chlorine burn to the forehead” and had eye, nasal and respiratory irritation that lasted for days.

Paul Gantt is a California-based hazardous materials specialist who trains corporate safety managers, government regulators and others on the proper handling of chemicals.

Gantt said the drum recycling business is immensely dangerous given the number of chemical variables in the hands of people who often don’t understand the full spectrum of chemistry.

“That’s nuts,” he said. “You’re creating a chemical brew, you really don’t know the full potential.”

Mix a couple wrong things together and you’ve got a lethal gas chamber, he said.

“The incompatibility aspects can be off the scale, in some cases indescribable.”

Capping a container of various unknown chemicals can essentially create a bomb, he explained.

Two key laws of chemistry kick in, both involving pressure.

Typically it starts with an exothermic reaction. That’s the heat generated from mixing incompatible substances. The heat causes the temperature to rise, and according to Gay-Lussac’s law, the pressure of gas is directly proportional to its temperature. As the temperature rises, so does the pressure.

Then comes Boyle’s law, ramping up the risk. This states that the pressure of gas is inversely proportional to volume. So when the space that the gas can occupy decreases — such as by putting a lid on a container — the pressure rises.

It can happen over hours or within fractions of a second.

Even a tiny amount of pressure on a typical drum lid can explode with a force equal to 800 pounds or more, experts say.

At least 41 people in the United States have been killed, and dozens more injured, in incidents involving drums with chemicals or residue over the last 15 years, according to an analysis of OSHA reports by the Journal Sentinel. The figures include all workplaces, not just drum reconditioning plants. Some of the explosions were caused by sparks from cutting torches coming in contact with vapors that remained in the drums.

“We’re lucky more than we are safe,” said Gantt, the chemical safety expert. “You might have 1,000 reactions that didn’t blow up a drum, but that was luck. What are we doing to ensure we are safe?”

Raymond Chojnacki was standing beside Charles Duggan on the day the drum exploded at the Oak Creek plant in 1984. He had just stepped away as Duggan leaned over to make sure the drum’s lid was fastened.

There were no warning signs of a chemical reaction, Chojnacki recalled in an interview with the Journal Sentinel. No crackling, popping or strong vapors.

“Whatever was in that drum reacted somehow and just exploded under pressure,” Chojnacki said. “Maybe he shook the barrel a little when he put the cap on, and that was it.”

The force sent Duggan high into the air. Chojnacki was covered with chemicals that spewed from the drum — like opening a giant shaken soda can.

“They heard it on the other side of the plant,” he said. It sounded like several sticks of dynamite going off.

A co-worker grabbed Chojnacki and pulled him into a nearby shower to wash off the chemicals. Others frantically searched for Duggan. They found him wedged in a stack of drums, upside down, a few feet away.

Duggan died from head injuries.

“He didn’t know what the hell hit him,” Chojnacki said. “It was over in a second.”

A co-worker found Duggan’s torn hat, 50 yards away, on the roof of the plant.

Investigators later determined the violent reaction in the drum was caused by the mixture of two common industrial chemicals: Hydrochloric acid and sodium hypochlorite, undiluted industrial bleach.

Workers told investigators that they had been worried about chemical reactions and had warned supervisors that, “someone is going to get his head blown off,” according to the Milwaukee County medical examiner’s death report.

Plant managers, including Scott Swosinski, denied knowing about any potential for drums to explode.

Swosinski told investigators from the medical examiner’s office that labels on drums weren’t always accurate and that customers trying to dispose of hazardous waste would commonly leave

small amounts of chemicals in the bottom of the barrels. It was standard practice at the plant to commingle the chemicals, the report said.

Swosinski remained part of Mid-America Steel Drum's management team until mid-2016. He could not be reached for comment.

Chojnacki escaped with dime-sized acid burns from the chemical spray. Emotionally, he was shaken.

"I was off work for maybe a month or so, and then I came back for a while," he said. "Then I just quit and got another job. I was tired of the whole ordeal."

Mid-America wasn't the only company at fault for putting workers in danger, Chojnacki said. The companies that shipped the containers with leftover chemicals shared the blame. They shouldn't have sent hazardous material to a drum reconditioning plant in the first place, he said.

"If they are using that chemical, they should have a way of disposing it (safely) there," he said.

Duggan's mother, Patricia Duggan, received a \$40,000 settlement from Milport Chemical, the company that shipped one of the volatile chemicals. The agreement included a clause prohibiting her from discussing details of her son's death.

More than 30 years later, Patricia Duggan said even if she hadn't agreed to keep quiet, she wouldn't want to talk about it. It remains too painful.

But she did say she hoped nobody else would be harmed in the same way.

"If they're still doing the same thing, I do hope you'll pursue the story," she said.

Documents and interviews show that Mid-America Steel Drum and others in the chemical container recycling industry have been operating the same way for decades, despite the dangers.

In August 2010, a month after Greif's CLCM group acquired Indianapolis Drum Service, a supervisor in the facility narrowly escaped injury after chemicals were commingled in a capped barrel.

Workers described the container as looking "like it was pregnant" before the lid shot off, landing 6 to 7 feet from the supervisor, Jerry Spegal. As with the drum that killed Duggan, this one spewed chemicals several feet in the air and drenched Spegal.

Spegal failed to mention the incident to OSHA inspectors who had been investigating the plant for several months following worker complaints about coughing and breathing problems from chemical exposure.

OSHA inspectors cited the company for 23 violations, the majority classified as serious. The company negotiated the fine from a proposed \$308,000 down to \$110,000.

Thomas McGarity, a University of Texas law school professor who has consulted for OSHA, said the agency's ability to hold employers accountable has been "woefully inadequate" for decades.

McGarity co-authored a study last year entitled, "When OSHA Gives Discounts on Danger, Workers Are Put At Risk."

The report noted that the agency inspects only 1% of workplaces each year, and often agrees to substantially reduced fines in exchange for a company's promise to fix the hazard promptly.

Employers often treat the fines as a cost of doing business, McGarity said.

In 2013, before Kramer joined Safety Management Services, the Iowa-based consulting firm conducted safety audits at CLCM plants in Indianapolis, Memphis and Arkadelphia.

The consultants rated each operation on compliance with corporate policies and procedures as well as government regulations. The facilities performance scores ranged from 48% to 61%.

One worker told the consultants that "no one follows any safety rules." Another pleaded: "Just continue to have prayer."

Consultants encouraged Greif to hire industrial hygienists to come in and evaluate worker exposure to chemical fumes.

In 2014, OSHA inspectors cited the Oak Creek plant with a "serious" violation for not having proper protections in place for "release of hazardous energy," known in industrial terms as "lockout/tagout." It includes such practices as ensuring equipment is disabled during maintenance.

The agency fined CLCM, \$7,000. The company negotiated it down to \$4,900.

One of the Arkadelphia employees, Billy Joe Patrick, said he heard talk over the years from managers about making his workplace safer. But not much was actually done.

"They would say 'We're gonna do this, we're gonna do that, we're gonna do this,'" he said in an interview. "Well, I didn't see anything happening regarding bettering it."

Patrick worked on a burner at the Arkadelphia plant in 2013, pouring chemical residue into a furnace and then pushing the drums through for cleaning.

He said barrels came in with all sorts of unknown chemicals.

"As soon as you dumped it, if it was real flammable, it was going to let you know real quick," he said.

Flames would shoot out of the furnace, he said, and it didn't matter whether you had on a face shield. The fire would flare up under it. There was not much Patrick could do but lean back as far as he could while holding onto the barrel. If he let go, fire would engulf the whole area.

"You can only step back so far. It shoots out that little opening, you don't have nowhere to go," he said. "There's fire all around you but you can't let go."

Patrick held on. His hair, mustache and beard were singed.

Greif told the Journal Sentinel the company is “examining investments in automation to increase safety” in its burner operations.

An incident in March 2013 prompted Patrick, 52 at the time, to quit.

He had just dumped something in the burner.

Right at that moment, he happened to be taking a deep breath.

“I went to my knees,” he said. “It felt like it just burnt my lungs. ... I started sweating golf balls.”

He went to see a doctor the next morning.

“They said, ‘Mr. Patrick, do you know you have COPD?’”

Patrick said he had never had breathing problems, or suspected he had chronic obstructive pulmonary disease, an incurable condition, until breathing in those fumes.

“They told me if I wanted to live, I better move to a different department or quit the job.”

Eric McClure spent his shifts at the Arkansas plant the same way Patrick did, shoving steel drums into a blazing furnace.

Every day he prayed.

“Lord, please don’t let anything happen to me.”

McClure, 36, had been burned. Chemicals from the bottom of a drum had splashed the back of his leg, causing painful swelling and blistering. He had seen flames scorch the faces and arms of co-workers. For close to a year, he watched as, day after day, someone at the plant was hurt, sometimes seriously.

One of his co-workers, Douglas Robinson, suffered a chemical burn on his leg that bubbled up and ate through layers of his skin, from his ankle to his knee. He spent more than a month on crutches.

“A lot of people are amazed that I still have my leg,” he said.

Another co-worker sustained a gash above his eye from the lid blowing off a drum.

In the fall of 2015, McClure left.

“I’m a man,” he said. “I done worked a lot of hard jobs, hard jobs, but this was the most unsafe job I’ve ever done in my life.”

In October 2015, the team from Safety Management Services, which now included Kramer, did a round of scheduled safety audits. They identified concerns at all the CLCM plants in four states.

None of the Milwaukee-area plants scored higher than 39% overall.

Ratings for management support and leadership were lower than 16% at all the plants. None scored higher than 42% on regulatory compliance.

In Oak Creek, “employees uniformly indicated that they felt safety had improved at the facility in recent years since the company joined Greif.”

At the same time, workers told the consultants they were not encouraged to report risky conditions or behaviors. The plant did not have a safety committee, or regular safety training program. In the category of accident investigations and prevention, the plant scored 18 out of a possible 85 points.

Workers were seen stepping into burners to wipe away ash; they were observed dumping and burning chemicals outside the burners — all highly hazardous behaviors. In all, consultants noted 46 needed improvements.

The plants in other states scored slightly better — the highest was Indianapolis at 65% — but still fell short of the company’s stated goal of 90%.

Results of the safety audits were sent to Greif’s leadership team.

“Chemical safety needs to be addressed urgently at your facility,” consultant Dale Sabers, who was part of the team, wrote in a Nov. 6, 2015, email to a group of Greif executives regarding the north side Milwaukee plant.

“The practice whereby employees mix many different chemicals together without regard to their chemical characteristics is inherently unsafe and could result in extremely dangerous reactions.”

Sabers also warned the company about using acetone to clean containers and storing it in an uncovered plastic bucket. Even traces of fumes from acetone — after barrels have been washed — have been known to blow up drums and kill workers in other industrial settings.

An Oak Creek plant manager said during the audit that he and others had expected they would receive support from Greif to make safety improvements.

“We were told we were going to have people on the shop floor with us going through safety procedures, hand in hand with employees,” he told consultants on their visit. “We got zero.”

Throughout the audio recordings, Johns repeatedly told Kramer that Greif executives and plant managers were ignoring his warnings about the practice of mixing incompatible chemicals.

Johns said he’d been nagging them for years and had requested money, \$60,000 per plant, for an industrial hygienist to survey the situation. He encouraged Greif leaders to come out and see the conditions for themselves.

“I will make their hair stand on end,” he said.

In a March 2016 phone conversation, recorded by Kramer, Johns said there had been a shake-up in Greif management. One of the safety executives he had hoped would push for improvements was gone. On his way out, that executive told Johns: “We don’t have any money (for the industrial hygienist).”

Two months later, Kramer asked Johns what had happened.

“We haven’t changed a thing,” Johns said. “We are doing it all exactly the same.”

He said the chemicals were still “all just going into a toxic soup, particularly there at Cornell (the north side Milwaukee plant).”

Greif executives spent two years studying the drum recycling and reconditioning industry before establishing CLCM and have told investors they were aware of environmental risks.

In a September 2010 conference call with financial analysts, Greif CEO Michael Gasser said the two companies they initially acquired — in Arkansas and Tennessee — had “by far the best practices from a risk mitigation standpoint.”

“We know that — we’re very comfortable that we’ve mitigated those risks through contractual arrangements, and also through the processes they have,” Gasser said.

Gasser didn’t elaborate on the contractual arrangements.

CLCM was created as a limited liability company, formed as a joint venture with local owners of the individual facilities.

LLCs, as they’re called, can shelter investors from lawsuits, and there are also tax advantages.

“All companies want liability protection,” said Joe Boucher, a Madison attorney who specializes in that area of law.

Those protections exist primarily on the civil side, he said, but don’t shield executives from criminal prosecution.

By 2013, Gasser was no longer Greif’s CEO. His successor, David Fischer, remained bullish on the drum reconditioning industry, despite problems at the CLCM plants.

“There are a growing number of very large customers — our largest, in fact, group of customers and some smaller ones — that require us to offer recycling/recondition capabilities as an imperative of doing business with them,” Fischer said in a Feb. 23, 2013, conference call with analysts.

“And that is something that we have recognized, and we are moving ahead with, in a very aggressive way.”

Will Kramer didn’t decide to become a whistle-blower overnight.

For more than six years as a safety consultant, he heard executives make jokes when people were hurt. He saw others falsify safety plans. He overheard one say, “I don’t give a crap about OSHA,” when it came to the federal agency’s regulation of formaldehyde. Others stressed the importance of “making f\*\*\*\*\* money” over keeping workers safe or protecting the environment, he said.

“I couldn’t leave it at the office,” Kramer said. “It invaded my whole life.”

He spoke up about workplace safety when “right to work” legislation surfaced in Wisconsin in 2015. He was arrested during a protest aimed at convincing lawmakers that the bill would result in more injuries to workers.

He wrote an opinion piece in a Madison newspaper about the safety problems he’d witnessed over the years and conflicts of interest facing safety consultants. Risk-management consultants cannot uphold their ethical oath to place worker safety above all else when the companies’ clients are writing their paychecks, he wrote, noting cases where he should have spoken up sooner.

Kramer had hoped his public confession exposing the conflicts would lead to industrywide solutions. Instead, the federal Board of Certified Safety Professionals stripped him of his professional certification, citing his violation of ethical standards.

In his April 2015 hearing before the board, Kramer defended himself.

“Show me a CSP (Certified Safety Professional) who is not actively violating our ethical standards ... and I will show you a CSP that is either a liar or unemployed,” he said. “We do not even fully cooperate with OSHA when it investigates our workplaces because our very job descriptions state it is our responsibility to protect the company from OSHA and other regulators.”

Moreover, consultants usually have to sign nondisclosure agreements forbidding them to discuss publicly the internal workings of the companies they’re auditing — a deal that allows misdeeds to continue, he said.

Kramer said he couldn’t ignore what he saw at Greif’s CLCM plants. He wasn’t going to let a nondisclosure contract keep him from doing what he thought was right.

On June 27, 2016, he filed a whistle-blower complaint with the U.S. Securities and Exchange Commission, detailing his findings and alleging that Greif was misleading investors by not disclosing their environmental risks.

It was the best way to get the company’s attention, his attorneys advised him.

Sept. 16, 2016 was Kramer’s last day on the job for Safety Management Services. He visited the Arkadelphia plant and invited Johns to lunch at a Chinese buffet. Kramer was leaving the risk-management business and had enrolled in law school.

He asked Johns for an update.

“I just don’t want us coming out again and seeing them mixing 1,000 different things into a drum,” Kramer said.

“You will never change that process,” Johns replied, noting he was still frustrated with what was going on: “You can’t take and mix flammables and caustics, bases, acids, everything into the same dang 275-gallon tote.”

Kramer had hoped to hear that the company had finally addressed the dangers of mixing unknown chemicals.

It hadn't.

"They don't care," Johns said. "This is the way we've always done it."

John Diedrich of the Journal Sentinel staff contributed to this report.

How we reported this story

In reporting this story, the Milwaukee Journal Sentinel relied on 16 hours of audio recordings and hundreds of pages of injury reports and safety audits supplied by a whistle-blower, as well as federal, state and local regulatory records, photographs, medical examiner reports, police and fire records, U.S. Securities and Exchange reports, lawsuits, interviews with eight recent workers from three plants, regulators, trade groups and chemical safety experts.

The whistle-blower, Will Kramer, worked for a division of the Iowa-based consulting firm of Cottingham & Butler, called Safety Management Services Co.

The news organization had samplings of the audio recordings provided by Kramer authenticated by Primeau Forensics, an audio and video firm in Rochester Hills, Mich., that specializes in such work for trials and other purposes. The recordings had not been cut or altered, the firm found.

Photographs and videos by workers, federal regulators and consultants with Safety Management Services match descriptions of conditions provided by workers and detailed in reports.

The number of injuries and deaths from exploding drums was determined by using data from the U.S. Occupational Safety and Health Administration.

Barrel company facing fine for exposing workers to hazardous chemicals, unsafe practices

Raquel Rutledge, Milwaukee Journal Sentinel - Published 7:01 p.m. CT April 21, 2017 | Updated 11:13 a.m. CT Sept. 8, 2017

An industrial drum refurbisher on Milwaukee's north side faces \$108,000 in federal fines stemming from serious safety violations that harm workers — and pose risks to the neighborhood.

The U.S. Occupational Safety and Health Administration has cited the Mid-America Steel Drum facility for 15 serious violations for exposing workers to chemical and heat-related burns, toxic gases, dangerous noise levels, the risk of falls and other hazards.

The “mixing of reactive materials/chemicals, as well as the mixing/addition of chemical unknowns, exposed employees to reactive chemical hazards,” according to a citation and notification of penalty issued last week by OSHA.

The company, on Cornell St. near W. Hampton Ave. and N. 24th St., recycles and reconditions industrial totes and is among a group of similar facilities operated by a joint venture called Container Life Cycle Management — or “Click’m.” CLCM facilities employ about 270 people, with additional operations in St. Francis and Oak Creek as well as Indianapolis, Memphis, Tenn., and Arkadelphia, Ark.

CLCM is majority owned by industrial packaging giant Greif Inc., headquartered in Delaware, Ohio.

Officials from Greif said Friday they are “cooperating closely” with OSHA regulators.

“We are aware of OSHA’s findings and while we do not agree with the results of the inquiry, we’re committed to addressing issues in a timely manner,” a spokesman for Greif said in a written statement to the Milwaukee Journal Sentinel.

A Journal Sentinel investigation into Greif’s CLCM facilities published in February detailed how unsafe practices at the plants resulted in worker injuries and risks to the environment. Workers told the Journal Sentinel the drums that arrive at the plant for refurbishing and recycling are not always empty — violating regulations — and instead contain chemicals, including hazardous ones, sloshing in the bottom. Workers pour the various chemical residues into a container without knowing what they’re mixing and how the chemicals might react.

The practice results in drums exploding and releasing toxic gases and vapors in the air. Workers have suffered severe chemical burns and respiratory illness, according to interviews and internal company records. In a 1984 case, before Greif/CLCM were involved with the business, a drum at a sister plant owned by Mid-America exploded in the face of a 23-year-old worker and killed him.

The Journal Sentinel’s findings were based on 16 hours of audio recordings and hundreds of pages of injury reports and safety audits supplied by a whistle-blower; as well as federal, state and local regulatory records; photographs; medical examiner reports; police and fire records; U.S. Securities and Exchange reports; lawsuits; and interviews with eight recent workers from three plants, regulators, trade groups and chemical safety experts.

The OSHA citation substantiates the Journal Sentinel’s findings.

It notes, in part: “the employer receives, stores, and processes chemical containers (totes) that contain chemicals such as, but not limited to: hydrogen peroxide, isopropanol, sodium hydroxide, sodium hypochlorite, acetone, sulfuric acid, hydrochloric acid, and paints.”

In addition, workers at the north side Milwaukee plant were exposed to fire dangers from acetone, which wasn't properly handled, the OSHA citation states. Workers were not adequately informed about the risks of each of the hundreds of chemicals they were handling, the agency's inspectors found.

Workers were allowed to go back into the plant without "procedures in place to ensure that the work environment was safe following the release of unknown gases and vapors from unwanted chemical reactions," inspectors noted.

Will Kramer, a former risk assessment consultant who blew the whistle on Greif, said OSHA's penalties illustrate a regulatory failure. The \$108,000 fine amounts to "pocket change," he said. Greif reported net sales of \$3.3 billion in 2016.

Kramer said OSHA investigators didn't contact him or seek evidence that the company was aware of its dangerous practices and deliberately ignored them. OSHA officials could not be reached for comment.

"In my role as a safety consultant to the company, we documented the same issues OSHA cited them for, and provided a detailed report with photos to the company's management with recommendations of how to fix the problems," Kramer wrote in a letter Friday to U.S. Sen. Tammy Baldwin, who has called for multiple federal investigations into the problems with the Greif/CLCM plants.

Such evidence would have allowed the agency to classify the violations as "willful," which carry much stiffer fines. Kramer said that might do more to "incentivize" the company to improve its practices.

OSHA conducted several inspections of the plant beginning in October 2016, after receiving a complaint from an employee. The inspections continued through April 6. The company has until May 30 to finish resolving all of the issues. "This confirms that despite (Greif officials) saying they fixed all the problems, they're still doing the same things," Kramer said.

EPA investigates fumes coming from Wisconsin barrel plant. Their own inspectors get sick.

John Diedrich and Raquel Rutledge, Milwaukee Published 2:08 p.m. CT June 30, 2017 | Updated 11:13 a.m. CT Sept. 8, 2017

Two federal inspectors became ill earlier this year while investigating a chain of industrial barrel refurbishing plants in Wisconsin, reporting nausea, dizziness and difficulty breathing as they spent several days talking to residents near one of the facilities.

A month earlier, other inspectors were inside the plants but said they didn't get to see regular activities as required by law. Instead, it appeared the company was staging operations to make it look like regulations were being followed.

Concerned that the company engaged in a cover-up and that the plant's true operations presented a risk to residents, federal prosecutors took the unusual step of asking a federal magistrate judge to

approve search warrants authorizing surprise inspections to collect samples. The judge approved them in early May.

A Milwaukee Journal Sentinel investigation in February uncovered dangerous working conditions and environmental problems at the plants and three others in Arkansas, Indiana and Tennessee, all part of the chain. The facilities are operated by Container Life Cycle Management (CLCM), a joint venture majority owned by industrial packaging giant Greif Inc.

The U.S. Environmental Protection Agency and other agencies sent inspectors to the CLCM Mid-America Steel Drum plants in St. Francis, Oak Creek and Milwaukee a short time later.

New details of the EPA inspections are outlined in reports, emails and other documents made public in the warrants filed by the EPA in U.S. District Court in Milwaukee in May.

In seeking warrants to do surprise inspections, EPA officials cited the Journal Sentinel investigation as well as previous environmental violations.

The plants refurbish 55-gallon metal drums and large plastic totes, cleaning them out for future use or to recycle them. The drums and totes are supposed to arrive empty, but they routinely come in "heavy," with a significant amount of chemicals remaining inside, according to documents and workers.

Dangerous chemicals have been mixed together and washed down floor drains and plumes of smoke from unknown chemical reactions have been released into neighborhoods, workers said. Fires have erupted at the plants, fouling the air and posing a danger to nearby homes, the investigation found.

The Journal Sentinel findings were based on 16 hours of audio recordings by a whistle-blower; hundreds of pages of documents, including internal injury reports and safety audits; as well as public records and interviews with workers, regulators and experts.

Greif spokeswoman Debbie Crow said the company has not yet received findings from the EPA and the company "will work with them to remedy any issues as they arise."

EPA officials would not comment on the ongoing investigation other than to say they don't yet have results from samples of material that were collected during the inspections.

Federal and state lawmakers have demanded action. U.S. Sen. Tammy Baldwin has written numerous letters to governmental agencies and told the Journal Sentinel immediate steps are needed to protect the public.

"I have no doubt that people have been harmed or put at risk, whether it's workers or people who live in these neighborhoods. ... It's important that all federal agencies charged with oversight do their job and get to the bottom of this," the Wisconsin Democrat said.

**Staged inspection suspected**

Federal and state regulators inspected the plants in Milwaukee shortly after the Journal Sentinel investigation.

The inspectors from the EPA, U.S. Department of Transportation and Wisconsin's Department of Natural Resources were trying to determine if there were violations of federal hazardous waste handling and emissions laws at the plants.

At each plant, the regulators said, there were indications they were not seeing typical operations, which they are supposed to be able to see under the law.

Inspectors noted they were barred from entering the plants until a company attorney arrived.

Barrels appeared to have been selected to avoid any containing hazardous waste, they said. Containers had new-looking white labels on them with the words "non-regulated waste." And a worker operating a furnace at one plant happened to be "on break" during the inspection, according to court documents.

Operations "appeared to EPA inspectors to be 'staged' to create the appearance of compliance with applicable environmental regulations," documents said.

Even with those efforts, the inspectors spotted possible violations of the law: Workers were guessing by "feel" if a barrel contained chemicals; fumes wafted from some barrels; possibly harmful waste was streaming down a storm drain; and records required by law to be kept were missing.

And by the company's own admission, one of the facilities was dealing with hazardous waste without a permit. The company's attorney wrote in a letter after the inspection that the company is now applying for a hazardous waste permit.

"This suggests a failure in the past to characterize properly wastes present at this facility," the warrant application said.

Inspectors arrived at the plant in the 2300 block of W. Cornell St. the morning of Feb. 24. After waiting for the lawyer to arrive, the inspectors entered the plant to find that operation was shut down, so there was little to observe.

Four days later, the inspectors went to the St. Francis plant. They had to wait an hour while the company called its lawyer to appear.

The inspectors believed the drums being processed on that day were "cherry-picked" so they did not include any hazardous waste. But inspectors also saw barrels fuming at the St. Francis plant, indicating that drums were not emptied.

An inspector went to the roof to examine the smokestack scrubber, which is designed to clean the exhaust gas as it leaves the plant. He discovered fluid coming off the scrubber was going into a pipe and then a storm drain.

"The reason the system was set up to leak in this way was not made clear during the inspection," the inspection report said.

At the Oak Creek inspection on March 2, inspectors identified several areas of concern. Workers used metal blades to cut the drums containing unknown and potentially flammable chemicals, creating a risk of explosion.

A worker died in Milwaukee in 1984 after a barrel of randomly mixed chemicals exploded in his face. There have been dozens of other deaths and serious injuries in incidents involving drums with chemicals or residue over the past 15 years across various industries.

The way workers were putting drums in the furnace in the Oak Creek plant represented a risk of fire or explosion — all dangers that happen routinely at the plants, according to workers interviewed by the Journal Sentinel.

#### **'Insane' plant near residents**

Residents around the St. Francis plant have contended with foul odors and smoke belching over their neighborhood for years, federal EPA investigators found while spending nearly a week in the area in March.

EPA investigators Aaron Price and Maureen O'Neill interviewed several residents in their homes, "where we believe the remnants of the exhaust had accumulated for years in the carpet and upholstery."

Residents reported health complaints including dizziness, itching, watery eyes, rashes on exposed skin, nausea, lymphoma, vitamin D issues, cardiovascular disease and throat cancer, according to documents.

Price and O'Neill both reported that they felt sick after being in the neighborhood around the St. Francis plant. O'Neill said her tongue swelled, her throat constricted and she was suffering from "unbearable" throbbing and numbness in her hands and feet.

She asked for Benadryl at the front desk of her hotel that night. The staff offered to take her to a hospital or pharmacy. A hotel driver took her to get an antihistamine. The swelling went down the next day, but the pain in the hands and feet persisted until she left the assignment.

Price, too, reported feeling ill: headaches, dizziness and breathing difficulty, nausea, sleep difficulty and trouble focusing.

A neighbor of the plant told Price and O'Neill the smell from the plant's emissions was strong enough that he could taste it. He couldn't get away from it, even in his house with the doors and windows closed.

A secretary at Willow Glen Elementary School, which is a half-mile south of the plant, called the Fire Department to investigate one day this year because the plant's odor was so strong in the school.

The investigators interviewed several residents who reported health problems including a man who talked about the danger of living near the plant with his 6-year-old daughter, who has had rashes, itchy eyes and dizziness, which he attributed to the smell and a pink film from the plant that settles on his property.

He told investigators he planned to move; no one should be living near the plant.

“He felt it to be ‘insane’ that the facility was allowed to be anywhere near a residential area.”

## **OSHA inspects Wisconsin barrel refurbishing plant after reports of unsafe work conditions**

John Diedrich, Milwaukee Journal Sentinel Published 11:59 a.m. CT Aug. 10, 2017 | Updated 10:02 a.m. CT Sept. 8, 2017

The federal agency charged with workplace safety has opened an inspection of an industrial drum refurbishing plant in St. Francis — but only months after reports of dangerous working conditions and action by environmental regulators uncovered numerous violations.

Inspectors from the U.S. Occupational Safety and Health Administration opened an inspection of Mid-America Steel Drum last week — on the same day the Milwaukee Journal Sentinel posted a story examining why the agency had inspected just one of six plants in the chain.

The inspection was opened Aug. 3, according to the agency website and a spokesman, who declined to say if inspectors have been in the plant yet.

There is no indication, however, that the agency is inspecting another local plant in the chain, in Oak Creek, which also refurbishes industrial drums and has been cited for illegally storing hazardous waste, among other violations.

A Milwaukee Journal Sentinel investigation in February revealed environmental problems and dangerous working conditions at a chain of barrel refurbishing plants, including three in Wisconsin — Oak Creek, Milwaukee and St. Francis — as well as facilities in Arkansas, Indiana and Tennessee.

Workers at the plants said chemicals were routinely mixed together, triggering dangerous reactions that resulted in chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.

One worker described pouring liquid from a drum into a collection container and a horrible smelling orange cloud filling the plant. The workers went outside and waited for the air to clear.

The Journal Sentinel findings were based on 16 hours of audio recordings by a whistle-blower. The plant's safety manager is heard on one recording saying, "When you look at the hazard potential here, they could blow up and kill eight people in a heartbeat."

U.S. Sen. Tammy Baldwin (D-Wis.) has criticized OSHA for not inspecting all the plants and said she was happy to learn of the action last week.

"I am pleased that they are finally doing their job at St. Francis and now they need to do so at Oak Creek as well," Baldwin said in a statement Wednesday.

Baldwin said she was told earlier by OSHA it could not go into the plants without a worker complaint. In a July letter to OSHA, Baldwin cited regulations that say OSHA can inspect a facility based on media reports or referrals from other government agencies.

### **Unannounced inspection**

OSHA spokesman Scott Allen said he could only confirm the agency opened an inspection into the St. Francis facility, located in the 3900 block of S. Pennsylvania Ave.

"No information will be available until the investigation is completed," Allen wrote in an email.

Allen did not answer a question about why OSHA opened its inspection of the St. Francis plant last week. The online entry lists the agency as doing a partial inspection and that it was the result of a referral.

The barrel refurbishing plants are operated by Container Life Cycle Management, known as CLCM, a joint venture majority owned by Ohio-based Greif Inc., an industrial packaging giant. The plants refurbish 55-gallon steel drums and large plastic chemical containers, cleaning them for reuse or recycling. The three Milwaukee-area plants operate as Mid-America Steel Drum.

Greif spokeswoman Debbie Crow said in a statement, "The company is committed to the health and safety of our colleagues and protecting the environment in the communities where we live and work. CLCM will continue to work closely with agency partners in an effort to uphold that commitment."

When asked if the OSHA inspection of the St. Francis plant was announced, OSHA spokesman Allen wrote, "We do not announce or pre-inform a company when OSHA conducts an investigation."

Federal environmental regulators did their own inspections of all three Milwaukee-area plants earlier this year but reported that inspectors were forced to wait until the company's attorney arrived and during the tour, they suspected they were not seeing typical operations, as required by federal law.

Federal prosecutors in Milwaukee took the unusual step of asking a federal magistrate judge to approve search warrants that authorized surprise inspections to collect samples.

### **EPA inspectors sickened**

The U.S. Environmental Protection Agency conducted its inspections in May. The results have not been released.

During the visit, two EPA investigators became ill while interviewing residents around the St. Francis plant, reporting nausea, dizziness and difficulty breathing.

The Wisconsin Department of Natural Resources also inspected the three barrel refurbishing facilities earlier this year and cited the company for 19 violations, according to 250 pages of enforcement reports released last month to the Journal Sentinel. Enforcement conferences with the company to discuss what has to be done to correct the violations are set for this month.

The company was cited for handling hazardous waste without permits; failing to keep required records; misrepresenting information on permit applications; sending hazardous ash to landfills not permitted to receive it; and continuing to send putrid odors over neighborhoods three years after similar smells were recorded.

State Sen. Chris Larson and state Rep. Christine Sinicki, both Democrats, applauded the DNR's action and in a letter asked the agency to participate in a public meeting for residents living near the plants.

The DNR said it could not attend a meeting because the investigation remains open. Larson and Sinicki are considering others who can speak about the DNR's findings publicly. No meeting date has been set.

OSHA officials inspected one drum plant in the chain after a complaint late last year.

They issued citations alleging unsafe work conditions at the Milwaukee facility, located on W. Cornell St. near W. Hampton Ave. and N. 24th St., and assessing \$108,000 in fines.

Among the violations found in the inspection: Workers were mixing chemicals from barrels, exposing workers to the risk of burns, explosions and the inhalation of toxic gas. The company disputes those violations.

## **OSHA opens safety inspection at another Wisconsin barrel refurbishing plant**

John Diedrich, Milwaukee Journal Sentinel - Published 12:00 p.m. CT Aug. 23, 2017 | Updated 3:11 p.m. CT Aug. 23, 2017

A federal agency that investigates workplace safety has opened an inspection into a second industrial drum refurbishing plant in the Milwaukee area.

Inspectors from the [U.S. Occupational Safety and Health Administration](#) launched an inspection of Mid-America Steel Drum in Oak Creek last Thursday, according to [online OSHA records](#).

The action comes six months after [reports of dangerous working conditions](#) by employees in the plant. It also follows inspections by environmental regulators who uncovered numerous violations.

A [Milwaukee Journal Sentinel investigation](#) in February revealed [environmental problems](#) and [dangerous working conditions](#) at a chain of barrel refurbishing plants, including

three in Wisconsin — Oak Creek, Milwaukee, and St. Francis — as well as facilities in Arkansas, Indiana and Tennessee.

Workers at the plants said chemicals were routinely mixed together, triggering dangerous reactions that resulted in chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.

OSHA opened an inspection into the Mid-America Steel Drum plant in St. Francis on Aug. 3 — the same day the Journal Sentinel posted [a story](#) examining why the agency had inspected just one of six plants in the chain.

Two weeks later, the inspection at the Oak Creek plant was opened.

U.S. Sen. Tammy Baldwin (D-Wis.), who has [criticized OSHA](#) for not inspecting all the plants, welcomed the agency's latest action.

"Since February, I have repeatedly requested that OSHA investigate these facilities," she said in a statement. "I am pleased that after pressing for OSHA to do its job, they have finally opened up an investigation into the Oak Creek facility."

The barrel refurbishing plants are operated by Container Life Cycle Management, known as CLCM, a joint venture majority owned by Ohio-based Greif Inc., an industrial packaging giant. The plants refurbish 55-gallon steel drums and large plastic chemical containers, cleaning them for reuse or recycling. The three Milwaukee-area plants operate as Mid-America Steel Drum.

A Greif spokeswoman said earlier that the company is committed to safety and would work closely with regulators "to uphold that commitment."

OSHA officials inspected one [drum plant in the chain](#) after a complaint late last year. They issued citations alleging unsafe work conditions at the Milwaukee facility, located on W. Cornell St. near W. Hampton Ave. and N. 24th St., and assessed \$108,000 in fines.

Among the violations found in the inspection: Workers were mixing chemicals from barrels, exposing workers to the risk of burns, explosions and the inhalation of toxic gas. The company disputes those violations.

An OSHA spokesman did not respond to an email seeking comment on the inspection of the Oak Creek plant.

Federal environmental regulators did their own inspections of all three Milwaukee-area plants earlier this year. They reported that inspectors were forced to wait until the company's attorney arrived and during the tour inspectors suspected they were not seeing typical operations, as required by federal law.

Federal prosecutors in Milwaukee took the unusual step of asking a federal magistrate judge to approve search warrants that authorized surprise inspections.

The U.S. Environmental Protection Agency conducted its inspections in May. The results have not been released. During the visit, two EPA investigators became ill while interviewing residents around the St. Francis plant, reporting nausea, dizziness and difficulty breathing.

The Wisconsin Department of Natural Resources also inspected the three Milwaukee-area barrel refurbishing facilities earlier this year and cited the company for 19 violations, according to 250 pages of enforcement reports released last month to the Journal Sentinel. Enforcement conferences with the company to discuss what has to be done to correct the violations are set for this month.

The company was cited for handling hazardous waste without permits; failing to keep required records; misrepresenting information on permit applications; sending hazardous ash to landfills not permitted to receive it; and continuing to send putrid odors over neighborhoods three years after similar smells were recorded.

## **EPA finds Wisconsin barrel plants violating environmental laws**

John Diedrich, Milwaukee Journal Sentinel - Published 11:02 a.m. CT Nov. 29, 2017 | Updated 3:48 p.m. CT Nov. 29, 2017

The U.S. Environmental Protection Agency has found a chain of industrial refurbishing plants in the Milwaukee area violated federal law, the agency announced Wednesday.

The EPA determined the plants in St. Francis, Oak Creek and Milwaukee were breaking the law by transporting, storing and treating hazardous waste without required licenses, among other violations.

EPA inspectors said plant officials blocked their entry into the St. Francis plant for nearly 30 minutes, even though they had a warrant issued by a federal magistrate judge. They also were initially denied access to the Oak Creek plant.

The agency took the unusual step of seeking the warrant after suspecting the company had "staged" operations in its plants during an earlier inspection.

Once inside, investigators found a host of problems: barrels labeled as "non-hazardous" that contained flammable chemicals; drums leaking unknown chemicals onto the ground; milky white plumes of smoke puffing out of the St. Francis facility, creating a "standing haze;" and a barrel that workers said was for water, but actually contained ignitable hazardous waste.

The inspections were initiated following a Milwaukee Journal Sentinel investigation, published in February, which uncovered a host of problems that endangered workers and residents living near the company's plants in the Milwaukee area and three other states — Tennessee, Indiana and Arkansas.

Workers at the plants told the Journal Sentinel that chemicals were routinely mixed together, triggering dangerous reactions that resulted in chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.

Residents near the St. Francis plant say it is often miserable living there. Fumes result in burning eyes, sore throats and headaches, forcing them to stay in their homes at times. Three of the residents have filed a class-action lawsuit.

The three plants, known locally as Mid-America, are operated by Container Life Cycle Management, a joint venture majority owned by Greif Inc., a \$3.3 billion Ohio-based firm.

The plants refurbish 55-gallon steel drums and large plastic chemical containers, cleaning them for reuse or recycling. Drums that cannot be refurbished are burned.

#### 'Heavies' at the plant

By law, barrels that arrive at the plant are supposed to be essentially empty with no more than an inch of contents in the bottom.

But the inspectors found barrels and totes with a significant amount of chemicals inside — called "heavies" in the industry — that had been sitting there in one case for at least three months, in violation of the law, the EPA said. Plant officials said workers determined if a barrel was heavy by "feel."

The EPA tested the air near the St. Francis facility in response to resident complaints and the "smelly emissions from the plant." During their investigation, two EPA inspectors who were interviewing residents themselves reported feeling ill.

Air testing by the EPA revealed the presence of volatile organic compounds associated with industrial activity. The agency is analyzing the data to determine if there is a health risk to workers and residents. The agency plans more testing.

The agency issued notices against the St. Francis and Oak Creek plants, alleging 13 violations of the federal Clean Air Act. The Milwaukee plant does not have a burning operation.

At the Oak Creek facility, the EPA says the company illegally treated hazardous waste in an incinerator. At St. Francis, the agency alleges the plant failed to control or measure potentially hazardous emissions, didn't keep adequate records or obtain proper permits and failed to adequately respond to requests for information.

Soil testing by the agency did not reveal levels of contamination that violated federal law.

Company questions violations

In a statement, a Greif spokeswoman said the company learned of the EPA violations Monday and continues to cooperate with regulators. The statement also contended regulators have changed their past standards to find problems.

"We are not perfect and will always work to address issues in cooperation with regulators," said Debbie Crow, in the statement. "Company representatives have met — on a voluntary basis — with federal and state environmental regulators on multiple occasions to discuss perceived issues."

The company has 30 days to respond. Documents indicate the EPA will then consider a fine, but no amount was listed.

"EPA, in coordination with the Wisconsin Department of Natural Resources and other government agencies, continues to investigate and intends to take appropriate action," an agency statement said.

The EPA is the latest regulatory agency to conclude the barrel plants are breaking the law. The EPA is one of at least five government agencies investigating the plants following the Journal Sentinel's investigation, citizen complaints and several letters from U.S. Sen. Tammy Baldwin (D-Wis.) and other members of Congress.

"I am pleased that they have now identified violations and are moving forward with issuing penalties and bringing the company into compliance," said Baldwin, who called on EPA to investigate in February. "Our work here is not done and I will continue to demand answers."

The state Department of Natural Resources and U.S. Department of Transportation together have uncovered three dozen violations. DOT has expanded its investigation to 13 plants all tied to Greif in nine states.

The U.S. Occupational Safety and Health Administration found 15 violations at the Milwaukee facility and issued a \$108,000 fine. OSHA continues to investigate the plants in Oak Creek and St. Francis but has not reported findings.

Rep. Gwen Moore (D-Wis.) said the EPA's findings are "deeply disturbing" given the population around the plants and credited the Journal Sentinel's investigation with bringing the dangers to light.

"Today's announcement not only stresses the need for enhanced transparency in the private sector, but it also underscores the necessity for press freedom and a responsive EPA that can hold companies accountable for breaking laws that protect the public," she said.

#### Mercury in wastewater

The Milwaukee Metropolitan Sewerage District found mercury in wastewater discharge from the St. Francis plant that repeatedly was over legal limits. While the issue existed for at least the past four years, MMSD did not meet with the company until a month after the Journal Sentinel investigation. The company promised to clean up the problem.

The Journal Sentinel findings were based on 16 hours of audio recordings by a whistle-blower; hundreds of pages of documents, including internal injury reports and safety audits; as well as public records and interviews with workers, regulators, and experts.

The whistleblower, Will Kramer, said Wednesday plant officials had plans for staging operations when government inspectors came, and the most recent blocked entry may have allowed them to prepare employees.

Kramer applauded the EPA's action, but he said regulators have as yet failed to determine where the barrels full of hazardous waste are sent.

"After further confirmation that this company has been illegally storing, treating, and transporting hazardous waste, my question continues to be: where did all of that hazardous waste end up? So far, neither the company nor regulators have answered that question."

## **Conditions were scary dangerous in Wisconsin barrel plants, say workers hurt on the job**

John Diedrich and Raquel Rutledge, Milwaukee - Published 2:02 p.m. CT Dec. 7, 2017  
| Updated 2:13 p.m. CT Dec. 7, 2017

For most of three years, Phillip Leitze stripped used 55-gallon chemical barrels to get them down to bare metal and ready for a fresh coat of paint.

It was dirty, dangerous work, but Leitze was glad to have the job at Mid-America Steel Drum in St. Francis — at least at first.

Each day, Leitze put on two extra layers of clothes. The machine he operated blasted tiny metal balls of "shot" that would ricochet back as if he was facing a hail storm. He wore the extra clothing to protect himself even when temperatures soared into the 90s.

As he sandblasted the barrels, metal shavings would spray back up at him.

"I had on a long plastic mask," he said, "but they were hitting everywhere, bouncing up under my shield."

Into his eyes.

When his shift was over, Leitze would take a magnetized piece of metal from his pocket and do what the guy who ran the machine before him advised: Stand in front of a mirror, pull down his eyelids one at a time and run a magnet along the edges, extracting the shavings, best he could.

He told his supervisors many times about metal getting in his eyes and lashing his body.

They offered no solution, he said, just as they did nothing when he told them about chemical burns on his arms and frequent shortness of breath, which he attributed to inhaling an array of chemicals from metal barrels and large plastic totes the plant recycles.

A Milwaukee Journal Sentinel investigation, published in February, exposed workplace hazards and environmental violations at barrel plants here and around the country and prompted investigations from at least five state and federal agencies.

Since then, Leitze and other former Mid-America employees have come forward to tell their own stories of dire working conditions in the plant — ones that echo what other employees had said and underline what inspectors have found.

"That's the hardest work I ever did," said Leitze, now 30, who was fired in 2015 because of missing too much work. He said they were sick days because of going to the doctor for work-related breathing problems, but he was fired anyway.

"What was happening to me was happening to people before me, and it's going to keep happening. They're messing people up."

Since the Journal Sentinel investigation, the plants — operated by Container Life Cycle Management, a joint venture majority owned by Ohio-based Greif Inc. — have received more than 70 violations from four agencies and \$114,000 in fines.

The recent interviews with former workers reveal the depth of the dangers they — and others — faced on a daily basis as they dealt with the plastic totes and drums that came in on semi trucks.

The steel drums were rolled on to a conveyor belt and went into an intensely hot furnace to burn off chemicals before being sandblasted, painted and sent back out. The plastic tote containers were often cut apart, the chemicals drained out of them and mixed with contents of other containers. Then the plastic was ground up for recycling.

The men all repeatedly suffered chemical burns. One worker was scorched so badly on his chest that he couldn't button his shirt as the wounds oozed, yet said he was told to keep working.

They frequently felt sick — headaches, running eyes, trouble breathing.

One worker, 21, who left the St. Francis plant this past summer, lost his sense of smell. He's found another line of work.

A worker at the Oak Creek plant said he slung partially full barrels of chemicals with no safety equipment except a pair of gloves.

All said they raised concerns with the company — and some with their union — but nothing was done.

Officials from the local Teamsters unit did not return calls for comment.

Greif spokeswoman Debbie Crow said the accounts provided by workers do not match the "standard processes and operations at CLCM facilities."

"We train our employees to work in a safe manner, follow standard processes and operations, and we rely on these employees to make decisions consistent with the requirements. We encourage our employees to report any safety issues, and those that have come to our attention have been addressed," Crow said.

"Our highest priority has been — and will continue to be — the health and safety of our employees and the communities in which we operate."

The workers said they knew, going in, it would be hard, but didn't realize what they were walking into. Some were paid \$12 an hour, while others, such as Leitze, started at about \$1 above the state's \$7.25 minimum wage.

"You never knew what you were dealing with. The smell that would come out of some of those totes was terrible," said Jeremy Dahl, who worked at the plant on N. 23rd and W. Cornell streets in Milwaukee, near W. Hampton Ave., until he quit in late 2015. "It's the worst job I ever had. It was just a nasty place to work.

"They didn't care about safety. It was just, 'Get the job done.' "

Needed the money

Leitze grew up on Milwaukee's north side and when he heard about the job at Mid-America paying \$8.50, he jumped at the chance for steady pay. The 25-year-old didn't have a lot of options in 2012.

A 6'1" 260-pound man who regularly lifted weights and played basketball, Leitze figured the physical job would be a good fit. Once he stepped into the plant on S. Pennsylvania Ave. in St. Francis, he saw the dangers.

"I was putting up with a lot of stuff because I needed the money," he said.

Barrels and totes at times came into the plants with several inches or more of chemicals sloshing around the bottom, the Journal Sentinel investigation found. Leitze said some were half or even three-quarters full.

Under federal law, the containers are supposed to be empty, with no more than an inch of residual material in the bottom.

The plants have been found in violation of federal and state law by the [U.S. Environmental Protection Agency](#) and the [Wisconsin Department of Natural Resources](#) for storing drums with hazardous waste in them without a permit. The company told the DNR it was not their fault that some vendors send drums that are too full.

Company officials said workers send back all the non-empty drums, called "heavies."

"At no time are we aware that any 'heavies' have been processed at any CLCM facility. Any contents of containers received by CLCM have been disposed of in accordance with all regulatory requirements," said Crow, the Greif spokeswoman.

Leitze and others told the Journal Sentinel that's not how it worked.

Partially full steel drums went down a conveyor line at the St. Francis plant and into a furnace where the chemicals were burned off, Leitze said. Sometimes the drums literally came out of the furnace on fire, pumping fumes into the air.

He recalled drums falling off the conveyer belt, pouring smoking hot chemicals onto the parking lot. The supervisors told workers to just let it burn out, he said.

**RELATED:** [Three neighbors sue Greif over St. Francis plant](#)

When chemicals spilled on the floor inside the plant, he said, they went right down the drain.

Earlier this year, the St. Francis plant was found to be in violation of local wastewater permits by discharging [illegal amounts of mercury](#).

After four years of periodic violations found by the Milwaukee Metropolitan Sewerage District, the company agreed to clean up the plant and better screen shipments from customers.

A worker at the plant said testing showed workers' boots had mercury on them, meaning the heavy metal could have been tracked into homes and elsewhere. The company collected all the boots and issued new ones, according to EPA records.

Training, safety minimal

Soon after he got the job, Leitze took over the "shot" machine, sandblasting the drums.

The machine wasn't calibrated properly, he said, so the pellets fired in a scatter-shot way, hitting his body and creating more spray of shavings. Without sufficient safety gear, it was a constant assault on his body and eyes, he said.

"That was one of the craziest things I ever had to deal with," he said.

On other assignments, he got burned.

Training was minimal, Leitze and others said. The workers once had to take a hazardous materials test. The company provided all of the roughly three dozen workers with the answers in advance, Leitze said.

Leitze dreaded certain chemicals. The one called "stripper" was the worst. It took off anything and "it would burn you raw," he said.

Other chemicals had an immediate effect on Leitze's lungs. He remembered a mint concentrate that sent a powerful freezing shiver through him. Another took his breath away.

"You feel like you were literally drowning," he said. "You'll be panicking for a minute or so before you calm down."

He started out at \$8.50 an hour and ended up at just over \$10 an hour. Leitze is now working as a bouncer at a bar.

"I knew what was going on there wasn't right," he said. "At the time I didn't know who to complain to. It was a terrible experience."

Chemical reactions common

Jacob Hajek, 25, came to the Mid-America plant in Milwaukee in 2014, drawn by \$12-an-hour — two bucks more than he was making at a car dealership doing oil changes.

Dahl followed Hajek from the dealership soon after for the same reasons. Dahl, now 36, had a son on the way and needed the money.

The plastic containers almost always came in with chemicals in the bottom, they said. Workers would lift the totes up onto a bandsaw, slice off the sides and then carry the cut-off bottom with chemicals inside to a "drain table."

The chemicals would be mixed together on the table, then left to drain into a steel drum, sometimes reacting with other chemicals to create a bubbly, smoking cauldron. They would pull those off to the side or drag them outside until they settled down.

Dahl recalled reactions where chemicals turned into a foam that was hard as a rock. They needed to use an ice scraper to get it off the table.

For Dahl, the worst smelling chemicals were the sulfurs that reeked of rotten eggs. When he opened those totes and got a whiff, he said his lungs burned, and he wound up with a cough that would last long after he got home.

When chemicals didn't react, the workers said they would simply fasten a lid on the barrels and ship them out. The workers never knew where they went.

Asked if there was a chemist or someone with a chemistry background in the plant to avoid such reactions, Dahl laughed.

"No. God no," he said.

One time, a tote spilled outside on the parking lot near a hole cut in the fence. DNR regulators spotted the hole during inspections earlier this year and noted it could allow chemicals to run off the lot and into the adjoining area.

Hajek said that is exactly what happened.

After the spill, Hajek asked his boss what to do. "He said, 'just leave it. The rain will wash it away.'"

Working while injured

Steel totes also came into the Milwaukee plant and for those they used an ordinary Shop Vac, sucking up the contents, again mixing them together, this time inside the vacuum.

Hajek and Dahl both said they told supervisors: there has to be a safer way to do it.

They said all they got was a shrug from the boss and an order to get the job done.

One day in September 2014, Hajek was pushing a Shop Vac full of chemicals, headed for the drain table. Without warning, the vacuum hose blew off, spraying his chest with a concoction of burning liquid. His skin bubbled.

Hajek went to his supervisor, who told him to put cold water on it and get back to work. Hajek wanted to go to the doctor, but his supervisor said no.

"He said, 'Not now. We're busy right now. We gotta get production done,'" Hajek said.

Hajek went home and spent a painful night trying to make the swelling and itching go away. His boss suggested over-the-counter lotions. Nothing helped.

They finally cleared him to go to a company-hired doctor, Paul Mankus, who prescribed a medicated cream. Hajek said Mankus also gave him advice: Quit working at the plant; he had seen many workers come into the clinic from that facility, Hajek said.

Mankus, who is retired, was contacted by the Journal Sentinel but said he didn't remember Hajek's case or others from Mid-America. He declined further comment.

Hajek said he never saw a union representative at the plant and he kept his mouth shut.

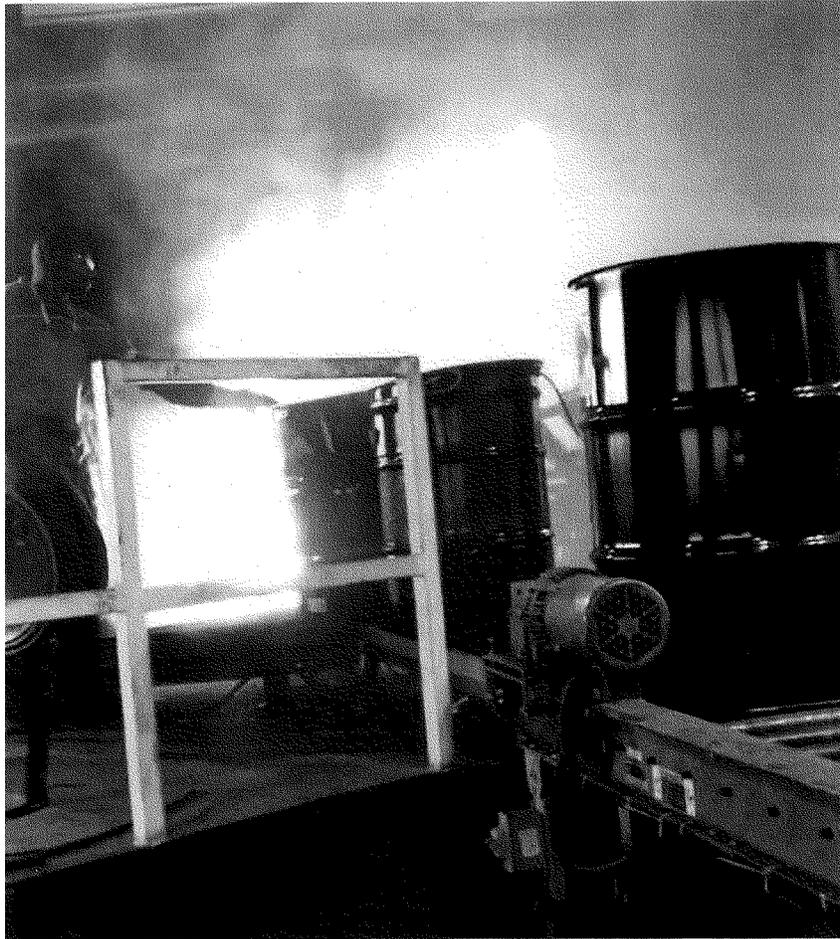
"I just needed the money," he said of the \$400-a-week he made.

Hajek said there were other burns he endured and a persistent breathing problem, one that continues today even though he is two and a half years out of the plant. The 25-year-old gasps for breath and blames the many chemicals he inhaled there.

The recovery from the chest burn was long and painful. He still can't go in the sun without his chest quickly turning dark red, becoming a hot, itchy rash.

"I should have never worked there," he said. "It wasn't worth it."

journal sentinel (HTTP://WWW.JSONLINE.COM)



SAFETY MANAGEMENT SERVICES CO.

Flames burst from a burner at the Container Life Cycle Management plant in Arkansas where steel drums are refurbished. Chemicals in the bottom of the drums have caused fires that have injured workers. The photo is from a 2013 audit of the plant.

A JOURNAL SENTINEL WATCHDOG REPORT

## Burned

Chemicals left in barrels leave workers and neighborhoods at risk

Feb. 15, 2017

[t](http://hrefshare.com/537ad) (<http://hrefshare.com/537ad>)
 [f](http://hrefshare.com/36fa2) (<http://hrefshare.com/36fa2>)
 [e](http://www.jsonline.com/story/news/investigations/2017/02/15/comment-chemicals-left-barrels-leave-workers-and-neighborhoods-risk/97934986/) (<http://www.jsonline.com/story/news/investigations/2017/02/15/comment-chemicals-left-barrels-leave-workers-and-neighborhoods-risk/97934986/>)

Nothing on the outside of the industrial building on Cornell St. offers any clue about what's going on inside.

The sign that says "Mid America IBC" doesn't suggest "hazard."

Residents living in the modest homes across the street would have no way to know that the facility — which recycles and refurbishes large chemical containers — was endangering workers in the plant and exposing the neighborhood to harm.

They had no way to hear what the man inside was saying.

It was Oct. 6, 2015, and the man — whose name is Steele Johns — was escorting a team of safety consultants through the plant in a small industrial stretch on Milwaukee's north side.

The advisers were brought in for a confidential consultation to help the company comply with federal safety regulations and minimize insurance liabilities.

Johns is a safety manager for a division of Greif Inc., a \$3.3 billion industrial packaging company that entered the business of reconditioning plastic containers and 55-gallon steel drums in 2010. He was telling the consultants he was worried — extremely worried — about several things, especially the unknown nature of the chemicals in the drums.

"When you look at the hazard potential here, they could blow up and kill eight people in a heartbeat," Johns said.

It wasn't a hypothetical threat. A drum exploded in the face of a worker at another Milwaukee area plant, now a sister facility of the Cornell St. operation. The worker, Charles Duggan, was doing what he did most every day: Capping a drum full of unknown chemicals. He was killed almost instantly. He was 23.

Yes, that was a long time ago — 1984. What's unsettling, Johns told the consultants, is that the dangerous procedures haven't changed. And workers are still getting injured.

"You'd think that this would be a big priority to never, ever, ever, ever do that again," he said. "But it's not. And that's the frightening part."

As for the federal agency responsible for workplace safety, Johns said, "Nobody knows this place is on the map."



Environmental problems plague industry

<http://projects.jsonline.com/news/2017/2/15/environmental-problems-plague-the-barrel-reconditioning-business.html>

**Journal Sentinel** ([HTTP://WWW.JSONLINE.COM](http://www.jsonline.com))

examining: three Mid-America Steel Drum plants in the Milwaukee area, plus others in Indianapolis, Memphis, Tenn., and Arkadelphia, Ark.

All are operated by a joint venture called Container Life Cycle Management — or “Click’m.” Greif is the majority owner of CLCM, which employs about 270, and has also assembled a network of independent reconditioners spanning more than two dozen cities across the United States, Canada and Europe.

Johns told the consultants that he had been trying to make safety improvements at the CLCM facilities for several years, but that corporate executives and plant managers did not take him seriously.

They know the procedures are a “travesty waiting to happen,” he said, but their attitude remained: “I don’t want anybody to see this. I don’t want anybody to know.”

At 61, having spent much of his career as a paramedic in San Diego, Johns understood the safety business. Before joining Greif in 2011, he was an environmental, health and safety manager at Goodrich Corp. for about 10 years.

Johns confided in the consultants his fear of what could easily happen as employees commingled random chemicals from containers brought in for scrapping or reconditioning.

“One of these days ... that mother is going to blow up,” he said of a collection container.

► “And when that happens, everybody is going to be sorry.

“But we knew it from the beginning.”

What Johns didn’t know was that one of the safety consultants was recording the conversation.



Greif Inc. is headquartered on a parklike campus in Delaware, Ohio, just north of Columbus.

For most of its history, the company focused on barrel and drum manufacturing. In 2010, it expanded into the drum recycling and reconditioning business, offering its customers the ability to “cut their environmental impact.” For Greif, it opened the door to additional revenue.

Greif established a majority ownership in CLCM, a limited liability company formed through joint ventures with the six facilities.

And it launched EarthMinded Life Cycle Services, a network of independent drum reconditioning companies across the world.

**journal sentinel** ([HTTP://WWW.JSONLINE.COM](http://www.jsonline.com))

announcing: "Each leader in the network was chosen based on expertise, environmentally responsible practices, reputation and commitment to satisfying the customer."

But an investigation by the Milwaukee Journal Sentinel has uncovered another side to Greif's CLCM operations. The findings back up what Johns told the consultants and reveal other troubling details about the business:



Origins of an industry

(<http://projects.jsonline.com/news/2017/2/15/how-the-barrel-business-got-its-start.html>)

- Practices at the six facilities have resulted in workers suffering chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.
- The operations have caused at least one big fire — heavily damaging the Indianapolis facility while endangering nearby residents and firefighters.
- Plants have been cited repeatedly by regulators for dumping too much mercury in the wastewater and toxic emissions into neighborhood air. At the Milwaukee plant, the safety manager and workers said chemical residue was washed down a floor drain.
- Greif's executives knew of environmental risks in the industry and structured CLCM in a way that could shield the publicly traded Greif from civil liabilities. Executives told financial analysts in 2010 that "those risks were very real," and that the company was protected in part by "contractual arrangements."
- Government agencies entrusted with protecting workers and the public have been ineffective, significantly reducing fines and failing to address egregious hazards. Such has been the case for decades, long before Greif entered the drum recycling business.

In the final months of 2016, for example, workers at several CLCM facilities were wearing dust masks, if any respiratory protection at all. Such masks do not filter out dangerous gases. The U.S. Occupational Safety and Health Administration had ordered the Oak Creek plant where Duggan was killed to implement a respirator program back in 1978.

The Journal Sentinel findings are based on 16 hours of audio recordings of managers and workers inside the plants; hundreds of pages of documents, including safety audits from private consultants, injury reports, federal and state regulatory records, lawsuits and fire investigations; and interviews with recent workers and industry experts.

Greif executives told the Journal Sentinel they recognized the CLCM facilities had "lacked compliance with Greif's global safety standards." But they said the company had since ordered "significant changes" to address operational and safety issues, spending \$1 million on improvements last year. The company also said it fired a manager at the Milwaukee plant for "repeated policy violations."

OSHA opened an inspection at that plant in October. It has not been completed.

**journal sentinel** ([HTTP://WWW.JSONLINE.COM](http://www.jsonline.com))

spokesman wrote that the Journal Sentinel's findings were outdated and that many improvements to the plants were made in 2016. The company declined to allow reporters inside the plants to see any safety improvements in action. The audio recordings of plant managers occurred between October 2015 and September 2016.



Statement from Steele Johns

journal sentinel<sup>(HTTP://WWW.JSONLINE.COM)</sup>

All that said, the facts as I see them are these:

- Greif paid a third party to come into our facility and evaluate the safety programs and the facility.
- During that audit, one of the auditors recorded our confidential conversations without my knowledge to use later for his own personal agenda.
- The information offered to the auditors was as open and factual as I understood the facts to be so that all opportunities for improvement could be completely identified.
- Areas where I saw issues and gaps were shared as completely as I could with anecdotal stories, as I understood them, to illustrate my points.
- Following the audit, a report was issued that clearly identified gaps and opportunities.
- During the 16 months since the audit, not only that site, but the entire CLCM safety program has been changed and improved on multiple fronts.
- These changes include - programs, processes, training, physical corrections to the facility and an increase in employee involvement and participation.

(<https://www.documentcloud.org/documents/3451174-Steele-Johns-Statement-Final.html#document/p1/a337059>)

Greif provided the Journal Sentinel with a statement from Johns (<https://www.documentcloud.org/documents/3451174-Steele-Johns-Statement-Final.html>), who said he was unaware he was being recorded and that the information he provided to the safety consultants was "open" and "factual" so they could identify opportunities for improvement.

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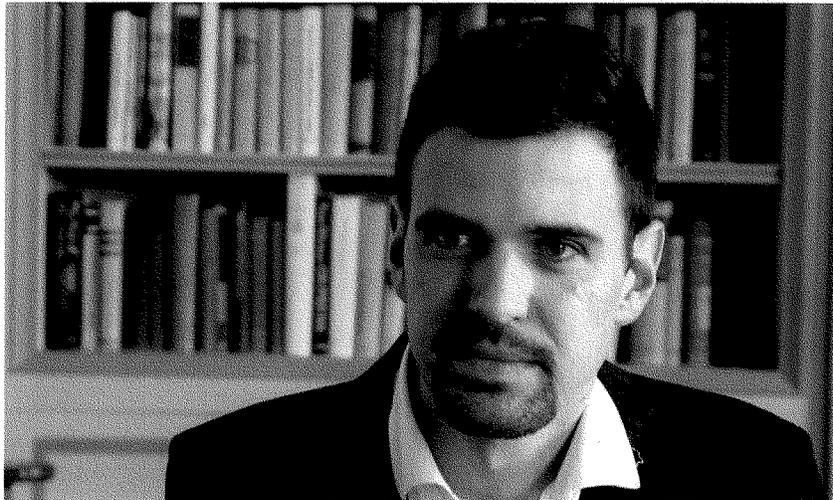
statement from Johns says. "While there continues to be room for improvement in our programs, our employees work in safe conditions with good training and proper equipment to perform their tasks. ... Far from being a story of failure, this is a story of success."

Over months of recordings, including a final one five months ago, Johns repeatedly said that improvements weren't being made fast enough.

The company did finally adopt a monthly training program, Johns said in September. But the plant managers were still "not listening to me," he said. He reiterated how he had informed them three years earlier that the situation was "scary" and that they were sending out hazardous waste they said wasn't regulated. Johns said it was still going on and he "guarantees" that the materials actually are regulated as hazardous.

He said he planned to crack down on safety meetings.

"I'm just tired of it," he said.



MIKE DE SISTI / MILWAUKEE JOURNAL SENTINEL

Will Kramer, a safety consultant with Cottingham & Butler Safety Management Services, filed a whistle-blower complaint against Greif Inc. and the CLCM drum reconditioning plants. Kramer and a team of consultants documented workplace safety problems and environmental issues with facilities in four states in 2015 and 2016.

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He initially wanted to go to the U.S. Naval Academy or work in intelligence for the U.S State Department.

Growing up in Madison, Kramer said, his parents instilled in him early on the importance of doing what's right over worrying about what others think of you.

When it came to politics — with one parent a Rush Limbaugh Republican and the other a Michael Moore Democrat — Kramer was raised to think for himself.

At 17, he insisted on wearing an American flag headband in a high school cross country race, despite rules prohibiting multicolored headwear. It was 2001, a few days after the Sept. 11 terrorist attacks, and he wanted to show his patriotism.

He was disqualified.

Kramer went to college at the University of Wisconsin-Stevens Point, where he double majored in political science and public administration.

Soon after graduation, he landed an internship with the U.S. Senate Special Committee on Aging, then-headed by Herb Kohl, a Wisconsin Democrat. Later he was hired as an associate investigator for the panel. His assignments included nursing home safety, prescription drug costs and problems with medical devices.

Kramer worked under chief investigator Jack Mitchell, best known for his role investigating the tobacco industry with help from whistle-blower Jeffrey Wigand. From Mitchell, Kramer heard about the toll whistle-blowing can take on those who feel compelled to do it: Health problems, stress, emotional and sometimes financial ruin.

He never imagined that 10 years later, at 32 years old with a wife and three young boys to support, he'd feel obligated to blow a whistle himself.

But as he listened to what Johns was saying about Greif's facilities, and saw on his visits what appeared to be violations of environmental laws and serious threats to workers and nearby residents, he decided he had to do something.

He secretly hit "record" on his iPhone.



The birth of the 55-gallon steel drum — U.S. Patent No. 808,327 — coincided with the increase in demand for oil in the early 1900s.

It was the work of Henry Wehrhahn, a Brooklyn native who aimed to perfect earlier iterations, from the clay vessels used by early civilizations to wooden barrels commonly used for centuries.

Wehrhahn worked for Iron Clad Manufacturing. His boss was a trailblazing investigative journalist-turned-inventor, best known for her work exposing abuses in mental hospitals in the late 1800s.

Elizabeth Jane Cochran Seaman — pen named Nellie Bly — had married into the steel business and turned to Wehrhahn to design a large container with a longer lifespan than wood, one that wouldn't leak.

After several attempts, Wehrhahn succeeded and in 1905, Bly acquired the patent for the steel drum. Wehrhahn moved to Milwaukee to take a top position at a steel tank company.

More than 110 years later, the blueprint for the 55-gallon steel drum remains largely the same.

Plastic drums have since entered the market and are growing in popularity, as are larger 275-gallon square containers.

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to aftershave. About half the materials transported are considered hazardous.

More than 20 million new plastic and steel barrels were manufactured in 2015; even more — about 27 million — were processed for reuse or scrapping.

The trade group that represents the drum reconditioning industry, the Reusable Industrial Packaging Association, says it's impossible to say for certain exactly how many companies are in the business. As of December, the organization had 64 members managing about 117 facilities in the U.S.

All pledge to adhere to guiding principles that include making "health, safety, and environmental considerations a priority" in all processes.



**Chemicals heighten fire risk**

(<http://projects.jsonline.com/news/2017/2/15/leftover-chemicals-heighten-the-risk-of-barrel-fires-at-refurbishing-facilities.html>)

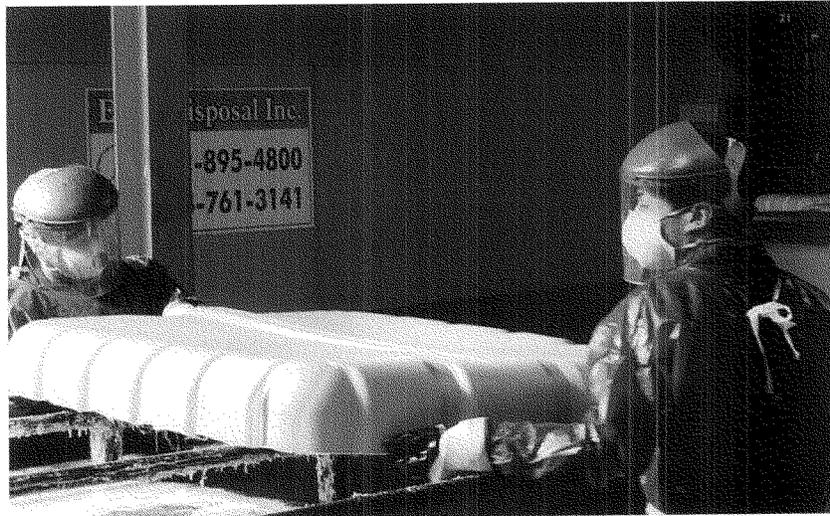
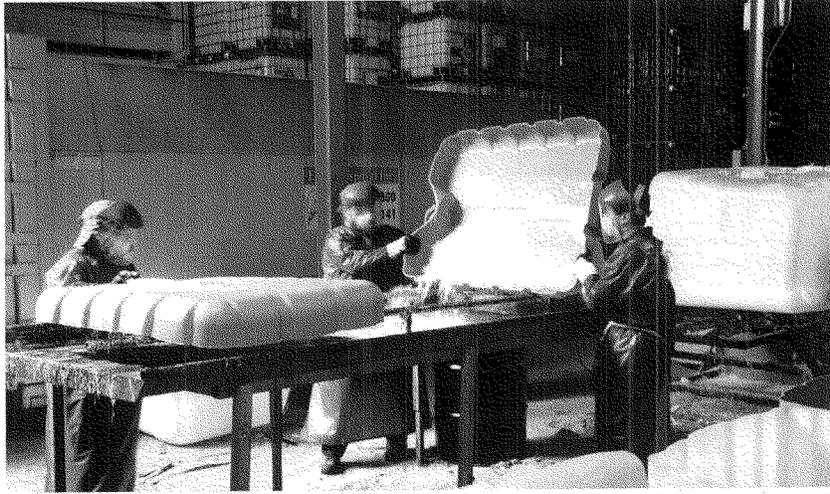


The trouble starts before used drums arrive at the refurbishing plants.

Instead of shipping empty drums to be refurbished or scrapped, companies of all kinds sometimes send containers with potentially dangerous chemical waste left sloshing in the bottoms.

By federal regulation, drums are considered "empty" if they contain an inch or less of hazardous residue that cannot be removed by pouring, pumping or other normal means, such as being turned upside down. The 1-inch rule is aimed at accommodating gooey, viscous substances that are difficult to remove.

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SAFETY MANAGEMENT SERVICES CO.

Workers at the Mid-America Steel Drum plant in Milwaukee process large chemical containers for scrap or reuse. They drain any remaining chemicals into a collection drum which has caused reactions and injuries.

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Why would a company send out drums for reconditioning or recycling when unused chemicals remain?

Sometimes it's just a matter of hurried workers not taking the time to get that last few gallons from the drums or containers. An electric pump can drain a 55-gallon drum in a matter of minutes, but insiders say the flow of chemicals sometimes slows as the pump gets close to the bottom, and workers don't always want to wait to finish the job.

So much is wasted, industry insiders have called the remaining chemicals the "\$1 billion inch." 

(<https://twitter.com/intent/tweet?>

[url=https%3A%2F%2Fprojects.jsonline.com%2Fnews%2F2017%2F2%2F15%2Fchemicals-left-in-barrels-leave-many-at-risk.html&text=So%20much%20is%20wasted%2C%20industry%20insiders%20have%20called%20the%20remaining%20chemicals%20the%20%E2](https://twitter.com/intent/tweet?url=https%3A%2F%2Fprojects.jsonline.com%2Fnews%2F2017%2F2%2F15%2Fchemicals-left-in-barrels-leave-many-at-risk.html&text=So%20much%20is%20wasted%2C%20industry%20insiders%20have%20called%20the%20remaining%20chemicals%20the%20%E2)

Some companies knowingly ship containers with an inch of liquid — unloading their waste an inch at a time — to avoid hazardous waste disposal costs, industry insiders say.

Chaime Schmeer, a plant manager at the north side Milwaukee facility, told Kramer and other safety consultants that he had asked for Brenntag — one of CLCM's largest customers and the world's largest chemical distributor — to be told to rinse the residue from drums containing acids, peroxides and other hazardous substances before sending them to his plant.

"I want those f\*\*\*\*\* rinsed," he said in one of the recorded conversations. "But they won't do it. They ain't rinsing nothing. ... Those things are wicked."

Federal regulations require companies shipping hazardous chemicals to clean containers before they send them as empties.

At times, companies disregard the rules altogether and send refurbishing plants what industry insiders refer to as "heavies." These are barrels that contain more than an inch of liquid or residue. Sometimes much more.

Reconditioning plants are supposed to refuse heavies and have them sent back to the companies that shipped them — and Greif officials maintain this is what they do. Most reconditioning plants are not permitted or equipped to handle hazardous waste.

But the Journal Sentinel found CLCM plants haven't always returned the barrels. When trucks roll up to the docks with a few heavies mixed in the load, workers have typically gone ahead and processed them, according to interviews with workers, OSHA reports and audio recordings from Kramer.

A supervisor at a plant in Memphis — recorded in September — said the only time his team rejects a drum is if it's too heavy for anybody to pick up and move.

"We get some that are, you know, more than an inch that we just, you know, pick up together and dump it up in a tote, let it drain ... whatever," the supervisor said.

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Sentinel they did the same.

And OSHA documents from 2010 confirmed the practice at the plant in Indianapolis.

Federal inspectors who visited the facility “observed multiple totes” with as much as 3 inches of liquid. Inspectors found that a “large percentage” of the chemicals (<https://www.documentcloud.org/documents/3260183-Dept-of-Labor-Report-on-Indianapolis-Drum.html>) in the plant were toxic liquids such as hydrofluoric and hydrochloric acids, sodium hydroxide, ammonia, diacetyl, acetone, benzene, nickel and formaldehyde.

Once the heavies hit the dock — whether they contain hazardous material or not — the threat escalates.



John Mateljan worked at the north side Milwaukee plant in 2015. His primary job was to cut up plastic containers for scrapping. Before he could cut one, he poured off whatever chemicals were left into a 275-gallon collection container.

The process was the same no matter what was in the containers, Mateljan said. Workers didn't separate corrosives from flammables, acids from bases, or take proper precautions to prevent volatile chemical reactions. Most of the time, Mateljan said, workers had no idea what chemicals they were handling and mixing.

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The U.S. Department of Transportation division responsible for overseeing the shipping of hazardous materials rarely tests chemicals to ensure drums and other containers are properly labeled.

The division doesn't have a budget for chemical testing. The average fine paid for violations in 2015 was \$7,822, according to department data.

Greif officials say their employees are well-trained and know the proper procedures for dealing with unlabeled and mislabeled drums.

Safety experts familiar with the industry say unlabeled drums with unknown chemicals should always be treated as hazardous.

Tony Rieck, a 25-year veteran of the workplace safety industry, put it this way:

"It's OK to assume that something is dangerous," said Rieck, president and CEO of T.R. Consulting Group in Colorado Springs, Colo. "It's never OK to assume that something is safe."

But that wasn't the approach at the Cornell St. plant in Milwaukee, according to Mateljan and others.

Mateljan, 29, recalled one instance when he poured liquid from a drum into the collection container and a horrible smelling orange cloud filled the plant.

"I was like, 'What the hell is going on in here?'" he told the Journal Sentinel.

The workers went outside for about a half an hour while the air cleared, he said.

Another time, he was using a shop vac to suck the contents out of a drum, a common practice at the plant. He stepped away to use the restroom and when he returned, the vacuum was smoking. The mixture inside was boiling.

He said workers would regularly set smelly drums outside to let the chemicals evaporate into the air or simmer down before pouring them into a collection container. The plant manager called those containers "stinkers."

Mateljan left his job after he broke his arm in a forklift accident at the plant. He said a good friend of his who still works there is having serious and worsening breathing problems that he suspects are from chemical fumes. Mateljan said he has taken his friend to the hospital several times.

"I tell him 'What's more important, your health or the money?' He wants to get out of there but he wants to still get paid."

Workers at the Milwaukee plant said they typically earn about \$12 per hour.

Luis Hernandez worked at the same Milwaukee plant for more than a year. He left in July after an injury when a saw fell on his knee and medical tests showed that something was wrong with his liver.

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smoker or drinker.

Hernandez graduated from the University of Wisconsin-Madison in 2015 and said he worked at the plant, close to where his family lives, to save money to go to graduate school.

He complained to OSHA last year about the commingling of chemicals and the lack of an eyewash station. He said the company put in the eyewash station only after he formally complained. But, he said, OSHA didn't do anything about the mixing of chemicals.



Video  
Chemicals left in the bottom of the drums have caused flash back fires that have injured workers.

Hernandez, like Schmeier, said that Brenntag shipped the "most disgusting things" rather than empty barrels to the refurbishing plants.

"And since they were a really loyal customer ... (CLCM) would take everything from them," he said.

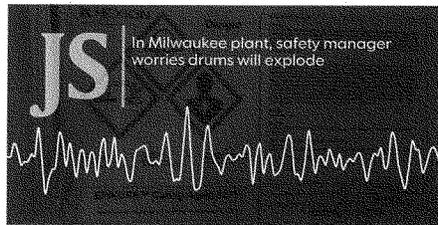
A Brenntag representative said nobody from Mid-America has contacted the company about any problem with the drums sent for recycling and/or refurbishing.

"IT IS THE POLICY OF Brenntag Great Lakes to adhere to the U.S. Environmental Protection Agency's definition of an empty drum/container within our operations," Chad Royer, vice president of operations, wrote in an email to the Journal Sentinel.

"However, in the interest of safety, we will be reaching-out to Mid-America to discuss this allegation."

Employees at the plant in Indianapolis, which Greif's joint venture had just acquired, told an OSHA inspector in 2010 that they mixed together "every type of chemical known to man" and had seen all kinds of reactions, such as smoke, crackling, spattering and bubbling of liquids.

While there, the inspector witnessed a smoking chemical reaction and saw fumes from hazardous substances being blown in an employee's face.



The inspector himself reported suffering "severe headaches, nausea and dizziness" that "did not subside for several hours" after he left the area. In addition he experienced "what appeared to be a chlorine burn to the forehead" and had eye, nasal and respiratory irritation that lasted for days.

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Paul Gantt is a California-based hazardous materials specialist who trains corporate safety managers, government regulators and others on the proper handling of chemicals.

Gantt said the drum recycling business is immensely dangerous given the number of chemical variables in the hands of people who often don't understand the full spectrum of chemistry.

"That's nuts," he said. "You're creating a chemical brew, you really don't know the full potential."

Mix a couple wrong things together and you've got a lethal gas chamber, he said.

"The incompatibility aspects can be off the scale, in some cases indescribable."

Capping a container of various unknown chemicals can essentially create a bomb, he explained.

Two key laws of chemistry kick in, both involving pressure.

Typically it starts with an exothermic reaction. That's the heat generated from mixing incompatible substances. The heat causes the temperature to rise, and according to Gay-Lussac's law, the pressure of gas is directly proportional to its temperature. As the temperature rises, so does the pressure.

Then comes Boyle's law, ramping up the risk. This states that the pressure of gas is inversely proportional to volume. So when the space that the gas can occupy decreases — such as by putting a lid on a container — the pressure rises.

It can happen over hours or within fractions of a second.

Even a tiny amount of pressure on a typical drum lid can explode with a force equal to 800 pounds or more, experts say.

At least 41 people in the United States have been killed, and dozens more injured, in incidents involving drums with chemicals or residue over the last 15 years, according to an analysis of OSHA reports by the Journal Sentinel. The figures include all workplaces, not just drum reconditioning plants. Some of the explosions were caused by sparks from cutting torches coming in contact with vapors that remained in the drums.

"We're lucky more than we are safe," said Gantt, the chemical safety expert. "You might have 1,000 reactions that didn't blow up a drum, but that was luck. What are we doing to ensure we are safe?"



Raymond Chojnacki was standing beside Charles Duggan on the day the drum exploded at the Oak Creek plant in 1984. He had just stepped away as Duggan leaned over to make sure the drum's lid was fastened.

There were no warning signs of a chemical reaction, Chojnacki recalled in an interview with the Journal Sentinel. No crackling, popping or strong vapors.

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Aerial photograph of Mid-America Steel Drum Co., 8570 S. Chicago Rd. in Oak Creek. *Mouse over or tap the image to see highlighted area.*

"Whatever was in that drum reacted somehow and just exploded under pressure," Chojnacki said. "Maybe he shook the barrel a little when he put the cap on, and that was it."

The force sent Duggan high into the air. Chojnacki was covered with chemicals that spewed from the drum — like opening a giant shaken soda can.

"They heard it on the other side of the plant," he said. It sounded like several sticks of dynamite going off.

A co-worker grabbed Chojnacki and pulled him into a nearby shower to wash off the chemicals. Others frantically searched for Duggan. They found him wedged in a stack of drums, upside down, a few feet away.

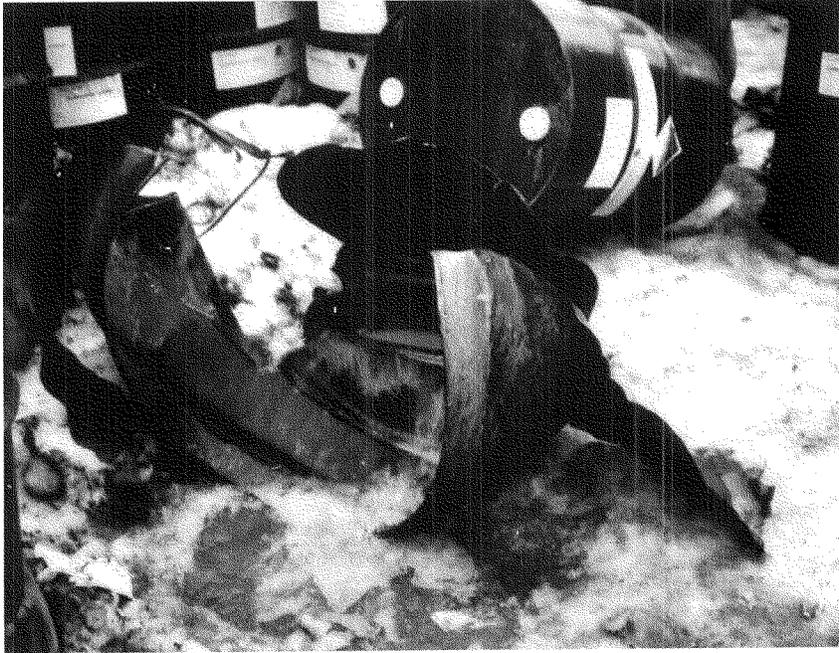
Duggan died from head injuries.

"He didn't know what the hell hit him," Chojnacki said. "It was over in a second."

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OSAK CREEK POLICE DEPARTMENT

The mixing of incompatible chemicals resulted in a violent chemical reaction and explosion that killed Charles Duggan, 23, an employee at Mid-America Steel Drum in Oak Creek. These photos were from the scene where Duggan was killed in February 1984. More photos. (<http://www.jsonline.com/picture-gallery/news/2017/02/14/photos-chemicals-in-drums-can-cause-injuries-and-death-for-workers/97923090/>)

A co-worker found Duggan's torn hat, 50 yards away, on the roof of the plant.

Investigators later determined the violent reaction in the drum was caused by the mixture of two common industrial chemicals: Hydrochloric acid and sodium hypochlorite, undiluted industrial bleach.

Workers told investigators that they had been worried about chemical reactions and had warned supervisors that, "someone is going to get his head blown off," according to the Milwaukee County medical examiner's death report.

Plant managers, including Scott Swosinski, denied knowing about any potential for drums to explode.

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accurate and that customers trying to dispose of hazardous waste would commonly leave small amounts of chemicals in the bottom of the barrels. It was standard practice at the plant to commingle the chemicals, the report said.

Swosinski remained part of Mid-America Steel Drum's management team until mid-2016. He could not be reached for comment.

Chojnacki escaped with dime-sized acid burns from the chemical spray. Emotionally, he was shaken.

"I was off work for maybe a month or so, and then I came back for a while," he said. "Then I just quit and got another job. I was tired of the whole ordeal."

Mid-America wasn't the only company at fault for putting workers in danger, Chojnacki said. The companies that shipped the containers with leftover chemicals shared the blame. They shouldn't have sent hazardous material to a drum reconditioning plant in the first place, he said.

"If they are using that chemical, they should have a way of disposing it (safely) there," he said.

Duggan's mother, Patricia Duggan, received a \$40,000 settlement from Milport Chemical, the company that shipped one of the volatile chemicals. The agreement included a clause prohibiting her from discussing details of her son's death.

More than 30 years later, Patricia Duggan said even if she hadn't agreed to keep quiet, she wouldn't want to talk about it. It remains too painful.

But she did say she hoped nobody else would be harmed in the same way.

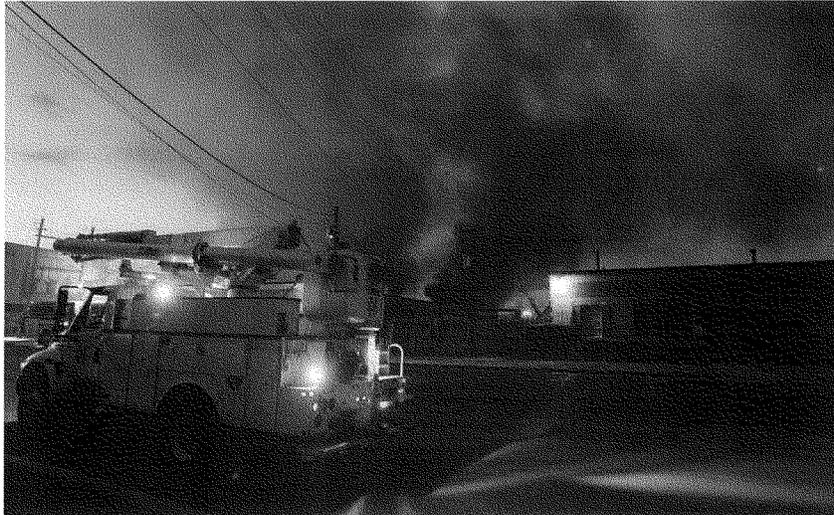
"If they're still doing the same thing, I do hope you'll pursue the story," she said.



Documents and interviews show that Mid-America Steel Drum and others in the chemical container recycling industry have been operating the same way for decades, despite the dangers.

In August 2010, a month after Greif's CLCM group acquired Indianapolis Drum Service, a supervisor in the facility narrowly escaped injury after chemicals were commingled in a capped barrel.

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ROBERT SCHEER/THE STAR

A three-alarm fire heavily damaged the IndyDrum plant in Indianapolis in May 2014. The fire was blamed on spontaneous combustion of chemicals.

Workers described the container as looking "like it was pregnant" before the lid shot off, landing 6 to 7 feet from the supervisor, Jerry Spegal. As with the drum that killed Duggan, this one spewed chemicals several feet in the air and drenched Spegal.

Spegal failed to mention the incident to OSHA inspectors who had been investigating the plant for several months following worker complaints about coughing and breathing problems from chemical exposure.

OSHA inspectors cited the company for 23 violations, the majority classified as serious. The company negotiated the fine from a proposed \$308,000 down to \$110,000.

Thomas McGarity, a University of Texas law school professor who has consulted for OSHA, said the agency's ability to hold employers accountable has been "woefully inadequate" for decades.

McGarity co-authored a study last year entitled, "When OSHA Gives Discounts on Danger, Workers Are Put At Risk." (<https://www.documentcloud.org/documents/3462187-OSHA-Discount-on-Danger-Report.html>)

The report noted that the agency inspects only 1% of workplaces each year, and often agrees to substantially reduced fines in exchange for a company's promise to fix the hazard promptly.

Employers often treat the fines as a cost of doing business, McGarity said.

## MORE ABOUT GREIF

Greif Inc., a manufacturer of industrial packaging and containers based in Ohio, began as a barrel-maker in 1877. In fiscal year 2016, Greif had \$3.3 billion in sales and more than 13,000 employees worldwide.

In 2013, before Kramer joined Safety Management Services, the Iowa-based consulting firm conducted safety audits at CLCM plants in Indianapolis, Memphis and Arkadelphia.

The consultants rated each operation on compliance with corporate policies and procedures as well as government regulations. The facilities performance scores ranged from 48% to 61%.

One worker told the consultants that "no one follows any safety rules." Another pleaded: "Just continue to have prayer."

Consultants encouraged Greif to hire industrial hygienists to come in and evaluate worker exposure to chemical fumes.

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protections in place for "release of hazardous energy," known in industrial terms as "lockout/tagout." It includes such practices as ensuring equipment is disabled during maintenance.

The agency fined CLCM, \$7,000. The company negotiated it down to \$4,900.

One of the Arkadelphia employees, Billy Joe Patrick, said he heard talk over the years from managers about making his workplace safer. But not much was actually done.

"They would say 'We're gonna do this, we're gonna do that, we're gonna do this,'" he said in an interview. "Well, I didn't see anything happening regarding bettering it."

Patrick worked on a burner at the Arkadelphia plant in 2013, pouring chemical residue into a furnace and then pushing the drums through for cleaning.

He said barrels came in with all sorts of unknown chemicals.

"As soon as you dumped it, if it was real flammable, it was going to let you know real quick," he said.

Flames would shoot out of the furnace, he said, and it didn't matter whether you had on a face shield. The fire would flare up under it. There was not much Patrick could do but lean back as far as he could while holding onto the barrel. If he let go, fire would engulf the whole area.

"You can only step back so far. It shoots out that little opening, you don't have nowhere to go," he said. "There's fire all around you but you can't let go."

Patrick held on. His hair, mustache and beard were singed.

Greif told the Journal Sentinel the company is "examining investments in automation to increase safety" in its burner operations.

An incident in March 2013 prompted Patrick, 52 at the time, to quit.

He had just dumped something in the burner.

Right at that moment, he happened to be taking a deep breath.

"I went to my knees," he said. "It felt like it just burnt my lungs. ... I started sweating golf balls."

He went to see a doctor the next morning.

"They said, 'Mr. Patrick, do you know you have COPD?'"

Patrick said he had never had breathing problems, or suspected he had chronic obstructive pulmonary disease, an incurable condition, until breathing in those fumes.

"They told me if I wanted to live, I better move to a different department or quit the job."

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into a blazing furnace.

Every day he prayed.

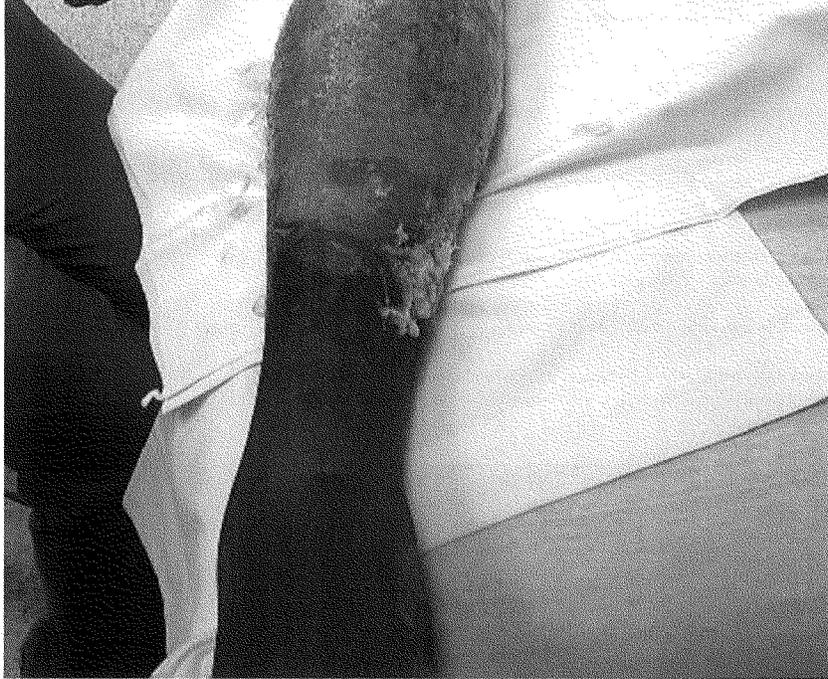
*"Lord, please don't let anything happen to me."*

McClure, 36, had been burned. Chemicals from the bottom of a drum had splashed the back of his leg, causing painful swelling and blistering. He had seen flames scorch the faces and arms of co-workers. For close to a year, he watched as, day after day, someone at the plant was hurt, sometimes seriously.

One of his co-workers, Douglas Robinson, suffered a chemical burn on his leg that bubbled up and ate through layers of his skin, from his ankle to his knee. He spent more than a month on crutches.



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SUBMITTED BY DOUGLAS ROBINSON

Douglas Robinson is treated for chemical burns that he received while working at CLCM's Arkansas plant.

"A lot of people are amazed that I still have my leg," he said.

Another co-worker sustained a gash above his eye from the lid blowing off a drum.

In the fall of 2015, McClure left.

"I'm a man," he said. "I done worked a lot of hard jobs, *hard jobs*, but this was the most unsafe job I've ever done in my life."

In October 2015, the team from Safety Management Services, which now included Kramer, did a round of scheduled safety audits. They identified concerns at all the CLCM plants in four states.

None of the Milwaukee-area plants scored higher than 39% overall.

Ratings for management support and leadership were lower than 16% at all the plants. None scored higher than 42% on regulatory compliance.

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recent years since the company joined Greif."

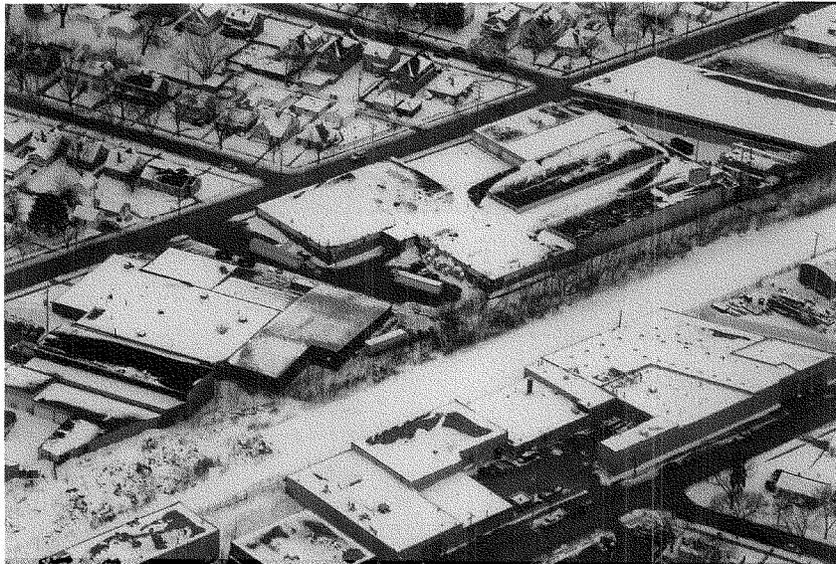
At the same time, workers told the consultants they were not encouraged to report risky conditions or behaviors. The plant did not have a safety committee, or regular safety training program. In the category of accident investigations and prevention, the plant scored 18 out of a possible 85 points.

Workers were seen stepping into burners to wipe away ash; they were observed dumping and burning chemicals outside the burners — all highly hazardous behaviors. In all, consultants noted 46 needed improvements.

The plants in other states scored slightly better — the highest was Indianapolis at 65% — but still fell short of the company's stated goal of 90%.

Results of the safety audits were sent to Greif's leadership team.

"Chemical safety needs to be addressed urgently at your facility," consultant Dale Sabers, who was part of the team, wrote in a Nov. 6, 2015, email to a group of Greif executives regarding the north side Milwaukee plant.



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Aerial photograph of Mid-America Steel Drum Co. plant at 2300 W. Cornell St. in Milwaukee. *Mouse over or tap the image to see highlighted area.*

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## Barrel company facing fine for exposing workers to hazardous chemicals, unsafe practices

Raquel Rutledge, Milwaukee Journal Sentinel Published 7:01 p.m. CT April 21, 2017 | Updated 11:13 a.m. CT Sept. 8, 2017



(Photo: Will Kramer, former safety consultant to Greif Inc.)

An industrial drum refurbisher on Milwaukee's north side faces \$108,000 in federal fines stemming from serious safety violations that harm workers — and pose risks to the neighborhood.

The U.S. Occupational Safety and Health Administration has cited the Mid-America Steel Drum facility for 15 serious violations for exposing workers to chemical and heat-related burns, toxic gases, dangerous noise levels, the risk of falls and other hazards.

The "mixing of reactive materials/chemicals, as well as the mixing/addition of chemical unknowns, exposed employees to reactive chemical hazards," according to a citation and notification of penalty issued last week by OSHA.

The company, on Cornell St. near W. Hampton Ave. and N. 24th St., recycles and reconditions industrial totes and is among a group of similar facilities operated by a joint venture called Container Life Cycle Management — or "Click'm." CLCM facilities employ about 270 people, with additional operations in St. Francis and Oak Creek as well as Indianapolis, Memphis, Tenn., and Arkadelphia, Ark.

CLCM is majority owned by industrial packaging giant Greif Inc., headquartered in Delaware, Ohio.

Officials from Greif said Friday they are "cooperating closely" with OSHA regulators.

"We are aware of OSHA's findings and while we do not agree with the results of the inquiry, we're committed to addressing issues in a timely manner," a spokesman for Greif said in a written statement to the Milwaukee Journal Sentinel.

A [Journal Sentinel investigation into Greif's CLCM facilities published in February \(https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html\)](https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html) detailed how unsafe practices at the plants resulted in worker injuries and risks to the environment. Workers told the Journal Sentinel the drums that arrive at the plant for refurbishing and recycling are not always empty — violating regulations — and instead contain chemicals, including hazardous ones, sloshing in the bottom. Workers pour the various chemical residues into a container without knowing what they're mixing and how the chemicals might react.



Workers say totes sometimes arrive at the plant with hazardous chemicals left sloshing in the bottom. (Photo: Will Kramer, former safety consultant to Greif Inc.)

The practice results in drums exploding and releasing toxic gases and vapors in the air. Workers have suffered severe chemical burns and respiratory illness, according to interviews and internal company records. In a 1984 case, before Greif/CLCM were involved with the business, a drum at a sister plant owned by Mid-America exploded in the face of a 23-year-old worker and killed him.

**SPECIAL REPORT: Chemicals left in barrels leave workers and neighborhoods at risk**  
 (<https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html>)

The Journal Sentinel's findings were based on 16 hours of audio recordings and hundreds of pages of injury reports and safety audits supplied by a whistle-blower; as well as federal, state and local regulatory records; photographs; medical examiner reports; police and fire records; U.S. Securities and Exchange reports; lawsuits; and interviews with eight recent workers from three plants, regulators, trade groups and chemical safety experts.

The OSHA citation substantiates the Journal Sentinel's findings.

It notes, in part: "the employer receives, stores, and processes chemical containers (totes) that contain chemicals such as, but not limited to: hydrogen peroxide, isopropanol, sodium hydroxide, sodium hypochlorite, acetone, sulfuric acid, hydrochloric acid, and paints."

In addition, workers at the north side Milwaukee plant were exposed to fire dangers from acetone, which wasn't properly handled, the OSHA citation states. Workers were not adequately informed about the risks of each of the hundreds of chemicals they were handling, the agency's inspectors found.

Workers were allowed to go back into the plant without "procedures in place to ensure that the work environment was safe following the release of unknown gases and vapors from unwanted chemical reactions," inspectors noted.

Will Kramer, a former risk assessment consultant who blew the whistle on Greif, said OSHA's penalties illustrate a regulatory failure. The \$108,000 fine amounts to "pocket change," he said. Greif reported net sales of \$3.3 billion in 2016.

Kramer said OSHA investigators didn't contact him or seek evidence that the company was aware of its dangerous practices and deliberately ignored them. OSHA officials could not be reached for comment.

"In my role as a safety consultant to the company, we documented the same issues OSHA cited them for, and provided a detailed report with photos to the company's management with recommendations of how to fix the problems," Kramer wrote in a letter Friday to U.S. Sen. [Tammy Baldwin, who has called for multiple federal investigations into the problems with the Greif/CLCM plants.](#) ([/story/news/investigations/2017/02/24/lawmakers-call-immediate-action-protect-workers-residents-barrel-refurbishing-plants/98003584/](#))

Such evidence would have allowed the agency to classify the violations as "willful," which carry much stiffer fines. Kramer said that might do more to "incentivize" the company to improve its practices.

OSHA conducted several inspections of the plant beginning in October 2016, after receiving a complaint from an employee. The inspections continued through April 6. The company has until May 30 to finish resolving all of the issues.

"This confirms that despite (Greif officials) saying they fixed all the problems, they're still doing the same things," Kramer said.

### **Read the investigation**

To read the Journal Sentinel's "Burned" investigation, into problems at drum reconditioning plants, go to [jsonline.com/burned](#) ([/burned](#)).

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## EPA investigates fumes coming from Wisconsin barrel plant. Their own inspectors get sick.

John Diedrich and Raquel Rutledge, Milwaukee Published 2:08 p.m. CT June 30, 2017 | Updated 11:13 a.m. CT Sept. 8, 2017



(Photo: Mike De Sisti, Milwaukee Journal Sentinel)

Two federal inspectors became ill earlier this year while investigating a chain of industrial barrel refurbishing plants in Wisconsin, reporting nausea, dizziness and difficulty breathing as they spent several days talking to residents near one of the facilities.

A month earlier, other inspectors were inside the plants but said they didn't get to see regular activities as required by law. Instead, it appeared the company was staging operations to make it look like regulations were being followed.

Concerned that the company engaged in a cover-up and that the plant's true operations presented a risk to residents, federal prosecutors took the unusual step of [asking a federal magistrate judge to approve search warrants](https://www.documentcloud.org/documents/3882913-Application-for-EPA-Warrant.html) (https://www.documentcloud.org/documents/3882913-Application-for-EPA-Warrant.html) authorizing surprise inspections to collect samples. The judge approved them in early May.

A Milwaukee Journal Sentinel investigation (<https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html>) in February uncovered [dangerous working conditions](https://projects.jsonline.com/news/2017/2/15/leftover-chemicals-heighten-the-risk-of-barrel-fires-at-refurbishing-facilities.html) (https://projects.jsonline.com/news/2017/2/15/leftover-chemicals-heighten-the-risk-of-barrel-fires-at-refurbishing-facilities.html) and [environmental problems](https://projects.jsonline.com/news/2017/2/15/environmental-problems-plague-the-barrel-reconditioning-business.html) (https://projects.jsonline.com/news/2017/2/15/environmental-problems-plague-the-barrel-reconditioning-business.html) at the plants and three others in Arkansas, Indiana and Tennessee, all part of the chain. The facilities are operated by Container Life Cycle Management (CLCM), a joint venture majority owned by industrial packaging giant [Greif Inc.](http://www.greif.com/) (http://www.greif.com/).

The [U.S. Environmental Protection Agency](https://www.epa.gov/) (https://www.epa.gov/) and other agencies sent inspectors to the CLCM Mid-America Steel Drum plants in St. Francis, Oak Creek and Milwaukee a short time later.

**RELATED:** [Chemicals left in barrels leave workers and neighborhoods at risk](http://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html) (http://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html)

**RELATED:** [Environmental problems plague the barrel reconditioning business](http://projects.jsonline.com/news/2017/2/15/environmental-problems-plague-the-barrel-reconditioning-business.html) (http://projects.jsonline.com/news/2017/2/15/environmental-problems-plague-the-barrel-reconditioning-business.html)

**RELATED:** [Leftover chemicals heighten the risk of barrel fires](http://projects.jsonline.com/news/2017/2/15/leftover-chemicals-heighten-the-risk-of-barrel-fires-at-refurbishing-facilities.html) (http://projects.jsonline.com/news/2017/2/15/leftover-chemicals-heighten-the-risk-of-barrel-fires-at-refurbishing-facilities.html)

**RELATED:** [How the barrel business got its start](http://projects.jsonline.com/news/2017/2/15/how-the-barrel-business-got-its-start.html) (http://projects.jsonline.com/news/2017/2/15/how-the-barrel-business-got-its-start.html)

New details of the EPA inspections are outlined in reports, emails and other documents made public in the warrants filed by the EPA in U.S. District Court in Milwaukee in May.

In seeking warrants to do surprise inspections, EPA officials cited the Journal Sentinel investigation as well as previous environmental violations.

The plants refurbish 55-gallon metal drums and large plastic totes, cleaning them out for future use or to recycle them. The drums and totes are supposed to arrive empty, but they routinely come in "heavy," with a significant amount of chemicals remaining inside, according to documents and workers.

Dangerous chemicals have been mixed together and washed down floor drains and plumes of smoke from unknown chemical reactions have been released into neighborhoods, workers said. Fires have erupted at the plants, fouling the air and posing a danger to nearby homes, the investigation found.

The Journal Sentinel findings were based on 16 hours of audio recordings by a whistle-blower; hundreds of pages of documents, including internal injury reports and safety audits; as well as public records and interviews with workers, regulators and experts.

Greif spokeswoman Debbie Crow said the company has not yet received findings from the EPA and the company "will work with them to remedy any issues as they arise."

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EPA officials would not comment on the ongoing investigation other than to say they don't yet have results from samples of material that were collected during the inspections.

Federal and state [lawmakers have demanded action](http://story/news/investigations/2017/02/24/lawmakers-call-immediate-action-protect-workers-residents-barrel-refurbishing-plants/98003584) (U.S. Sen. Tammy Baldwin has written numerous letters to governmental agencies and told the Journal Sentinel immediate steps are needed to protect the public.

"I have no doubt that people have been harmed or put at risk, whether it's workers or people who live in these neighborhoods. ... It's important that all federal agencies charged with oversight do their job and get to the bottom of this," the Wisconsin Democrat said.



Fire heavily damaged Kitzinger Cooperage in St. Francis in 2005. Kitzinger refurbished drums for many companies with flammable products such as paint and oil. In 2011, it was acquired by Mid-America Steel Drum Co. (Photo: Journal Sentinel files)

### Staged inspection suspected

Federal and state regulators inspected the plants in Milwaukee shortly after the Journal Sentinel investigation.

The inspectors from the EPA, [U.S. Department of Transportation \(https://www.transportation.gov/\)](https://www.transportation.gov/) and Wisconsin's [Department of Natural Resources \(http://dnr.wi.gov/\)](http://dnr.wi.gov/) were trying to determine if there were violations of federal hazardous waste handling and emissions laws at the plants.

At each plant, the regulators said, there were indications they were not seeing typical operations, which they are supposed to be able to see under the law.

Inspectors noted they were barred from entering the plants until a company attorney arrived.

Barrels appeared to have been selected to avoid any containing hazardous waste, they said. Containers had new-looking white labels on them with the words "non-regulated waste." And a worker operating a furnace at one plant happened to be "on break" during the inspection, according to court documents.

Operations "appeared to EPA inspectors to be 'staged' to create the appearance of compliance with applicable environmental regulations," documents said.

Even with those efforts, the inspectors spotted possible violations of the law: Workers were guessing by "feel" if a barrel contained chemicals; fumes wafted from some barrels; possibly harmful waste was streaming down a storm drain; and records required by law to be kept were missing.

And by the company's own admission, one of the facilities was dealing with hazardous waste without a permit. The company's attorney [wrote in a letter \(https://www.documentcloud.org/documents/3882815-Foley-Atty-Letter.html\)](https://www.documentcloud.org/documents/3882815-Foley-Atty-Letter.html) after the inspection that the company is now applying for a hazardous waste permit.

"This suggests a failure in the past to characterize properly wastes present at this facility," the warrant application said.

Inspectors arrived at the plant in the 2300 block of W. Cornell St. the morning of Feb. 24. After waiting for the lawyer to arrive, the inspectors entered the plant to find that operation was shut down, so there was little to observe.

Four days later, the inspectors went to the St. Francis plant. They had to wait an hour while the company called its lawyer to appear.

The inspectors believed the drums being processed on that day were "cherry-picked" so they did not include any hazardous waste. But inspectors also saw barrels fuming at the St. Francis plant, indicating that drums were not emptied.

An inspector went to the roof to examine the smokestack scrubber, which is designed to clean the exhaust gas as it leaves the plant. He discovered fluid coming off the scrubber was going into a pipe and then a storm drain.

"The reason the system was set up to leak in this way was not made clear during the inspection," the inspection report said.

At the Oak Creek inspection on March 2, inspectors identified several areas of concern. Workers used metal blades to cut the drums containing unknown and potentially flammable chemicals, creating a risk of explosion.

A worker died in Milwaukee in 1984 after a barrel of randomly mixed chemicals exploded in his face. There have been dozens of other deaths and serious injuries in incidents involving drums with chemicals or residue over the past 15 years across various industries.

The way workers were putting drums in the furnace in the Oak Creek plant represented a risk of fire or explosion — all dangers that happen routinely at the plants, according to workers interviewed by the Journal Sentinel.

### **'Insane' plant near residents**

Residents around the St. Francis plant have contended with [foul odors and smoke belching over their neighborhood \(story/news/investigations/2017/03/03/residents-rail-against-putrid-fumes-barrel-refurbishing-plant-milwaukee-suburb-st-francis/98687732/\)](#) for years, federal EPA investigators found while spending nearly a week in the area in March.

EPA investigators Aaron Price and Maureen O'Neill interviewed several residents in their homes, "where we believe the remnants of the exhaust had accumulated for years in the carpet and upholstery."

Residents reported health complaints including dizziness, itching, watery eyes, rashes on exposed skin, nausea, lymphoma, vitamin D issues, cardiovascular disease and throat cancer, according to documents.



A flame plume wraps around as a chemical drum is dumped into burner. Image, taken in late September 2013, is from a 2013 audit of Drumco of Arkansas in Arkadelphia, Ark. (Photo: Safety Management Services Company)

Price and O'Neill both reported that they felt sick after being in the neighborhood (<https://www.documentcloud.org/documents/3882916-EPA-Agents-Email.html>) around the St. Francis plant. O'Neill said her tongue swelled, her throat constricted and she was suffering from "unbearable" throbbing and numbness in her hands and feet.

She asked for Benadryl at the front desk of her hotel that night. The staff offered to take her to a hospital or pharmacy. A hotel driver took her to get an antihistamine. The swelling went down the next day, but the pain in the hands and feet persisted until she left the assignment.

Price, too, reported feeling ill: headaches, dizziness and breathing difficulty, nausea, sleep difficulty and trouble focusing.

A neighbor of the plant told Price and O'Neill the smell from the plant's emissions was strong enough that he could taste it. He couldn't get away from it, even in his house with the doors and windows closed.

A secretary at Willow Glen Elementary School, which is a half-mile south of the plant, called the Fire Department to investigate one day this year because the plant's odor was so strong in the school.

The investigators interviewed several residents who reported health problems including a man who talked about the danger of living near the plant with his 6-year-old daughter, who has had rashes, itchy eyes and dizziness, which he attributed to the smell and a pink film from the plant that settles on his property.

He told investigators he planned to move; no one should be living near the plant.

"He felt it to be 'insane' that the facility was allowed to be anywhere near a residential area."

John Diedrich can be reached at [john.diedrich@jm.com](mailto:john.diedrich@jm.com) (mailto:john.diedrich@jm.com) and [@john\\_diedrich](https://twitter.com/john_diedrich) ([https://twitter.com/john\\_diedrich](https://twitter.com/john_diedrich)).

### Read the investigation

To read the Journal Sentinel's "Burned" investigation, into safety hazards at drum reconditioning plants, go to [jsonline.com/burned](https://projects.jsonline.com/burned) (<https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html>).

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## OSHA opens safety inspection at another Wisconsin barrel refurbishing plant

[John Dieckrich](#), Milwaukee Journal Sentinel | Published 12:00 p.m. CT Aug. 23, 2017 | Updated 3:11 p.m. CT Aug. 23, 2017



(Photo: Wisconsin Department of Natural Resources)

A federal agency that investigates workplace safety has opened an inspection into a second industrial drum refurbishing plant in the Milwaukee area.

Inspectors from the U.S. Occupational Safety and Health Administration (<https://www.osha.gov/>) launched an inspection of Mid-America Steel Drum in Oak Creek last Thursday, according to [online OSHA records](https://www.osha.gov/bls/imis/establishment_search?) ([https://www.osha.gov/bls/imis/establishment\\_search?](https://www.osha.gov/bls/imis/establishment_search?)

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The action comes six months after [reports of dangerous working conditions](https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html) (<https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html>) by employees in the plant. It also follows inspections by environmental regulators who uncovered numerous violations.

A Milwaukee Journal Sentinel investigation (<https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html>) in February revealed [environmental problems](https://projects.jsonline.com/news/2017/2/15/environmental-problems-plague-the-barrel-reconditioning-business.html) (<https://projects.jsonline.com/news/2017/2/15/environmental-problems-plague-the-barrel-reconditioning-business.html>) and [dangerous working conditions](https://projects.jsonline.com/news/2017/2/15/leftover-chemicals-heighten-the-risk-of-barrel-fires-at-refurbishing-facilities.html) (<https://projects.jsonline.com/news/2017/2/15/leftover-chemicals-heighten-the-risk-of-barrel-fires-at-refurbishing-facilities.html>) at a chain of barrel refurbishing plants, including three in Wisconsin — Oak Creek, Milwaukee, and St. Francis — as well as facilities in Arkansas, Indiana and Tennessee.

Workers at the plants said chemicals were routinely mixed together, triggering dangerous reactions that resulted in chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.

OSHA opened an inspection into the Mid-America Steel Drum plant in St. Francis on Aug. 3 — the same day the Journal Sentinel posted [a story](https://www.jsonline.com/story/news/investigations/2017/08/03/wisconsin-barrel-plants-not-inspected-osha/529077001/) (<https://www.jsonline.com/story/news/investigations/2017/08/03/wisconsin-barrel-plants-not-inspected-osha/529077001/>) examining why the agency had inspected just one of six plants in the chain (<https://www.jsonline.com/story/news/investigations/2017/04/21/barrel-company-facing-fine-exposing-workers-hazardous-chemicals-unsafe-practices/100760340/>).

Two weeks later, the inspection at the Oak Creek plant was opened.

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**Related:** OSHA has not inspected two troubled Wisconsin barrel plants. **\$29.99** Tammy Baldwin wants to know why (<https://www.jsonline.com/story/news/investigations/2017/08/03/wisconsin-barrel-plants-not-inspected-osha/529077001/>)

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**Related:** Wisconsin DNR says Milwaukee industrial barrel plants broke environmental laws (<https://www.jsonline.com/story/news/investigations/2017/07/25/wisconsin-dnr-says-milwaukee-industrial-barrel-plants-broke-environmental-laws/52924111/>)

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**Related:** EPA investigates fumes coming from Wisconsin barrel plant. Their own inspectors get sick. (<https://www.jsonline.com/story/news/investigations/2017/06/30/epa-investigators-get-sick-barrel-plants/435413001/>)

U.S. Sen. Tammy Baldwin (D-Wis.), who has criticized OSHA (<https://www.documentcloud.org/documents/3911347-Letter-to-OSHA-Re-St-Francis-and-Oak-Creek.html>) for not inspecting all the plants, welcomed the agency's latest action.

"Since February, I have repeatedly requested that OSHA investigate these facilities," she said in a statement. "I am pleased that after pressing for OSHA to do its job, they have finally opened up an investigation into the Oak Creek facility."

The barrel refurbishing plants are operated by Container Life Cycle Management, known as CLCM, a joint venture majority owned by Ohio-based Greif Inc., an industrial packaging giant. The plants refurbish 55-gallon steel drums and large plastic chemical containers, cleaning them for reuse or recycling. The three Milwaukee-area plants operate as Mid-America Steel Drum.

A Greif spokeswoman said earlier that the company is committed to safety and would work closely with regulators "to uphold that commitment."

OSHA officials inspected one [drum plant in the chain](#) ([/story/news/investigations/2017/04/21/barrel-company-facing-fine-exposing-workers-hazardous-chemicals-unsafe-practices/100760340/](#)) after a complaint late last year. They issued citations alleging unsafe work conditions at the Milwaukee facility, located on W. Cornell St. near W. Hampton Ave. and N. 24th St., and assessed \$108,000 in fines.

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Among the violations found in the inspection: Workers were mixing chemicals from barrels, exposing workers to the risk of burns, explosions and the inhalation of toxic gas. The company disputes those violations.

An OSHA spokesman did not respond to an email seeking comment on the inspection of the Oak Creek plant.

Federal environmental regulators did their own inspections of all three Milwaukee-area plants earlier this year. They reported that inspectors were forced to wait until the company's attorney arrived and during the tour inspectors suspected they were not seeing typical operations, as required by federal law.

Federal prosecutors in Milwaukee took the unusual step of asking a federal magistrate judge to approve search warrants that authorized surprise inspections.

The U.S. Environmental Protection Agency conducted its inspections in May. The results have not been released. During the visit, two EPA investigators [became ill](#) ([/story/news/investigations/2017/06/30/epa-investigators-get-sick-barrel-plants/435413001/](#)) while interviewing residents around the St. Francis plant, reporting nausea, dizziness and difficulty breathing.

The Wisconsin Department of Natural Resources also inspected the three Milwaukee-area barrel refurbishing facilities earlier this year and [cited the company for 19 violations](#) ([/story/news/investigations/2017/07/25/wisconsin-dnr-says-milwaukee-industrial-barrel-plants-broke-environmental-laws/502524001/](#)), according to 250 pages of enforcement reports released last month to the Journal Sentinel. Enforcement conferences with the company to discuss what has to be done to correct the violations are set for this month.

The company was cited for handling hazardous waste without permits; failing to keep required records; misrepresenting information on permit applications; sending hazardous ash to landfills not permitted to receive it; and continuing to send putrid odors over neighborhoods three years after similar smells were recorded.



State environmental regulators issued violations at three Container Life Cycle Management industrial barrel reconditioning plants in Milwaukee County for having hazardous waste on site without a permit. The labels on these barrels indicate a permit is needed, the state Department of Natural Resources says. (Photo: Wisconsin Department of Natural Resources)

*Raquel Rutledge of the Journal Sentinel staff contributed to this report.*

**Read the investigation**

To read the Journal Sentinel's "Burned" investigation, into safety hazards at drum reconditioning plants, go to [jsonline.com/burned](https://projects.jsonline.com/burned) (<https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html>).

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## Senators call for industrial barrel investigation to expand in a letter to EPA, OSHA

John Diedrich, Milwaukee Journal Sentinel Published 6:01 p.m. CT Oct. 13, 2017 | Updated 1:03 p.m. CT Oct. 14, 2017



(Photo: Mike De Stasi / Milwaukee Journal Sentinel)

Two U.S. senators are calling on federal environment and workplace regulators to expand their investigations into industrial barrel refurbishing plants from <https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html> three Wisconsin operations to 15 facilities in 10 states.

U.S. Sens. [Tammy Baldwin](https://www.baldwin.senate.gov/) (D-Wis.) and [Joe Donnelly](https://www.donnelly.senate.gov/) (D-Ind.) sent a letter Thursday to the heads of the [U.S. Environmental Protection Agency](https://www.epa.gov/) and [U.S. Occupational Safety and Health Administration](https://www.osha.gov/), urging them to expand their probes as the U.S. Department of Transportation [already has done](https://story/news/investigations/2017/09/15/industrial-barrel-plants-hit-more-violations/655918001/).

A [Milwaukee Journal Sentinel investigation](https://www.jsonline.com/story/news/investigations/2017/02/15/chemicals-left-in-barrels-leave-many-at-risk.html) published in February, uncovered a series of problems that endangered workers and residents living near the facilities, which are operated by Container Life Cycle Management, a joint venture majority owned by Greif Inc., a \$3.3 billion packaging giant based in Ohio.

The plants refurbish 55-gallon steel drums and large plastic chemical containers, cleaning them for reuse or recycling.

Workers at the plants said chemicals were routinely mixed together, triggering dangerous reactions that resulted in chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.

The Journal Sentinel findings were based on 16 hours of audio recordings by a whistleblower; hundreds of pages of documents, including internal injury reports and safety audits; as well as public records and interviews with workers, regulators and experts.

The senators called on the EPA and OSHA — which already are investigating plants in St. Francis, Oak Creek and Milwaukee — to expand to an investigation of all 15 plants that make up EarthMinded Life Cycle Services, a network of independent drum reconditioning companies across the nation and the world, launched by Greif.

"Whistleblower accounts and news reports raise concerns that the company may be operating with dangerous practices throughout the organization," the senators wrote in the [Oct. 12 letter](https://www.documentcloud.org/documents/4108279-Baldwin-Donnelly-National-OSHA-EPA-Letter-10-12.html).

"Given concerning findings documented at sites in Wisconsin, all facilities connected to Greif's barrel refurbishing business warrant prompt investigation to potentially save lives and prevent serious environmental harm."

A Greif spokeswoman did not immediately respond to a request for comment.

A spokesman for the EPA said in a statement: "We are reviewing the letter and would not be able to comment at this time."

Representatives from OSHA did not immediately respond to inquiries.

**RELATED:** [Chemicals left in barrels leave workers and neighborhoods at risk](https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html)

**RELATED:** [Read entire 'Burned' investigation](https://www.jsonline.com/story/news/investigations/2017/02/15/chemicals-left-in-barrels-leave-many-at-risk.html)

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Federal and state regulators launched investigations into the plants, which operate in the Milwaukee area as Mid-America Steel Drum, shortly after the Journal Sentinel investigation was published.

During their inspection of the Mid-America plants in the Milwaukee area, officials said they didn't get to see regular activities as required by law.

They took the rare step of asking a federal magistrate judge to approve search warrants authorizing surprise inspections to collect samples. In documents, officials noted that [two EPA investigators became ill \(/story/news/investigations/2017/06/30/epa-investigators-get-sick-barrel-plants/435413001/\)](#) while interviewing people living around the St. Francis plant.

The Wisconsin Department of Natural Resources found [19 environmental violations \(/story/news/investigations/2017/07/25/wisconsin-dnr-says-milwaukee-industrial-barrel-plants-broke-environmental-laws/502524001/\)](#) at the plants. The U.S. Department of Transportation found 16 violations and has expanded its investigation to plants in nine states.

OSHA found 15 violations at the Milwaukee facility and issued a \$108,000 fine. It later opened investigations into the St. Francis and Oak Creek plants.

The whistleblower, Will Kramer, who worked as a safety consultant in the plants, has also filed a complaint with the U.S. Securities and Exchange Commission, alleging [Greif has failed to properly notify shareholders of the company's environmental liabilities \(/story/news/investigations/2017/10/06/greif-board-members-face-insider-trading-complaint/735737001/\)](#).

Kramer also filed a complaint that accuses the chairman of Greif's board, Michael Gasser, and board member Daniel Gunsett of engaging in insider trading.

Baldwin called on the SEC to investigate the accusations. The SEC declined to comment.

In a [public statement to shareholders \(/story/news/investigations/2017/10/10/greif-denies-board-members-engaged-insider-trading/749538001/\)](#), Greif says it followed all securities law in terms of its reporting to shareholders. The company also said Gasser and Gunsett deny they engaged in insider trading.

*Raquel Rutledge of the Journal Sentinel staff contributed to this report.*

## COMPANIES TARGETED FOR INSPECTION

Here is a list of the other industrial barrel plants that two U.S. senators want to see inspected by the EPA and OSHA. The agencies already are investigating three such plants in the Milwaukee area:

Kearny Steel Container, Newark, N.J.

Chambers Drum Company, Inc, Fairburn, Ga.

Container Life Cycle, Ludlow, Ky.

Drumco of Tennessee, Memphis, Tenn.

Indianapolis Drum Service, Indianapolis, Ind.

Drumco of Arkansas, Arkadelphia, Ark.

West Texas Drum LTD, Baytown, Tex.

West Texas Drum LTD, Odessa, Tex.

CMS, LLC - Los Angeles, Calif.

CMS, LLC - Bay Area, Hayward, Calif

CMS, LLC - Portland (Steel Drum), Portland, Ore.

CMS, LLC - Portland (IBC & Plastic Recycling), Portland, Ore.



Plastic totes are stored outside the Mid-America Steel Drum plant on W. Cornell St. in Milwaukee. State and federal regulators found more than two dozen violations during inspections of three such plants in the area in early 2017. (Photo: Wisconsin Department of Natural Resources)

### Read the investigation

To read the Milwaukee Journal Sentinel's "Burned" investigation, into safety hazards at drum reconditioning plants, go to [jsonline.com/burned](https://jsonline.com/burned/?topic=721e3103-a5b5-4546-8201-88150531c93a/burned-series/) ([/topic/721e3103-a5b5-4546-8201-88150531c93a/burned-series/](https://topic/721e3103-a5b5-4546-8201-88150531c93a/burned-series/)).

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## Residents sue Wisconsin industrial barrel plant over noxious odors

[John Dietrich, Milwaukee Journal Sentinel](#) Published 1:57 p.m. CT Nov. 8, 2017 | Updated 5:12 p.m. CT Nov. 8, 2017



(Photo: Wisconsin Department of Natural Resources)

Residents living near an industrial barrel refurbishing plant in St. Francis on Wednesday sued the company, saying the facility belches noxious fumes over their homes, diminishing their quality of life as well as their property values.

Three residents — Michael Tennesen, Deborah Kessel and Robert Kress — sued the plant's parent company, Greif Inc., a \$3.3 billion packaging company based in Ohio, alleging its operations are a nuisance and that it is guilty of negligence for failing to improve operations as recommended by a safety consultant.

The three filed a class-action complaint in Milwaukee County Circuit Court. Their attorneys will be seeking to have Circuit Judge Stephanie Rothstein to certify it as a [class action](http://litigation.findlaw.com/legal-system/class-action-cases.html) (<http://litigation.findlaw.com/legal-system/class-action-cases.html>), which would allow other residents to join it.

The suit proposes to allow any residents with similar complaints in a one-mile ring around the plant, in the 3900 block of S. Pennsylvania Ave., to join the suit, which seeks unspecified damages.



The plants, operated by Container Life Cycle Management, refurbish 55-gallon steel drums and large plastic chemical containers, cleaning them out for reuse or recycling. (Photo: Wisconsin Department of Natural Resources)

"I am proud of Robert, Debbie and Mike for stepping forward to take on this big company," said Milwaukee attorney Michael Lueder, who also is working with a Detroit firm on the case.

"These folks just want to be able to let their kids and grandkids enjoy the yard on a sunny day. They want to invite guests for barbecues without embarrassment. They want to hang their clothes out on the line and pull them down smelling fresh, and not like unpleasant chemicals."

A Greif spokeswoman said the company had not seen the lawsuit and therefore could not comment.

**RELATED:** [Chemicals left in barrels leave workers and neighborhoods at risk \(https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html\)](https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html)

**RELATED:** [After years of violations, Wisconsin industrial barrel plant addresses mercury in water \(story/news/investigations/2017/11/03/mercury-violations-industrial-barrel-plant-wisconsin/822589001/\)](https://projects.jsonline.com/news/2017/11/03/mercury-violations-industrial-barrel-plant-wisconsin/822589001/)

**RELATED:** [Read entire 'Burned' investigation \(topic/721e3103-e5b5-4546-8201-88150531c93a/burned-series/\)](https://projects.jsonline.com/news/2017/11/03/mercury-violations-industrial-barrel-plant-wisconsin/822589001/)

A Journal Sentinel investigation, published in February (<https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html>), uncovered a host of problems that endangered workers and residents living near the company's plant in St. Francis as well as facilities in Oak Creek, Milwaukee and three other states.

Workers at the plants told the Journal Sentinel chemicals were routinely mixed together, triggering dangerous reactions that resulted in chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.

Residents, especially those living near the St. Francis plant, [said in a meeting \(story/news/investigations/2017/03/03/residents-rail-against-puifd-fumes-barrel-refurbishing-plant-milwaukee-suburb-st-francis/98887732/\)](https://projects.jsonline.com/news/2017/03/03/residents-rail-against-puifd-fumes-barrel-refurbishing-plant-milwaukee-suburb-st-francis/98887732/) following publication that it is often miserable living near the facility. The smell can be so powerful that residents are forced to stay in their homes. They say the fumes lead to burning eyes, sore throats and headaches.

Following the Journal Sentinel investigation, agents from the U.S. Environmental Protection Agency spent several days interviewing residents near the St. Francis plant. The EPA investigators themselves [reported experiencing health problems \(story/news/investigations/2017/06/30/epa-investigators-get-sick-barrel-plants/435413001/\)](https://projects.jsonline.com/news/2017/06/30/epa-investigators-get-sick-barrel-plants/435413001/) during that time.

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The EPA is one of at least five government agencies investigating the plants following the news organization's investigation, [at the urging \(story/news/investigations/2017/10/13/senators-calls-industrial-barrel-investigation-expand-letter-epa-osha/762900001/\)](https://projects.jsonline.com/news/2017/10/13/senators-calls-industrial-barrel-investigation-expand-letter-epa-osha/762900001/) of several members of Congress. The state Department of Natural Resources and U.S. Department of Transportation together have uncovered three dozen violations.

[Mercury levels over the legal limit \(story/news/investigations/2017/11/03/mercury-violations-industrial-barrel-plant-wisconsin/822589001/\)](https://projects.jsonline.com/news/2017/11/03/mercury-violations-industrial-barrel-plant-wisconsin/822589001/) have been found in wastewater coming from the St. Francis plant for at least four years. Following the investigation, officials met with the company, which promised to clean it up.

The three plants, known locally as Mid-America, are operated by Container Life Cycle Management, a joint venture majority owned by Greif.

The plants refurbish 55-gallon steel drums and large plastic chemical containers, cleaning them for reuse or recycling. Those drums that cannot be refurbished are burned.

The company has "negligently created an unreasonable risk of harm" by sending noxious odors into the neighborhood, the suit says.

*Reporter Raquel Rutledge contributed to this report.*

**Read the investigation**

To read past stories in the Milwaukee Journal Sentinel's Burned investigation, into problems at barrel refurbishing plants around the country, go to [jsonline.com/burned](https://www.jsonline.com/story/news/local/milwaukee/2017/12/04/burned-investigation-into-problems-at-barrel-refurbishing-plants-around-the-country/109564001/) (/topic/721e3103-a5b5-4546-8201-88150531c93a/burned-series/).

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## EPA finds Wisconsin barrel plants violating environmental laws

John Diederich, Milwaukee Journal Sentinel Published 11:02 a.m. CT Nov. 29, 2017 | Updated 3:48 p.m. CT Nov. 29, 2017



(Photo: U.S. Environmental Protection Agency)

The U.S. Environmental Protection Agency (<https://www.epa.gov/>) has found a chain of industrial refurbishing plants in the Milwaukee area violated federal law (<https://www.epa.gov/wi/epa-investigating-milwaukee-company-potential-environmental-violations>), the agency announced Wednesday.

The EPA determined the plants in St. Francis, Oak Creek and Milwaukee were breaking the law by transporting, storing and treating hazardous waste without required licenses, among other violations.

EPA inspectors said plant officials blocked their entry into the St. Francis plant for nearly 30 minutes, even though they had a warrant issued by a federal magistrate judge. They also were initially denied access to the Oak Creek plant.

The agency took the unusual step of seeking the warrant after suspecting the company had "staged" operations (<https://www.jsonline.com/story/news/investigations/2017/06/30/epa-investigators-get-sick-barrel-plants/435413001/>) in its plants during an earlier inspection.

Once inside, investigators found a host of problems: barrels labeled as "non-hazardous" that contained flammable chemicals; drums leaking unknown chemicals onto the ground; milky white plumes of smoke puffing out of the St. Francis facility, creating a "standing haze;" and a barrel that workers said was for water, but actually contained ignitable hazardous waste.

The inspections were initiated following a [Milwaukee Journal Sentinel investigation \(https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html\)](https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html), published in February, which uncovered a host of problems that endangered workers and residents living near the company's plants in the Milwaukee area and three other states — Tennessee, Indiana and Arkansas.

**RELATED:** [Chemicals left in barrels leave workers and neighborhoods at risk \(https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html\)](https://projects.jsonline.com/news/2017/2/15/chemicals-left-in-barrels-leave-many-at-risk.html)

**RELATED:** [Read entire Burned series \(https://www.jsonline.com/story/news/investigations/2017/07/25/wisconsin-dnr-says-milwaukee-industrial-barrel-plants-broke-environmental-laws/502524001/\)](https://www.jsonline.com/story/news/investigations/2017/07/25/wisconsin-dnr-says-milwaukee-industrial-barrel-plants-broke-environmental-laws/502524001/)

**RELATED:** [Residents sue Wisconsin industrial barrel plant over noxious odors \(https://www.jsonline.com/story/news/investigations/2017/11/08/wisconsin-industrial-barrel-plant-lawsuit-pollution/835786001/\)](https://www.jsonline.com/story/news/investigations/2017/11/08/wisconsin-industrial-barrel-plant-lawsuit-pollution/835786001/)

**RELATED:** [Wisconsin DNR says industrial barrel plants broke environmental laws \(https://www.jsonline.com/story/news/investigations/2017/07/25/wisconsin-dnr-says-milwaukee-industrial-barrel-plants-broke-environmental-laws/502524001/\)](https://www.jsonline.com/story/news/investigations/2017/07/25/wisconsin-dnr-says-milwaukee-industrial-barrel-plants-broke-environmental-laws/502524001/)

Workers at the plants told the Journal Sentinel that chemicals were routinely mixed together, triggering dangerous reactions that resulted in chemical and heat-related burns, injuries from exploding barrels, breathing difficulties and other health problems.

Residents near the St. Francis plant say it is often miserable living there. Fumes result in burning eyes, sore throats and headaches, forcing them to stay in their homes at times. Three of the residents have filed a [class-action lawsuit \(https://www.jsonline.com/story/news/investigations/2017/11/08/wisconsin-industrial-barrel-plant-lawsuit-pollution/835786001/\)](https://www.jsonline.com/story/news/investigations/2017/11/08/wisconsin-industrial-barrel-plant-lawsuit-pollution/835786001/).



Plastic totes are stored outside the Mid-America Steel Drum plant on W. Cornell St. in Milwaukee. State and federal regulators found more than two dozen violations during inspections of three such plants in the area in early 2017. (Photo: Wisconsin Department of Natural Resources)



Fifty-five gallon drums are seen stored in a parking lot outside the Mid-America Steel Drum plant in St. Francis during a safety inspection of the facility. (Photo: Wisconsin Department of Natural Resources)

The three plants, known locally as Mid-America, are operated by Container Life Cycle Management, a joint venture majority owned by Greif Inc., a \$3.3 billion Ohio-based firm.

The plants refurbish 55-gallon steel drums and large plastic chemical containers, cleaning them for reuse or recycling. Drums that cannot be refurbished are burned.

### **'Heavies' at the plant**

By law, barrels that arrive at the plant are supposed to be essentially empty with no more than an inch of contents in the bottom.

But the inspectors found barrels and totes with a significant amount of chemicals inside — called "heavies" in the industry — that had been sitting there in one case for at least three months, in violation of the law, the EPA said. Plant officials said workers determined if a barrel was heavy by "feel."

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The EPA tested the air near the St. Francis facility in response to resident complaints and the "smelly emissions from the plant." [During their investigation](#) ([/story/news/investigations/2017/06/30/epa-investigators-get-sick-barrel-plants/435413001/](#)), two EPA inspectors who were interviewing residents themselves reported feeling ill. (<https://www.documentcloud.org/documents/3882916-EPA-Agents-Email.html>).

Air testing by the EPA revealed the presence of volatile organic compounds associated with industrial activity. The agency is analyzing the data to determine if there is a health risk to workers and residents. The agency plans more testing.

The agency issued notices against the St. Francis and Oak Creek plants, alleging 13 violations of the federal Clean Air Act. The Milwaukee plant does not have a burning operation.

At the Oak Creek facility, the EPA says the company illegally treated hazardous waste in an incinerator. At St. Francis, the agency alleges the plant failed to control or measure potentially hazardous emissions, didn't keep adequate records or obtain proper permits and failed to adequately respond to requests for information.

Soil testing by the agency did not reveal levels of contamination that violated federal law.

### Company questions violations

In a statement, a Greif spokeswoman said the company learned of the EPA violations Monday and continues to cooperate with regulators. The statement also contended regulators have changed their past standards to find problems.

"We are not perfect and will always work to address issues in cooperation with regulators," said Debbie Crow, in the statement. "Company representatives have met — on a voluntary basis — with federal and state environmental regulators on multiple occasions to discuss perceived issues."

The company has 30 days to respond. Documents indicate the EPA will then consider a fine, but no amount was listed.

"EPA, in coordination with the Wisconsin Department of Natural Resources and other government agencies, continues to investigate and intends to take appropriate action," an agency statement said.

The EPA is the latest regulatory agency to conclude the barrel plants are breaking the law. The EPA is one of at least five government agencies investigating the plants following the Journal Sentinel's investigation, citizen complaints and several letters from U.S. Sen. Tammy Baldwin (D-Wis.) and other members of Congress.

"I am pleased that they have now identified violations and are moving forward with issuing penalties and bringing the company into compliance," said Baldwin, who called on EPA to investigate in February. "Our work here is not done and I will continue to demand answers."

The [state Department of Natural Resources](#) ([/story/news/investigations/2017/07/25/wisconsin-dnr-says-milwaukee-industrial-barrel-plants-broke-environmental-laws/502524001/](#)) and U.S. Department of Transportation together have uncovered three dozen violations. DOT has expanded its investigation to [13 plants all tied to Greif in nine states](#). ([/story/news/investigations/2017/09/15/industrial-barrel-plants-hit-more-violations/655818001/](#)).

The U.S. Occupational Safety and Health Administration found 15 violations at the Milwaukee facility and issued a \$108,000 fine. OSHA [continues to investigate](#) ([/story/news/investigations/2017/08/10/osha-inspects-wisconsin-barrel-plant/553430001/](#)) the plants in Oak Creek and St. Francis but has not reported findings.

Rep. Gwen Moore (D-Wis.) said the EPA's findings are "deeply disturbing" given the population around the plants and credited the Journal Sentinel's investigation with bringing the dangers to light.

"Today's announcement not only stresses the need for enhanced transparency in the private sector, but it also underscores the necessity for press freedom and a responsive EPA that can hold companies accountable for breaking laws that protect the public," she said.

### **Mercury in wastewater**

The Milwaukee Metropolitan Sewerage District found mercury in wastewater discharge from the St. Francis plant that repeatedly was over legal limits ([/story/news/investigations/2017/11/03/mercury-violations-industrial-barrel-plant-wisconsin/822589001/](https://www.jsonline.com/story/news/investigations/2017/11/03/mercury-violations-industrial-barrel-plant-wisconsin/822589001/)). While the issue existed for at least the past four years, MMSD did not meet with the company until a month after the Journal Sentinel investigation. The company promised to clean up the problem.

The Journal Sentinel findings were based on 16 hours of audio recordings by a whistle-blower; hundreds of pages of documents, including internal injury reports and safety audits; as well as public records and interviews with workers, regulators, and experts.

The whistleblower, Will Kramer, said Wednesday plant officials had plans for staging operations when government inspectors came, and the most recent blocked entry may have allowed them to prepare employees.

Kramer applauded the EPA's action, but he said regulators have as yet failed to determine where the barrels full of hazardous waste are sent.

"After further confirmation that this company has been illegally storing, treating, and transporting hazardous waste, my question continues to be: where did all of that hazardous waste end up? So far, neither the company nor regulators have answered that question."

### **Read the investigation**

To read the Journal Sentinel's "Burned" investigation, into safety hazards at drum reconditioning plants, go to [jsonline.com/burned](https://www.jsonline.com/burned/) ([/burned](https://www.jsonline.com/burned/)).

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Chairman Lamar Alexander  
Ranking Member Patty Murray  
Members of the Committee  
Committee on Health, Education, Labor and Pensions  
428 Senate Dirksen Office Building  
Washington, DC 20510

November 16, 2017

Dear Chairman Alexander, Ranking Member Murray, and Honorable Committee Members,

We are writing to you on behalf of AMCHA Initiative to highly recommend Kenneth L. Marcus to lead the Department of Education's Office for Civil Rights.

AMCHA Initiative is a non-profit organization dedicated to combating anti-Semitism on colleges and universities in the U.S. We monitor more than 400 campuses across the U.S. for anti-Semitic activity, conduct research on anti-Jewish discrimination, and work directly with legislators and university administrators to fight this rising bigotry. Started as a grassroots organization, we represent thousands of students, alumni, parents, grandparents, rabbis, religious school principals and synagogue members who have joined together to speak in one voice to ensure the safety and well-being of Jewish students on college and university campuses. Additional background on our work is available at <http://www.amchainitiative.org>.

We have worked closely with Ken for decades and we cannot think of a more qualified individual to head the Office for Civil Rights. While many are most familiar with the work Ken has done since 2011 as a scholar of anti-Semitism and a legal advocate for Jewish civil rights, he has spent decades using the law to fight discrimination of all types – from discrimination affecting disabled persons to gender-based discrimination to faith-based discrimination and more.

Early in his career, Ken served as lead counsel and prevailed in a landmark First Amendment lawsuit, representing a group of neighbors in Berkeley, California who sued U.S. Department of Housing and Urban Development officials for investigating speech. The decision was hailed as “good news for friends of free speech” and forced HUD to change its policy on fair housing investigations. After the lawsuit, Ken went on to work at HUD where he fought against lending discrimination and predatory lending and for fair housing rights for the disabled. During his first tenure at OCR, Ken was praised by feminist advocates for strengthening Title IX enforcement and hailed for warning school districts to cease racially segregated activities. He also ensured that Jewish, Sikh and

Muslim students were protected from ethnic and ancestral discrimination under Title VI of the Civil Rights Act of 1964. He has taught courses on diversity management, civil rights law, and law for the education administrator, and has organized lecture series on equality and social justice.

As evidenced by Ken's vast work against racial, gender, and religious discrimination and discrimination affecting the disabled community, Ken brings a unique understanding of how civil liberties protections and free speech rights can work together under the law. Unlike others who argue that preventing discrimination and protecting the First Amendment are at odds, Ken understands that these are not competing issues. He believes both are paramount responsibilities of our government and of a public university, and he understands how schools can and must do both. At a time of rising intolerance and increased polarization in our nation, and particularly on our campuses, we cannot think of a person better equipped to safeguard the civil rights of all students. We urge you to confirm him as Assistant Secretary for Civil Rights at the Department of Education.

Sincerely,



Tammi Rossman-Benjamin  
AMCHA Initiative, Director  
[Tammi@amchainitiative.org](mailto:Tammi@amchainitiative.org)  
831-236-5812  
[www.AMCHAinitiative.org](http://www.AMCHAinitiative.org)



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Rabbi Andrew Baker

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December 4, 2017

Senator Lamar Alexander  
Chairman, U.S. Senate Committee on Health, Education, Labor & Pensions  
428 Senate Dirksen Office Building  
Washington, DC 20510

Dear Chairman Alexander,

On behalf of AJC, the global Jewish advocacy organization, I write today to express our support for Kenneth Marcus's nomination for Assistant Secretary for Civil Rights under the Department of Education.

Mr. Marcus has a distinguished record of service as the Staff Director of the U.S. Commission on Civil Rights and in the Department of Education itself. This experience will enable him to provide the necessary leadership to the Department of Education in these critical times.

Thank you for taking note of our position as you and your colleagues begin your deliberations on Mr. Marcus' nomination.

Respectfully,

A handwritten signature in black ink, appearing to read 'Andrew Baker', written in a cursive style.

Rabbi Andrew Baker  
Director, International Jewish Affairs  
American Jewish Committee




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**B ' N A I B ' R I T H I N T E R N A T I O N A L**


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December 1, 2017

The Honorable Lamar Alexander, Chairman  
 The Honorable Patty Murray, Ranking Member  
 Committee on Health, Education, Labor and Pensions  
 United States Senate  
 Washington, D.C. 20510

Dear Senators Alexander and Murray:

On behalf of B'nai B'rith International's more than 100,000 members and supporters, we write to express our strong support for the nomination of Kenneth Marcus to serve as Assistant Secretary of Education for Civil Rights. We feel that Mr. Marcus' experience, knowledge, and principles make him an outstanding candidate to hold a key civil rights position in the federal government.

Mr. Marcus has been a champion in the fight against anti-Semitism on university campuses. An author of a book on the definition of anti-Semitism, Mr. Marcus thoroughly understands this pressing social illness in all its contemporary manifestations. In his previous government service, his use of Title VI of the Civil Rights Act of 1964 played an important role in protecting the civil rights of groups such as Jews, Muslims, and Sikhs, who combine ethnic and religious characteristics.

At a time of rising anti-Semitism and other forms of bigotry, university campuses have become a particular area of concern. According to a recent study, anti-Semitic incidents on college campuses in the United States increased by 45 percent in 2016. This underscores the need for a strong civil rights defender at the Department of Education. We believe Kenneth Marcus is deeply qualified to fulfill this role.

We urge the Senate's prompt confirmation of Mr. Marcus as Assistant Secretary of Education for Civil Rights. Thank you for your attention and consideration.

Respectfully,

Gary P. Saltzman  
 President

Daniel S. Mariaschin  
 Executive Vice President

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**Webber, Mitchell D.**

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**From:** Joann & Roger Clegg <rjcclegg@verizon.net>  
**Sent:** Friday, December 01, 2017 10:17 AM  
**To:** Elizabeth\_Gorman@help.senate.gov; Kristin\_Nelson@help.senate.gov;  
Beth\_Stein@help.senate.gov  
**Subject:** CEO letter re Ken Marcus

Senator Lamar Alexander

Senator Patty Murray

Senate Committee on Health, Education, Labor and Pensions

December 1, 2017

Dear Senators Alexander and Murray,

I am writing on behalf of the Center for Equal Opportunity to express our unqualified support for the nomination of Kenneth L. Marcus to be Assistant Secretary for Civil Rights at the U.S. Department of Education. The Center for Equal Opportunity is a nonprofit, nonpartisan research and educational organization that focuses on issues involving race and ethnicity, including civil-rights enforcement.

It is hard to imagine how anyone could be better qualified than Ken Marcus to be the Assistant Secretary for Civil Rights at the Education Department. Begin with the obvious fact that Mr. Marcus has already held that position in the acting capacity during the George W. Bush administration and did an outstanding job. He has also served elsewhere in the government in civil-rights positions, at the Department of Housing and Urban Development and as staff director of the U.S. Commission on Civil Rights.

He was a lawyer in private practice and is a thoughtful scholar as well, teaching at the City University of New York's Baruch College School of Public Affairs, and authoring two books (one published by Oxford University Press and the other by Cambridge University Press).

And he founded and currently heads the Louis D. Brandeis Center for Center for Human Rights under Law, which is devoted to fighting anti-Semitism and other prejudice on our college campuses.

He is an outstanding choice to enforce the civil rights of all individuals in the nation's educational system.

On a personal note, I have worked with Ken on civil-rights issues continually since 2001. I have never met anyone more serious, reflective, judicious, fair-minded, and even-handed than Ken, in addition to no one with a better grasp of the civil-rights issues that he will face in his new job.

Thank you very much for your consideration of our views.

Sincerely,

Roger Clegg

President and General Counsel

Center for Equal Opportunity



December 4, 2017

The Honorable Lamar Alexander  
Chairman

The Honorable Patty Murray  
Ranking Member

U.S. Senate Committee on Health, Education, Labor and Pensions  
428 Dirksen Senate Office Building  
Washington DC 20510

Dear Chairman Alexander and Ranking Member Murray:

On behalf of the 3.8 million members of Christians United for Israel, we urge you to support President Donald Trump's nomination of Kenneth Marcus to serve as the Department of Education's Assistant Secretary for Civil Rights.

He is eminently qualified for the position, possessing the experience and clear-eyed vision to tackle the important issues this office is tasked with addressing. He is the right man, at the right time, for this job, and we believe the committee and the full Senate should approve his nomination without delay.

People of conscience across the country are deeply concerned with rising tide of anti-Semitism on college campuses. Jewish and pro-Israel students face bullying, harassment and intimidation because of their faith and support for the Jewish state. Mr. Marcus's voice and experience on this issue would be invaluable to the Department of Education as it works to apply the protections of Title IV of the 1964 Civil rights Act protections to Jewish students and their supporters facing discrimination.

We thank you for your attention to this matter and look forward to hearing of your support for Mr. Marcus's confirmation. If you have any questions please do not hesitate to reach out.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Hagee".

Pastor John Hagee  
Founder and Chairman  
Christians United for Israel

A handwritten signature in cursive script, appearing to read "Sandra Parker".

Sandra Parker  
Chairwoman  
Christians United for Israel Action Fund



Chairman Lamar Alexander  
 Ranking Member Patty Murray  
 Members of the Committee  
 Committee on Health, Education, Labor and Pensions  
 428 Senate Dirksen Office Building  
 Washington, DC 20510

Dear Chairman Lamar Alexander and Ranking Member Patty Murray,

I am writing on behalf of the Endowment for Middle East Truth (EMET) regarding Mr. Kenneth L. Marcus' nomination as the Department of Education's Assistant Secretary for Civil Rights. We urge you to confirm Mr. Marcus' nomination.

EMET is a non-partisan policy and advocacy organization based in Washington, DC, that educates policy-makers by providing pertinent information to Members of Congress to make informed decisions that will improve American security and the security of our ally, Israel. I and EMET have been honored work with Mr. Marcus for more than a decade.

Mr. Marcus is well-qualified for this position. Previously, he had served the second Bush administration as its Department of Housing and Urban Development's deputy assistant secretary for fair housing and equal opportunity. Mr. Marcus also served as the staff director of the U.S. Commission on Civil Rights, and was delegated the authority of Assistant Secretary of Education for Civil Rights, where he enthusiastically enforced anti-discrimination measures. According to a piece in *The Atlantic*, the administration "started taking a stronger approach to enforcing civil-rights laws" under Mr. Marcus' leadership. A civil rights lawyer, Mr. Marcus has fought for the rights of the disabled, women, and many minority groups, including Hispanics, African Americans, Sikhs, Arabs, Muslims, and Asians. In 2004, Mr. Marcus, with then-Assistant Attorney General for Civil Rights R. Alexander Acosta, issued guidance warning school districts to stop racially segregated activities. Their letter segregated activities "are inconsistent with federal law and should not be tolerated."

Also in 2004, Mr. Marcus authored a "Dear Colleague Letter" to universities to address discrimination against students "who may be targeted for harassment based on their membership in groups that exhibit both ethnic and religious characteristics, such as Arab Muslims, Jewish Americans and Sikhs." The letter further states "OCR will aggressively prosecute harassment of religious students who are targeted on the basis of race or gender, as well as racial or gender harassment of students who are targeted on the basis of religion."

Mr. Marcus founded the Louis D. Brandeis Center For Human Rights Under Law in 2012 "to advance the civil and human rights of the Jewish people and to promote justice for all." Unfortunately, some extremist, anti-Israel fringe groups have launched a sophisticated smear campaign against Mr. Marcus, due to his commitment to fighting anti-Semitism. These groups include Palestine Legal and Jewish Voices for Peace, which both, arguably, contribute to the rise of anti-Semitism on campuses due to their support of the Boycott, Divestment, and Sanctions Movement. Their insidious allegations against Mr. Marcus are undeniably false.



Mr. Marcus' vast work fighting gender, racial and religious discrimination, and his commitment to both preventing discrimination while upholding the First Amendment, make him an ideal fit to the Department of Education's Assistant Secretary for Civil Rights. I and my staff know that Mr. Marcus will serve our nation with fairness towards all minority groups, and with the upmost respect and honor. We urge you to confirm Mr. Marcus as Assistant Secretary for Civil Rights at the Department of Education.

Sincerely,

A handwritten signature in cursive script, which reads "Sarah N. Stern".

Sarah N. Stern  
Founder and President  
Endowment for Middle East Truth



December 4, 2017

United States Senate Committee Health, Education, Labor & Pensions  
428 Senate Dirksen Office Building, Washington, D.C. 20510  
Re: Endorsement of Kenneth L. Marcus

Dear Chairman Alexander, Ranking Member Murray and Members of the Committee,

We at the Foundation for Defense of Democracies (FDD), a 501c3 non-profit Washington, DC based policy institute, affirm our support for President Trump's nomination of Kenneth L. Marcus as the Department of Education's Assistant Secretary for Civil Rights.

Mr. Marcus is an accomplished attorney whose years of public service demonstrate a history of protecting all students. Having served as the Staff Director at the U.S. Commission on Civil Rights from 2004-2008, Mr. Marcus has demonstrated his ability to fairly enforce regulations related to Title VI and Title IX grievances and to defend the civil rights of all minorities.

Following his government service, Mr. Marcus founded the Louis D. Brandeis Center for Human Rights Under Law to protect the civil rights of all Americans. For instance, in 2012, Mr. Marcus testified in front of the U.S. Commission on Civil Rights on "Combatting Anti-Muslim and Anti-Arab Hate and Bias" in which he urged universities and law enforcement to combat discrimination against Arab Americans, Muslims, Sikhs and Hindus.

In addition, Mr. Marcus has a track record of working with legislators and stakeholders from both sides of the aisle to build consensus. He is acutely mission-driven and committed to working in a non-partisan manner in the support of civil rights for all minorities.

We are confident that Mr. Marcus will uphold the mission of the Office for Civil Rights to "ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights." He is a brilliant lawyer and experienced public servant and first and foremost he's going to uphold the law.

We thank you for scheduling the hearing and we recommend that every senator support Mr. Marcus' confirmation.

Sincerely,

Clifford D. May  
President



October 30, 2017

Dear Chairman Alexander and Ranking Member Murray,

I am writing to express my wholehearted support for the nomination of Kenneth L. Marcus to the position of Assistant U.S. Secretary of Education for Civil Rights. Ken is a highly qualified and capable choice for this important position in the Department of Education, and I strongly endorse his confirmation.

I have known Ken as a marvelous person and friend for more than 20 years, going back to our time of involvement in Jewish leadership community work. Since then, Ken has dedicated his life and career to advancing civil and human rights, and has been particularly effective in combating anti-Semitism on college campuses through his work in founding the Louis D. Brandeis Center for Human Rights Under Law. In a few short years, Ken has built the Center into a premier civil rights agency with impacts in Washington, D.C., around the country, and across the world.

Ken is a brilliant attorney who brings a wealth of experience in the various facets of advancing civil rights and promoting justice for all, having worked in the areas of research, education, advocacy, and litigation around civil and human rights issues. In addition to his obvious qualifications Ken is loyal, ethical, and dedicated to the service of others, as shown in his admirable service in previous senior U.S. government positions.

Ken's experience, expertise, and personal character are second to none and I believe he would be a tremendous asset to the U.S. Administration in the role of Assistant U.S. Secretary of Education for Civil Rights. Thank you for your consideration of this letter and my strong recommendation on behalf of Kenneth L. Marcus.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn Hamer".

Glenn Hamer



3200 N. Central Ave. | Suite 1125  
Phoenix, AZ 85012  
www.azchamber.com  
P: 602.248.9172 | F: 602.265.1262



Chairman Lamar Alexander  
Ranking Member Patty Murray  
Members of the United States Senate Committee on Health, Education, Labor and Pensions  
428 Senate Dirksen Office Building  
Washington, D.C. 20510

November 29, 2017

Dear Chairman Alexander, Ranking Member Murray and Honorable Committee Members of the U.S. Senate HELP Committee:

On behalf of Hillel International, the largest Jewish campus organization in the world, engaging college students at more than 550 universities across the globe, we highly recommend you confirm Kenneth L. Marcus, as Assistant Secretary for Civil Rights at the Department of Education.

Mr. Marcus has been a longtime champion for civil rights and for college students. We have worked personally with him on several campuses across the country in response to specific issues of bigotry and discrimination, and we have found him to be extremely skilled and knowledgeable in Civil Rights laws. Mr. Marcus has been a true leader in fighting discrimination in an analytical and impartial manner. He is an extremely experienced attorney who is highly qualified for the position and we urge to you to confirm him as Assistant Secretary for Civil Rights at the Department of Education. Thank you.

Sincerely,

*Eric Fingerhut*

**Eric D. Fingerhut**  
President & CEO

P: 202-449-6561 | E: [efingerhut@hillel.org](mailto:efingerhut@hillel.org)  
[www.hillel.org](http://www.hillel.org) | [Facebook](#) | [Twitter](#)

*Tracy Turoff*

**Tracy A. Turoff**  
Vice President & General Counsel

P: 202-909-3320 | E: [tturoff@hillel.org](mailto:tturoff@hillel.org)  
[www.hillel.org](http://www.hillel.org) | [Facebook](#) | [Twitter](#)



Chairman Lamar Alexander  
428 Dirksen Senate Office Building  
Washington, DC 20510

Ranking Member Patty Murray  
428 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Alexander and Ranking Member Murray:

The Israeli-American Coalition for Action strongly supports Ken Marcus's nomination for Assistant Secretary for Civil Rights at the Department of Education. We urge a swift approval of his nomination due to his exceptional qualifications as a civil rights advocate, as a public servant, and as a passionate adversary of anti-Semitism.

Mr. Marcus is well-equipped to serve as Assistant Secretary for Civil Rights, as he previously served as Assistant Secretary of Education for the Office for Civil Rights, then spent four years as staff director at the U.S. Commission on Civil Rights. During his time leading the Commission on Civil Rights, Mr. Marcus better enforced civil rights protections by clarifying that his ethnic groups that share a religious faith (such as Arab Muslims, Jewish Americans and Sikhs) are entitled to protections based on ethnicity, a directive that has helped to protect the civil rights of many Israeli-Americans and Jewish Americans across the country.

Mr. Marcus has also proven himself to be a generally skilled public servant. As the General Deputy Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity, he reduced agency's aged-case backlog from 80 percent down to 37.1 percent.

For the past six years, Mr. Marcus has worked to oppose anti-Semitism across the country through his role as President and Director of the Louis D. Brandeis Center for Human Rights Under Law, an organization that works to advance the civil and human rights of the Jewish people and promote justice for all. Mr. Marcus is passionate about combating the resurgence of anti-Semitism in higher education. We strongly support his work to combat the Boycott, Divestment, and Sanctions (BDS) movement, which has brought a newfound resurgence of anti-Semitism to American campuses.

We urge your Committee to swiftly confirm Mr. Marcus and send his nomination to the full Senate.

Sincerely,  
The Board of the Israeli-American Coalition for Action



November 29, 2017

United States Senate Committee Health, Education, Labor & Pensions  
428 Senate Dirksen Office Building, Washington, D.C. 20510  
Re: Endorsement of Kenneth L. Marcus Confirmation

Dear Chairman Alexander, Ranking Member Murray and members of the U.S. Senate HELP Committee:

On behalf of the Louis D. Brandeis Center for Human Rights Under the Law (the "Brandeis Center"), an organization committed to combating anti-Semitism and bigotry on college campuses, we (the Brandeis Center board) urge you to confirm the founder and president of our organization, Kenneth L. Marcus, as Assistant Secretary for Civil Rights at the Department of Education. Though we are saddened by his potential departure, we are also confident that, in his new role, Marcus' unflinching commitment to justice-based policies and unparalleled leadership skills will greatly advance the cause of civil rights.

As a dedicated and highly experienced expert on civil rights, Marcus is eminently qualified to serve as Assistant Secretary for Civil Rights at the Department of Education. Marcus previously served as Staff Director at the U.S. Commission on Civil Rights ("OCR") from 2004 to 2008, and was delegated the authority of Assistant Secretary of Education for Civil Rights from 2003 to 2004. He has, in both roles, done much to advance the cause of civil rights.

*The Atlantic* magazine recently acknowledged that under Marcus' tenure at OCR, "the [George W. Bush] administration started taking a stronger approach to enforcing civil-rights laws" and that he began the "work to reinvigorate the OCR." While at OCR, Marcus authored important guidance, at the request of women's rights groups, reminding universities of their obligation to appoint Title IX coordinators. Under Marcus' leadership, OCR followed that up with action to make sure that universities complied. He led nationwide initiatives to protect racial, ethnic, and language-minority students, including African American, Hispanic, and Asian students and to ensure equal access for disabled college students, including accessible classrooms, dormitories, and parking facilities. Marcus also authored OCR's policy addressing all forms of anti-Semitism as well as other forms of religious discrimination that involve an ethnic or ancestral component.

After leaving the government, Marcus founded the Brandeis Center. In just six years, the Brandeis Center has become a forceful and effective institution for the protection of civil rights, especially on campus. The Brandeis Center has provided legal support for dozens of scholars, administrators, and students, engaged with administrators to remind them of their obligations under Title VI of the Civil Rights Act, and developed numerous educational materials on contemporary anti-Semitic discourse. The Brandeis Center has also founded 18 law school chapters to train the next generation of advocates.

The work of Marcus and the Brandeis Center is not limited to fighting anti-Semitism. We have also challenged anti-Muslim prejudice in higher education and urged federal authorities to track, monitor, and fight discrimination against Sikhs, Hindus, and Arab Americans. Marcus has spoken out against sexual harassment, raising public awareness about this problem and urging serious response from university administrations. And the Brandeis Center has provided a platform for experts to speak out against persecution of other groups, such as the Roma people in Europe.

We believe that the Department of Education's Office for Civil Rights, and the nation as a whole, will benefit greatly from Marcus' uncanny leadership skills and deep commitment to promoting civil rights. We therefore urge every Senator to support Marcus' confirmation.

Very Truly Yours,

The Board of the Brandeis Center

Dr. Richard Cravatts  
Adam S. Feuerstein  
L. Rachel Lerman  
Jeffrey Robbins  
Judd Serotta  
Tevi Troy

**Webber, Mitchell D.**

---

**From:** romirowsky@gmail.com on behalf of Asaf Romirowsky <Aromirowsky@spme.org>  
**Sent:** Monday, December 04, 2017 11:05 AM  
**To:** Beth\_stein@help.senate.gov; Kristen\_Nelson@help.senate.gov;  
Elizabeth\_Gorman@help.senate.gov  
**Subject:** From Scholars for Peace in the Middle East - Letter in Support of Kenneth L. Marcus  
for the next Assistant Secretary of Education for Civil Rights

Scholars For Peace in The Middle East (SPME)  
PO Box 2241  
Bala Cynwyd, PA 19004

Dear Chairman Lamar Alexander and Ranking Member Patty Murray,

We are writing in support of the nomination of Mr. Kenneth Marcus of the Brandeis Center, to be the next Assistant Secretary for Civil Rights at the U.S. Department of Education. We know Mr. Marcus to be an incredibly qualified candidate for this role. As a law professor with a degree from University of California, Berkeley, he served in the second Bush Administration as the Department of Housing and Urban Development's deputy assistant secretary for fair housing and equal opportunity. He was the *de facto* head of the U.S. Department of Education's civil right office and the staff director of the U.S. Commission on Civil Rights.

It is due to his advocacy against anti-Semitism and bigotry that his is now being subjected to a smear campaign. Anti-Israel extremists are worried that if Mr. Marcus gets the nomination Jewish students will receive all the protections that they deserve, and it will be more difficult to spread hate against Jews and Israelis. This is exactly why we believe he should be nominated.

Mr. Marcus has a track record of being articulate, fair-minded. He is not anti-Palestinian; rather an individual dedicated to non-discrimination and equal treatment of all students, including Jewish and Palestinian students and above all, strives for a campus climate that is respectful and free of intimidation.

Given all of the above, we hope that you too will see all his many qualifications and nominate Kenneth Marcus to be the next Assistant Secretary for Civil Rights at the U.S. Department of Education

Sincerely,

Asaf Romirowsky, PhD

--  
 **SPME**  
  **SCHOLARS FOR PEACE IN THE MIDDLE EAST**  
Asaf Romirowsky, PhD  
Executive Director  
(215) 866-8811  
<http://spme.org/>

**Webber, Mitchell D.**

---

**From:** Rabbi Abraham Cooper <acooper@wiesenthal.com>  
**Sent:** Thursday, November 30, 2017 9:57 PM  
**To:** Webber, Mitchell D.  
**Subject:** FW: Ken Marcus nomination

FYI

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**From:** Abraham Cooper <acooper@wiesenthal.com>  
**Date:** Thursday, November 30, 2017 at 6:54 PM  
**To:** "Kristin\_Nelson@help.senate.gov" <Kristin\_Nelson@help.senate.gov>  
**Subject:** FW: Ken Marcus nomination

November 29<sup>th</sup>, 2017

Chairman, Honorable Lamar Alexander  
Ranking Member, Honorable Patty Murray  
Health, Education, Labor & Pension Committee

Dear Senators Alexander and Murray;

I am writing on behalf of the 400,000 constituent American families of the Simon Wiesenthal Center, a leading Jewish Human Rights NGO to express full and unqualified support for Ken Marcus' nomination as Assistant Secretary for Civil Rights, Department of Education.

I have known Mr. Marcus for over a decade and have always found him to be knowledgeable, thoughtful, thorough, *and* fair.

I have no doubt he will apply all those attributes to serve as Assistant Secretary with distinction and help ensure that the Department of Education will be available to all students who seek its help.

Please feel free to contact me directly, if I can be of any assistance.

Sincerely,  
Rabbi Abraham Cooper  
Associate Dean



*National Association of State Directors of Special Education, Inc.*

225 Reinekers Lane, Suite 420, Alexandria, VA 22314  
Tel: 703/519-3800 Fax: 703/519-3808 www.nasdse.org

November 29, 2017

Dear Senator:

I write on behalf of the National Association of State Directors of Special Education (NASDSE), the national nonprofit organization that represents the state directors of special education, the Part B data managers and the 619 Early Childhood Coordinators in the states, the District of Columbia, the federal territories, the Freely Associated States and the Department of Defense Education Agency.

NASDSE unequivocally supports the nomination of Johnny Collett to be the Assistant Secretary for the Office of Special Education and Rehabilitation Services at the U.S. Department of Education.

Mr. Collett has a wealth of experience in working with children, youth and adults with disabilities and their families. He has dedicated his entire professional career to ensuring that all students with disabilities are held to high levels of achievement and that the necessary supports and services are available to meet their needs. He has worked with stakeholders in the disability community at the local, state and national levels and has gained a reputation for valuing their input through an authentic stakeholder process.

He previously served as the Director of Special Education at the Kentucky Department of Education. In that capacity, he also served on the Board of Directors of NASDSE. He has continued his work with all special education stakeholders in his tenure with the National Center for Systemic Improvement where he is based at the Council of Chief State School Officers.

At NASDSE's recently concluded 79<sup>th</sup> Annual Conference, Mr. Collett accepted NASDSE's Martha J. Field's Award of Excellence on behalf of the Council of Chief State School Officers (CCSSO) in recognition of the collaborative work that Mr. Collett has undertaken in his current position at CCSSO.

Mr. Collett is an excellent choice to serve as Assistant Secretary and NASDSE urges you to vote to accept this nomination.

Sincerely,

Theron (Bill) East, Jr., Ed.D.  
Executive Director



December 4, 2017

Chairman Lamar Alexander  
U.S. Senate  
Washington, DC, 20510

Ranking Member Patty Murray  
U.S. Senate  
Washington, DC 20510

Dear Chairman Alexander and Ranking Member Murray:

The National Center for Special Education in Charter Schools (NCSECS) is pleased to endorse nominee Johnny Collett as Assistant Secretary, Office of Special Education and Rehabilitative Services (OSERS) at the U.S. Department of Education.

NCSECS is dedicated to ensuring that students with disabilities have equal access to charter schools and that charter schools are designed and operated to enable all students to succeed. NCSECS is a leader and partner with state charter authorizers, charter networks, and charter schools across the U.S. We advocate for and support the fundamental principle that public schools must be required to serve all students and given important autonomies.

The role of the Assistant Secretary of OSERS is critical to upholding the special education laws that protect students with disabilities, including the estimated 300,000 students with disabilities enrolled in charter schools. The rights of these students under the *Individuals with Disabilities Education Act* (IDEA) is a federal responsibility that must be understood, promoted and enforced the by U.S. Department of Education.

Collett has a demonstrated track record and commitment to students with disabilities at both the state and national level. Once confirmed, we look forward to working with him on the Department's charge to ensure students with disabilities have the same opportunity as any other child to enroll in a charter school and receive the instruction and support needed to achieve their full potential. NCSECS believes Collett will be an asset to OSERS and to students with disabilities across the country.

Sincerely,

Lauren Morando Rhim, Ph.D.  
Executive Director

**NCSECS.ORG**  
National Center for Special Education in Charter Schools



## Statement from Mimi Corcoran on the Nomination of Johnny Collett as Assistant Secretary of the Office of Special Education and Rehabilitative Services

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**For Immediate Release**

November 15, 2017

**Washington, DC** – The National Center for Learning Disabilities (NCLD) is pleased to support the nomination of Johnny Collett as Assistant Secretary of the U.S. Department of Education's (USED) Office of Special Education and Rehabilitative Services (OSERS). NCLD urges the Senate to move forward with the confirmation process and fill this critical role.

12/5/2017 Statement from Mimi Corcoran on the Nomination of Johnny Collett as Assistant Secretary of the Office of Special Education and Rehabilitative ...

Parents must be informed and empowered partners in their child's education, and USED plays a critical role in supporting them. NCLD has worked for years with USED to ensure parents and students receive the help and guidance they need to succeed. We are heartened that throughout his career in education, Collett has worked with students with disabilities and their families, beginning in the classroom as a special education teacher and eventually leading the state of Kentucky as State Special Education Director. NCLD looks forward to working with the USED and Collett to improve student outcomes, maintain high expectations, and provide appropriate supports and resources for students with disabilities. His knowledge of and dedication to the needs of students and families will be a valuable asset to USED.

In light of the issues and concerns facing our community today, all stakeholders' voices and viewpoints must be heard, included, and respected. We will not always agree, but it is our hope that Collett will work closely with families and the disability community to form strong partnerships and ensure all stakeholders are well informed and a meaningful part of the process.

NCLD stands ready to work collaboratively with Collett to make sure the needs of students with disabilities and their families are met, and that all students learn, grow and thrive.

###

**Full statement available [here](#).**

### Recent Posts



**Denver Broncos Player Garrett Bolles Supports the 1 in 5 for My Cause My Cleats**

**When Streamlining Ed Policy, Engage Parents First**



For immediate release

Contact: Annie Baldauf, 703-264-9435, [annieb@cec.sped.org](mailto:annieb@cec.sped.org)

### CEC Applauds White House Nominee for OSERS

Arlington, Va., Nov. 16, 2017 – President Donald J. Trump announced on Wednesday his intention to nominate Johnny Collett as the Assistant Secretary of the Office of Special Education and Rehabilitative Services at the U.S. Department of Education. Collett currently serves as the Director of Special Education Outcomes at the Council of Chief State School Officers (CCSSO), where he works to support states in their efforts to raise expectations and improve outcomes for children and youth with disabilities. Previously, he served as Director of the Division of Learning Services and State Director of Special Education at the Kentucky Department of Education as well as worked as a high school special education teacher.

The Council for Exceptional Children is pleased to support the nomination of Collett. “We urge the U.S. Senate to swiftly confirm this well qualified nominee,” said Deborah Ziegler, CEC director of policy and advocacy. As a special educator, Mr. Collett will be a key member of the Secretary’s cabinet and comes to the table with expertise in special education research, policy and practice at the local, state, and national level. In an April 2017 CCSSO interview, Collett stated, “So, as we think about improving academic achievement and outcomes for students with disabilities we must talk about both high expectations and appropriate supports.”

“I am encouraged by the nomination of Collett as the Assistant Secretary of the Office of Special Education and Rehabilitative Services. Children and youth with disabilities who are served by CEC members deserve to have someone at the helm who has expertise in the field and can ensure the provision of a free appropriate public education and early intervention services. CEC looks forward to a collaborative working relationship with him,” said Mikki Garcia, CEC president.

CEC stands ready to partner with Collett to achieve the successful implementation of the Individuals with Disabilities Education Act and to ensure that all children and youth with disabilities have access to the necessary supports and services to attain their developmental and educational outcomes.

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###

*The Council for Exceptional Children (CEC) is the professional association of educators dedicated to advancing the educational success of children and youth with exceptionalities that accomplishes its mission through advocacy, standards, and professional development. Learn more about CEC at [www.cec.sped.org](http://www.cec.sped.org).*

## Department of Education Post



12/5/2017 ~

CCSSO Director of Special Outcomes Nominated to US Department of Education Post | CCSSO

Washington, D.C. (November 15, 2017) - President Trump on Thursday announce his intent to nominate Johnny Collett as Assistant Secretary of Education for Special Education and Rehabilitative Services at the U.S. Department of Education. Collett currently serves as Director of Special Education Outcomes at the Council of Chief State School Officers (CCSSO).

CCSSO Executive Director Chris Minnich released the following statement about Collett's nomination:

"Congratulations to Johnny Collett. Johnny recognizes we must set high expectations and provide the necessary supports for each and every child to create a more equitable education system. He has experience at the national, state and local level that will be a strong asset to the U.S. Department of Education."

###

*The Council of Chief State School Officers (CCSSO) is a nonpartisan, nationwide, nonprofit organization of public officials who head departments of elementary and secondary education in the states, the District of Columbia, the Department of Defense Education Activity, and five U.S. extra-state jurisdictions. CCSSO provides leadership, advocacy, and technical assistance on major educational issues. The Council seeks member consensus on major educational issues and expresses their views to civic and professional organizations, federal agencies, Congress, and the public.*

**Published:**

NOVEMBER 15, 2017

**Author:**

CCSSO

**SHARE:**


**AMERICAN SOCIETY OF SAFETY ENGINEERS**

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United States Senate

 The Hon. Johnny Isakson  
Chairman  
Subcommittee on Employment and  
Workplace Safety  
United States Senate

 The Hon. Patty Murray  
Ranking Member  
Committee on Health, Education, Labor  
and Pensions  
United States Senate

 The Hon. Al Franken  
Ranking Member  
Subcommittee on Employment and  
Workplace Safety  
United States Senate

Re: Nomination of Scott Mugno for Assistant Secretary of Labor, Occupational Safety &amp; Health Administration

Dear Chairmen Alexander and Isakson and Ranking Members Murray and Franken:

The American Society of Safety Engineers (ASSE) is pleased to offer its support for the nomination of Scott Mugno for Assistant Secretary of Labor for the Occupational Safety &amp; Health Administration (OSHA).

ASSE represents more than 37,000 occupational safety and health (OSH) professionals advancing workplace safety and health in every industry, in every state, and around the globe. Our members are thought leaders who consistently set the OSH community's standards for excellence and ethics.

We applaud the administration's choice to nominate an OSH professional to lead OSHA. Mr. Mugno's experience leading 200 OSH professionals at FedEx will have given him a clear view of the day-to-day realities and challenges of keeping workers safe. He will have practical experience developing usable systems and solutions used to ensure safe working conditions for a team of 95,000 employees at FedEx.

If confirmed, Mr. Mugno's transportation expertise can be applied to addressing motor vehicle incident fatalities, the leading cause of workplace death. His interest in finding data-driven solutions through research and collaboration could address critical gaps in OSH knowledge. We believe that through his role at OSHA he can assist employers to reach safety goals that exceed basic compliance.

We offer our assistance to you and your colleagues as you consider Mr. Mugno's nomination. If confirmed, ASSE pledges to work with him and his staff in our shared mission of ensuring safe and healthy working conditions for our nation's workforce.

Sincerely,

James D. Smith, M.S., CSP

ART DANIEL, President  
EDDIE STEWART, Senior Vice President  
DIRK ELSPERMAN, Vice President  
MICHAEL MORRAND, Treasurer  
STEPHEN E. SANDHERR, Chief Executive Officer  
DAVID LUKENS, Chief Operating Officer



December 4, 2017

The Honorable Lamar Alexander  
United States Senate  
Washington, DC

Dear Chairman Alexander:

The Associated General Contractors of America (AGC) strongly supports the nomination of Scott Mugno to serve as the next Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA). AGC is a national association representing more than 26,000 construction firms with chapters and members in every state. AGC chapters and members place safety as a priority in the construction industry and understand the moral obligation of protecting our workforce.

During his time at FedEx Ground, Mr. Mugno served as managing director of corporate safety, health and fire prevention from 2000 – 2011 until his promotion to vice president of safety, sustainability and vehicle maintenance. Over this period, he has demonstrated that he possesses the leadership and collaborative qualities needed to lead OSHA. He recognizes that by working together, the regulated community and the agency can achieve results in further advancing safety in the workplace.

AGC looks forward to working with Mr. Mugno on the important issue of safety in the construction industry and continuing our positive relationship with OSHA. Mr. Mugno is a good choice to fulfill OSHA's leadership role in improving safety in the construction industry and we urge the Senate to quickly confirm his nomination.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey D. Shoaf".

Jeffrey D. Shoaf  
Senior Executive Director, Government Affairs



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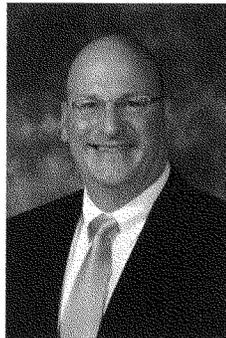
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ATRI News and Media » ATRI Press Releases » ATRI RAC Chair Nominated to Lead OSHA

### ATRI RAC Chair Nominated to Lead OSHA

Scott



Mugno, ATRI's Research Advisory Committee Chairman, has been nominated to be the next Assistant Secretary of Labor, leading the Occupational Safety and Health Administration. Scott currently serves as vice president of safety, sustainability and vehicle maintenance

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12/5/2017

ATRI RAC Chair Nominated to Lead OSHA – American Transportation Research Institute

- Safety
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at FedEx Ground. Mugno has worked for FedEx in a variety of safety-related roles since 1994 and has twice received FedEx's highest honor, the FedEx Five Star Award, for his safety leadership at FedEx Express.

Scott has been actively involved with ATRI for more than a decade.

"Scott has always shown a commitment not only to safety, but to using good data and input to determine how best to improve safety," said **ATRI President Rebecca Brewster**. "He has repeatedly demonstrated this commitment through his involvement with ATRI and it is a trait that I know will make him a strong and fair regulator."

ATRI congratulates Scott Mugno on his nomination to lead OSHA.

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## ATA Congratulates Scott Mugno on OSHA Nomination



Longtime Champion of Trucking Safety to Lead Workplace Safety Agency

NEWS PROVIDED BY  
**American Trucking Associations** →  
 Oct 27, 2017, 20:30 ET

ARLINGTON, Va., Oct. 27, 2017 /PRNewswire-USNewswire/ -- Today, the American Trucking Associations congratulated Scott Mugno, vice president of safety, sustainability and vehicle maintenance at FedEx Ground, on his nomination to be the next Assistant Secretary of Labor for the Occupational Safety and Health Administration.

"Scott is a very familiar face to ATA, having been a longtime and active member in our organization," said **ATA President and CEO Chris Spear**. "Throughout that whole time, he has been a strong and committed voice for safety and responsibility. He is an outstanding choice to lead OSHA and I look forward to working with him after his swift confirmation."

Mugno has worked for FedEx in a variety of safety-related roles since 1994, most recently as vice president of safety, sustainability and vehicle maintenance at FedEx Ground. In that time, he has served on or led a number of key ATA policy committees including the Safety Policy Committee, Labor and Regulatory Affairs Policy Committee, the Hazardous Materials Committee, the Hours-of-Service Subcommittee and the Ergonomics Subcommittee.

In addition, Mugno is also currently the chairman of the American Transportation Research Institute's Research Advisory Committee.

"Scott has always shown a commitment not only to safety, but to using good data and input to determine how best to improve safety," said **ATRI President Rebecca Brewster**. "He has repeatedly demonstrated this commitment through his involvement with ATRI and it is a trait that I know will make him a strong and fair regulator."

*American Trucking Associations is the largest national trade association for the trucking industry. Through a federation of 50 affiliated state trucking associations and industry-related conferences and councils, ATA is the voice of the industry America depends on most to move our nation's freight. Follow ATA on Twitter or on Facebook. Trucking Moves America Forward*

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## The OSHA Defense Report

### OSHA Updates from Conn Maciel Carey's OSHA Practice Group

## Trump Announces Nomination of Scott Mugno to Lead OSHA as Assistant Secretary of Labor

📅 [OCTOBER 30, 2017](#) [OCTOBER 30, 2017](#) 👤 [ERIC J. CONN](#) 🗨️ [LEAVE A COMMENT](#)  
By [Eric J. Conn \(http://www.connmaciel.com/conn\)](http://www.connmaciel.com/conn)

After months of rumors and speculation, this morning, October 30, 2017, [the White House finally announced its choice for the role of Assistant Secretary of Labor for OSHA](https://www.whitehouse.gov/the-press-office/2017/10/27/president-donald-j-trump-announces-intent-nominate-personnel-key) (<https://www.whitehouse.gov/the-press-office/2017/10/27/president-donald-j-trump-announces-intent-nominate-personnel-key>). I am personally very pleased that nomination was [Scott A. Mugno](https://www.linkedin.com/in/scott-a-mugno-9b84668/) (<https://www.linkedin.com/in/scott-a-mugno-9b84668/>).

Scott presently serves as the Vice President of Safety, Vehicle Maintenance, and Sustainability for FedEx Ground. In that position, he has been in charge of the safety and health mission for an organization with nearly 90,000 workers, across more than 588 workplaces, and a fleet of more than 58,000 trailers. He has an impeccable reputation in the safety space as a great leader, a tremendous motivator for safety, a faithful believer in the safety mission, and a true safety professional. For the past six years, Mr. Mugno has successfully curated FedEx Ground's core principle of "Safety Above All," which means that:

*"no package [FedEx] could ever carry is worth jeopardizing the safety of one employee."*

The White House touted <https://www.whitehouse.gov/the-press-office/2017/10/27/president-donald-j-trump-announces-intent-nominate-personnel-key> Scott's qualifications for the position of OSHA's chief administrator in a [press release announcing his nomination](https://www.whitehouse.gov/the-press-office/2017/10/27/president-donald-j-trump-announces-intent-nominate-personnel-key) (<https://www.whitehouse.gov/the-press-office/2017/10/27/president-donald-j-trump-announces-intent-nominate-personnel-key>):

*"His responsibilities in both [of his Safety leadership positions at FedEx] included developing, promoting and facilitating the safety and health program and culture. Mr. Mugno was twice awarded FedEx's highest honor, the FedEx Five Star Award, for his safety leadership...."*

Scott has been a friend and professional associate for many years, and I believe his diverse background puts him in a unique position to be a dynamic and successful leader at OSHA. In his current job, Scott is a Corporate Safety Director. Previous to his FedEx Ground position, Scott was the Corporate Safety

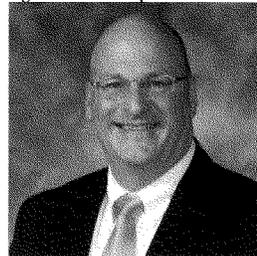
Director at FedEx Express in Memphis. Prior to that, he had been a practicing regulatory attorney for both private employers and law firms. Before that, he spent six years serving our nation as an attorney in the Army JAG corps. The combination of all of these past experiences puts Scott in a unique position to successfully execute OSHA’s safety mission.

OSHA’s chief administrator has typically come from the ranks of other government roles, academia, or private law firms. In OSHA’s history, rarely has the agency been led by someone who has served as Corporate Safety Director. Moving into the regulator’s seat with a real understanding of the practical side and challenges of managing a safety program, managing employees’ participation in safety, and managing the business side of safety, can only improve OSHA’s relationship with the regulated community and its ability to effectively carry out its safety mission. Combine all of these experiences, and you have a truly unique outlook on and appreciation for safety from several valuable perspective.

As a former practicing attorney, both in-house for employers with challenging safety environments and with outside law firms, Scott understands the regulatory environment he is walking into. He understands the rulemaking process and challenges that OSHA faces, the interaction between Congress, OSHA and the White House. He understands the nuances of the OSHA regulatory framework, and the challenges and opportunities employers face in operating a business within that framework. That will undoubtedly help him as an OSHA administrator focus on solutions and agenda items that fit within the law, rather than chasing initiatives, advancing interpretations, and pushing enforcement policies (<https://www.linkedin.com/in/scott-a-mugno-9b84668/>) that are destined to be struck down by the OSH Review Commission or federal courts.

I expect Scott will find ways to utilize all the tools in OSHA’s tool belt, not just the enforcement stick, to drive the agency’s safety mission. To be clear, I can hardly envision Scott as an industry stooge. He will not go out of his way to make life easier for employers at the expense of worker safety. I expect that he will utilize effective compliance assistance, promote worthwhile cooperative programs, and still advance an enforcement agenda, but one that is fair and smart.

Finally, as a former Army JAG lawyer, Scott understands the great value in public service. Without a doubt, that sense of duty and commitment to serving the nation is what motivated him to accept this nomination as Assistant Secretary of Labor for OSHA. He has conveyed to me the awesome responsibility he feels as the Safety Director responsible for thousands of workers at FedEx, and I am confident he will feel that same responsibility for all of America’s workers, and that America’s workforce will be extremely well served, should Scott Mugno be fortunate enough to be confirmed in this role.



12/5/2017

Trump Announces Nomination of Scott Mugno to Lead OSHA as Assistant Secretary of Labor – The OSHA Defense Report

▣ [OSHA ENFORCEMENT](#), [OSHA RULEMAKING](#), [UNCATEGORIZED](#)   ▣ [APPOINTMENT](#),  
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[SAFETY FOR FEDEX GROUND](#), [WHITE HOUSE](#)

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12/5/2017 NATE Congratulates Scott Mugno on Nomination to Serve as Top OSHA Administrator - The National Association of Tower Erectors

#### NATE Congratulates Scott Mugno on Nomination to Serve as Top OSHA Administrator

Posted 10.30.17

Categories: [NATE News](#)

For Immediate Release:  
October 30, 2017

#### NATE Congratulates Scott Mugno on Nomination to Serve as Top OSHA Administrator

(Washington, D.C.) - The National Association of Tower Erectors (NATE) today congratulated Scott Mugno on his nomination by President Trump to serve as Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), the agency's top administrative post.

"NATE congratulates Scott Mugno and encourages the U.S. Senate to quickly confirm his nomination to serve as the Assistant Secretary of Labor for OSHA," stated Executive Director Todd Schlekeway. "Mr. Mugno has a strong reputation as a leader in safety and health and possesses vast private sector and military experience that will serve him well in this leadership role," added Schlekeway.

Scott Mugno is currently the Vice President for Safety, Sustainability and Vehicle Maintenance at FedEx Ground in Pittsburgh, Pennsylvania. He was previously the Managing Director for FedEx Express Corporate Safety, Health and Fire Protection in Memphis, Tennessee. His responsibilities in both those positions included developing, promoting and facilitating the safety and health program and culture. Mr. Mugno was twice awarded FedEx's highest honor, the FedEx Five Star Award, for his safety leadership at FedEx Express. Prior to FedEx, Mr. Mugno was a Division Counsel at Westinghouse Electric Corporation's Waste Isolation Division and Deputy Staff Judge Advocate for the Eastern Region U.S. Army Military Traffic Management Command. He also held other legal positions in the U.S. Army JAG Corps at the 24th Infantry Division at Fort Stewart, Georgia and in small private-practice law firms before joining the U.S. Army JAG Corps. Mr. Mugno is a graduate of Washburn University School of Law, Topeka, Kansas and St. John's University, Jamaica, New York.

For more information on Scott Mugno's nomination, visit [HERE](#).

###

#### About National Association of Tower Erectors

*National Association of Tower Erectors (NATE) is a non-profit trade association in the wireless infrastructure industry providing a unified voice for tower erection, service and maintenance companies. Today the Association boasts over 730 member companies located throughout the United States, Australia, Bahamas, Canada, Jamaica, Puerto Rico and Saudi Arabia. For additional information on NATE, please visit [www.natehome.com](http://www.natehome.com).*

**COMMENTS:** [Leave a Comment](#)

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12/5/2017

U.S. Chamber Statement on the Nomination of Scott Mugno | U.S. Chamber of Commerce



**U.S. Chamber of Commerce**  
Standing Up for American Enterprise

<https://www.uschamber.com/press-release/us-chamber-statement-the-nomination-scott-mugno>

## **U.S. Chamber Statement on the Nomination of Scott Mugno**

Monday, October 30, 2017 - 11:00am

WASHINGTON, D.C. - U.S. Chamber Senior Vice President for Labor, Immigration, & Employee Benefits Randy Johnson issued the following statement about Scott Mugno being nominated to be the Assistant Secretary of Labor for OSHA:

"Scott is an outstanding nominee for this position. We have worked with Scott for more than 20 years on workplace safety issues and throughout that time his only concern has always been to find the solution that advances the cause of improving workplace safety. Scott's extensive history of working with a wide variety of stakeholders including OSHA, organized labor, and academic researchers gives him a unique level of credibility for leading this important agency. We look forward to the Senate moving quickly to confirm him."

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AMERICAN STATISTICAL ASSOCIATION  
Promoting the Practice and Profession of Statistics\*

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November 30, 2017

The Honorable Lamar Alexander  
Chair, Committee on Health, Education,  
Labor and Pensions  
United States Senate  
Washington, DC 20510

The Honorable Patty Murray  
Ranking Member, Committee on Health,  
Education, Labor and Pensions  
United States Senate  
Washington, DC 20510

Dear Senators Alexander and Murray,

As president of the American Statistical Association (ASA), I am pleased to offer the ASA's support of the nomination of Dr. William Beach for Commissioner of the Bureau of Labor Statistics (BLS).

In May of this year, the ASA joined with 19 other organizations on a letter to President Trump urging swift appointment of a BLS commissioner with credentials that include strong management experience, economic and statistical skills, extensive engagement with the federal statistical agencies, and a high degree of familiarity with BLS. This requires an understanding of its products and broader relevance and visibility in the statistical community, including a thorough understanding of the National Academies' *Principles and Practices for a Federal Statistical Agency*. It also requires an ability to interact effectively with both Congress and senior Department of Labor staff. We reiterated these requirements in an August letter with many other organizations to Secretary Acosta.

We're pleased to see that Dr. Beach meets these criteria and we fully support his nomination to head this very important agency.

Allow me to emphasize the vital role of the BLS, the country's second largest federal statistical agency and a major producer of the nation's primary economic indicators. Indeed, countless businesses, communities, students, and government policy makers rely on the accuracy, objectivity, and timeliness of statistical information from the BLS. Its critically important products include:

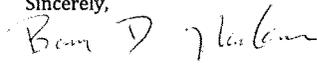
- Jobs outlook, upon which employers, job seekers, and students base their training, participation, and other labor market decisions;
- Consumer Price Index, which tracks inflation and informs monetary policy;

- Employment and unemployment rates at the national, state and local levels, which serve as the most timely and accurate indicators of economic activity;
- Measures of productivity that gauge our nation's economic performance; and
- Monthly data on changes in the prices of imported and exported goods traded between the U.S. and the rest of the world, which help track trends in international competitiveness.

Because it is imperative that BLS has the resources to do its job effectively and efficiently, allow me to also take the opportunity to note it is imperative that BLS has the resources to do its job effectively and efficiently. We are very concerned the BLS has been flat funded since fiscal year 2010, resulting in a 14% cut to its purchasing power due to inflation. We ask that you work to ensure that BLS funding returns to levels sufficient to cover its varied and vital statistical programs.

Thank you for your consideration.

Sincerely,



Barry D. Nussbaum  
President, American Statistical Association

Cc: Members of the Senate Committee on Health, Education, Labor and Pensions



Council of Professional Associations on Federal Statistics  
 20 F Street, NW, Suite 700, Washington, DC 20001  
 Office: 202.507.6254  
[www.copafs.org](http://www.copafs.org)

*ADVANCING EXCELLENCE IN FEDERAL STATISTICS*

December 1, 2017

The Honorable Lamar Alexander Chair,  
 Committee on Health, Education, Labor,  
 and Pensions  
 United States Senate  
 Washington, DC 20510

The Honorable Patty Murray Ranking Member,  
 Committee on Health, Education, Labor,  
 and Pensions  
 United States Senate  
 Washington, DC 20510

Dear Chair Alexander and Ranking Member Murray:

As the Chair and co-chair of the Friends of the Bureau of Labor Statistics we write to enthusiastically support the nomination of William Beach as Commissioner of the of the U.S. Bureau of Labor Statistics and to urge his swift confirmation.

Dr. Beach is an excellent nominee to lead the Bureau of Labor Statistics. He holds an outstanding background and qualifications for this critical position. He currently serves as the Vice President of Research at the Mercatus Center at George Mason University. Dr. Beach previously served as the Chief Economist for the Senate Budget Committee Republican Staff. Prior to serving in that position, he was the Lazof Fellow in Economics at the Heritage Foundation and Director of the Foundations Center for Data Analysis. As Director, Dr. Beach directed research in areas with great relevance to the Bureau of Labor Statistics, including: Social Security; education; trade; and the effects of tax changes on individuals, families, business sectors, and the national economy. Dr. Beach also has corporate experience, having served as the Senior Economist at Sprint United, Inc.

As you know, accurate, timely, and readily available statistics are an essential public good in a democratic nation and free enterprise economy. Such statistics help government and private entities make better decisions, producing a more vibrant and efficient economy. By the same token, lack of such statistics or poor quality statistics can lead to poor choices that waste public and private resources and make people's lives worse. For the United States, the Bureau of Labor Statistics produces vital information about jobs and unemployment, wages, working conditions and prices. A part of the Department of Labor, the Bureau of Labor Statistics is the second largest and the oldest statistical agency within the Federal government. For more than 125 years, the Bureau of Labor Statistics has collected, analyzed, disseminated and improved essential economic information, serving as a key pillar of the knowledge infrastructure of the nation.

The Bureau of Labor Statistics is at a critical juncture, facing constrained funding at a time of growing national need and uses for gold-standard statistics and a sharp imperative for modernization. Strong leadership from Dr. Beach will help the Bureau of Labor Statistics manage these challenges. With a return to full funding and additional funds for initiatives, the BLS could restore the temporary cuts it has made, reduce risk of operational failure and accomplish many important improvements to its statistical programs. Possible improvements include

- Measuring the gig economy on an ongoing basis.
- Supporting the Workforce Innovation and Opportunity Act by improving timelines and regional and job detail in existing programs.

- Developing an Input Price Index by industry to provide competitiveness and outsourcing measures and improve measures of industry productivity.
- Modernizing the Consumer Expenditure Survey to reduce response burden and improve quality by taking advantage of new technologies.
- Expanding quality-adjustment efforts and detail for services and tech industry prices to keep up with growth in these parts of economic activity.
- Measuring employer-provided training for the first time since 1995 in order to track this otherwise invisible part of worker training in the US.

In summary, William Beach has a wealth of academic, legislative and corporate experience and is an outstanding nominee for Commissioner of the U.S. Bureau of Labor Statistics. We strongly recommend that the Senate confirm Dr. Beach and urge it do so quickly, so he can assume leadership of this essential agency in a timely manner.

Erica Groshen  
Chair, Friends of the Bureau of Labor Statistics

John Thompson  
Co-Chair, Friends of the Bureau of Labor Statistics  
Executive Director, Council of Professional  
Associations on Federal Statistics

APB Associates  
American Statistical Association  
Association of Population Centers  
Association of Public Data Users  
CHRR at The Ohio State University  
California Center for Population Research at UCLA  
Council for Community and Economic Research  
CUNY Institute for Demographic Research  
Economic History Association  
Haver Analytics  
Institute for Population Research, The Ohio State University  
National Association for Business Economics  
National Association of Home Builders  
Population Association of America  
Puerto Rico Institute of Statistics  
JD Foster, Senior Vice President, Economic Policy Division, and Chief Economist, US Chamber of Commerce

Susan Athey  
Phillip L. Swagel  
Michael R. Strain  
Brady West



December 3, 2017

Dear Chairman Alexander of the Senate HELP Committee:

This letter is to serve as my recommendation for the nomination of Dr. William Beach as the Commissioner of Labor Statistics.

Dr. Beach has spent the majority of his life in public service. I have known Dr. Beach for 11 years. I first met him working at the Heritage Foundation. The department I served in coincided with his and I came to quickly learn his superb ability and skillset as a data scientist. He was instrumental in developing an econometrics model that was critical in analyzing various policy changes that would affect local state and national health. His research was always detailed, concise, and easily interpreted by those who were not experts in the analytics field.

His ability took him to the halls of Congress where he served alongside congressional members deciphering budgetary issues. As the Chief Economist for the Senate Budget Committee, he was instrumental in providing critical information to members of the legislature that had sweeping influence on legislation.

In his current role as Vice President for Policy Research at the Mercatus Institute, Dr. Beach is responsible for setting the strategic vision of his research staff. He oversees his team through encouragement, mentorship, and development. While he sets the overall vision for his staff, he allows individuals to take ownership of the critical steps necessary to achieve the vision.

On a more personal note, Dr. Beach has changed my life. If it were not for his mentorship, guidance, and intention of seeing the best achieved in myself, I would not be in my current role as Assistant Professor and Director at the Baker School of Business at the Citadel. He cares for people from all walks of life, taking a keen interest in their professional development. He seeks to better everyone's fortunes through his work and insight, not a select few. Finally, he is a master of assembling functioning teams and leading them to success. I've watched how he has formed and led several teams at various organizations and all teams achieved their strategic goals. Lastly, I know I am not the only one he has impacted. There is a long list of individuals like myself he has invested in that have gone on to better roles that are positively impacting society.

In conclusion, I give the highest recommendation that Dr. Beach's nomination is approved. If you need any further information, please feel free to contact me or call on my cell phone: 714-642-3824.

With gratitude

A handwritten signature in black ink, appearing to read "James Bezjian".

James Bezjian, Ph.D.  
Assistant Professor of Entrepreneurship  
Director-Business Innovation Lab

THE CITADEL  
Baker School of Business, 171 Moultrie Street, Charleston SC 29409-6190  
(843) 953-5056 Fax (843) 953-6764 www.citadel.edu/bsb

## QUESTIONS AND ANSWERS

RESPONSE BY WILLIAM BEACH TO QUESTIONS OF SENATOR ALEXANDER, SENATOR SCOTT, SENATOR YOUNG, SENATOR MURKOWSKI, SENATOR MURRAY, SENATOR WHITEHOUSE, SENATOR WARREN, AND SENATOR KAINE

SENATOR ALEXANDER

*Question 1.* The Household Survey, also known as the Current Population Survey, is an important tool to measure the workforce. What ideas do you have to better educate the public about that survey?

Answer. If confirmed, I'll work with the staff of the BLS to improve public communication of entire array of BLS products, but especially of the fruitful Current Population Survey. Few surveys in the history of government has been as productive of research and better understanding of our economic and social world as the CPS. Clearly, we could do more marketing of CPS data on social media, through the traditional national media, and through professional associations and societies. It also is worth thinking about initiating more use in the nation's high schools and colleges of this wonderful monthly survey.

SENATOR SCOTT

Dr. Beach, as you know the North American Industry Classification System (NAICS) is utilized by the Bureau of Labor Statistics to organize workforce data. NAICS was created in 1997, however most industries in 2017 do not look or operate as they did 20 years ago, due in large part to the growth in technology roles alone. In 1997: Apple was only in the computer business, Amazon was largely just into books, and uber was not what one used to get from point A to point B.

As a result of categorizing workers by the physical building they work in and not the company/industry they work for, the data is distorted. Economic and public reporting of this data continues, presenting inaccurate accounts of industry sizes and shifts, as there is no alternative data.

Take for example, a retail company, where workers would fall into multiple NAICS industries. Despite being employed by a retail company, an order filler could fall into the "Distribution Center" industry if they work in a retailer's distribution center, while an accountant would fall into the "Management of Companies" industry because they work in the retailer's office building. Because they do not work in a building whose main function is a store, these employees are not considered retail industry employees in the data.

Other industries are facing the same situation as well, as many employees work in industries and occupations that are not directly reflected by the building they work in.

*Question 1.* Will you consider working with industry groups to develop alternative datasets and outputs that represent modern industries?

*Question 2.* Will you commit to developing datasets to measure and track modern industries as a whole?

Answer. A core element of BLS's mission is to present the current economy to citizens and policymakers. They do this through surveys and extensive research on how the economy is changing, particularly how the workplace and workforce are evolving. This element of the mission dates back to BLS's founding when it principally studied the development of the urban workforce at the end of the 19th Century.

If confirmed, I will work closely with BLS staff, academics, and economists to move BLS into a better understanding of the current structure of economic activity. We lack a full picture of how Americans earn their living, of where and under what conditions they work, and of what forms of work and work environments are vanishing. We lack, as well, a good understanding of the effects of globalization on work and earnings.

I look forward to working with you to advance a better appreciation of the current economy.

SENATOR YOUNG

The workforce of the 21st Century is experiencing new challenges and opportunities not envisioned in past years. Workers are now seeking "alternative work arrangements" that provide more flexibility than the traditional 9am–5pm job. These alternative work arrangements can offer greater independence, flexibility in choosing hours, or a chance for retired individuals to participate in the workforce. According to a report from McKinsey Global Institute, approximately 20–30 percent of all workers in Europe and the United States engage in some form of independent work.

If confirmed as the Commissioner of Labor Statistics, you will have jurisdiction over a wide range of data collection efforts managed by the Bureau of Labor Statistics.

*Question 1.* What role will the Bureau of Labor Statistics play in understanding the 21st Century economy?

a. Under your direction, how will data collection efforts help to inform policy-makers looking to address issues surrounding this “independent workforce”?

Answer. If confirmed, I will immediately begin working with my BLS colleagues in a vigorous effort to gain a better understanding of the current economy. That effort will extend, as well, to a partnership with Census and the Bureau of Economic Analysis (Commerce Department) to capture the shape and contents of the economy. We lack a full picture of how Americans earn their living, of where and under what conditions they work, and of what forms of work and work environments are vanishing. We lack, as well, a good understanding of the effects of globalization on work and earnings. I look forward to working with you as we deepen our understanding of contemporary economic life.

The Contingent Worker and Alternative Work Arrangement Supplement (CWS) to the Current Population Survey will be crucial to understanding the size and scope of participants in this independent workforce. This data was last collected in 2005, though a new round was recently launched earlier this year. As our country experiences a multitude of changes and advancements in technology, regular data collection efforts on the independent workforce and the gig economy will guide policy-makers to make sure that we are not just responding, but anticipating these new challenges.

*Question 2.* In your opinion, what benefit does this Contingent Worker and Alternative Work Arrangement Supplement provide?

*Question 2a.* Under your direction, how will you view data collection efforts like this, and do you see value in regular data collection efforts?

Answer. There likely are a number of policy insights to be derived from a better understanding of the contingent workforce. That said, my main interest, if confirmed, will be to lead BLS toward a better description of the current workforce, which vitally depends on a deeper appreciation of the contingent worker’s workplace and work life. We will no doubt sharpen our knowledge of the economic product they produce, which could lead to a sharper, more accurate GDP estimate.

I see this effort as indicative of similar new initiatives that we will need on the workforce and on prices indexes if we are to properly document the state of the current economy. The economic world constantly changes; and, as it does, so must the economic data collection efforts of the BLS.

#### SENATOR MURKOWSKI

*Question 1.* In 2011, the U.S. Department of Labor transferred the estimation work done for the Current Employment Statistics program from the states to the Bureau of Labor Statistics. This change was proposed in order to save \$5 million. At the time, state workforce agencies strongly opposed this proposal due to concerns that data quality would erode. The National Association of State Workforce Agencies noted, among other concerns, that “Estimated monthly employment changes have been much more volatile with the reduction in state analyst input and authority—centrally generated estimates did not reflect economic reality—states’ production of state and metropolitan estimates would cease” and that combined with other actions by BLS to “exert greater control of state and metropolitan area estimates, BLS severely limited state analysts’ ability to make interventions in the statewide estimates—based on state analysts’ local knowledge.” I am informed by the Alaska Department of Labor and Workforce Development that the predicted deterioration in the quality of the Current Employment Statistics estimates has occurred for Alaska and a number of other small states. Further, the estimates produced for Alaska by the Bureau “are bad enough that we stopped referring to them at all in our monthly unemployment rate/jobs press release”. As an example, the U.S. Department of Labor’s Current Employment Statistics numbers for this past summer were “way off” and Alaska’s Department of Labor would “have lost credibility trying to explain” the estimates. Will you commit to reviewing this situation with Alaska’s Department of Labor and Workforce Development and working to fix these problems?

Answer. Reasonably accurate and complete estimates of the workforce are crucial to well-functioning government programs and to many private initiatives. If confirmed, I will work with staff of the BLS to assess the success of the CES, with a particular emphasis on states with smaller populations.

SENATOR MURRAY

*Question 1.* If confirmed, what are your priorities for the BLS?

Answer. I am, first and foremost, focused on advancing the integrity and independence of BLS. On a more substantive level, I want to support efforts to improve the quality, accuracy, and timeliness of the data BLS publishes. In addition, I want to encourage a better understanding of today's workplace and workforce.

*Question 2.* How have you used BLS data in your research? Please provide examples.

Answer. I have used BLS data over my entire career, from building revenue estimation models (where employment data played a crucial role) for that State of Missouri at the beginning of my professional life to writing policy papers requiring BLS employment or price data while I worked at Heritage and the Senate.

*Question 3.* Do you feel it is important for BLS to better publicize the importance of its data?

Answer. The products of BLS add significantly to the data infrastructure of the US economy. All of the stakeholders in BLS programs should better know this contribution.

*Question 4.* Do you intend to eliminate or shrink any BLS programs?

Answer. It is not my intention, however, if confirmed, I will work with the funds that are appropriated by Congress to fulfill the mission of the BLS. I cannot commit to insulate any one program from a reduction should the budget passed by Congress include reduced funding.

*Question 5.* Do you believe the BLS is adequately funded? If not, would you advocate for a budget increase? How would you engage in such advocacy?

Answer. If confirmed, I will work with the funds that are appropriated by Congress to fulfill the mission of the BLS.

*Question 6.* Do businesses, the government, and private citizens need BLS data? Why is it that the private sector is unable to meet this need?

Answer. BLS data are widely viewed as non-partisan, expertly created, and reliable from time period to time period. Businesses extensively use the products of BLS with confidence that they are the best estimates possible. For example, CPI estimates often are built into contracts that require action when inflation reaches specified levels.

*Question 7.* Do you support combining the statistical agencies into a StatsUSA in order to share services and data more easily?

Answer. It is my understanding that any change to the current structure of statistical agencies would likely require a change in the law. Should I be confirmed, I would fully comply with any change in statute.

*Question 8.* Do you support the recommendations of the Ryan-Murray Commission on Evidence-Based Policymaking? What is your view of the "Foundations for Evidence-Based Policymaking Act of 2017" passed by the House last month?

Answer. I have not studied in detail the recommendations of the Commission nor am I familiar with the Foundations for Evidence-Based Policymaking Act of 2017. I will state, however, my support of providing the best, non-privileged data in support of the work of policymakers charged with addressing pressing public problems.

*Question 9.* What are your views on balancing the goal of expanding access to data with concerns over maintaining the privacy of such data? Do you believe it is possible to improve both access to and privacy of confidential data? Please explain.

Answer. Government agencies must protect personal and business data, which generally means keeping those data from public distribution. However, the Internal Revenue Service has demonstrated that it is possible to release public use datasets created from otherwise private data by sampling those data and masking them through top coding and averaging. Other governmental bodies create such public use files that support research while protecting sensitive information.

*Question 10.* Do you support making data available publicly for research and informational purposes?

Answer. Generally, yes, with the protections against disclosure of private data indicated in my answer to question 9 above.

*Question 11.* Do you support intra-agency agreements for data matching to enhance the scope of available data? Under what conditions should matched data be available to non-government researchers?

Answer. Subject to the statutory constraints on intra-agency sharing of data created after Watergate, I believe that data matching of administrative records frequently produces a better foundation for decisions by policymakers than use of aggregated data. Again, as mentioned in previous answers, privacy considerations enter in to any decision to provide data to government and non-government researchers. The BLS also maintains standards of access that, in part, turn on disclosure agreements executed by BLS and researchers.

*Question 12.* Do you support matching survey data to administrative records for increased efficiency and improving data quality? Under what conditions should matched data be available to non-government researchers?

Answer. Yes, subject to the constraints and considerations mentioned in my answer to question 11. Providing access to non-government researchers of such matched data should be subject to the use and disclosure standards currently maintained by BLS.

*Question 13.* Does consolidation of IT operations with those of other DOL agencies pose a risk to BLS independence from political influence?

Answer. I believe that providing for greater efficiencies that do not pose a risk to the independence of the Bureau merit consideration.

*Question 14.* Which stakeholder groups are the most important for BLS to be in touch with? How will you maintain contact with them?

Answer. There are a number of stakeholders important to BLS's success. I will know more about the roles played by these groups if I am confirmed. However, those big users of BLS data—academic researchers and their professional organizations, government researchers, and analysts working in private businesses—clearly constitute the major supporters of BLS's work. In addition, the BLS needs to maintain excellent relations with the Congress and the key administrative agencies. If confirmed, I will support the Bureau's strategic plan for improving communication with all users of BLS products and make a special effort to secure and advance the support of the three major segments mentioned above.

*Question 15.* Which specific, affirmative measures will you take if the President or any cabinet official in the executive branch disparages the integrity, reliability or authenticity of BLS data?

Answer. If confirmed, I would fully comply with the law and maintain the integrity of BLS's mission without regard to political pressure. BLS must be viewed as a reliable collector of data and I will insist that BLS continue its tradition of being insulated from political interference.

*Question 16.* Which specific procedures would you implement at BLS to minimize the agency's exposure to political intervention in light of the current President's history of disparaging BLS data?

Answer. If confirmed, I would fully comply with the law and maintain the integrity of BLS's mission without regard to political pressure. BLS must be viewed as a reliable collector of data and I will insist that BLS continue its tradition of being insulated from political interference.

*Question 17.* Do you commit to alerting this Committee if you are asked by the President or a political appointee of the President to change or conceal BLS data or engage in any other activity which may compromise the independence and integrity of BLS?

Answer. If confirmed, I would fully comply with the law and maintain the integrity of BLS's mission without regard to political pressure. BLS must be viewed as a reliable collector of data and I will insist that BLS continue its tradition of being insulated from political interference.

*Question 18.* Data is critical to better understanding the future of work and trends in the labor market—especially the changing nature of work relationships, such as independent contracting, “temp” work, labor staffing and the proliferation of “gig” economy jobs. As you know, the main BLS product relevant to these developments is the Survey of Contingent Work and Alternative Work Arrangements, which was fielded in May 2017 as a supplement to the current population survey. Do you support the development of this survey? Should it continue beyond 2018?

Answer. Yes, I support this survey and hope to continue it beyond 2018.

*Question 19.* The Survey of Contingent Work and Alternative Work Arrangements has allowed for a better understanding of the types of work and characteristics of the workers doing the work. However, a better understanding of the employers' side of the equation is necessary. What would you recommend changing or adding to ex-

isting surveys to study evolving employer decisions and business practices that drive these changes?

Answer. If confirmed, I will work with BLS analysts to find ways to better understand America's evolving workplace and workforce. The effort will cover all of the employment surveys, including the Survey of Contingent Work and Alternative Work. What changes I would recommend making to this and the other employment surveys will depend on what I learn about current plans at BLS, should I be confirmed.

*Question 20.* During the 1990's, BLS conducted a survey of the amount of formal training that employers provided or financed for their employees. Such data is key to fill in existing gaps in our knowledge relating to the workforce training system. Would you recommend that BLS conduct such a survey again? If not, why not?

Answer. If confirmed, I will study the pros and cons of conducting a survey of employer provided training. I lack the information at this point to adequately answer your question.

*Question 21.* In 1982, the Labor Department dramatically narrowed its efforts to collect data on work stoppages, announcing that it would up the threshold of data collection on work stoppages involving at least six workers to those involving over 1,000 workers.<sup>1</sup> This has caused Federal policymakers to lose information on trends in labor-management relations, specifically, how often labor and management revert to their respective, so-called "economic weapons" of strikes and lockouts. Would you recommend that BLS return to its earlier data-collection threshold of work stoppages involving at least six workers? If not, why not?

Answer. If confirmed, I will study the possibility of re-instituting the survey of work stoppages that you reference in your question. I do not have enough information now on the reasons for the discontinuation to answer your question adequately.

*Question 22.* Do you support Data Synchronization legislation to allow the Census to share its business register with BLS for the purposes of synchronizing lists across the two agencies?

Answer. It has struck me for many years that we would support better policy-making decisions if statistical agencies matched or synchronized data series for which there are little or no privacy concerns. On the specifics of your question, however, I would need more information to frame an adequate, non-speculative answer. If confirmed, I will learn more about the potential for data synchronization.

*Question 23.* The Human Resources department at the Department of Labor Human Resources has reportedly begun weighing in on BLS determinations regarding the Pathways program. Do you support BLS use of the Pathways program as a way to bring in new employees for BLS positions? Do you believe that BLS decisions regarding these employees should be given deference?

Answer. I will maintain the integrity and independence of the BLS. A good portion of the integrity of the organization stems from the quality of its workforce. If confirmed, I will work with every willing partner to improve the skill level of BLS employees. However, I lack the specific information needed to answer adequately your question. If confirmed, I will learn more about the Pathways program.

*Question 24.* The Department of Labor 2016 report entitled "Advancing LGBT Workplace Rights," is no longer available on the Department of Labor's website but may still be accessed at the following link: <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2580&context=key-workplace>. Do you support the BLS initiatives mentioned in the report? Should BLS expand its efforts to collect information on LGBT individuals?

Answer. I believe that equal opportunity is a core civil right and a fundamental element to economic security. However, I am sufficiently unfamiliar with the details of the report you reference to answer your question adequately. Certainly, every worker's rights, safety and health should be protected fully under all prevailing law.

*Question 25.* What is your opinion about whether minority members of the HELP Committee have the authority to conduct oversight of BLS?

Answer. It is my understanding that various committees and their members, spanning both chambers of Congress, have jurisdiction over the Department of Labor and its constituent agencies, such as BLS, including an oversight role in addition to legislative, budgeting and, in the case of the Senate, the advice and consent role for nominations.

<sup>1</sup>L.J. Perry and Patrick Wilson, "Trends in Work Stoppages: A Global Perspective, International Labour Organization," International Labour Office Working Paper 47 (2004): 10.

*Question 26.* If confirmed, do you agree to provide briefings to members of the HELP Committee, including minority members, if requested?

Answer. If confirmed, I look forward to maintaining an open dialog with you and your congressional colleagues on topics relevant to the Bureau of Labor Statistics.

*Question 27.* If confirmed, do you commit to answer promptly any letters or requests for information from individual members of the HELP Committee including request for BLS documents, communications, or other forms of data?

Answer. If confirmed, I will provide responses to all Members of Congress.

SENATOR WHITEHOUSE

*Scientific Peer Review:*

*Question 1.* During the confirmation hearing, you said that your report on the Lieberman-Warner Climate Security Act published online on May 12, 2008 was peer reviewed.

Independent and refereed peer review is a formal process where an article is submitted to a journal, reviewed by external experts, and either approved or rejected for publication by a neutral third party editor or referee. Did your paper go through independent and refereed review before publishing?

Answer. The Heritage Foundation report you reference in this question was not submitted to a journal for publication. However, this paper depended on the results of econometric models, an energy model, and a structural model of the US economy. Two steps were taken to assess our work using outside reviewers. First, we submitted our work to a leading energy economist to ascertain if we had adequately accounted for the principal ways the proposed legislation would affect energy production, distribution, pricing, and consumption. Second, we submitted our work with the US macroeconomic model to economists who were familiar with the model. All of these reviewers suggested improvements to our modeling and to our paper, which resulted in at least two rounds of changes (if memory serves me correctly).

*Question 2.* If your paper was not independently reviewed and refereed can you explain in more detail what you meant by peer review by answering the following.

- a. Was there a neutral third party editor that was managing the paper as it went through the external review process?
- b. Did the paper undergo revisions based on external feedback from outside experts? If so how many rounds?
- c. How many outside experts reviewed your paper prior to revision and publication?
- d. Does the Center for Data Analysis at Heritage have a record of rejecting papers if outside experts provide negative feedback on the work? And who at CDA decides what papers get published?

Answer. See my comments to question 1. My practice at the Center for Data Analysis was to submit all model based and statistical papers to some level of peer review. That level of scrutiny was sufficiently high as to support my cancellation of several projects. My judgment on publication was usually sufficient to determine whether a project went forward, but I sometimes was assisted in that decision by the Vice President for Domestic Policy.

*Question 3.* With the same understanding of the peer review process in the previous question, please list all publications you authored or co-authored since the beginning of your tenure at the Heritage Foundation to the present that were peer reviewed.

Answer. I spent 18 years at Heritage, which makes it all but impossible to give you a complete list of papers for which we asked guidance by outside reviewers. Suffice it to say, that all of those papers that used the U.S. Macroeconomic Model of Global Insight, Inc. were reviewed at least by Global Insight, whose advice on modeling always proved highly valuable. Also, our policy modeling work in energy, immigration, crime, and family structure also received review by outside experts.

*Question 4.* What degree did you receive from the University of Buckingham?

Answer. Doctor of Philosophy.

*Question 5.* If you have not yet provided your dissertation to the Committee for review, will you do so?

Answer. Yes.

*Other Side of the Ledger:*

*Question 6.* During the confirmation hearing, you said that your report on the Lieberman-Warner Climate Security Act published online on May 12, 2008 included health and climate benefits in its cost benefit analysis.

a. Did your cost benefit analysis include the benefit-per-ton of reducing particulate matter, ozone, Nitrous Oxide, Sulfur Dioxide, and Carbon Monoxide that would be reduced under the bill?

b. Did your cost benefit analysis include the avoided climate damages that would have occurred from implementing the bill? Specifically, did your cost benefit analysis calculate the dollar value of avoided damages using the Social Cost of Carbon—the measure of long-term damage done by carbon pollution?

Answer. Our analysis of the Lieberman-Warner Climate Security Act was an economic analysis of the legislation. That is, we assessed the economic costs and benefits of implementation (including its fiscal effect) over a 30-year period. The paper contains a methodological appendix that describes the operation of the energy model (where, for example, implementation of carbon sequestration and renewable standards, among others, were made) and the operation of the macroeconomic model. Our work did not include estimated feedbacks to the economy from weather or long-run climate changes.

*Question 7.* If your cost benefit analysis included the health and climate benefits described above would this change the overall net benefits reported in your cost benefit analysis?

Answer. It is doubtful that including a social cost of carbon calculation in our modeling would have been appropriate. The U.S. Macroeconomic Model has been specified and estimated over a long historical period during which enormous gains in environmental quality were achieved. These gains are contained in the parameter estimates on the economic variables. In other words, the model expects the trend of future economic activity to yield better environmental results. Thus, environmental gains were embodied in our baseline. The policy simulation also estimated the additional gains from more renewables, carbon sequestration, improved appliance standards, and so forth. We built our analysis of the economic effects of Lieberman-Warner on this foundation of baseline and energy modeling results.

#### SENATOR WARREN

*Question 1.* You've often advocated for decreasing government spending, but, after years of budget cuts, the BLS is already severely underfunded. Do you support increasing BLS funding, decreasing it, or keeping it the same?

a. If you support increased funding, can you commit to actively advocating for more funding to Secretary Acosta, the White House, and Congress?

b. If you support cutting funding or keeping it level, what programs or offices at the Bureau would you cut?

Answer. If confirmed, I will work with the funds that are appropriated by Congress to fulfill the mission of the BLS.

*Question 2.* Former BLS Commissioner Erica Groshen said earlier this year that the Bureau "may be headed toward failure" due to budget cuts.<sup>2</sup>

a. Do you share this view?

b. What will you do to address this problem?

c. If you face decreased funding (regardless of your own opinions on the issue), how will you handle a smaller budget? What programs will consider shrinking or cutting? Also, please describe your views on balancing thoroughness and accuracy with breadth and volume of programs in such a scenario.

Answer. If confirmed, I will work with the funds that are appropriated by Congress to fulfill the mission of the BLS.

*Question 3.* You've spent much of your career working for organizations with financial backing from the Koch Brothers and other major conservative donors.

a. Have the Koch brothers ever been involved in your research, either at the Mercatus Center or elsewhere? If so, please describe their involvement in detail.

Answer. The Koch brothers have never been involved in my research.

*Question 4.* What influence, if any, do you believe is appropriate for think tanks to have on a statistical agency such as BLS?

Answer. The BLS needs the support of a broad community of scholars and professional organizations, which includes research institutions and think tanks. However, no person or organization should be allowed special influence on BLS. There are times, of course, when BLS will call on academics and policy experts to advise it on topics under BLS's purview. For example, the Brookings Institution recently held a day-long conference to probe for likely reasons behind the slowdown in labor pro-

<sup>2</sup> <http://www.govexec.com/management/2017/04/former-labor-statistics-chief-warns-trump-against-budget-cuts/137252/>

ductivity. That conference provided excellent advice to BLS how the agency could improve the quality of its surveys.

*Question 5.* How specifically will you ensure that BLS and its staff is entirely insulated from the political preferences of think tanks, advocacy groups, and their donors?

Answer. As I have stated previously, I will do everything in my power to advance the integrity and independence of the BLS. If confirmed, I would fully comply with the law and maintain the integrity of BLS's mission without regard to political pressure. BLS must be viewed as a reliable collector of data and I will insist that the BLS continues its tradition of being insulated from political interference regardless of the source.

*Question 6.* During the appropriations process, I've fought for full BLS funding and in particular for the funding to reinstate the Contingent Worker Supplement, which hadn't been fielded since 2005. I was happy to see that BLS finally received money to field this supplement, and I'm looking forward to seeing the results of that survey, which I understand will be ready shortly.

a. Will you commit to (a) briefing this committee on and (b) discussing with me the results of that survey?

Answer. If confirmed, I look forward to maintaining an open dialog with you and your congressional colleagues regarding the work of the Bureau.

*Question 7.* You mentioned during your interview with Committee staff that you are interested in helping BLS establish a better understanding of problems with labor force participation and recent declines in productivity. How will you do this if you are confirmed?

Answer. If confirmed, I will work with BLS staff to commission research by leading academics on the underlying reasons for non-participation by men and women in the prime working ages. A great deal of important work is being done on this topic and it should inform BLS's strategy for providing policymakers with better data on problems with labor force participation. I also will work with BLS analysts who study the skills of workers, since the slow growth in productivity may be attributable to skill problems in certain segments of the workforce.

*Question 8.* President Trump has questioned the legitimacy of BLS statistics, particularly the unemployment rate, at least 19 times, especially on the campaign trail in 2015 and 2016.<sup>3</sup> He has called BLS employment statistics "all phony numbers," "totally fiction," "one of the biggest hoaxes in modern politics," and "numbers given to politicians to look good." Then, in February 2017, after the release of favorable jobs numbers, Trump said that though the data had been phony in the past, they were "very real now."<sup>4</sup>

a. Do you believe that President Trump's attacks on BLS data have any basis in fact?

b. If you are confirmed, and President Trump criticizes the integrity of BLS during your tenure, can you commit to publicly repudiating such an attack?

Answer. I believe that President Trump is as interested as anyone in a strong and independent BLS. I have stated in my confirmation testimony that I will be a tireless defender of BLS's integrity..

*Question 9.* Will you commit to notifying Congress if the White House attempts to interfere in any way with the integrity of BLS data?

Answer. The standing of the HELP Committee as the committee of jurisdiction and oversight provides ample opportunities for updating Members on issues affecting the integrity of BLS.

#### SENATOR KAINE

*Question 1.* During his campaign, President Trump repeatedly claimed that the Federal Government's unemployment numbers were "phony" and a "hoax." And the Treasury Secretary told the Senate Finance Committee that the unemployment rate is not real." However, when February's jobs report came out, the President praised the report and Sean Spicer quoted the President as saying "they may have been phony in the past, but they are very real now." Mick Mulvaney said that "The Obama administration was manipulating the numbers, in terms of the number of people in the workforce, to make the unemployment look smaller than it actually

<sup>3</sup> [https://www.washingtonpost.com/news/work/wp/2017/03/10/19-times-trump-called-the-jobs-numbers-fake-before-they-made-him-look-good/?hpid=hp\\_hp-top-table-main-trump-jobs-numbers%3Ahomepage%2Fstory&utm\\_term=.5f932b795747](https://www.washingtonpost.com/news/work/wp/2017/03/10/19-times-trump-called-the-jobs-numbers-fake-before-they-made-him-look-good/?hpid=hp_hp-top-table-main-trump-jobs-numbers%3Ahomepage%2Fstory&utm_term=.5f932b795747)

<sup>4</sup> <http://thehill.com/policy/finance/323425-spicer-quoting-trump-jobs-reports-may-have-been-phony-in-the-past-but-theyre>

was.” The economy depends on these unemployment numbers, and all our Federal data and statistics, for our nation’s economic health.

- a. Will you commit to keeping the Bureau of Labor and Statistics independent and maintain its integrity?
- b. If our unemployment rate rises, would you advise President Trump to stand behind BLS’ data?
- c. If President Trump tweeted and attacked the unemployment number will you pledge to protect BLS?

Answer. If confirmed, I would fully comply with the law and maintain the integrity of BLS’s mission without regard to political pressure. BLS must be viewed as a reliable collector of data and I will insist that BLS continue its tradition of being insulated from political interference.

*Question 2.* As an independent agency, the Bureau of Labor Statistics (BLS) serves a critical function by collecting data to understand overall economic trends in our labor market. This data provides invaluable insight into the American workforce and areas where our nation can improve. However, from my experience the Current Population Survey lacks critical occupational data on career and technical occupations. This data is essential as our workforce landscape is changing and Congress implements policies impacting workforce and higher education training?

- a. Are you aware of this shortfall?
- b. Will you commit to working with me on this issue?

Answer. I have a general understanding of the issue of surveying occupations that you mention. If confirmed, I look forward to maintaining an open dialog with you and your congressional colleagues regarding the work of the Bureau.

*Question 3.* In 1998, you argued in two reports for the Heritage Foundation that Social Security was a bad deal for minorities based on life expectancy and rates of return. Your work came under sharp criticism, including one complaint that described the findings as “grossly in error due to faulty methodology.”

- a. Do you approach research with a particular outcome in mind?
- b. How have you responded to criticisms of your research process?
- c. Have you considered changes to the methodology or processes for data collected by or reports issued by BLS?

Answer. Like all researchers, I am interested in some questions more than others. A desire to discover ways that people all across the income spectrum can prepare better for retirement has always motivated my work on Social Security. Before Social Security became so financially challenged, the set of possible enhancements included supplemental, personal retirement accounts. Our work in 1998 was criticized, in part because we were challenging the accepted view on Social Security and private accounts. We responded to our critics in a lengthy policy report entitled “Reply to the Critics”. In general I believe BLS should provide as accurate, timely, and relevant data as possible. However any changes to data collection or reports should be made in consultation with BLS career staff and outside technical advisors. As I have not been confirmed and have not had those conversations, I have no plans now for changing BLS methodologies or data collection processes or reports. Once confirmed I intend to listen to BLS career staff and work with them to make the Bureau as effective as possible, and to maximize the value the American people receive from its work.

RESPONSE BY JOHNNY COLLETT TO QUESTIONS OF SENATOR MURRAY, SENATOR SANDERS, SENATOR CASEY, SENATOR BENNET, SENATOR WHITEHOUSE, SENATOR MURPHY, SENATOR KAINE, SENATOR HASSAN, SENATOR HATCH, AND SENATOR COLLINS

SENATOR MURRAY

*Question 1.* The Trump Administration budget proposes eliminating funding for the Vocational Rehabilitation Supported Employment State Grants, the Special Olympics, and Title II-A funding for preparing, training, and recruiting high-quality teachers and school leaders. Do you support President Trump’s budget proposal?

Answer. Since I was not at the Department during the development of the Fiscal Year 2018 Budget Proposal, it would not be appropriate for me to speculate on those decisions. However, I understand that difficult decisions had to be made and, if confirmed, I look forward to working with the Department in developing future budget proposals.

*Question 2.* The Office of Special Education and Rehabilitative Services (OSERS) administers more than \$16 billion in funding and employs more than 200 people. Please describe your previous management experience, including how many people you have managed and the annual budget you oversaw.

Answer. As Director of the Division of Learning Services at the Kentucky Department of Education, I provided oversight to a division that included special education (IDEA), as well as other program areas including English Learners (Title III), gifted and talented, response to intervention, the Kentucky School for the Blind, and the Kentucky School for the Deaf. I managed a total of approximately 240 staff and oversaw an annual budget of approximately \$240 million (including both Federal and state dollars).

*Question 3.* Based on your experience overseeing special education in Kentucky's public schools and working for the Council of Chief State School Officers (CCSSO), do you believe that public schools have the financial resources they need to provide a high quality education to each child with a disability attending public schools?

Answer. Undoubtedly, financial resources contribute to a public agency's ability to meet the requirements of the Individuals with Disabilities Education Act (IDEA). Funding, however, is not the sole determinative factor in a school's ability to provide quality special education and related services. Other factors such as the provision of quality instruction, progress monitoring within a schoolwide system of support, a commitment to having high expectations, and creating a supportive learning environment are critical components and are just as important as financial resources to ensuring schools provide a high quality education for children with disabilities.

*Question 4.* Do you support the increased use of pay for success initiatives, in K-12 education and/or in early childhood education?

Answer. I am aware that Congress, under the Every Student Succeeds Act, has allowed states and local school districts to support pay for success initiatives with Federal funds in certain programs. Decisions concerning the implementation of such initiatives, as Congress so appropriately decided under ESSA, should be made by state and local officials, as well as principals and teachers who are closest to our children.

*Question 5.* Do you believe a contract under a pay for success initiative should be allowed to use a reduction in special education placements as an outcome payor?

Answer. All contracts utilized by public school districts, including contracts executed as a part of a pay for success (PFS) initiative, must be consistent with applicable Federal law, including being carefully designed to avoid violating the right of children with disabilities to a free, appropriate public education under the Individuals with Disabilities Education Act (IDEA). Toward this end, PFS projects must not incentivize the identification of fewer students for special education and related services and must include safeguards to protect statutory rights.

*Question 6.* Do you share Secretary DeVos's commitment to expand the use of private school vouchers?

Answer. I am committed to public education and the interests of students and parents, as demonstrated by my work as a high school special education teacher, the state director for special education in Kentucky, and the work I have most recently led as the director for special education outcomes at the Council of Chief State School Officers. I believe that all parents, including parents of children with disabilities, should have the option of enrolling their child in the school that best meets their child's needs.

*Question 7.* Do you believe that Secretary DeVos's commitment to expand private school vouchers specifically targeted to students with disabilities is in conflict with the Federal law's goal of community integration of people with disabilities?

Answer. I support the mandated goal of IDEA, which is to provide all students with a free appropriate public education in the least restrictive environment possible.

*Question 8.* President Trump and Secretary DeVos have proposed to manipulate ESSA's Education Innovation and Research (EIR) program to promote private school vouchers. Do you believe that using ESSA dollars to promote school vouchers will help to strengthen public education for the 90 percent of students who attend public schools?

Answer. I believe in the importance of research and evidence when it comes to finding new ways to support students and improve educational outcomes. I am not aware of the specific details of that budget proposal, but recognize that it is ultimately up to Congress to determine whether Federal funding should be appropriated for those purposes.

*Question 9.* The mission of the Office of Special Education Programs (OSEP) is "to lead the nation's efforts to improve outcomes for children with disabilities, birth through 21, and their families, ensuring access to fair, equitable, and high-quality

education and services.” How do private school voucher programs fulfill this mission?

Answer. There is no Federal voucher program authorized under the Individuals with Disabilities Education Act (IDEA) or administered by the Office of Special Education Programs (OSEP). As such, if confirmed, I look forward to working with States, local school districts, and public schools to ensure compliance with IDEA and to achieve OSEP’s important mission.

*Question 10.* Do you support allowing IDEA funds to be reallocated for use within a private school voucher program?

Answer. No provision of the Individuals with Disabilities Education Act (IDEA) authorizes the direct allocation or reallocation of funds to private schools. It is the local educational agency’s (LEA’s) responsibility under IDEA to locate, identify, evaluate, and spend a proportionate share of IDEA funds for equitable services for children with disabilities enrolled by their parents in private schools. Each LEA must address these requirements through timely and meaningful consultation with representatives of private schools and parent representatives of parentally placed private school children with disabilities. If confirmed, I look forward to working with the Secretary and staff of the Department, and Members of Congress to ensure that all children with disabilities have opportunities to succeed.

*Question 11.* Private school voucher programs reduce funding available for public schools-funding used to provide special education and related services to children with disabilities. How does diverting needed resources from the public school system support high quality education for students with disabilities?

Answer. State funding systems are detailed, complicated, and vary significantly by state. Often, funding is based on a formula that includes a per-pupil allocation based on the number of students enrolled in a public school district. Such funding systems include a base amount for enrolled students, and additional funding based on the characteristics of the enrolled student population. That is, the funding a public school receives is based on the number and characteristics of students enrolled in the district. At the same time, giving parents meaningful choices is an important factor in education. Leaving this issue primarily to state officials and legislators who best know the needs of their parents and students is appropriate.

*Question 12.* The Education Department issued guidance in December 2016 providing much needed clarity regarding charter schools’ compliance with the Individuals with Disabilities Education Act (IDEA) and section 504 of the Rehabilitation Act. Will you commit to maintaining this guidance, if confirmed?

Answer. My understanding is that the Department is thoroughly reviewing all guidance pursuant to Executive Order 13777. If confirmed, I look forward to participating in the review of both regulatory and non-regulatory documents. I commit to conducting the review thoroughly, thoughtfully, and with the overall goal of doing what is best for children with disabilities.

*Question 13.* Please explain the steps that you will take to ensure that states, local educational agencies, charter school authorizers, charter school support organizations, charter school management organizations, and charter schools understand their responsibilities related to students with disabilities?

Answer. Charter schools are public schools and, therefore, have the same responsibilities related to students with disabilities under Federal law as any other public school. If confirmed, I will work to ensure that all public schools, public school districts, charter school authorizers, or other entities overseeing the education of students in public schools understand their responsibilities and comply with Federal requirements related to students with disabilities.

*Question 14.* The Every Student Succeeds Act (ESSA) allows states to develop alternate diplomas for students with the most significant cognitive disabilities and count those students in their graduation rates, if certain conditions are met. For example, the alternate diploma must be standards-based, align with the state requirements for the regular high school diploma, be earned during the period of FAPE, and cannot be a certificate of completion, certificate of attendance, or any similar lesser credential. Congress clearly intended for this diploma to be meaningful-and if a student earned this diploma it signified that student was ready for competitive integrated employment. What was your role, if any, in Kentucky developing alternate diplomas? What requirements must students must meet to earn an alternate diploma in Kentucky?

Answer. As Director of the Division of Learning Services at the Kentucky Department of Education (KDE), I worked on KDE’s response to *KY Senate Bill 43* (2012), which required the Kentucky Board of Education to promulgate regulations for an

“alternative high school diploma.” Effectively, the bill simply required a change of name, in Kentucky’s Minimum Requirements for High School Graduation regulation (704 KAR 3:305), from “Certificate of Attainment” to “Alternative High School Diploma.” This change in name did not change how students participating in the alternate assessment and awarded an “Alternative High School Diploma” were included in calculating the state’s graduation rate used for Federal reporting and accountability purposes; meaning, students obtaining an “Alternative High School Diploma” were not included as graduates for purposes of calculating the Federal adjusted cohort graduation rate for a school, district, or the state as a whole.

In terms of requirements students must meet to earn an “Alternative High School Diploma” in Kentucky, the following is from Kentucky’s Minimum Requirements for High School Graduation regulation (704 KAR 3:305):

*Section 8. Beginning with the graduating class of 2013, if the severity of an exceptional student’s disability precludes a course of study that meets the high school graduation requirements established in Section 1 of this administrative regulation leading to receipt of a high school diploma, an alternative course of study shall be offered.*

*(1) This course of study shall be based upon student needs and the provisions specified in 704 KAR 3:303, Required core academic standards, and shall be reviewed at least annually.*

*(2) A student who completes this course of study shall receive an alternative high school diploma to be awarded by the local board of education consistent with the graduation practices for all students.*

*(3) A local board of education may establish policies to award an alternative high school diploma to a former student who has received a certificate or certificate of attainment.*

ESSA appropriately assumes the vast majority of students can obtain a regular high school diploma and requires states to incorporate graduation rates into state accountability systems. ESSA also acknowledges students with the most significant cognitive disabilities assessed using the alternate assessment aligned to alternate academic achievement standards may be awarded state-defined alternate diplomas that meet the statutory requirements referenced in the question. If confirmed I will ensure that OSERS supports the ongoing work in the Office of Elementary and Secondary Education (OESE) to implement these provisions of ESSA.

*Question 15.* What should the role of the Assistant Secretary of OSERS be in making sure states do not manipulate this diploma to be less meaningful?

Answer. If confirmed as Assistant Secretary of OSERS, my role will be to ensure that states comply with Federal law, and I would work with OSERS staff and officials from OESE on this matter.

*Question 16.* If you are confirmed, do you plan to have the Office of Special Education Programs (OSEP) continue to implement the Results-Driven Accountability system for determining compliance with the IDEA? If not, why not?

Answer. I was the Director of Special Education for the Kentucky State Department of Education when Results-Driven Accountability (RDA) was first introduced by OSEP, and I agree that compliance with the Individuals with Disabilities Education Act (IDEA) should include a focus on results for children with disabilities. If confirmed, I look forward to working with the career staff in OSERS to examine the components and focus areas OSEP has identified to ensure the overall system of monitoring and compliance appropriately focuses on improving results for children with disabilities, consistent with the IDEA. I am committed to implementing IDEA with respect to the rights of individuals with disabilities and their families, while also ensuring a continued focus on improving results and outcomes for children with disabilities.

*Question 17.* Although Section 614(d)(3)(B)(iii) of IDEA is clear regarding “Braille instruction” for students with the disability of “visual impairment including blindness,” according to the American Printing House for the Blind’s “Annual Report 2016,” 8.2 percent of blind students use Braille as their primary reading medium. In 2013, at my urging, OSEP released a “Dear Colleague letter” reiterating schools’ responsibilities under IDEA to provide Braille instruction to blind students. Will you commit to protecting this guidance document if you are confirmed as Assistant Secretary? If not, please explain. What other actions should OSEP take to encourage schools to comply with this guidance?

Answer. Ensuring that states and local school districts are providing appropriate instruction and supports to students who are blind or visually impaired is important. If confirmed, I look forward to the opportunity to review all non-regulatory

guidance documents. I commit to conducting the review thoroughly, thoughtfully, and with the overall goal of doing what is best for children with disabilities.

*Question 18.* As you are aware, students with disabilities are not always held to the highest of expectations, which, in part, leads to low achievement rates. In the Endrew F. decision, a unanimous Supreme Court held that children with disabilities are entitled to an Individualized Education Program (IEP) that is reasonably calculated to enable the child to make academic progress and advance from grade to grade. Before the Supreme Court's decision, many states were operating under a "merely more than de minimus" standard. Beyond the Question and Answer guidance issued on December 7, 2017, what steps should the Assistant Secretary at OSERS be taking to ensure all children with disabilities are held to the highest expectations and no longer "merely more than de minimus"?

Answer. If confirmed as Assistant Secretary of OSERS, my role will be to ensure that states comply with Federal law, including the requirements of IDEA. Ultimately, however, it is up to states to ensure that local school districts, schools, and IEP teams are setting challenging and ambitious goals for all children with disabilities. If confirmed, I look forward to working with states and supporting their efforts to ensure that every child has appropriately ambitious goals based on the unique circumstances of the child, and the opportunity to meet challenging objectives.

*Question 19.* Last year, the Department issued regulations requiring states to use a standard approach to identify significant disproportionality under IDEA. However, states were given until the spring of 2019 to make the required determinations. News reports indicate the Secretary is considering delaying the significant disproportionality regulation. Do you support this regulation?

Answer. If confirmed, I will look into that matter and work with Department officials and take into account the views of stakeholders to determine what is most appropriate.

*Question 20.* Do you support postponing, modifying, or rescinding this regulation?

Answer. I do not believe that it would be appropriate for me to commit to any policy decision before I am confirmed. My understanding is that the Department is in the process of thoroughly reviewing all existing regulations and guidance pursuant to Executive Order 13777. If confirmed, I would work on this as a part of that process.

*Question 21.* Is it the role of the Assistant Secretary of OSERS to be combating disparate discipline and placement of students with disabilities based on race? What should that role be?

Answer. The role of the Assistant Secretary of OSERS is to monitor and enforce the implementation of Federal laws, which may include providing guidance, technical assistance, or disseminating information to aide in improved identification, placement, and delivery of services for students with disabilities. Should I be confirmed, to the extent that students with disabilities are being disparately disciplined or placed based on race, I would work with the Office for Civil Rights and other appropriate Department offices.

*Question 22.* If confirmed, how will OSERS work to decrease bullying, harassment, and the use of aversive behavioral interventions?

Answer. Bullying or harassment of any student is unacceptable. If confirmed, I would work with the Secretary and other offices within the Department, including the Office for Civil Rights, to help ensure that students have safe learning environments and that applicable Federal laws prohibiting these forms of discrimination are enforced.

*Question 23.* The U.S. Education Department's Office for Civil Rights (OCR) sends a survey to all public schools in the country requesting data about academic and disciplinary issues, including the use of restraint and seclusion. A recent Politico article described how this data show students with disabilities are disproportionately subjected to restraint and seclusion and that use of these aversive behavioral interventions are underreported. What are your views on the role of the OSERS, and the Department, to create better systems for reporting and enforcing accurate reporting? Do you think this data is important and necessary?

Answer. If one child is harmed by the inappropriate use of seclusion and restraint, it is too many. If confirmed, I look forward to working with the Office for Civil Rights to address these issues. OSERS has a strong record of investing in positive behavioral interventions and supports and providing technical assistance to states and school districts seeking to implement such policies. If confirmed, I look forward to ensuring states and local school districts have access to these tools and programs.

*Question 24.* Seclusion and restraint are aversive behavioral practices used in schools for control and punishment. Decades of research documents prove that these practices lead to pain and injury, negative outcomes, and decreased instructional time. Further, seclusion and restraint do not decrease undesirable behavior, indicating these practices are ineffective behavior interventions. Despite the evidence of harm and ineffectiveness of seclusion and restraint, the practices continue to be used widely across the country. In your exchange with Senator Isakson, he indicated that seclusion and restraint may be misconstrued by those using it because in reality, the practices are needed for students with significant disabilities and behavioral challenges. Do you believe seclusion should ever be used on any student? Do you believe restraint should ever be used on any student?

Answer. The Individuals with Disabilities Education Act (IDEA) does not address the use of seclusion and restraint directly, but the law does emphasize the use of positive behavioral interventions and supports. If confirmed, I look forward to working with states and local school districts to ensure public agencies have access to these systems and practices and provide the behavioral interventions and supports that students need.

*Question 25.* Do you believe the Department has a role in limiting the use of seclusion and restraint in schools? Please explain your rationale.

Answer. OSERS, through programs administered under Part D of the Individuals with Disabilities Education Act (IDEA) has an opportunity to support states and school districts as they work to implement positive behavioral interventions and supports. If confirmed, I look forward to continuing to support states and local school districts in these efforts.

*Question 26.* In 2009, former Secretary Duncan released two letters indicating the Department of Education's position on seclusion and restraint. The first was to Chief State School Officers urging a review of policies to ensure the safety of students. The other letter was sent to Congress regarding actions taken to limit the use of seclusion and restraint. Unfortunately, little has been done since that time. In 2016, the Office for Civil Rights (OCR) released guidance on seclusion and restraint practices, but minimal information has come out of OSERS. If confirmed, what efforts will you take to reduce seclusion and restraint in schools? Do you believe this should be a joint priority for OCR and OSERS?

Answer. If confirmed, I look forward to conducting a thorough review of these guidance documents, and what other actions have been taken, and doing so in a meaningful and thoughtful way that focuses on what is best for children with disabilities, and seeing whether other actions should be taken. I also look forward to collaborating with the Office for Civil Rights on a number of projects, possibly including the issue of seclusion and restraint.

*Question 27.* Extensive evidence indicates the best way to reduce seclusion and restraint is through positive, preventative practices. During the last administration, the Office of Special Education Programs (OSEP) took many steps forward in funding efforts to support positive behavior interventions and supports (PBIS) in schools. In 2016, OSEP released guidance to help ensure students whose behavior impedes the learning of others are supported through the use of PBIS and other strategies that address behavior. Please provide a description of the steps you plan to take, if confirmed, to extend this work to implement positive, proactive strategies in schools in order to reduce aversive and exclusionary discipline.

Answer. OSERS has a strong history of investing in projects aimed to support the education of students whose behavior may impede learning. If confirmed, I look forward to working with OSERS staff to learn the full extent of OSERS efforts, and when appropriate, continuing or enhancing OSERS efforts to focus on supporting states and school districts as they work to implement positive behavioral interventions and supports.

*Question 28.* During the 2014–2015 school year, the national high school graduation rate reached 83 percent. Meanwhile, students with disabilities graduated at an average rate of 64 percent, indicating a significant achievement gap still remains between students with disabilities and their non—disabled peers. If confirmed, what is your plan to work with local schools, districts, and states to close achievement gaps and achieve the intent of the Every Student Succeeds Act (ESSA)-to provide all children with disabilities the opportunity to receive a fair, equitable, and high-quality education?

Answer. I am committed to focusing on improving results and outcomes for students with disabilities. If confirmed I will ensure that OSERS supports the ongoing work in OESE to implement ESSA and look for opportunities to support states in

efforts to ensure that children with disabilities have equitable opportunities to succeed.

*Question 29.* Several states submitted Every Student Succeeds Act (ESSA) state plans requesting waivers from key ESSA provisions. Under ESSA, a state may measure the progress of no more than 1 percent of its students against “alternate academic achievement assessments.” These assessments must be based on the state’s challenging grade level academic content standards. Several states have asked the Secretary to waive this requirement. I understand that your home State of Kentucky requested a waiver of this requirement, which was already granted—thereby allowing the state to test students with disabilities with below-grade level assessments. As I stated at the hearing, one of the reasons Senator Alexander and I agreed to reauthorize the Elementary and Secondary Education Act was to stop Federal education law from being administered via waiver. It is premature—and not right for our nation’s children—for the Department of Education to already be waiving core provisions of ESSA before the law is even fully implemented by states. If you are confirmed, how will you advise Secretary DeVos regarding granting additional ESSA waivers to states wanting to avoid ESSA’s requirements on testing students with “alternate academic achievement assessments”? Please explain your answer fully.

*Answer.* I have not been involved in the development of Kentucky’s request for a waiver from the 1 percent cap on students measured against alternative academic standards, nor am I aware of how the Department evaluated the waiver request. The Every Student Succeeds Act (ESSA) itself, as passed by Congress, allows states to submit a waiver on the 1 percent assessment requirement. If confirmed, I look forward to working with the Secretary and the Office of Elementary and Secondary Education (OESE) to ensure that the law is implemented as Congress intended and in a way that focuses on providing flexibility, and supporting states and local efforts to improve outcomes for children with disabilities.

*Question 30.* If confirmed, you will have the opportunity to work with the Secretary on the implementation of the Every Student Succeeds Act (ESSA) as related to students with disabilities. Provisions in ESSA under Sec. 1111(g) require states to support schools in reducing aversive and exclusionary discipline practices, specifically referring to suspension, expulsions, seclusion, and restraint. Every state has submitted a plan at this time, yet very few provide concrete information about steps that will be taken to reduce these practices. Even fewer specifically address seclusion and restraint. In your efforts to advise the Secretary, what will you do to ensure the law is being implemented and specifically, these practices reduced?

*Answer.* If confirmed, I look forward to working with the Office of Elementary and Secondary Education to support states as they focus on reducing aversive and exclusionary discipline practices. For several years, it is my understanding that OSERS has focused on supporting states in efforts to reduce such practices through its discretionary grant programs, specifically through the technical assistance. If confirmed, I look forward to learning more about these investments and identifying ways to support states and local school districts.

*Question 31.* Research conclusively shows that inclusion of students with disabilities is beneficial to all students—those with disabilities and those without disabilities. All students experience better academic outcomes when they learn side by side with diverse learners. In most states, some students with disabilities are educated in specialized schools. These may be private, charter, or alternative schools. What oversight do you believe is needed of these specialized schools? Do you believe they unnecessarily segregate students with disabilities?

*Answer.* The Individuals with Disabilities Education Act (IDEA) requires schools districts to ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. IDEA requires students with disabilities be educated with children without disabilities to the maximum extent appropriate and students with disabilities are removed to separate classes or schools only when the nature or severity of their disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This means that, while students must be educated in the general education environment to the maximum extent appropriate, school districts are required to offer a continuum of other placement settings to include special education classes, and specialized schools when necessary to provide special education and related services. In addition, if a public agency places a child with a disability in a private school as a means of providing that child special education and related services, the child has all the rights of a child with a disability who is served by a public agency. If confirmed, I look forward to working with local

school districts to ensure that placement decisions are being made consistent with IDEA, and on an individualized basis based on the unique needs of the individual child.

*Question 32.* If confirmed, how do you plan to work with DOJ to ensure states are not segregating students with disabilities in violation of the Americans with Disabilities Act?

Answer. The Office for Civil Rights (OCR) ensures school district compliance with the Americans with Disabilities Act (ADA). As such, I look forward to supporting OCR in its compliance activities and working with the Department of Justice and other Department officials to share information and support our collective efforts to ensure state and district compliance with the ADA.

*Question 33.* Research has shown that specialized schools are more likely to use exclusionary and aversive discipline practices, often used disproportionately on students of color who also experience disabilities. If confirmed, what efforts will you take to ensure public specialized schools are in compliance with the law and uphold the rights of students with disabilities including issues related to disproportionate discipline practices?

Answer. I am committed to enforcing the provisions of the Individuals with Disabilities Education Act (IDEA). This includes working with all educators who provide special education and related services under IDEA to ensure that children with disabilities are served in an environment free from disproportionate discipline. If confirmed, I look forward to supporting state and district efforts to examine such practices.

*Question 34.* Earlier this year, the previous administration released a guidance document on how to achieve access to inclusive, high-quality early childhood programs where children are supported in the least restrictive environment (LRE). The letter states, "These requirements [LRE] reflect the IDEA's strong preference for educating students with disabilities in regular classes with appropriate aids and supports." While this guidance document sets a clear standard for preschool students, there has been limited information on the Department's views of LRE for all students with disabilities. Concurrently, OSEP collected data indicates that while inclusion rates have risen, in many states students with disabilities are still educated outside the general education classroom. Do you believe this is an area that needs greater oversight to ensure students with disabilities are receiving a high-quality education in LRE? If confirmed, please explain what steps you will take to ensure LRE is implemented according to law to improve inclusive opportunities for all students with disabilities.

Answer. The Individuals with Disabilities Education Act (IDEA) requires, to the maximum extent appropriate, children with disabilities be educated with their non-disabled peers or in the least restrictive environment (LRE). The law is clear that removal from the regular education environment should occur only if the nature or severity of the disability is such that an appropriate education in a general education classroom with supplementary aids and services cannot be achieved. The placement decision is made by a group of individuals, the IEP team; placements must meet statutory LRE requirements. I am committed to implementing these provisions of IDEA faithfully, and I look forward to learning more about OSERS' ongoing efforts to ensure that children are served in the LRE.

*Question 35.* According to the Department's website, year after year the number of children and families served under Part C increases. What plans do you have to support states and local communities to address the increased challenge of ensuring early intervention services for children with disabilities, birth to three, and their families?

Answer. From my previous experience both in Kentucky and at CCSSO, I know that OSERS has focused on improving reporting procedures, data collection, and data quality under IDEA Part C. I believe this has allowed for more accurate information on the ongoing work of states to provide early intervention services to infants and toddlers with disabilities under Part C. If confirmed, I look forward to better understanding recent changes OSERS has made to work with states to improve the quality of services provided under IDEA Part C and evaluating whether such an increase is due to better data collection or increased participation. I look forward to continuing to support state efforts to provide quality early intervention services.

*Question 36.* Increased incidence of neonatal abstinence syndrome as a result of our nation's opioid crisis is resulting in more children in need of early intervention services. How do you plan to collaborate with the Department of Health and Human

Services (HHS) to ensure that local communities are prepared to address these increased needs for early intervention services?

Answer. The opioid crisis that has been identified in a number of states will certainly have an impact on infants, toddlers, children and youth in those states—and in the ability of those states to meet increased needs in the population of children served. I know the Administration has identified addressing the opioid crisis as a priority, and I look forward to having an opportunity to work with Department officials and officials from other Federal agencies including HHS to support states in addressing these challenges.

*Question 37.* The “2020 Federal Youth Transition Plan: A Federal Interagency Strategy” outlines how agencies will enhance interagency coordination through identification of a shared vision, compatible outcome goals, and policy priorities. Are you familiar with this work? If confirmed, how will you work with your Federal partners to support this plan?

Answer. If confirmed, I look forward to examining this report more carefully and evaluating how OSERS can support children and youth with disabilities as they transition. OSERS is uniquely positioned to serve individuals with disabilities throughout the continuum of their lives; from infancy into adulthood. Although IDEA has always identified transitions as a key matter, the more recent reauthorization of the Workforce Innovation and Opportunity Act in 2014 placed an increase focus on transitions. I look forward to focusing on how we can work together to ensure children with disabilities successfully transition into post-secondary opportunities. I worked extensively on this issue in Kentucky and look forward to continuing that focus.

*Question 38.* If you are confirmed, how will OSERS ensure full accessibility for digital content for students and parents with disabilities is provided by the Department of Education, State education agencies (SEAs) and local education agencies (LEAs)?

Answer. I am familiar with OSERS’ previous focus on accessibility and the significant investments OSEP has aimed at ensuring children with disabilities have access to digital content, reading materials, and technology. If confirmed, I look forward to better understanding those investments, and working to ensure children with disabilities have access in a manner consistent with all applicable laws and requirements.

*Question 39.* In recent years, the use of technology for people with disabilities, especially students receiving special education supports and services, has grown dramatically. If confirmed, will you maintain and expand technology based services and supports for students with disabilities in special education?

Answer. If confirmed, I look forward to better understanding OSERS’ investments that focus on technology for individuals with disabilities. I am supportive of existing discretionary grant opportunities authorized under Part D of IDEA and how those programs can be used to foster technology development in a manner consistent with IDEA.

*Question 40.* Under the Workforce Innovation and Opportunity Act (WIOA), what do you believe should be the Department’s interpretation of an integrated setting? Should this be defined at the work-unit level?

Answer 40. I am committed to enforcing the Workforce Innovation and Opportunity Act to ensure that individuals with disabilities have the opportunity to work in fully integrated settings. If confirmed, I will work with staff from OSERS staff, the Office of the General Counsel, and other offices to make sure the Department is appropriately interpreting the law.

*Question 41.* Under WIOA, should the Department allow AbilityOne contracts an exemption to allow enclave or other types of group work settings of primarily individuals with disabilities to meet the definition of an integrated setting?

Answer. I am committed to enforcing the Workforce Innovation and Opportunity Act is implemented properly. If confirmed, I will work with staff from OSERS staff, the Office of the General Counsel, and other offices to make sure the Department is appropriately interpreting the law.

*Question 42.* Subminimum wage placements do not qualify as employment outcomes under vocational rehabilitation regulations. However, some support changing that requirement to allow for subminimum wage employment to count as an allowable placement under the VR program. In your opinion should subminimum wage be an allowable placement under the VR program for youth? For adults?

Answer. I am committed to enforcing the VR program is implemented properly. Should I be confirmed, I would work with staff from OSERS staff, the Office of the

General Counsel, and other offices to make sure the Department is appropriately interpreting the law and applicable regulations.

*Question 43.* Section 511 of WIOA plays an important role in diverting youth with disabilities away from subminimum wage jobs toward competitive integrated employment. However, some segregated employment settings continue to advocate that youth with disabilities be allowed to go directly to subminimum wage jobs and to segregated settings without first going to the state VR system. Do you support youth with disabilities being required to explore integrated work, even if their parents express an interest in segregated employment setting?

Answer. A fundamental principle of the Workforce Innovation and Opportunity Act (WIOA) is that individuals and youth with disabilities work in competitive integrated employment. Furthermore, Section 511 places limitations on the ability of individuals with disabilities to be paid subminimum wages. I am committed to enforcing the statutory requirements of WIOA. If confirmed, I look forward to working with Department officials and state vocational rehabilitation agencies to work with parents and families and support the decisions of families within the scope of statute.

*Question 44.* In vocational rehabilitation, there is some confusion around “informed choice.” The HELP Committee continues to hear about agencies using labor market data to support only employment goals in line with labor market demands. This practice limits the range of employment opportunities available to consumers of vocational rehabilitation. Should state vocational rehabilitation agencies limit employment opportunity goals only to jobs that are in demand in the local labor market?

Answer. Individuals with disabilities participating in vocational rehabilitation programs are certainly entitled to exercise choice with respect to employment outcomes allowed under the vocational rehabilitation program. The law itself, the Workforce Innovation and Opportunity Act (WIOA), establishes those parameters. If confirmed, I look forward to working with Department officials and state vocational rehabilitation agencies to ensure that the statutory requirements of WIOA are met—and that individuals participating in the program have the opportunity to pursue their desired employment outcomes.

*Question 45.* If confirmed, how will you implement the recommendations included in the congressionally mandated report of the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disability?

Answer. While I am familiar with the report, my previous work has not provided an opportunity to analyze the recommendations of the Committee related to increasing opportunities for individuals with disabilities to obtain competitive integrated employment. If confirmed, I look forward to working with staff from the Department, stakeholders, vocational rehabilitation agencies, and families to better understand the recommendations and to determine how we can work together to increase opportunities for individuals with disabilities to work in fully integrated settings.

*Question 46.* Do you support dual enrollment in high school and post-secondary education for students with disabilities, including students with intellectual disabilities? Please explain your reasoning.

Answer. Several states and local school districts have programs in place that allow students to participate in dual enrollment programs and post-secondary education partnerships. Such programs increase post-secondary opportunities and provide for a smooth and successful transition into post-secondary opportunities. Such programs should be accessible and available to children and youth with disabilities. But whether to support dual enrollment programs is a matter best left to state and local officials who are closer to the needs of their students.

*Question 47.* What is your opinion of the Randolph-Sheppard Program administered by the Rehabilitation Services Administration?

Answer. The Randolph-Sheppard Act is Federal law. The statute was passed by Congress and is administered by OSERS. I do not view implementation of the law as optional. If confirmed, under my leadership, OSERS will continue to administer the program appropriately.

*Question 48.* Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing guidance?

Answer. My understanding is that the Department is thoroughly reviewing all guidance pursuant to Executive Order 13777. If confirmed, I will work, as appropriate within my role, with Department officials, including the Department’s Office of Legislation and congressional Affairs, on these matters.

*Question 49.* What is your opinion about whether minority members of the HELP Committee have the authority to conduct oversight of the U.S. Department of Education?

Answer. I appreciate and respect the oversight responsibilities of Members of Congress and this committee. If confirmed, I will work with the Office of Legislation and congressional Affairs to be as responsive as possible to all congressional inquiries in a timely and thoughtful way, regardless of party.

*Question 50.* If confirmed, do you agree to provide briefings to members of the HELP Committee, including minority members, if requested?

Answer. If confirmed, I will work with my colleagues in the Office of Legislation and congressional Affairs to ensure any briefing requests from members of the HELP Committee regardless of party or position are responded to in a timely and appropriate manner, whenever participation by the Office of Special Education and Rehabilitative Services is requested.

*Question 51.* If confirmed, do you commit to answer promptly and completely any letters or requests for information from individual members of the HELP Committee including request for Department of Education documents, communications, or other forms of data?

Answer. If confirmed, I work with the Office of Legislation and congressional Affairs, as appropriate, to be as responsive as possible to all congressional inquiries and requests for information in a timely and thoughtful way.

#### SENATOR SANDERS

*Question 1.* While you were the Director of the Division of Learning Services and State Director of Special Education for the Kentucky Department of Education, the graduation rate for school year 2014–2015 for white students was 89 percent, black students was 80 percent, Hispanic students was 83 percent, American Indian/Alaskan Native students was 81 percent, students with disabilities was 66 percent, and English learner students was 67 percent. What best practices did you determine from your time with the Kentucky Department of Education would help schools improve graduation rates for students with disabilities? As Assistant Secretary for Special Education and Rehabilitative Services, how will you help schools across the country improve their graduation rates for students with disabilities?

Answer. I am proud of my tenure as the Director of the Division of Learning Services at the Kentucky Department of Education (KDE). Kentucky's Adjusted Cohort Graduation Rate (ACGR) for students with disabilities exceeds the national rate. Additionally, across the years of my tenure, the ACGR between students with disabilities and the all students group in Kentucky was smaller than the gap in the whole of the U.S. Over the years, the number of students with disabilities graduating with a regular high school diploma has remained steady, exceeding that of the U.S. as a whole. In 2014–2015, Black and Hispanic students with disabilities left school with a regular high school diploma at higher rates than the national average (7 percent and 8 percent respectively).

During my tenure I demonstrated a commitment to raising expectations and improving outcomes for all students with disabilities, including students with the most significant cognitive disabilities, and ensuring that those high expectations were met with the appropriate resources and supports students needed in order to achieve the outcomes that we and, most importantly they, envisioned. This included a focus on understanding and addressing the capacity needs of teachers and leaders so that they could meet the diverse and particular needs of the students they served. In service to that commitment, during my tenure, Kentucky applied for and received, from the U.S. Department of Education, Office of Special Education Programs (OSEP), a State Personnel Development Grant (SPDG). The SPDG Program, authorized by the Individuals with Disabilities Education Act (IDEA), provides funds to assist states in reforming and improving their systems for personnel preparation and professional development in early intervention, education and transition services in order to enhance results for children with disabilities.

In addition, during my tenure, I demonstrated a commitment to collaborating meaningfully and effectively with any and all who had a stake in the success of students with disabilities, including across offices/ division within the state department of education, other state child serving agencies, local schools, districts, and communities, and parents and families.

I am consistently struck by the fact that the Office of Special Education and Rehabilitative Services (OSERS) has the unique opportunity to impact positively across the life of an individual with a disability—from birth through competitive integrated employment. If confirmed as Assistant Secretary for OSERS, I will look for-

ward to the opportunity to serve the millions of children, youth, and adults with disabilities and their families across our Nation, and will faithfully demonstrate the same commitments that I have across my career; namely, to raising expectations and improving outcomes for children, youth, and adults with disabilities, and to collaborating meaningfully and effectively with any and all who have a stake in their success.

*Question 2.* The Every Student Succeeds Act requires stakeholder engagement in the development of state plans. But as you know, many in the disability community felt like this was a “check the box” exercise instead of a meaningful opportunity to provide feedback. Since you were Director of Special Education Outcomes at the Council of Chief State School Officers (CCSSO) while the law was being implemented, what is your perspective on this? More generally, what responsibility do you see for the Assistant Secretary of OSERS to ensure that states involve parents and communities, especially those with diverse voices, in the development and implementation of state plans?

*Answer.* I view components of Every Student Succeeds Act that require states to meaningfully engage with stakeholders, including stakeholders in the disability community, as key provisions and opportunities for state-led collaboration. In my previous capacity with CCSSO, I worked with state leaders and certainly encouraged such collaboration. In fact, while the Director of Special Education in Kentucky, I demonstrated a commitment to collaborating meaningfully and effectively with stakeholders. If confirmed, I will continue to prioritize stakeholder engagement and look forward to working with stakeholders on issues directly under the purview of OSERS.

#### SENATOR CASEY

*Question 1.* The most recent Civil Rights Data Collection had over 170,000 reported incidents of restraining or secluding students during the 2013–2014 school year. Restraints and seclusions can lead to significant emotional trauma as well as physical harm and, in the worst cases, death of a student. A 2014 report from this Committee reported incidents of families who had not known about their children being restrained or secluded in school. In some cases, families requested that schools stop these practices and they were denied that request. One family even reported they had to move in order to stop the use of restraint and seclusion with their daughter. In May 2012 the Department issued a resource document related to the use of restraint and seclusion in schools that emphasized prevention and use of those techniques only in emergency situations. That year the Civil Rights Data Collection reported just over 60,000 incidents of restraint and seclusion in schools. The use has almost tripled since that time and the Department has not issued formal guidance or regulations.

a. What will you do to assist states and districts to increase their efforts to create positive school environments and reduce the use of restraint and seclusion in schools?

*Answer.* OSERS has a strong record of investing in positive behavioral interventions and supports and, if confirmed, I look forward to ensuring states and local school districts have access to these tools and programs. If one child is harmed by the inappropriate use of seclusion and restraint, it is too many. I look forward to working with states to ensure they have access to training and the tools needed to provide the behavioral interventions and supports that students need.

b. If confirmed, what efforts will you promote to decrease bullying in schools, increase student engagement, and decrease emergency situations where restraint or seclusion would be used?

*Answer.* If confirmed, I look forward to examining how bullying affects children with disabilities, and working with the Office for Civil Rights to address these issues. I believe in the implementation schoolwide systems of support that include proactive strategies for defining, teaching, and supporting appropriate student behaviors to create positive school environments.

*Question 2.* Students with disabilities were the overwhelming recipients of the use of restraint and seclusion as reported by the most recent Civil Rights Data Collection. How will you work with states and local school districts to reduce the use of restraint and seclusion with children with disabilities while also ensuring they have access to the least restrictive environment for instruction and access to the general curriculum?

*Answer.* Consistent with OSERS’ previous investments, I believe that supporting states and local school districts and providing technical assistance to schools as they implement positive behavioral interventions and supports is the best way to address

this problem. If confirmed, I look forward to working with the Office for Civil Rights and examining how we can better support states and school districts.

Question 3. GAO recently released a report about the use of private school vouchers on students with disabilities. One of the major findings was that only half of private schools provide families' of students with disabilities information about the specific services offered, even when the schools are specifically designed for students with disabilities. This information can include which disabilities are served at the school and how families' rights change under IDEA when they move from a public school to a private school. How will you ensure that families who may be considering private school placement for their children with disabilities receive all of the information about their rights and their children's rights?

Answer. I am concerned about any parent not having the information they need to make informed decisions about their child's education. If confirmed, I look forward to working with the Secretary to determine how the U.S. Department of Education can support state-developed and operated voucher programs and how OSERS can empower parents with information under the current statutory provisions of the Individuals with Disabilities Education Act.

a. How will you ensure that families of children with disabilities know how academically effective the school they are considering is with instructing their son or daughter to reach academic success?

Answer. If confirmed, I will encourage transparency of information on academic effectiveness and I will look into how OSERS can further help empower parents to receive relevant information. Children with disabilities who are considering placing their children in private school settings are best suited to make a decision regarding the effectiveness of a particular school and how that school may best meet the needs of their child.

b. What requirements do you see implementing to ensure parents and families have the information they need to make the critical decision about where their children should attend school?

Answer. The Individuals with Disabilities Education Act sets forth the legal rights of children with disabilities who are parentally placed in private schools. I am concerned about any parent not having the information they need to make informed decisions about their child's education. If confirmed, I am open to learning more and discussing with the Secretary how the Department might best empower parents as well as respond to the recommendations from the GAO report.

c. Deciding to move from one public school to another or to a private school setting is a huge decision, particularly if that move includes giving up certain rights to due process and access to services. What regulations and guidance will you put in place to ensure families have the information they need?

Answer. The Individuals with Disabilities Education Act sets forth the legal rights of children with disabilities who are parentally placed in private schools. If confirmed, I look forward to working with the Secretary to determine how the Department can best and most appropriately support and empower parents.

SENATOR BENNET

*Question 1.* As Assistant Secretary, what steps will you take to ensure that families can participate in the decisionmaking process of educating a child with disabilities?

Answer. A long-standing, fundamental principle inherent in the Individuals with Disabilities Education Act (IDEA) is parental involvement in educational decisions involving their child. I am committed to this important principle and to upholding IDEA's focus on involving parents.

*Question 2.* As you know, there's a shortage of special education teacher in the US? How do you believe our nation should address this shortage? What steps will you take at the Department of Education to ensure that students with disabilities are taught by qualified teachers?

Answer. Teacher recruitment and teacher retention is a challenge for all states, and specifically in the area of special education. Teacher preparation, teaching training, and teacher certification is determined at the state level and the requirements and processes vary drastically by state. In my experience, the challenges are specific and vary by state. If confirmed, I am committed to supporting states in addressing these important issues and fostering an environment that allows states to innovatively address these challenges.

Question 3. How can we better align education and employment programs to ensure that students with disabilities can work and live independently? How will you address this at the Department of Education?

Answer. OSERS can play a key role in supporting states and local school districts as they focus on transition services—and as special educators and post-secondary leaders including vocational rehabilitation work together to ensure that youth with disabilities transition successfully from K–12 into post-secondary opportunities. OSERS has key investments that support states in these efforts and it is important to continue the focus on aligning services to ensure successful transition. If confirmed, I look forward to working with the Secretary to determine how the Department can best and most appropriately support these efforts.

SENATOR WHITEHOUSE

*Question 1.* In speaking with Rhode Island educators, I have often found that the most innovative solutions for improving education come from teachers themselves. Will you commit to meeting with public school teachers on a regular basis to discuss their ideas for improving public schools?

Answer. I am committed to working with all stakeholders who play a key role in ensuring that children with disabilities receive quality special education and related services and access to a quality education and the opportunity to succeed. In my previous role as the Kentucky State Department of Education, I prioritized stakeholder engagement, including engagement with teachers. I utilized my relationships with stakeholders in my more recent role at CCSSO. If confirmed, I will continue to work with stakeholders so that we can leverage partnerships to improve outcomes for children with disabilities.

*Question 2.* In ESSA, I authored several provisions to help keep kids who encounter the juvenile justice system stay on track, including having states establish procedures around timely transitions, back to school or re-entry programs upon release, and to better facilitate transferring academic credits and records between school and juvenile justice facilities. Research indicates that students with disabilities are over-represented in the juvenile justice system. What steps do you believe are needed to ensure that students with disabilities are not unduly ensnared in the juvenile justice system?

Answer. I believe that continued support to states and local school districts is necessary for public agencies to understand the requirements of the Individuals with Disabilities Education Act (IDEA) and how those requirements apply to youth with disabilities incarcerated in the juvenile justice system. If confirmed, I look forward to further examining this issue and determining how OSERS can work with states and local school districts to build capacity to address these issues within requirements of IDEA.

Question 3. What obligation does the Federal Government have to provide funding to state and local entities to assist in covering public school costs related to serving children with disabilities?

a. Do you believe the Federal Government should increase its financial commitment to states and local districts under IDEA?

Answer. If confirmed, I am committed to working with the Secretary and Members of Congress to ensure that states and school districts have needed resources and funding to serve children with disabilities under IDEA.

b. Should the Federal Government fund 40 percent of IDEA costs as it originally intended to?

Answer. If confirmed, I am committed to working with the Secretary and Members of Congress to ensure that states and school districts have needed resources and funding to serve children with disabilities under IDEA.

Question 4. Is it your position that students with disabilities who attend schools funded with public money, whether at public schools, public charter schools or through voucher programs should be protected under IDEA? If not, please explain what limitations you believe are appropriate.

Answer. Charter schools are public schools and, therefore, required to meet any and all requirements under the Individuals with Disability Education Act (IDEA) applicable to traditional public schools. IDEA also sets forth the rights of children with disabilities who are parentally placed in private schools. The law itself designates the rights and protections afforded to this population of students. If confirmed, I look forward to working with the Secretary to determine how the Department can best and most appropriately implement the law.

Question 5. Do you have concerns about voucher programs funded through public funds that require students with disabilities to waive their IDEA rights? What are your views on such waivers?

Answer. The Individuals with Disabilities Education Act sets forth the rights of children with disabilities who are parentally placed in private schools—regardless of whether the child is attending a private school through a state-developed voucher program. While it is true that the rights of such children change once they are enrolled in private schools, they are eligible for equitable services under IDEA. They are also considered as a part of the statutorily prescribed meaningful consultation process. If confirmed, I look forward to working with the Secretary to determine how the Department can best and most appropriately support and empower parents. Q04

Question 6. Do you commit to not using non-commercial airplane or helicopter travel paid for at taxpayer expense?

Answer. The Administration has put into place procedures to address these concerns. I am fully committed to not using non-commercial airplane or helicopter travel—as a steward of the taxpayer funds—and committed to complying with all requirements and directives to ensure that taxpayers' funds are used appropriately.

SENATOR MURPHY

Question 1. ESSA now requires that state plans explain how they will assist districts in reducing the use of aversive behavioral interventions, such as seclusion and restraint. Unfortunately, the Department has approved some state plans that omitted this requirement. OSERS staff are part of the team that reviews ESSA state plans. Would you advise the Secretary to approve a plan that does not meet this statutory requirement?

Answer. If confirmed, I am committed to working with the Office of Elementary and Secondary Education and supporting the Department's efforts to implement ESSA as Congress intended.

Question 2. In your role heading the Office of Special Education and Rehabilitative Services, how will you ensure students with disabilities are protected from harmful discipline practices like seclusion and restraint?

Answer. If one child is harmed by the in appropriate use of seclusion and restraint, it is too many. If confirmed, I look forward to working with the Office for Civil Rights and other Department staff to address these issues. Additionally, OSERS has a strong record of investing in positive behavioral interventions and supports and providing technical assistance to states and school districts as they implement such systems. I look forward to ensuring states and local school districts have access to these tools and programs.

SENATOR KAINÉ

*Question 1.* During your time as state director in Kentucky, few School Districts were identified for significant disproportionality—for example, in 2010 merely 5 of the 176 school districts in Kentucky were identified and only 7 in 2011. Yet, when the Department of Education released its analysis of Kentucky last year—using a simple methodology for identifying problematic schools—they found that 115 of Kentucky's districts had significant disproportionality. How do you explain this?

*Question 1a.* Why didn't more schools, under your direct leadership at the Kentucky DOE, get identified for significant disproportionality when the data clearly shows a big problem?

Answer. I believe the analysis mentioned in this question refers to the February 2016 report from the Department of Education (ED)—Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by state, Analysis by Category, and Race/Ethnicity. If so, the purpose of this document, as stated by ED, was to "provide the public with a set of tables showing the number and percentage of school districts that would be identified with significant disproportionality if ED's example risk ratio thresholds were adopted by all 50 states and the District of Columbia."

The IDEA does not itself define significant disproportionality, and places obligation on states to determine if significant disproportionality is occurring, and leaves how the determination is made to states. During my tenure as Director of the Division of Learning Services at the Kentucky Department of Education (KDE), the state made these determinations using the following process:

- Calculated the ratio at which students of a particular race/ethnicity were identified;
- Calculated the ratio at which students not of that race/ethnicity were identified;

- Compared these ratios
- When the comparison revealed that the ratio for students of a specific race/ethnicity was at least three (3) times greater than the ratio for students not of that race/ethnicity, KDE identified the district as having significant disproportionality in the area examined.
- If identified, districts were required to use 15 percent of their Part B funds under IDEA on Comprehensive Coordinated Early Intervening Services (CEIS).

\* *The “N” size required: Fifty (50) students of the particular race/ethnicity enrolled, and ten (10) students of that race/ethnicity identified for special education*

The KDE provided annual training/support to districts identified as having significant disproportionality. Moreover, in April 2015, KDE developed and conducted a series of web-based trainings on significant disproportionality and the use Part B funds under IDEA on Comprehensive Coordinated Early Intervening Services.

During my tenure as Director of the Division of Learning Services at KDE, Kentucky complied with the requirements of IDEA regarding significant disproportionality. If confirmed as Assistant Secretary for the Office of Special Education and Rehabilitative Services, I will work faithfully to do what is best for students and am committed to upholding IDEA’s provisions and safeguards on significant disproportionality.

*Question 2.* According to a 2016 report by the Civil Rights Data Collection, students with disabilities are more than two times as likely as students without disabilities to receive a suspension in a K–12 setting. Furthermore, students with disabilities experience disproportionate seclusion and/or restraint as a disciplinary measure. In your role, how will you hold schools and school districts accountable for disproportionality in using exclusionary discipline practices targeted at students with disabilities?

Answer. If confirmed, I look forward to working with the Office for Civil Rights to address disproportional discipline practices, including exclusionary discipline practice, in accordance with IDEA. OSERS has a strong record of investing in positive behavioral interventions and supports, which I believe can provide evidence-based tools for dealing with such challenges. I look forward to ensuring states and local school districts have access to these tools and programs.

- a. In your experience as a special education teacher, what are the most effective behavior management strategies to maximize student learning and eliminate the need for exclusionary discipline policies?

Answer. The Individuals with Disabilities Education Act (IDEA) emphasizes the use of positive behavioral interventions and supports, and I found that to be effective to maximize student learning and eliminate the need for exclusionary discipline policies. The choice of effective behavior strategies should be made by a team of people who know the child best, be based on evidence, and be focused on what will best meet the needs of the child. In my experience, the implementation of schoolwide systems of support that include proactive strategies for defining, teaching, and supporting appropriate student behaviors help to create positive school environments where students’ and educators’ needs are met and where teaching and learning can most effectively occur. Within this system of support, careful attention to ensuring that appropriate behavioral supports are included in the students’ Individualized Education Program (IEP), and that the IEP is implemented accordingly, is critical.

*Question 3.* On November 30th, 2017, the U.S. Government Accountability Office (GAO) released a new report around private school choice for children with disabilities. One recommendation GAO offers is for the Assistant Secretary for OSERS to review and correct inaccurate IDEA-related information provided by a state. In your role as Assistant Secretary, do you commit to following this GAO recommendation?

Answer. If confirmed, I am committed to examining the recommendation, within the statutory provisions of IDEA, and working with the Secretary to determine how we can best support parents so that they have access to accurate and helpful information.

- a. How will you work with states to ensure parents and students with disabilities are well-aware that a student’s rights under IDEA will be given up if the student attends a private school?

Answer. The Individuals with Disabilities Education Act (IDEA) prescribes the rights and protections afforded to children with disabilities who are parentally placed in private school programs. The law itself determines what rights are afforded to those children, and I look forward to looking at how the Department can appropriately help states, within the provisions of IDEA. If confirmed, I look forward to working with the Secretary to determine how we can best support parents so that they have access to accurate and helpful information.

*Question 4.* What steps will you take to hold charter and private school accountable for offering appropriate services for students with disabilities?

Answer. Charter schools are public schools required to meet any and all requirements under the Individuals with Disability Education Act (IDEA) applicable to traditional public schools. The provisions of IDEA that require free appropriate public education do not apply to private schools. If confirmed, I am committed to enforcing existing provisions of IDEA.

*Question 5.* It is critical that the civil rights of all students, including those with disabilities, are protected. How will your office work with the Office of Civil Rights to ensure this is the case?

Answer. While OCR's authority in enforcing anti-discrimination laws differs from OSERS' mission, the offices do have the shared mission of working on behalf of children with disabilities to ensure that they have an opportunity to succeed in an environment free from discrimination. I believe there are opportunities for collaboration that would allow the offices to focus on improved outcomes for children with disabilities. If confirmed, I look forward to working with OCR to ensure that students with disabilities have access to a quality education.

*Question 6.* Infants, toddlers, and preschool children with disabilities deserve access to high-quality early childhood programs. How will you work with the Department of Health and Human Services to support the inclusion of young students with disabilities in these programs? The Department of Health and Human Services helps ensure that infants, toddlers, and young children with disabilities have access to high quality early education programs. This aligns with OSERS' mission of ensure that infants and toddlers with disabilities are provided quality early intervention services.

Answer. If confirmed, I look forward to having an opportunity to work with HHS to support states as they work to provide quality services to all young children with disabilities, in accordance with IDEA.

SENATOR HASSAN

*Question 1.* During the hearing, you said you had read the recent Government Accountability Office (GAO) report, "Private School Choice: Federal Actions Needed to Ensure Parents are Notified About Changes in Rights for Students with Disabilities." On page 30 of this report there is a recommendation for executive action pertaining to the role of the Assistance Secretary for Special Education and Rehabilitative Services. This recommendation asks the Assistant Secretary to work with states to correct inaccurate information. If confirmed, do you commit to executing this recommendation?

Answer. I am committed to implementing the Individuals with Disabilities Education Act (IDEA) and, if confirmed, I look forward to working with the Secretary to determine how OSERS can work with states to support state-developed opportunities that provide choices for parents and families of children with disabilities. I am concerned about any parent not having the information they need to make informed decisions about their child's education. If confirmed, I am open to learning more and discussing with the Secretary how the Department might best respond to the recommendations from the GAO report.

*Question 2.* The Department of Education has two very broad grants of authority under law, 20 USC 1221e-3 ("to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department"); and 20 USC 3474 ("to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.").

Do you believe either authority enables the Department of Education and the Secretary to require that states disclose to students and their families when they give up their rights under the Individuals with Disabilities Education Act to a Free and Appropriate Public Education in the least restrictive environment when using a voucher to attend a private school? And would you work with the Secretary to do this?

Answer. The cited provisions of the Individuals with Disabilities Education Act (IDEA) apply to the administration of authorized Federal programs under IDEA. The law does not include notification requirements relating specifically to how the rights of parents or children with disabilities change when they voluntarily "un-enroll" from the public school system. If confirmed, I look forward to working with the Secretary to determine how OSERS can address this issue within the parameters of IDEA.

SENATOR HATCH

*Question 1.* The issue of providing students with disabilities access to innovative technologies is very important. I recently cosponsored the Aim High Act with Senator Warren, which would establish an independent commission to provide institutions with voluntary guidelines to follow in providing access to educational technologies in a way that aligns with Federal disabilities law. Do you believe it's important to expand access to educational technology for students with disabilities in a way that coincides with Federal disabilities law?

Answer. Ensuring that children and youth with disabilities have access to innovative technologies is a significant goal. OSERS has a long history of using discretionary grant funding under Part D of the Individuals with Disabilities Education Act (IDEA) to not only increase access to innovative technologies, but to provide technical assistance to states and local school districts as they work to provide fully accessible technology to disabled students. OSERS investments also encourage the development of new technologies that benefit children with disabilities. If confirmed, I look forward to learning more about OSERS ongoing investments and working further to ensure students with disabilities have access to innovative technologies that are key to their success in school.

SENATOR COLLINS

*Question 1.* When I talk to school administrators in my state and ask them, what is the single greatest impact that the Federal Government could have on your ability to provide a good education for all students, invariably they tell me it would be for the Federal Government to pay its promised share for IDEA—for special education for children with special needs. The Federal Government has never lived up to the promise it made in the mid-1970's when this landmark law was passed. Do you agree that this would make a difference for every school district?

Answer. If confirmed, I am committed to working with the Secretary and Members of Congress to ensure that states and school districts have the resources and funding needed to serve children with disabilities. I recognize that it is ultimately up to Congress to determine how much Federal funding should be appropriated for those purposes. Undoubtedly, financial resources contribute to a public agency's ability to meet the requirements of the IDEA. Funding, however, is not the sole determinative factor in a school's ability to provide quality special education and related services. Other factors such as the provision of quality instruction, progress monitoring within a schoolwide system of support, a commitment to having high expectations, and creating a supported learning environment are also critical components of ensuring schools have the resources to provide a high quality education for children with disabilities. If confirmed, I look forward to working with the Secretary and Members of Congress on these important issues.

RESPONSE BY KENNETH MARCUS TO QUESTIONS OF SENATOR MURRAY, SENATOR SANDERS, SENATOR CASEY, SENATOR BENNET, SENATOR WHITEHOUSE, SENATOR BALDWIN, SENATOR MURPHY, SENATOR WARREN, SENATOR KAINE, SENATOR HASSAN, SENATOR MURKOWSKI, AND SENATOR HATCH

SENATOR MURRAY

*Question 1.* Previous Assistant Secretaries for Civil Rights have maintained oversight of specific types of cases to ensure uniform approaches to cases across regional offices. If confirmed, will you require regional directors to report to you on open investigations into certain types of complaints? If so, which types of complaints?

Answer. Ensuring national consistency across the regional offices of OCR is an important purpose of management and oversight. If confirmed, I will take appropriate measures to further the goal of uniform approaches to cases throughout OCR.

*Question 2.* Should OCR investigators only open systemic investigations when the complainant has alleged a systemic problem?

Answer. There are many factors that should be considered in a decision whether an investigation should be opened systemically. If confirmed, I will ensure that OCR's approach to systemic investigations furthers OCR's mission of vigorous enforcement of the civil rights statutes under OCR's jurisdiction.

*Question 3.* When is it appropriate to use each of the following types of OCR enforcement activities: 1) systemic investigations; 2) individual investigations; and 3) compliance reviews?

Answer. There are many factors that should be considered in determining the facts and circumstances under which an individual investigation, systemic investiga-

tion, or compliance review is most appropriate for a particular enforcement activity. If confirmed, I will ensure that OCR's approach to each type of investigation furthers OCR's mission of vigorous enforcement of the civil rights statutes under OCR's jurisdiction.

*Question 4.* OCR has seen an increase in the number of civil rights complaints filed from approximately 8,600 complaints in 2009 to about 10,500 unduplicated complaints in 2016. This year, the Department suggested increasing the caseload of field investigators while also proposing cutting the non-attorney staff by 59 employees. Given your experience at the Department, do you agree OCR needs fewer staff members? Do you think OCR has sufficient staff to resolve complaints in a high quality and efficient manner?

Answer. If confirmed, I look forward to examining the resources available to OCR and to the best of my ability ensuring that OCR continues to have sufficient staff to resolve complaints in a high quality, efficient manner.

*Question 5.* The 2018 budget proposed by the Trump Administration for the Office for Civil Rights includes a reduction of \$1.7 million that, combined with increases for the Civil Rights Data Collection (CRDC), would result in 59 fewer staff at a time when OCR continues to experience increasing workloads of complaints and investigations. Both the House and Senate Committees on Appropriations rejected this proposal, with the Senate Committee increasing OCR's budget to the level required to maintain all existing staff and implement the CRDC.

I have strongly argued for increases in OCR's budget because of its critical mission and increasing workloads. Unfortunately, this year OCR reduced its staffing of attorney/equal opportunity specialists by more than 40, or 10 percent, and offered buyouts to another 45 employees. That means that the number of staff available to effectively investigate and monitor complaints and investigations will further increase when they already are at unacceptably high levels.

Do you commit that you will advocate for the resources necessary to thoroughly investigate and monitor OCR's workloads and fulfill the mission of OCR? If confirmed and Congress provides you with funding for staff needed to fully investigate and monitor complaints in a timely way, can you assure me that you will use the appropriation for this purpose?

Answer. If confirmed, I will advocate for OCR having the budget and resources necessary to fulfill its critical mission, and will manage OCR's operations in such a way that OCR stewards its congressional appropriations to ensure that OCR's role enforcing civil rights is conducted vigorously and efficiently.

*Question 6.* In your view, how does implicit bias contribute to disparate impact?

Answer. Generally speaking, disparate impact in many contexts (e.g., rates of discipline of students) can be caused by a multitude of factors, which may include implicit biases of decisionmakers.

*Question 7.* At the 10th Anniversary National Convention of the American Constitution Society, you participated in a panel on disparate impact, during which you stated that there should be a "good faith exception" to disparate impact liability. What did you mean by "good faith exception," and what sorts of evidence would you accept to demonstrate "good faith" in the disparate impact context? How would a good faith exception operate in practice?

Answer. Disparate impact can be a useful civil rights enforcement tool for identifying discrimination in the absence of direct evidence of intent. I presented my personal legal assessment of the issues raised in this question, as I understood them at roughly the time of that ACS conference, in my article on "The War Between Disparate Impact and Equal Protection." That article can be found here: <https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2009/9/ricci-marcus-0.pdf>. To my knowledge, a "good faith" exception does not exist under current OCR policy. If I were confirmed, I would not infer a good faith exception in OCR disparate impact policies unless one was provided within a statute or regulation over which OCR has jurisdiction.

*Question 8.* At the same panel, you shared that during your tenure "overseeing civil rights enforcement agencies during the President George W. Bush administration," you were concerned that the disparate impact doctrine had been "abused" in prior administrations. Please give examples of how the disparate impact doctrine was abused.

Answer. I do not recall what examples I had in mind at the time.

*Question 9.* If a school district's African-American students are 4.5 times less likely than their white peers to have been identified as eligible for the district's Gifted

and Talented Education (GATE) programs, is that sufficient evidence to open a disparate impact investigation?

Answer. There are many factors considered by OCR's dedicated, qualified career investigators in deciding whether a particular set of circumstances warrant opening an investigation, and it would be inappropriate for me to predetermine a hypothetical set of facts that could come before my potential employer. If confirmed, I will support enforcement of Title VI of the Civil Rights Act of 1964 to ensure that instances of racial discrimination are fully, vigorously investigated and remedied.

*Question 10.* Do you commit to maintaining the Department of Education and Department of Justice joint 2014 Dear Colleague on disparate discipline?

Answer. It's my understanding that the Department is under Presidential Executive Order to systematically review all regulations and guidance, and it would be premature of me to weigh in on that process without being privy to the discussions occurring in the Department in that regard. If confirmed, I look forward to engaging in the regulatory review process as it pertains to the 2014 Dear Colleague Letter on racially discriminatory discipline.

*Question 11.* As I noted in a letter to Secretary DeVos, there have been far too many examples of messages of intolerance and hate directed at and often intended to intimidate students on our college campuses. As just a few examples, a swastika was found at Georgetown University in a bathroom on the first day of Rosh Hashanah. Flyers saying "Imagine a Muslim-Free America" and "Beware the International Jew" were papered across the University of Houston's campus. And at the University of Maryland, a noose was placed in the kitchen of the Phi Kappa Tau fraternity.

In fact, since March 2016, the Southern Poverty Law Center has identified more than 329 incidents of white nationalist fliers and recruitment materials on 241 different college campuses. BuzzFeed News identified 154 incidents of white supremacist propaganda and other acts of racism on college campuses since the election, and more than one in three of these incidents directly cited President Trump's name or one of his slogans. Do you believe college and university leadership should exercise their rights to disavow hate speech by naming the hate in open, campus-wide communications?

Answer. In my personal capacity, and as President of the Louis D. Brandeis Center for Human Rights Under Law, I have repeatedly expressed that view. If confirmed, I will advise the Secretary and work with policymakers in OCR and other areas of the Department to promote the ability and responsibility of college and university leadership to maintain a safe, nondiscriminatory, inclusive campus culture and environment in which the robust exchange of ideas can occur.

*Question 12.* What do you believe is the role of OCR in combating hate and discrimination on college campuses? What specific steps will you take at OCR to advance that role?

Answer. Hate and discrimination have no place on college campuses, and OCR's critical mission includes enforcing the civil rights statutes prohibiting discrimination based on race, color, national origin, sex, age, and disability over which Congress has granted OCR enforcement authority. If confirmed, I will work to ensure that OCR's enforcement activities identify and remedy illegal discrimination and I will advise the Secretary and other areas of the Department to promote campus environments where free speech is exercised in a manner that ensures the safety and dignity of all students.

*Question 13.* You authored the law review article "Higher Education, Harassment, and First Amendment Opportunism," in the William & Mary Bill of Rights Journal in 2008. In that article, you wrote "needless to say, the U.S. Department of Education's Office for Civil Rights may limit the extent to which it regulates speech activities as a matter of administrative discretion, even if it is not constitutionally mandated to do so." What factors will you consider when determining whether and how to regulate speech activities?

Answer. If I were confirmed, I would apply existing law and policy, rather than my personal views or past academic publications. With respect to speech activities, I would consider the issues set forth in OCR's 2003 First Amendment Dear Colleague letter as well as other applicable guidance and law. <https://www.ed.gov/about/offices/list/ocr/firstamend.html>

*Question 14.* In addition to speech activities, when does OCR have discretion to limit its enforcement of Federal or constitutional law?

Answer. As a Federal agency, OCR has a responsibility to conduct its enforcement consistent with the protections guaranteed under the U.S. Constitution and to vigorously fulfill its mission of ensuring equal access to education for all students by rem-

edging discrimination based on race, ethnicity, national origin, sex, and disability. If confirmed, my priority will be to robustly enforce the civil rights with which OCR has been granted jurisdiction, rather than to seek out the limits on OCR's enforcement activities.

*Question 15.* You have written that without a definition of anti-Semitism, OCR "has been paralyzed" and "is failing in its mission to protect Jewish students." If confirmed, will you adopt a definition of anti-Semitism? Do you support the adoption by OCR of the State Department's definition of anti-Semitism?

Answer. In my personal capacity, and as President of the Louis D. Brandeis Center for Human Rights Under Law, I have indeed supported OCR's adoption of the State Department's definition of anti-Semitism, and I have not changed my views on this subject. If confirmed, however, I would engage in a different process, involving broader discussions with staff within the Department and outside stakeholders, before recommending particular policies of this sort.

*Question 16.* If confirmed, do you plan to make investigations of anti-Semitic bullying and harassment a priority? Do you plan to initiate systemic investigations of anti-Semitic bullying and harassment?

Answer. I am greatly concerned about incidents and patterns of anti-Semitic bullying and harassment in our nation's schools and college campuses. If confirmed, I will support OCR exercising its jurisdiction under Title VI of the Civil Rights Act of 1964 to address anti-Semitic harassment consistent with current law. I am equally concerned about incidents and patterns of bullying and harassment based on other forms of discrimination. If confirmed, I will evaluate the range of enforcement issues facing OCR and advise the Secretary as to any enforcement priorities that may best fulfill OCR's mission of vigorous enforcement of each of the civil rights statutes under OCR's jurisdiction, including whether systemic investigations or compliance reviews into particular types of discrimination will best fulfill that mission.

*Question 17.* When does criticism of foreign governments constitute actionable harassment?

Answer. The line between political speech protected by the First Amendment and actionable harassment often turns on the particular facts and circumstances. Recognizing and taking action against illegal harassment in a manner consistent with constitutional speech protections is one of the most difficult and important functions of OCR's enforcement activities. If confirmed, I will do my best to ensure that OCR consistently undertakes vigorous enforcement of civil rights statutes in a manner consistent with the U.S. Constitution.

*Question 18.* Erwin Chemerinsky, Dean of Berkeley Law School and constitutional scholar, has criticized your approach to enforcing Title VII. According to news reports, Chemerinsky has said, "any administrator in a public university who tried to follow Professor Marcus's approach would certainly be successfully sued for violating the First Amendment." (Stephen Zunes, "Trump's Dangerous Appointment to Key Civil Rights Position: Kenneth Marcus," Huffington Post, 11/08/17). How would you advise a college administrator to balance concerns about discriminatory rhetoric with the mandate to protect free speech?

Answer. It is my understanding that Dean Chemerinsky made this statement specifically about the approach taken in the article on "First Amendment Opportunism" that is discussed in Question 13. That article was not intended to provide advice for university administrators. The advice that I have given to university administrators, in my role as President of the Louis D. Brandeis Center, is reflected rather in the LDB Best Practices Guide for Combating Campus Anti-Semitism and Anti-Israelism. (see <http://brandeiscenter.com/best-practices-guide-for-combating-campus-anti-semitism-and-anti-israelism/>). Specifically, I have generally tried to avoid advising college administrators to "balance" the concerns described in this question. Rather, I have urged public university administrators to protect free speech to the full extent required under the First Amendment while also fully complying with all applicable anti-discrimination laws. If confirmed, I would advise administrators to comply with all applicable statutes and regulations and would direct them to OCR policies, such as the 2003 First Amendment Dear Colleague letter.

*Question 19.* When does hate speech become harassment or discrimination? When does hate speech create a hostile environment so severe that OCR has jurisdiction to take enforcement action to address it?

Answer. The line between hate speech protected by the First Amendment and actionable harassment often turns on the particular facts and circumstances. Recognizing and taking action against illegal harassment in a manner consistent with constitutional speech protections is one of the most difficult and important functions

of OCR's enforcement activities. If confirmed, I will do my best to ensure that OCR consistently undertakes vigorous enforcement of civil rights statutes in a manner consistent with the U.S. Constitution.

*Question 20.* In April of 98, you spoke at a Traditional Values Coalition news conference. You spoke in opposition to a bill sponsored by Senator Kennedy and Senator Specter to expand hate crimes legislation to cover violence based on sexual orientation, calling it a “slippery slope to controlling our thoughts and motivations,” and referenced a “multicultural” and “homosexual” agenda. Do you stand by the comments you made at the April 1998 Traditional Values Coalition news conference about hate crimes legislation? Do you support the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act enacted into law in 2009?

Answer. My views on such matters have evolved since 1998. I support full enforcement of Federal hate crimes laws.

*Question 21.* During the same conference, you spoke strongly against President Clinton's National Hate Crimes Prevention Curriculum (“Healing the Hate” curriculum.) You said it authorizes and legitimizes indoctrination. You read a particular quote that you objected to, which referenced “prejudice and contempt, cloaked in the pretense of religion or political conviction.” Do you stand by the comments you made at the April 1998 Traditional Values Coalition news conference? When does religious conviction or personal moral beliefs permit students to make discriminatory or hurtful comments about their peers based on their race, religion, gender or sexual orientation?

Answer. As I indicated in response to the prior question, my views on such matters have evolved since 1998. I can think of no such exception to Federal civil rights laws.

*Question 22.* Secretary DeVos revoked joint Department of Justice and Department of Education guidance clarifying the protections afforded to transgender students. In doing so, she said that protections for transgender students are “best solved at the state and local level. Schools, communities, and families can find—and in many cases have found—solutions that protect all students.” Do you agree that the scope of protections afforded to students under Title IX is an issue best resolved at the state and local level?

Answer. Title IX is a Federal civil rights statute. For this reason, the scope of protections afforded to students under Title IX is best resolved at the Federal level. Title IX prohibitions on sex discrimination, including harassment based on sex stereotyping, continue to protect all students, including transgender students. It is also appropriate for state and local authorities to adopt additional measures to protect all students if they choose to do so.

*Question 23.* Does Title IX provide transgender students the right to access facilities consistent with their gender-identity? Will you commit to ensuring that OCR consistently investigates complaints that allege transgender students have been denied access to facilities consistent with their gender-identity?

Answer. Title IX prohibits discrimination based on sex. As previously indicated, Title IX prohibitions on sex discrimination, including harassment based on sex stereotyping, continue to protect all students, including transgender students. The question as to whether Title IX provides additional protections to transgender students beyond those described above, and the nature and scope of such protections, is currently being litigated. If Congress should pass a law providing OCR with the authority described in this question, I would commit, if confirmed, to ensuring that OCR fully and vigorously enforces it. Similarly, if confirmed, I would commit to ensuring that OCR investigates complaints consistently with any decision that the U.S. Supreme Court should issue on this matter.

*Question 24.* Does Title IX require schools to take action in response to bullying or harassment on the basis of a students' sexual orientation or gender identity? If so, under what circumstances does OCR have jurisdiction over these types of complaints?

Answer. Title IX obligates schools to respond to incidents of bullying and harassment based on sex so that all students are protected against sex discrimination. This protection applies to each and every student regardless of sexual orientation or gender identity. OCR has jurisdiction over complaints that any school receiving Federal education funding has subjected students to sex discrimination in the form of sex-based bullying or harassment.

*Question 25.* Are there any regions where you believe OCR investigators do not have the authority to investigate complaints of 1) gender-identity discrimination or 2) sexual-orientation discrimination? If so, which regions?

Answer. OCR has nationwide jurisdiction under Title IX to investigate complaints of sex discrimination against any student, regardless of gender identity or sexual orientation.

*Question 26.* In your view, is it appropriate for Regional Directors or individual OCR investigators to determine whether Title IX prohibits sexual orientation or gender identity discrimination?

Answer. No; the scope of Title IX's prohibition against discrimination based on sex is a legal determination that requires national consistency within OCR, and should not be determined by OCR's individual Regional Directors or individual investigators.

*Question 27.* In interviews with my staff and in your confirmation hearing, you have repeatedly called the U.S. Department of Education's Civil Rights Data Collection (CRDC) "valuable" and "important," citing your experiences using the data when you worked at the Department during the George W. Bush administration. Do you commit to maintaining, at a minimum, the current categories of data collection?

Answer. I support the data collection efforts represented in the CRDC. If confirmed, I will continue to consider ways in which the CRDC's usefulness can be improved upon in future data collection cycles.

*Question 28.* In an August 25, 2017 letter, I wrote to Secretary DeVos about my support for several updated proposals in the most recent proposed revision to the CRDC, including the proposal to include school districts in Puerto Rico in the data collection as well as the proposal to add reporting on computer science classes and school internet access. What do you think of these proposals? Are there other new categories of data collection you would consider adding to the CRDC?

Answer. I support the data collection efforts represented in the CRDC. If confirmed, I will continue to evaluate ways in which the CRDC's usefulness can be improved upon in future data collection cycles.

*Question 29.* In the same letter, I strongly objected to the new proposal to define a student's sex as "the concept of describing the biological traits that distinguish the male and female of a species" rather than the "designation of female or male as indicated in a student's record." As I wrote in the letter, "[b]y asking schools not to identify students based on their own school records, it appears the Department is requiring school employees conduct individual inquiries into students' past medical and social histories. This is an extremely invasive request and an unnecessary violation of students' privacy. All students, including transgender students, deserve to be treated with dignity and respect and their privacy protected by their teachers, schools, and the government." What is your view on this definition of sex as it applies to the CRDC?

Answer. Without the benefit of being privy to the discussions occurring in OCR and the Department concerning reasons for inclusion of particular definitions used in the CRDC, I cannot provide an informed view of that definition; however, if confirmed, I look forward to considering all perspectives in determining ways in which the value of the CRDC as a data and enforcement tool can be strengthened.

*Question 30.* Beginning with the 2009–2010 collection, school districts have been required to report information about restraint and seclusion of students at school to the Civil Rights Data Collection (CRDC). But according to news reports, many school districts—including school districts with large student enrollments such as New York and Chicago—fail to report any data about restraint and seclusion. If confirmed, what specific steps will you take to bring school districts that do not report accurate information on the CRDC into compliance? Will you accept and investigate OCR complaints about schools that fail to report their restraint and seclusion data to the CRDC?

Answer. I am aware through media reports of the problem of discrepancies in data reported through the CRDC. If confirmed, I will consider appropriate ways for continually strengthening the reliability of the data collected by the CRDC, including enforcement options as allowed by law.

*Question 31.* The Brandeis Center under your leadership filed a joint amicus brief in *Fisher v. University of Texas at Austin*. The brief quotes Daniel Golden's argument that "Asian-Americans are the new Jews" and the "most disenfranchised group" in college admissions. Do you personally endorse this view? What does "Asian-Americans are the new Jews" mean to you?

Answer. I personally believe that many Asian Americans face stereotypes, discrimination, and bias today, just as Jewish Americans have faced analogous challenges historically. This is unacceptable. I do not have a view on whether Asians

are the “most disenfranchised group.” However, I do think that it is important to address discrimination against all groups.

*Question 32.* The Supreme Court disagreed with the positions set out in this brief and ruled in favor of the University and important non-governmental partners of the Office of Civil Rights. Do you still agree with arguments made in the Brandeis Center’s amicus brief in *Fisher v. University of Texas* (Fisher I)?

Answer. I believe that OCR must apply the law as interpreted by the U.S. Supreme Court in its decisions including the Fisher case.

*Question 33.* As Acting Assistant Secretary for Civil Rights in 2004, you published a report encouraging schools to use race-neutral policies, characterizing affirmative action as a set of discriminatory and unlawful “racial preferences” that pose an obstacle “to the achievement of a color-blind society.” Do you agree with the Supreme Court that race-conscious admissions are constitutional and that affirmative action is necessary to achieve the compelling interest of diversity in education?

Answer. Respectfully, I do not share that characterization of the 2004 report. Indeed, in the letter introducing that report, I wrote that, “The Supreme Court’s decisions in the Michigan affirmative action litigation affirm that our shared commitment to diversity is both compelling and just when pursued within lawful parameters.” If confirmed, I would apply the law in the manner set forth by the U.S. Supreme Court, including Supreme Court decisions dealing with the constitutionality of affirmative action and the compelling interest of diversity.

*Question 34.* In a law review article you authored titled, “The Right Frontier for Civil Rights Reform,” you wrote that the use of race-conscious admissions “appears to have caused demonstrable harms, not only to the qualified white and Asian applicants who have presumably been denied admission on the basis of their race, but also the black (or Hispanic) applicants who have been admitted on that basis.” Do you stand by that position? If so, how will that influence your enforcement of Title VI as interpreted by the Bakke, Grutter, and Gratz decisions?

Answer. The quoted language referred to the situation at one institution at a particular time in the past. I do not recall the particular incident well enough to have a view about it now; however, any views that I might have had about it in the past would not influence my enforcement of Title VI if I were confirmed.

*Question 35.* Do you believe disparities in accessing or participating in athletics exist for women and girls of color? If so, do you think that OCR should take steps to address those disparities?

Answer. I believe that disparities unfortunately exist for women and girls of color with respect to access to and participation in athletics. If confirmed, I will ensure that OCR remains committed to vigorous enforcement of Title IX and Title VI by investigating discrimination based on sex and race so that all students have access to their school’s programs and activities, including athletics.

*Question 36.* The Department adopted a three-part test in 1979 to assess schools’ compliance with Title IX’s athletics participation requirements. Do you believe this three-part test requires institutions to implement quotas or to cut male teams to come into compliance with Title IX?

Answer. No.

*Question 37.* Title IX prohibits discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom. In order to comply with that prohibition, schools are required to excuse absences for pregnant students for as long as medically necessary, to allow students to make up work missed due to pregnancy or related conditions, and to provide accommodations that are reasonable and responsive to pregnant students’ needs. Will you enforce Title IX protections for pregnant and parenting students, as well as for students who terminate their pregnancies?

Answer. If confirmed, I will enforce Title IX protections against sex discrimination for all students, including pregnant and parenting students.

*Question 38.* The Supreme Court has ruled in *Brown v. Board of Education of Topeka* that separating students based on race is unconstitutional, creating inherent inequities. You have supported policies that allow for separating schools and classrooms based on the sex of students. In your opinion, how can separate schools for boys and girls offer equal opportunity when separate schools based on race do not?

Answer. If confirmed, I will support policies that implement applicable law and regulation. Current Department regulations permit single-sex education to occur within certain parameters, and I will enforce those regulations.

*Brown v. Board of Education* was a decision of fundamental importance. On matters pertaining to single-sex education, I would if confirmed refer specifically to the principles established by *Justice Ruth Bader Ginsberg in United States v. Virginia* (the “VMI” case) and reflected in OCR regulations.

*Question 39.* Is it permissible for schools to offer classes in a coeducational setting and a single-sex setting for one sex but not the other?

Answer. Current Department regulations permit schools to provide single-sex classes or extracurricular activities only under certain circumstances as set forth in 34 C.F.R. 106.34(b). To comply with that regulation, a school may be required to provide a substantially equal single-sex class or extracurricular activity for the excluded sex.

*Question 40.* Women and girls, particularly girls and women of color, are severely under-represented in fields that are non-traditional for their gender, such as science, technology, engineering, and math (STEM). Do you believe that OCR has a role in ensuring that discrimination does not prevent girls and women from entering or being pushed out of fields that are nontraditional for their gender? If so, what is that role and what steps would you take to determine what needs to be done to eliminate such discrimination?

Answer. OCR has a critical role in remedying sex-based discrimination for all students, including women and girls in the context of discrimination that prevents women and girls from participating in STEM education. If confirmed, I would ensure that OCR vigorously enforces Title IX protections for women and girls in all educational programs and activities.

*Question 41.* Do you believe that direct cross-examination of a complainant by a respondent is ever appropriate in Title IX hearings and investigations? If yes, when is it appropriate? Are there times when it is required?

Answer. It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

*Question 42.* Do you believe that mediation is appropriate in cases of sexual violence and sexual assault? Do you believe that informal resolutions are appropriate in cases of sexual violence and sexual assault?

Answer. It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

*Question 43.* Do you believe that schools should wait or not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation (with allowances for temporarily delaying fact-finding while police are gathering evidence)?

Answer. It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

*Question 44.* Do you believe that it is ever appropriate for respondents to be allowed the right to appeal case outcomes but not complainants?

Answer. It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

*Question 45.* Can schools fulfill their Title IX obligations if their process or procedure for handling a case of sexual violence or assault is different from other dispute resolution processes?

Answer. It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

*Question 46.* If you are confirmed, will the Office for Civil Rights enforce the ADA’s community integration mandate, pursuant to the Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which prohibits the unnecessary segregation of people with disabilities, including students? If not, why not?

Answer. It’s my understanding that the Department of Justice and the Department of Health and Human Services’ Office for Civil Rights have primary responsibility for implementing the Supreme Court’s decision in *Olmstead* to ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs. If confirmed to lead OCR, I will as appropriate work with the Department of Education’s Office of Special Education and Rehabilitative Services as

well as DOJ and HHS to ensure that OCR abides by all applicable Supreme Court precedent.

*Question 47.* The Department of Education took the position in *K.M. v. Tustin Unified School District* (725 F.3d 1088 (9th Cir. 2013)) that the Individuals with Disabilities Education Act (IDEA) and Title II of the ADA impose different requirements on schools providing communication services to students with disabilities. Do you agree with this position? If not, why not?

Answer. It would not be appropriate of me to opine on particular actions undertaken by the previous Administration. If confirmed, I will lead OCR in such a manner as to fully and effectively enforce all applicable provisions of Title II of the ADA (over which OCR has jurisdiction), and work with the Department's Office of Special Education and Rehabilitative Services with respect to enforcement of the IDEA.

*Question 48.* In 2013 the Department of Justice sent a letter to the State of Wisconsin stating that the state's school choice program, which is funded and administered by the state, was subject to Title II of the ADA, which prohibits disability discrimination by state and local governments. The letter states that a student who is eligible for the school choice program "is entitled to the same opportunity as her non-disabled peers to attend the voucher school of her choice and to meaningfully access the general education curriculum offered by that school." Do you agree with this interpretation of the ADA? If not, why not?

Answer. It would not be appropriate of me to opine on particular actions undertaken by the previous Administration. If confirmed, I will lead OCR in such a manner as to fully and effectively enforce all applicable provisions of Title II of the ADA.

*Question 49.* Under your leadership, will the Office for Civil Rights continue to process complaints regarding whether private schools participating in voucher programs violate a student's rights under the ADA or Section 504?

Answer. If confirmed, I will lead OCR in such a manner as to fully and effectively enforce the provisions of Title II of the ADA and Section 504 of the Rehabilitation Act of 1973.

*Question 50.* The Departments of Education and Justice issued joint guidance in 2014 to explain schools' obligations under Title VI to ensure that their enrollment practices do not discriminate against students on the basis of their "actual or perceived citizenship or immigration status." This guidance applies the Supreme Court's ruling in *Plyler v. Doe*, 457 U.S. 202 (1982). Was this guidance appropriate? Do you commit to maintain this 2014 guidance? If not, why not?

Answer. It is my understanding that the Department is under Presidential Executive Order to systematically review all regulations and guidance, and it would be premature of me to weigh in on that process without being privy to the discussions occurring in the Department in that regard. If confirmed, I look forward to engaging in the regulatory review process as it pertains to the 2014 Dear Colleague Letter on school enrollment procedures that addresses compliance with Federal civil rights laws and U.S. Supreme Court precedent.

*Question 51.* The 2015 joint guidance issued by the Departments of Education and Justice clarifies schools' obligations under Title VI to ensure that English Language Learner (ELL) students have equitable access to educational opportunities. Further, the guidance promotes access to meaningful communication with schools for limited English proficiency (LEP) parents. Was this guidance appropriate? Do you commit to maintain this 2015 guidance? If not, why not?

Answer. It is my understanding that the Department is under Presidential Executive Order to systematically review all regulations and guidance, and it would be premature of me to weigh in on that process without being privy to the discussions occurring in the Department in that regard. If confirmed, I look forward to engaging in the regulatory review process as it pertains to the 2015 Dear Colleague Letter on ELL and LEP issues.

*Question 52.* Earlier this year President Trump rescinded Deferred Action for Childhood Arrivals (DACA), effectively revoking Dreamers' work permit eligibility and protection from deportation. What will OCR do under your leadership to protect access to education for Dreamers and undocumented students?

Answer. If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student's right to access his or her education free from discrimination based on race, color, or national origin, consistent with U.S. Supreme Court precedent, such as *Plyler v. Doe*. *Plyler v. Doe* established every child's right to receive a public education regardless of immigration status.

*Question 53.* If confirmed, how will OCR under your leadership treat schools that offer sanctuary protections to undocumented students and teachers?

Answer. Under my leadership if I am confirmed, OCR will hold all schools that receive Federal funds accountable for compliance with the civil rights statutes under OCR's jurisdiction.

*Question 54.* Secretary DeVos has denounced the longstanding use of Dear Colleague Letters, and in a September 7th speech, she declared "the era of rule by letter is over." In your role as Acting Assistant Secretary for OCR during the George W. Bush administration, you signed five Dear Colleague letters clarifying schools' Title VI and Title IX obligations. What is your view on the use of Dear Colleague Letters? Do you agree with Secretary DeVos' position on the use of subregulatory guidance? When is the use of subregulatory guidance appropriate?

Answer. Dear Colleague Letters and other forms of subregulatory guidance do not have the force or effect of law, but can provide useful clarifications of existing law and regulation. I agree with the Secretary's position as to subregulatory guidance that has been treated as legally binding without complying with the Administrative Procedures Act.

*Question 55.* Do you intend to maintain all current Dear Colleague letters unless there is an intervening change in the law or regulations? If not, what factors would lead you to revoke current guidance on a particular issue?

Answer. It is my understanding that the Department is under Presidential Executive Order to systematically review all regulations and guidance, and it would be premature of me to weigh in on that process without being privy to the discussions occurring in the Department in that regard, including factors to be considered in recommending whether particular guidance should be modified or revoked.

*Question 56.* Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing guidance?

Answer. My understanding is that the Department is thoroughly reviewing all guidance pursuant to Executive Order 13777. If confirmed, I will work, as appropriate within my role, with Department officials, including the Department's Office of Legislation and congressional Affairs, on these matters.

*Question 57.* What is your opinion about whether minority members of the HELP Committee have the authority to conduct oversight of the U.S. Department of Education?

Answer. I appreciate and respect the oversight responsibilities of Members of Congress and this Committee. If confirmed, I will work with the Office of Legislation and congressional Affairs to be as responsive as possible to all congressional inquiries in a timely and thoughtful way, regardless of party.

*Question 58.* If confirmed, do you agree to provide briefings to members of the HELP Committee, including minority members, if requested?

Answer. If confirmed, I will work with my colleagues in the Office of Legislation and congressional Affairs to ensure any briefing requests from members of the HELP Committee regardless of party or position are responded to in a timely and appropriate manner, whenever participation by the Office for Civil Rights is requested.

*Question 59.* If confirmed, do you commit to answer promptly and completely any letters or requests for information from individual members of the HELP Committee including request for Department of Education documents, communications, or other forms of data?

Answer. If confirmed, I work with the Office of Legislation and congressional Affairs, as appropriate, to be as responsive as possible to all congressional inquiries and requests for information in a timely and thoughtful way.

#### SENATOR SANDERS

*Question 1.* President Trump's Budget Proposal for fiscal year 2018, which Secretary DeVos supports, suggested cutting the Office for Civil Rights (OCR) budget by 7 percent, and reducing the number of full-time equivalent employees by 46. As you may have heard, as part of the effort to cut staff, the Department of Education has received approval to buy out 45 staff from OCR, out of the 255 voluntary offers made November 1 to employees to separate or retire early. What will you do to ensure that OCR has the full-time, skilled staff it needs to properly conduct investigations, provide technical assistance to schools and school districts that request assistance in preventing and addressing discrimination, and issue guidance and regulations to clarify school officials' responsibilities?

Answer. If confirmed, I will advocate for OCR having the budget and resources necessary to fulfill its critical mission, and will manage OCR's operations in such a way that OCR stewards its congressional appropriations to ensure that OCR's role enforcing civil rights is conducted vigorously and efficiently.

*Question 2.* The Assistant Secretary for Civil Rights oversees OCR, to "ensure equal access to education and to promote educational excellence throughout the Nation through vigorous enforcement of civil rights." In addition, OCR enforces a number of Federal civil rights laws that prohibit discrimination, including Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Title IX, and the Age Discrimination Act. OCR also investigates and resolves complaints of discrimination on the basis of race, sex, disability, age, and national origin. Do you agree with the U.S. Supreme Court that colleges and universities have a compelling interest in promoting racial diversity in higher education? Do you think OCR should play a role in enforcing the principles of diversity and inclusion? How, in your view, is this best accomplished?

Answer. If confirmed, I will conduct OCR enforcement activities, including investigation of complaints over whether colleges and universities are legally promoting racial diversity, by rigorously applying Title VI and U.S. Supreme Court precedent.

*Question 3.* On June 25, 2002, when you were Deputy General Assistant Secretary for Fair Housing and Equal Opportunity at HUD, you testified before a subcommittee of the House Committee on Financial Services on the role that lending discrimination may play in the disparity in homeownership rates between whites and some people of color. In congressional testimony you referenced a HUD-commissioned study, titled All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions, that examined how lenders treated blacks and Hispanics at the pre-application stage, when they inquired about residential mortgage financing. You mentioned that the study revealed that while the majority of mortgage lending transactions do not involve discrimination, blacks and Hispanics, in the markets studied, tended to receive less information, less assistance, and worse terms. You said then that HUD was "stepping up its efforts to combat lending discrimination." As Assistant Secretary for Civil Rights, would you take a similar approach to enforce a number of Federal civil rights laws that prohibit discrimination, including Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Title IX, and the Age Discrimination Act? If confirmed, what specific policies will you lead to carry out Federal anti-discrimination laws?

Answer. Thank you for highlighting my work in this area. I certainly was appalled by this evidence of discrimination against African American and Hispanic lenders, and I was pleased to play a role in enforcement efforts developed to combat it. Yes, I would be similarly concerned about discriminatory treatment of minorities, women, or the disabled under the statutes listed in this question. If confirmed, I will follow the existing policies of the Office for Civil Rights unless or until such time as they were changed, rescinded, or supplemented under appropriate procedures.

*Question 4.* It is clear that schools violate civil rights laws when they intentionally discriminate against students because of their race, national origin, sex, or other protected class. It is also true that schools may be liable for unintentional discrimination against students when they adopt policies that seem neutral, but have a different impact on students because of their race or gender. This is called "disparate impact," and while complicated to prove and controversial, is a key part of OCR's jurisdiction and ability to enforce the full scope of Federal civil rights laws. As Assistant Secretary for Civil Rights, what will you do to enforce the doctrine of disparate impact that protects students against discrimination, and allows for a remedy similar to when an employment practice that may be neutral on its face has an unjustified adverse effect on members of a protected class?

Answer. If confirmed, I will ensure that OCR enforces the civil rights statutes under its jurisdiction vigorously within the bounds of current law and regulation. Current regulations under Title VI of the Civil Rights Act of 1964 [at 34 C.F.R. 100.3(b)(2)(3)] prohibit schools that receive Federal funds from adopting policies that have the effect of subjecting students to discrimination based on race.

#### SENATOR CASEY

*Question 1.* In 2014, the Department of Education's Office of Civil Rights published a list of colleges and universities with open Title IX complaints regarding campus sexual harassment and assault. In previous Administrations, including during your prior tenure, this information was not made publicly available. Releasing

this information shined a light on how pervasive sexual violence is on our college campuses. It increased scrutiny, and encouraged many colleges and universities to take a look at their policies to ensure all students were able to receive an education in a safe environment. As Louis Brandeis said, “sunlight is said to be the best of disinfectants.”

*a.* You testified that you could not commit to continuing to make this data publicly available because you felt you needed to evaluate the best approach. Will you commit to sharing information about your evaluation with this committee, including the process, stakeholders, and research you use?

Answer. If confirmed, I will work with my colleagues in the Office of Legislation and Congressional Affairs to be responsive to any requests for information from members of the HELP Committee or other congressional offices.

*b.* In addition, OCR is responsible for investigating complaints regarding discrimination on the basis of disability, race and national origin, religion, and age. Would you share your views on expanding transparency by making information about open investigations on the basis of these claims publicly available?

Answer. If confirmed, I will work with my colleagues in the Office of Legislation and Congressional Affairs to be responsive to any requests for information from members of the HELP Committee or other congressional offices.

*c.* OCR does not publish all data, such as the length of time it takes to complete an investigation. However, when asked, they have provided such information to Congress. This information is critical to helping us to perform our oversight responsibilities as well as ensure the Department has the resources needed to complete investigations in a timely manner. If confirmed, would you commit that OCR would continue to provide this data to Congress?

Answer. If confirmed, I will work with my colleagues in the Office of Legislation and Congressional Affairs to be responsive to any requests for information from members of the HELP Committee or other congressional offices.

*Question 2.* You have been the director of a research center and you have been both a consumer and producer of data upon which policy is based. One of the great values of the Office of Civil Rights has been the publication and availability to the public, of the Civil Rights Data Collection. The data set has allowed researchers, state and local policymakers, school administrators, and parents and family members to examine the practices of schools and then use the information to help shape policies at the building level all the way up to the state level. The Civil Rights Data Collection allows us to see if students in poor districts are gaining access to higher level science and math classes, to Advanced Placement curriculum, and to such challenging programs as the International Baccalaureate program. It allows us to see when and which children schools suspend or expel. It helped us see the significant problem with preschool expulsions so that local school districts and states could address those concerns.

*a.* If confirmed, will you continue the collection of the Civil Rights Data Collection and continue to make it readily available to states, schools, and the public?  
Answer. I support the data collection efforts represented in the CRDC. If confirmed, I will continue to consider ways in which the CRDC’s usefulness can be improved upon in future data collection cycles.

*b.* As you probably know, while the data set is extremely valuable for examining the outcomes of schools and districts, some local school districts do not report data in areas such as incidents of bullying. Will you continue to assist states and school districts to increase the validity and accuracy of their reporting of the data?

Answer. If confirmed, I will consider ways for continually strengthening the reliability of the data collected by the CRDC, including improving or expanding assistance available to states and school districts to help them comply with their reporting obligations.

*Question 3.* The most recent Civil Rights Data Collection had over 170,000 reported incidents of restraining or secluding students during the 2013–2014 school year. Restraints and seclusions can lead to significant emotional trauma as well as physical harm and, in the worst cases, death of a student. A 2014 report from this Committee reported incidents of families who had not known about their children being restrained or secluded in school. In some cases, families requested that schools stop these practices and they were denied that request. One family even reported they had to move in order to stop the use of restraint and seclusion with their daughter. In May 2012 the Department issued a resource document related to the use of restraint and seclusion in schools that emphasized prevention and use

of those techniques only in emergency situations. That year the Civil Rights Data Collection reported just over 60,000 incidents of restraint and seclusion in schools. The use has almost tripled since that time and the Department has not issued formal guidance or regulations. Will you commit to continue the collection of data on incidents of the use of restraint and seclusion in schools so that school leaders and the families and communities they serve will know about these incidents and efforts to eliminate their use?

Answer. As I have stated I support the data collection efforts represented in the CRDC, and if confirmed I will advocate for the Department to continue to collect and publish this important data. However, it would not be appropriate for me to commit to any particular data element within this collection, out of deference to the Secretary. If confirmed, I look forward to working with the Secretary and you on this issue.

*Question 4.* According to data from the Office for Civil Rights Civil Rights Data Collection, there are significant disparities in discipline for students of color and their white peers in both preschool and elementary and secondary education. Indeed, during the 2013–14 school year, black K–12 students were 3.8 times more likely to receive an out-of-school suspension compared to their white peers and black preschool students were 3.6 times more likely to receive a suspension. This is an alarming gap. In your view, what is the role of Office of Civil Rights in addressing these disparities?

Answer. No student should be subjected to discipline based on his or her race, and an important part of OCR's mission is to conduct enforcement activities that address instances of racial discrimination, including in the way in which a student is disciplined.

*Question 5.* Bullying is a major epidemic in our nation's schools and a serious problem facing children. According to data released in 2016 from the National Center for Education statistics, more than 20 percent of students report being bullied. Research shows that bullying and harassment have adverse long-term consequences, including decreased concentration at school, increased school absenteeism, damage to the victim's self-esteem, and increased social anxiety. LGBTQ students are particularly vulnerable to bullying and harassment. Title IX prohibits gender-based harassment, which includes "harassing conduct based on a student's failure to conform to sex stereotypes." Far too often, LGBTQ students are the target of gender-based harassment. How do you view the Office of Civil Rights' role in ensuring that LGBTQ students are free from harassment, including gender-based harassment?

Answer. A critical aspect of OCR's mission is to conduct enforcement activities designed to combat bullying in the form of sex-based harassment. Under my leadership, if confirmed, OCR will seek to protect every student regardless of his or her sexual orientation or gender identity, from illegal sex-based discrimination.

SENATOR BENNET

*Question 1.* How will you enforce *Plyler v. Doe* to ensure that the status of an undocumented or their guardian does not affect their right to receive a public education?

Answer. If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student's right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent such as *Plyler v. Doe*, which established every child's right to receive a public education regardless of immigration status. Enforcement efforts in this regard may include investigating incoming complaints, initiating compliance reviews or directed investigations, and providing technical assistance to schools, students, and parents.

*Question 2.* Will you evaluate residency requirements to ensure that they do not bar or discourage undocumented students from enrolling in school?

Answer. Under my leadership, if confirmed, OCR will examine school policies that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers based on race, color, or national origin.

*Question 3.* How will you ensure that districts do not request information that they will use to deny access to schools on the basis of race, color, or national origin?

Answer. Under my leadership, if confirmed, OCR will examine school policies that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers based on race, color, or national origin.

*Question 4.* How will your office enforce *Lau v. Nichols* to ensure that schools are meaningfully communicating with guardians who have limited English proficiency?

Answer. Under the U.S. Supreme Court's decision in *Lau v. Nichols*, schools' compliance with their legal obligations under Title VI of the Civil Rights Act of 1964 includes taking affirmative steps to ensure that students with limited English proficiency can meaningfully participate in their educational programs and services. If confirmed, I will ensure that OCR continues to undertake enforcement activities so that schools comply with their obligations to English language learners and LEP students and parents, including effective communications with LEP parents and guardians.

*Question 5.* What steps will your office take to ensure that English Learner students can participate meaningfully and equally in curricular and extracurricular programs?

Answer. Under the U.S. Supreme Court's decision in *Lau v. Nichols*, schools' compliance with their legal obligations under Title VI of the Civil Rights Act of 1964 includes taking affirmative steps to ensure that students with limited English proficiency can meaningfully participate in their educational programs and services. If confirmed, I will ensure that OCR continues to undertake enforcement activities so that schools comply with their obligations to English language learners and LEP students and parents, including participation in the school's programs and activities

*Question 6.* How will you enforce *Lau v. Nichols* to ensure that schools are avoiding unnecessary segregation of English Learner students?

Answer. Under the U.S. Supreme Court's decision in *Lau v. Nichols*, schools' compliance with their legal obligations under Title VI of the Civil Rights Act of 1964 includes taking affirmative steps to ensure that students with limited English proficiency can meaningfully participate in their educational programs and services. If confirmed, I will ensure that OCR continues to undertake enforcement activities so that schools comply with their obligations in a manner that avoids unnecessary isolation or segregation of English language learners.

SENATOR WHITEHOUSE

*Question 1.* Many believe that sexual harassment and violence are pervasive problems in schools, at every level, that interfere with students' access to education. Do you agree with this characterization?

Answer. Yes.

*Question 2.* One obstacle to obtaining justice for sexual assault survivors can be the views of local law enforcement agencies or agents. When law enforcement officers have views that include beliefs like: false rape reports are common, women "ask for it", or that men can't be raped-beliefs that are demonstrably false, this can negatively affect the course of an investigation. Do you agree that these types of perspectives can be obstacles for sexual assault victims when working with law enforcement to obtain justice?

Answer. Yes.

*a.* Are you aware of the Trauma Informed Sexual Assault Training? If so, what applicability would it have to your work if confirmed? If not, will you commit to reviewing it before you are confirmed?

Answer. I am familiar with commonly understood and applied principles of trauma-informed approaches to sexual assault training of investigators and adjudicators. If confirmed, I will review and consider all aspects of issues surrounding the critically important problem of combating sexual assault in schools, including the way in which trauma-informed training is incorporated into campus sexual assault investigations.

*Question 3.* Under your leadership, how would the Office of Civil Rights proceed with sexual assault and misconduct investigations?

Answer. If confirmed, OCR under my leadership will continue to vigorously enforce Title IX's statutory and regulatory prohibitions on sex discrimination, including holding schools accountable for responding promptly and equitably to reports of sexual harassment and assault.

*Question 4.* Do you agree with the account of the Acting Assistant Secretary of campus sexual assault that "Rather, the accusations—90 percent of them—fall into the category of 'we were both drunk,' 'we broke up, and 6 months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right,'"? What are your views of this description?

Answer. I disagree with the characterizations expressed in that description and consider sexual assault on campus to be a serious problem across our country. If confirmed, OCR under my leadership will continue to vigorously enforce Title IX's statutory and regulatory prohibitions on sex discrimination, including holding schools accountable for responding promptly and equitably to reports of sexual harassment and assault.

*Question 5.* In your view would it be appropriate for a school to use a preponderance of the evidence standard in its disciplinary proceedings for academic violations, vandalism, and drug use, but used a clear and convincing standard for sexual assault investigations?

Answer. It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department. If confirmed, I look forward to working with the Secretary on this issue.

*Question 6.* Do you believe an individual can choose their sexual orientation or gender identity? Do you believe LGBT individuals receive "preferred treatment" under Federal hate crimes law?

Answer. No, that is not my personal belief. If confirmed to this position, I would evaluate, consider, and help develop policy based not on my personal beliefs, but on sound legal analysis and consideration of the policy perspectives expressed by stakeholders, the public, Members of Congress, and other Department officials. If confirmed, I would work to ensure that the civil rights laws over which OCR has jurisdiction are vigorously enforced with the goal of protecting every student in our nation's schools from the evils of illegal discrimination.

*Question 7.* What assurances can you provide me that you will work to protect the rights of LGBT students in school settings if you are confirmed?

Answer. If confirmed, I would work to ensure that the civil rights laws over which OCR has jurisdiction are vigorously enforced with the goal of protecting every student in our nation's schools, including LGBT students, from the evils of illegal discrimination.

*Question 8.* You have written that racial inequality and gaps between black and white Americans can be significantly attributed to black "cultural dysfunction" and "family structure," rather than to a history of systemic discrimination. Is this still your view?

Answer. No. For that matter, I do not recall having endorsed those views in the past either, although I remember describing the positions and attributing them to others.

*Question 9.* Disparate impact discrimination results when facially neutral policies adversely affect members of a protected class more than other students and aren't necessary for meeting any important educational goal—for example, a school policy prohibiting students from having braided hair can have a disparate impact on black students and lead to black students being singled out for discipline as a result. You have been an outspoken critic of disparate impact liability, claiming that remedies for disparate impact discrimination likely violate the Fourteenth Amendment's Equal Protection Clause. Do you believe disparate impact discrimination is a form of discrimination reached by the laws enforced by OCR?

Answer. Yes. As I have indicated above, disparate impact doctrine plays an important role in civil rights enforcement.

*Question 10.* Do you commit to not using non-commercial airplane or helicopter travel paid for at taxpayer expense?

Answer. Yes.

#### SENATOR BALDWIN

*Question 1.* As the Department continues to examine its Title IX policy and practice with regard to campus sexual assault, it is critical that the perspectives of survivors are taken into account. Will you commit to inclusion of those voices in your policy decisionmaking, including meeting with individual survivors and the organizations representing their interests?

Answer. Meeting with and carefully considering the views, perspectives, and experiences of sexual assault survivors is an important component of policymaking. If confirmed, I will ensure that OCR follows that approach on the critical issue of how best to enforce Title IX's prohibition against sex-based discrimination that occurs in the form of sexual harassment and assault.

*Question 2.* I am concerned that the Department's February rescission of guidance to schools about their obligations to provide a safe and equitable educational envi-

ronment for transgender students has left school districts without a clear understanding of what they should be doing—the very purpose of guidance from the Department. On June 6, the Office of Civil Rights issued instructions to its regional directors about processing complaints involving transgender students. This document states that OCR may not rely on the policy set forth in the prior guidance, but “should rely on Title IX and its implementing regulations, as interpreted in decisions of Federal courts and OCR guidance documents that remain in effect.”

My home State of Wisconsin is one of the states in which a Federal appeals court has ruled that Title IX prohibits school policies that treat students differently because they are transgender, including policies that exclude them from using restrooms and other facilities consistent with their gender identities. If you are confirmed, under your leadership would OCR review and pursue a Wisconsin transgender student’s Title IX complaint consistent with that interpretation of the law? If you are confirmed, under your leadership would OCR advise a Wisconsin school district about its obligations under Title IX with regard to transgender students consistent with that interpretation of the law?

Answer. I am aware of the Secretary’s decision to rescind the 2016 Dear Colleague Letter on Transgender Students. It would be inappropriate for me to opine about the Department’s legal positions when I do not work for the Department. If confirmed, I will work with the Department’s lawyers and the Secretary to address this important topic.

*Question 3.* In withdrawing that guidance regarding transgender students, the Department cited “significant litigation” involving this issue and cited to a single district court ruling contrary to the guidance. Since that time, a number of Federal courts, including the U.S. Court of Appeals for the Seventh Circuit, has ruled consistently with the Department’s prior position.

Many issues related to civil rights laws, including those OCR is charged with enforcing, have not and may never be specifically addressed by the U.S. Supreme Court. Do you believe OCR should follow the law as interpreted by the lower Federal courts? If the Supreme Court has not addressed an issue, would you, if confirmed, direct OCR to interpret a law under its jurisdiction in a manner consistent with a majority of Federal courts that have addressed that issue?

Answer. It would be inappropriate for me to opine about the Department’s legal positions when I do not work for the Department, but if confirmed, I will work with the Department’s lawyers and the Secretary to address this important topic.

*Question 4.* During your tenure at the Brandeis Center, the organization filed a number of Title VI discrimination claims with OCR alleging that student organizing and academic programming regarding Israel and the Palestinian Territories created a hostile environment for Jewish students at several colleges and universities. While these claims were dismissed by the Office, you subsequently wrote in a September 2013 op-ed in the Jerusalem Post that filing them had “the effect we had set out to achieve” by exposing universities to bad publicity, making it harder for certain student groups to recruit new members, and harming the future employment prospects of certain students.

Given the perspective you expressed in that op-ed and the underlying work of the Brandeis Center under your leadership, if confirmed, how would you address any actual or apparent conflict of interest in the handling of similar Title VI claims filed with OCR? Will you commit to recusing yourself from consideration of any similar claim of discrimination under Title VI?

Answer. I do not believe that this description of the Brandeis Center’s work is factually accurate. Having said that, if confirmed, I will abide by the ethics recommendations and decisions made by ethics counsel.

SENATOR MURPHY

*Question.* The Civil Rights Data Collection is a unique and invaluable source of information for researchers and practitioners on “school-pushout” indicators like suspensions, expulsions, and referrals to law enforcement. If confirmed, what steps would you take to bring school districts into compliance when they fail to report data as required?

Answer. If confirmed, I will consider ways for continually strengthening the reliability of the data collected by the CRDC, including enforcement options as allowed by law for school districts that do not comply with their reporting obligations.

SENATOR WARREN

*Question 1.* In your legal opinion, what statutes and laws does the Office of Civil Rights (OCR) have the ability to enforce? What is within the office’s jurisdiction?

Answer. OCR has enforcement jurisdiction under: Title VI of the Civil Rights Act of 1964 (prohibiting race, color, or national origin discrimination in all programs or activities receiving Federal funds); Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in all education programs or activities receiving Federal funds); Section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination based on disability in programs, services, and activities receiving Federal funds); the Age Discrimination Act of 1975 (prohibiting age discrimination in all programs or activities receiving Federal funds); Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination in state and local government services regardless of receipt of Federal funds); and the Boy Scouts of America Equal Access Act of 2001 (prohibiting public elementary and secondary schools from denying equal access to school facilities to the Boy Scouts of America and certain other youth groups). In undertaking enforcement activities pursuant to its jurisdiction under the foregoing statutes, OCR must conduct its enforcement and apply its laws, regulations, and policies in a manner consistent with the U.S. Constitution and all applicable U.S. Supreme Court precedent.

*Question 2.* In your legal opinion, what civil rights statutes or laws, which may be violated in a school setting in a manner that harms students, fall outside of OCR's jurisdiction?

Answer. OCR's jurisdiction under the civil rights statutes prohibiting discrimination based on race, color, national origin, sex, disability, age, and equal access for the Boy Scouts (and similar youth groups) provides the basis for OCR's authority to undertake enforcement activities.

*Question 3.* In your legal opinion, what type of evidence is needed for OCR to initiate an investigation?

Answer. The type of evidence needed for OCR to initiate an investigation depends on the facts and circumstances of the particular potential investigation, but generally, OCR initiates investigations (whether directed investigations or compliance reviews) where facts indicate concern that a recipient of Federal funds may be in violation of one or more of the civil rights statutes OCR is charged with enforcing.

*Question 4.* During your nomination hearing, you were "unsure" if ensuring undocumented students had access to education fell under OCR's jurisdiction. What is OCR's role and obligation with regard to complying with and enforcing the Supreme Court's decision in *Plyler v. Doe*, concluding that the Equal Protection Clause of the Fourteenth Amendment protects of undocumented students from discrimination?

Answer. OCR enforces Title VI of the Civil Rights Act of 1964 to protect every student's right to access his or her education free from discrimination based on race, color, or national origin, consistent with U.S. Supreme Court precedent, such as *Plyler v. Doe*, which established every child's right to receive a public education regardless of immigration status.

*Question 5.* According to a July 2012 OCR report, under Title VI of the Civil Rights Act of 1964, OCR is responsible for "affirming the equal right of all children in the U.S., regardless of their immigration status, race, color or national origin, to attend public elementary and secondary school."<sup>1</sup> Do you believe that discrimination on the basis of citizenship status is protected under Title VI's protection against discrimination on the basis of race, color, or national origin?

Answer. If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student's right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent, such as *Plyler v. Doe*, which established every child's right to receive a public education regardless of immigration status.

*Question 6.* In your legal opinion, does Title VI prohibit states and districts from unjustifiably utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of a program for individuals of a particular race, color, or national origin?

Answer. If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student's right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent, such as *Plyler v. Doe*, which established every child's right to receive a public education regardless of immigration status.

<sup>1</sup> Office of Civil Rights. (2012, July). "Title VI Enforcement Highlights." U.S. Department of Education.

Under my leadership, if confirmed, OCR will examine any school policy that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers based on race, ethnicity, or national origin.

*Question 7.* In 2011, the U.S. Department of Justice and U.S. Department of Education (“The Department”) issued a joint Dear Colleague letter, which notes that a “State may not deny access to a basic public education any child residing in the state, whether present in the United States legally or otherwise”.<sup>2</sup> In 2014, the same Departments reaffirmed these rights and instructed school districts on how to ensure equal access for all children to public schools, regardless of status.<sup>3</sup> Do you agree that under both the U.S. Constitution and Title VI of the Civil Rights Act of 1964, states may not deny access to a basic public education to any child residing in the state, whether present in the United States legally or otherwise?

*Answer 7.* OCR enforces Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, color, or national origin, consistent with U.S. Supreme Court precedent, such as *Plyler v. Doe*, which established every child’s right to receive a public education regardless of immigration status.

*Question 8.* In your legal opinion, do you believe OCR has the authority to ensure that states and districts do not deny access to a basic public education to any child residing in the state, whether present in the United States legally or otherwise?

*Answer.* OCR has authority under Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent, such as *Plyler v. Doe*, which established every child’s right to receive a public education regardless of immigration status.

*a.* If confirmed, what would be your duty to act in a circumstance where undocumented students are clearly facing discrimination in schools?

*Answer.* If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent, such as *Plyler v. Doe*, which established every child’s right to receive a public education regardless of immigration status.

*b.* Will you commit to referring such clear and unconstitutional discrimination to the U.S. Department of Justice if it came to your attention?

*Answer.* If confirmed, I will work with my colleagues in the U.S. Department of Justice, along with the Department of Education’s Office for General Counsel, to abide by all memoranda of understanding, delegation agreements, and other inter-agency agreements, as well as applicable laws and regulations, regarding referrals of matters to appropriate enforcement agencies.

*Question 9.* A school district refuses to enroll a student who has a foreign birth certificate or fails to provide social security number. Based solely on this information, does OCR have the authority to investigate this district for discrimination against this student?

*Answer.* OCR enforces Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, ethnicity, or national origin. Under my leadership, if confirmed, OCR will examine school policies that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers based on race, color, or national origin. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

*Question 10.* If confirmed, will your office ensure that school districts will not collect social security numbers in a manner that impedes the enrollment of undocumented or foreign-born students?

*Answer.* Under my leadership, if confirmed, OCR will examine school policies that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers of discrimination based on race, color, or national origin. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

*Question 11.* If a public school teacher refused to teach any undocumented students, even those who are U.S. citizens, because they believe these students to be

<sup>2</sup> <https://www.ed.gov/about/offices/list/ocr/letters/colleague-201101.html>

<sup>3</sup> <https://www.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>

undocumented, if confirmed, would OCR step in to protect the civil rights of those undocumented students?

Answer. Under my leadership, if confirmed, OCR will examine any school policy that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers of discrimination based on race, color, or national origin. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

*Question 12.* In February, 2017, Secretary of Education Betsy DeVos and Attorney General Jeff Sessions rolled back guidance from the Obama administration regarding transgender student rights, suggesting there was no legal basis to interpret Title IX in this manner. Do you believe that harassment of lesbian, gay, bisexual, and transgender (LGBT) students falls under the jurisdiction of Title IX?

Answer. Title IX prohibitions on sex discrimination, including harassment based on sex stereotyping, protect all students, including LGBT students.

*Question 13.* Numerous Federal circuit<sup>4</sup> and district<sup>5</sup> courts have held that Federal civil rights nondiscrimination laws that prohibit discrimination on the basis of sex protect transgender people from discrimination. Additionally, a growing body of case law has determined that those laws also prohibit sexual orientation discrimination. For example, the Seventh Circuit has determined that sexual orientation discrimination and gender identity discrimination are prohibited Title VII and Title IX in *Hively v. Ivy Tech*<sup>6</sup> and *Whitaker v. Kenosha Unified School District*<sup>7</sup> respectively. In the Seventh Circuit, and in any jurisdiction with applicable case law, do you believe OCR has the authority, under its Title IX responsibilities, to protect LGBT students from discrimination on the basis of their sexual orientation and gender identity?

Answer. Title IX prohibitions on sex discrimination, including harassment based on sex stereotyping, protect all students, including LGBT students.

*Question 14.* I understand that a complaint does not automatically and necessarily constitute a violation of civil rights law. I also understand that a complaint is used by OCR to determine whether or not the office should open an investigation to determine if students' civil rights have been violated.

Answer. We note there is no question asked here for response.

*Question 15.* I would like to understand what types of complaints indicate to you that an OCR investigation is necessary to protect the civil rights of the LGBT students. In your legal opinion, in the following cases, is there enough information to open an OCR investigation to determine if violations of civil rights laws under OCR jurisdiction have occurred? (Please answer each question individually.)

a. A public high school softball coach refuses to allow a transgender girl to play on the school's softball team.

Answer. Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

b. A public school suspends a transgender boy for wearing the boy's version of the school's required uniform.

Answer. Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

c. A public high school prohibits a student from bringing his boyfriend (or her girlfriend) to prom solely because the school leadership does not believe homosexuality aligns with the school's values.

Answer. Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

<sup>4</sup> See *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Smith v. city of Salem* 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).

<sup>5</sup> See, e.g., *Miles v. New York Univ.*, 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997), *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008), and *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

<sup>6</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016)

<sup>7</sup> *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017)

d. A transgender student's parent notifies school officials that their child prefers a different name and gender pronoun that what is on official school records, but the public school refuses to recognize this preference.

Answer. Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

e. A public college prohibits the creation of a Gay Straight Alliance, but allows for other non-curricular student clubs.

Answer. Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

Question 16. Do you believe all American youth, regardless of race, have equal access to resources and activities (e.g., tutors, well-funded public education, extra-curricular programs, etc.) that are traditionally considered in the college admissions process?

Answer. No.

Question 17. Do you believe that peaceful expressions of criticism of Israeli government policy on United States college and university campuses are protected speech under the First Amendment? Please explain and cite applicable legal authority.

Answer. Yes. The Supreme Court has decisively and correctly declared the following: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Question 18. Do you believe that peaceful expressions of criticism of Israeli government policies or actions on United States college and university campuses represent prima facie evidence of violations of the civil rights of Jewish students? Please explain and cite applicable legal authority.

Answer. No. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). OCR has properly recognized that it "interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles." See 2003 Dear Colleague Letter, <https://www.ed.gov/about/offices/list/ocr/firstamend.html>

Question 19. Do you believe that peaceful expressions of criticism of the policies or actions of the Palestinian Liberation Organization (PLO), the Palestinian Authority (PA), any other Palestinian entity or group, or a Palestinian individual on United States college and university campuses are protected speech under the First Amendment? Please explain and cite applicable legal authority.

Answer. Yes. Please see my response to question number 17.

Question 20. In your April 2011 paper assessing OCR's bullying and harassment policy, you recommended that OCR adopt the State Department-endorsed definition of anti-Semitism, which includes examples of ways in which anti-Semitism can intersect with hatred toward Israel (i.e., demonizing Israel, applying a double standard when assessing Israeli government policy, delegitimizing Israel's existence, etc.). Kenneth Stern, a former director of the division on anti-Semitism and extremism at the American Jewish Committee (AJC) and the lead author of that definition, wrote in an editorial in December 2016 that it "was intended for data collectors writing reports about anti-Semitism in Europe. It was never supposed to curtail speech on campus."

Are you concerned that, were you to implement your recommendation and require OCR to adopt the State Department definition of anti-Semitism for the purposes of investigating complaints for alleged violations of students' civil rights, would such an approach lead to unconstitutional restrictions on speech regarding the Israeli-Palestinian conflict on United States college and university campuses? Please explain and cite applicable legal authority.

Answer. In my personal capacity and as President of the Louis D. Brandeis Center for Human Rights Under Law, I have recommended that OCR use the State Department definition of anti-Semitism in a manner consistent with the proposed Anti-Semitism Awareness Act and the First Amendment. That is to say, I have recommended that the definition be used to determine whether certain conduct, pertinent to Title VI of the Civil Rights Act of 1964, is motivated by anti-Semitic intent.

The Supreme Court has held that “The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

Question 21. In your capacity as President of the Louis D. Brandeis Center for Human Rights Under Law, or in any other role in your professional life, please describe your efforts to promote dialog and mutual understanding between Jewish and Arab students on United States college and university campuses.

Answer. I have promoted dialog and mutual understanding in a variety of ways. For example, I have personally made it a point to speak out against anti-Arab stereotypes in the media and in the entertainment industry, and I have given public testimony on this issue. <http://brandeiscenter.com/wp-content/uploads/2017/10/testimony-021313.pdf>.

I have also spoken out against anti-Muslim discrimination, especially in American penal institutions, and have given testimony as well as published research on this area. <https://link.springer.com/article/10.1007/s12552-009-9003-5>.

This reflects the Brandeis Center’s vision statement, which provides that “The Louis D. Brandeis Center promotes justice for all as a means of securing the rights of the Jewish people and secures the rights of the Jewish people as a means of advancing justice for all.” I have also encouraged the Brandeis Center’s law student chapters to collaborate with a wide range of other law student groups and to share best practices for such collaborations with one another.

If you have any questions, then please contact Josh Delaney in my office at (202) 224-4543.

#### SENATOR KAINE

Question 1. President Trump and Secretary DeVos have been huge proponents of spending taxpayer dollars to fund private voucher programs. There have been numerous stories about private school voucher programs discriminating against children and families, including students with disabilities and LGBT students or students whose parents may be from the LGBT community.

a. Do you believe that private school receiving taxpayer dollars should be able to deny admissions to a student who is gay?

Answer. Schools receiving Federal financial assistance must comply with Federal civil rights laws, including prohibitions under Title IX against discrimination based on sex.

b. What about for a child whose parents are gay?

Answer. Schools receiving Federal financial assistance must comply with Federal civil rights laws, including prohibitions under Title IX against discrimination based on sex.

c. What about if a child is in a wheelchair?

Answer. Schools receiving Federal financial assistance must comply with Federal civil rights laws, including prohibitions against discrimination based on disability.

Question 2. According to the Civil Rights Data Collection, African American students are almost four times as likely to be suspended and nearly twice as likely to be expelled than white students, while students with disabilities are more than twice likely to be suspended than students without disabilities.

a. If a school discipline policy resulted in a disparate impact on students of a particular race as compared with students of other races, is it the role of the OCR Assistant Secretary to examine this policy and combat disparate discipline based on race?

Answer. Yes, it is the role of OCR to do so, if the matter is identified through OCR’s complaint-resolution process or in its proactive compliance reviews, and if the identified policy is in violation of Title VI; although this work is typically conducted not by the Assistant Secretary alone, but rather with OCR’s career enforcement staff.

b. If confirmed, do you commit to investigating these schools and school districts?

Answer. If confirmed, I commit to working with departmental staff to ensure that such matters are addressed properly under applicable laws, regulations, and policies.

c. Do you commit to maintaining the disparate discipline guidance too?

Answer. Out of deference to the Secretary, whom I have not had the opportunity to discuss this matter with, I cannot commit to any particular policy or decision related to this matter.

d. Based on your prior leadership as Acting Assistant Secretary of OCR, what alternative policy or practices would you recommend to be put in place to alleviate disparate impact?

Answer. If OCR were to replace its existing guidance on student discipline, as this question seems to envision, the process of doing so would be appropriate for a rulemaking process with public notice and comment. I would not pre-decide the issue. Instead, any recommendations would be based on a process providing for public input.

*Question 3.* In September 2017, OCR's Acting Assistant Secretary, Candice Jackson, rescinded critical Title IX guidance that was issued in 2011 and 2014. This decision came 2 days after the comment collection period ended, in which 99 percent of the 12,000 comments it received on the guidance advised the Department of Education to maintain it. After rescinding the guidance, OCR issued problematic and confusing interim guidance and announced that new Title IX policy would be created through a public comment period.

a. Why release new interim guidance on a topic prior to consideration of public comments?

Answer. It would be inappropriate for me to comment on the decision made to release the interim guidance when I have not been privy to Department discussions leading to that decision.

b. Do you think the public comment period is an important aspect of the decisionmaking process? If so, do you commit to considering public comments before rescinding guidance or issuing new guidance?

Answer. If confirmed, I will support Department compliance with the Administrative Procedures Act and meaningful review and consideration by the Department of public comments received.

c. How will you consider public comments when making decisions around guidance?

Answer. If confirmed, I will support Department compliance with the Administrative Procedures Act and meaningful review and consideration by the Department of public comments received.

*Question 4.* During your tenure at OCR you issued a 2004 Dear Colleague letter which stated you will "aggressively prosecute" a school for what you believe to be "religious harassment."

a. Will you do so in the instance that a school abides with its Title IX obligations to address anti-LGBTQ harassment by disciplining a perpetrator who cites his or her religious beliefs?

Answer No. In the 2004 Dear Colleague letter to which you refer, I noted that "OCR lacks jurisdiction to prohibit discrimination against students based on religion per se" but announced that "OCR will aggressively prosecute harassment of religious students who are targeted on the basis of race or gender, as well as racial or gender harassment of students who are targeted on the basis of religion." If confirmed, I would not prosecute "religious harassment" unless given the statutory authority to do so.

b. Do you think it is acceptable for a student to harass LGBTQ students based on the student's personal religious beliefs?

Answer. No.

*Question 5.* During your tenure as Acting Assistant Secretary for OCR in 2004, you proposed new Title IX regulations to allow schools to offer single-sex education. There is overwhelming evidence that suggests single-sex education reinforces harmful gender stereotypes and does not actually improve educational outcomes.

a. Considering this abundance of research, how do you justify your decision?

Answer. During my prior tenure at the Department, the Secretary of Education proposed new regulations on this subject.

During my prior tenure at the Department, the Secretary of Education proposed new regulations on this subject. The Department set forth the basis for its decision at:

<https://www.Federalregister.gov/documents/2006/10/25/E6-17858/non-discrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-Federal>

b. Do you believe that students learn differently based on sex?

Answer. While my personal beliefs or opinions do not determine how I would, if confirmed, approach OCR's responsibility to enforce applicable regulations, I believe that all students have the right to learn in an environment free from discrimination

based on sex, and I am aware that the question of whether students learn differently based on sex is the subject of debate and varying perspectives.

c. How will you utilize evidence from research as you make decisions in your role?

Answer. If confirmed, I will enforce the statutes and regulations that apply to issues falling under OCR's purview, and provide advice to the Secretary based on many factors including evidence-based research.

SENATOR HASSAN

*Question 1.* During your nomination hearing, I referenced an internal memo Acting Assistant Secretary Candice Jackson sent in June.<sup>8</sup> This memo addresses the way in which the Office of Civil Rights investigates claims. Specifically, this memo removed a recommended 3 year look back to determine whether a particular claim is part of a larger systemic issue and advised investigators that a systemic approach may only be applied when individual complaint allegations raise systemic concerns.

When asked about the Office of Civil Rights' use of systemic investigations, you said, "I believe that there is a role for systemic investigations just as there is a role for individual investigations and that the decision should be made on a fact-specific, case-by-case basis," indicating that you may also have concerns with this memo.

You committed to me that you would review this memo and report back to the HELP committee your findings and any changes you make to the investigation process.

If confirmed, can you commit to do this within 3 months?

Answer. If confirmed, I will work with my colleagues in the Office of Legislation and congressional Affairs to be responsive to any requests for information from members of the HELP Committee or other congressional offices.

*Question 2.* Does Section 504 of the Rehabilitation Act apply to a student who experiences a learning disability, such as ADHD who is reaching grade level proficiency year over year but may misplace assignments, and be inattentive or disruptive in class?

Answer. Section 504 applies to any student with a disability (whether or not the student is also IDEA-eligible), and a disability is defined to mean a physical or mental impairment that substantially limits a major life activity (or a record of such an impairment, or is regarded as having such an impairment). A student with a learning disability that substantially limits a major life activity is therefore covered under Section 504.

*Question 3.* What standard of evidence do you believe is appropriate to use in adjudicating cases of sexual harassment and violence in Title IX proceedings?

Answer. It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

SENATOR MURKOWSKI

*Question 1.* Under the Commerce Clause, Congress can provide programs specifically to benefit Indians due to their indigenoussness—a political, rather than racial, classification. Congress has tasked the Department with treating Native Hawaiians in that manner. During your tenure as Staff Director at the U.S. Commission on Civil Rights, the Commission came to the conclusion that Congress could not pass the Native Hawaiian recognition bill because Native Hawaiians are not Indians under the Constitution. Did you agree with that conclusion? If so, how will you act in your capacity (if confirmed) as Assistant Secretary of OCR in addressing congressionally authorized programs pertaining to Native Hawaiians and their rights as indigenous people? Do you believe that statutes providing programs for Native Hawaiians through the Department of Education are unconstitutional? If disputes arising as to the enforceability of such statutes occur will you decline to enforce?

Answer. The Commission's findings and recommendations were adopted by the Commissioners rather than by the Staff Director. As Staff Director, I tried to ensure that the Commissioners had sufficient staff support for their determinations, rather than supplanting my own personal views for theirs. OCR is not responsible, to the best of my knowledge, for administration of any congressionally authorized programs pertaining to Native Hawaiians and their rights as indigenous people. I do not recall having formed a personal legal opinion on the constitutional issue de-

<sup>8</sup> OCR Instructions to the field re Scope of Complaints (<https://www.documentcloud.org/documents/3863019-doc00742420170609111824.html>)

scribed in this question. However, if I were called upon to administer such programs, or take other action with respect to the programs, I would enforce the law. If a question concerning constitutionality should arise, I would consult with the Office of General Counsel and any other applicable governmental legal advisors before taking action. If confirmed I would be faithful to the Constitution and enforce all statutes within the lawful authority of the position to which I were confirmed.

*Question 2.* During your tenure as Staff Director of the U.S. Commission on Civil Rights, the agency was polarized between a majority of Republicans and independents who were once Republicans and the minority. The Democrats serving on the Commission felt that their views were neither heard nor respected. What actions did you take to reduce that ideological polarization and address concerns that the Commission was ineffectual because of that polarization?

Answer. During my tenure, the Commission took several steps to protect and respect the views of minority commissioners. It is however the Commissioners themselves who deserve credit for these reforms, since they took the lead based on the understanding that addressing such matters fell within their responsibility. The General Accountability Office summarized some of the reforms adopted during my tenure in this way: "In 2005, the Commission acted to implement our 2003 recommendation to increase Commissioners' involvement in the development of its national office products." <https://www.gao.gov/assets/260/250044.html> The GAO further elaborated: "Under new policies effective in May 2005, the Commissioners are required to approve Commission products at all key stages, from proposal development through final report stages, and their approval requires a majority vote. If there are any significant changes to a product at any stage, the Staff Director and Commissioners are required to approve these changes as well. This change marks a significant improvement over previous Commission policy, in which the Commissioners had limited involvement in the development of its products. The previously limited role was a source of considerable concern to some Commissioners and led to our 2003 recommendation that the Commission provide for increased involvement of the Commissioners in planning and implementation."

In addition, during this period, the Commission adopted other measures to protect appointees of the minority party, including reforms to enable separate votes on each finding and recommendation; to give all Commissioners adequate time to prepare opinions for publication; to ensure that the agency is specific as to whether certain findings and recommendations are made on behalf of all Commissioners or only a certain number of them; and to prevent public communications that mischaracterize the Commission's findings and recommendations. I oversaw the development of a system that would ensure that every Commissioner could provide equal input into the process for selecting the topics of national enforcement reports.

*Question 3.* During the hearing held on December 5, you were asked whether the Office of Civil Rights would investigate complaints filed by transgender students. You replied that all students deserve freedom from harassment and discrimination and that if confirmed, you would enforce all applicable laws, and investigate if the facts of the case meet the standards for investigation. However, on November 14, 2017 in his hearing before the Committee, General Zais stated that LGBT students do not belong to a protected class and that he is unclear right now what the law is if an LGBT student is subjected to bullying. Given this, can you please clarify your position as to what protections the Office of Civil Rights can provide LGBT students who file complaints that they have experienced bullying and harassment in school?

Answer. Every student, including every LGBT student, is protected from discrimination based on sex, race, and disability under the laws in OCR's jurisdiction. Title IX prohibits sex discrimination (including harassment, bullying, and violence) where the sex-based harassment or bullying targets a student for being gender non-conforming or otherwise failing to adhere to sex stereotypes. Any student, regardless of sexual orientation or gender identity, is entitled to file a complaint with OCR arising from sex-based bullying and harassment.

SENATOR HATCH

*Question 1.* Mr. Marcus, your office routinely collects data on civil rights abuses at schools across the country, which has made it possible to see when states and districts and schools are providing great support for students or are underserving students. Will you continue to collect this information and make it available to the public so that communities can make informed educational decisions?

Answer. Yes; I support the data collection efforts represented in the CRDC, and if confirmed I will advocate for the Department to continue to collect and publish this important data.

RESPONSE BY SCOTT A. MUGNO TO QUESTIONS OF SENATOR MURRAY, SENATOR WHITEHOUSE, SENATOR BALDWIN, SENATOR WARREN, AND SENATOR HATCH

SENATOR MURRAY

*Question 1.* The mission of the Occupational Safety and Health Administration (OSHA) is “to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.” If confirmed, how will you assure safe and healthful working conditions as the head of OSHA?

Answer. As I stated in my testimony before the committee, it begins by leading and facilitating transparent discussions between all safety professionals—the career experts at OSHA, as well as those from the various stakeholder sectors. By using timely, actionable, and accurate data as well as all the “tools” OSHA is provided by the OSH Act appropriately, OSHA can continue to improve the safe and healthy working conditions for working men and women.

*Question 2.* You participate in the safety, health, and labor policy activities of the Chamber of Commerce, and the Chamber strongly supports your nomination to head OSHA. You have also served as Chair of the Chamber’s OSHA committee, and the Labor Policy Committee. Please provide the following information:

- a. During what time period did you Chair each of these committees?
- b. What are/were your responsibilities in each of these positions?
- c. Are there particular policies of the Chamber with regard to safety and health that you do not support or agree with?

Answer. I have been Chairman of the U.S. Chamber of Commerce’s OSHA Subcommittee since June 2006. I have been Chairman of the U.S. Chamber of Commerce’s Labor Relations Committee since June 2011. I have been a member of each of these member committees prior to that. In these Chairman’s roles, I lead and facilitate the meetings and their discussions through an agenda set by the Chamber’s staff. At times, as the Labor Relations Committee Chairman, I made recommendations to the Chamber staff concerning speakers members would be interested in hearing from at those committee meetings. While I don’t recall specific policies, FedEx (I as their representative) always advocated for clear effective policies or regulations that would improve safety and health in the workplace.

*Question 3.* You noted in your opening statement at your confirmation hearing that you “fully respect the role organized labor has played in the safety arena over its history.” In what ways do you believe that organized labor contributes to worker health and safety in today’s workplaces?

Answer. Some of organized labor’s safety professionals repeatedly and continually reach out to their peers in other sectors in sincere, passionate efforts to find common ground to improve safety and health in our country’s workplaces. As I stated in my opening statement, this is noble work.

*Question 4.* What do you see as the correct balance between enforcement and compliance assistance? Would you seek to change that balance to provide additional resources to compliance assistance activities relative to enforcement?

Answer. As I mentioned in my testimony, both compliance assistance and enforcement are necessary tools, but they are not mutually exclusive. As specified in the OSH Act, OSHA is authorized to use enforcement, compliance assistance, training, outreach, and voluntary collaborative programs to maximize its effectiveness. These multiple avenues currently exist for OSHA and employers to engage with each other in their mutual goal to improve workplaces. They include the Alliance Program, The Strategic Partnership program, the Voluntary Protection Program, the Challenge program and the SHARP program. The balanced use and expansion of all these effective tools should be encouraged and supported.

*Question 5.* OSHA collected summary injury and illness data from employers from 1996–2011. In 2004, a court ruled that OSHA had to make that data publicly available under FOIA, and in recent years, OSHA also made the data available in a searchable data base on its website. Will you continue to make establishment specific injury and illness data collected by OSHA publicly available?

Answer. I understand the data base this data sits on is several generations behind in the technology world. It is also my understanding that OSHA is working to up-

date the injury and illness data base system in order to continue to make this information searchable on newer computers.

*Question 6.* As you know, OSHA has limited resources and would take over 150 years to get into every workplace just once. How do you believe OSHA should target its inspection and compliance assistance resources? Do you think it should target inspections to the most dangerous workplaces or the most dangerous industries?

Answer. If confirmed, I look forward to discussing this and many other issues with the Department's OSHA staff. Clearly a prioritization process must be used to address the highest risks responsible for the highest number of fatalities and serious injuries occurring. The prudent approach in addressing these is using the appropriate "tools" provided under the OSH Act—enforcement, compliance assistance, training, outreach, and voluntary collaborative programs—in order to maximize life-saving effectiveness and improvement.

*Question 7.* What data do you think OSHA needs to make determinations regarding how to target inspections?

Answer. If confirmed, I look forward to discussing this and many other issues with the Department's OSHA staff. Additionally, I would seek input from NIOSH and BLS. Timely, actionable, and accurate data is key to developing and executing a successful safety improvement effort.

*Question 8.* OSHA has a long-standing policy of holding multiple employers responsible for the safety and health hazards that they create or control that put workers at risk. In addition, in recent years, with the growth in the use of staffing agencies by employers, OSHA has set forth policies on the safety and health responsibilities of staffing agencies and host employers.

- a. Do you support OSHA's multiemployer and joint employer enforcement policies?
- b. As OSHA Assistant Secretary, would you maintain them?

Answer. As I stated in my testimony before the committee, OSHA has a long-standing multiemployer policy with regard to enforcement and I expect this to continue.

*Question 9.* One of OSHA's major responsibilities is to set safety and health standards.

- a. What in your view are the most important and effective S&H standards that OSHA has issued?
- b. Are their OSHA standards that you think are ineffective or problematic and should be revised or repealed? Which ones?
- c. What safety and health hazards do you think are not adequately addressed by current OSHA standards where new standards are needed?

Answer. There are many important and effective safety and health standards; hazardous materials, toxic and hazardous substances, personal protective equipment, and control of hazardous energy to name a few. I am an advocate for periodic review of all safety and health standards—so standards do not become problematic or ineffective. But if they do become outdated, then they can be retired. Permissible exposure limits (PELs) are an example of requirements in need of this attention.

*Question 10.* In a discussion on worker safety at the Chamber of Commerce, you are quoted as saying "we have got to free OSHA from its own statutory and regulatory handcuffs." And that "maybe some regulations should be subject to sunset provisions." What specific regulations do you think should be removed or "sunset"?

Answer. As stated above, I am an advocate for periodic review of all safety and health standards—so standards do not become problematic or ineffective but if they do become outdated, then they can be retired. Permissible exposure limits (PELs) are an example of requirements in need of this attention. The fast changing workplace along with technologies not envisioned when many regulations were implemented may dictate some regulations be revised, updated, or retired.

*Question 11.* In 2014, FedEx filed comments regarding OSHA's rule to "Improve Tracking of Workplace Injuries and Illnesses," also known as the "electronic record-keeping rule," opposing the collection of detailed injury data from larger employers and stronger anti-retaliation protections. FedEx also opposed making any of the injury and illness data public. The FedEx comments listed you as the contact for FedEx. Do you believe that this information should not be publicly available?

Answer. Among other concerns raised, protecting employee privacy and personal identifying information was critical. In August that concern was legitimized when OSHA took down the data base gathering this data due to a suspected breach.

*Question 12.* Do you believe that workers who report injuries to their employers should be legally protected against retaliation?

Answer. Absolutely. No employee should be subjected to illegal retaliation in the workplace for exercising a legal right they possess.

*Question 13.* OSHA's electronic recordkeeping rule does not allow employers to discourage workers from reporting an injury or illness, and it requires education around and enforcement of anti-retaliation rights. The rule's anti-retaliation provisions went into effect in 2016. As FedEx Ground's Vice President of Safety, Sustainability and Vehicle Maintenance, what steps have you taken to comply with the anti-retaliation requirements within the rule?

Answer. FedEx Ground enhanced its injury reporting policy in 2016 to ensure compliance with this rule.

*Question 14.* Section 550 of the House consolidated appropriations bill for fiscal year 2018 (H.R. 3354), which was passed by the House of Representatives on September 14, 2017, blocks funding for the implementation of the above mentioned rule to "Improve Tracking of Workplace Injuries and Illnesses." Do you support or oppose House Section 550, which would block funding for the implementation of the injury and illness reporting rule?

Answer. Should I be confirmed, I will abide by the laws enacted.

*Question 15.* In January, the Chamber of Commerce and other industry groups filed a lawsuit against the Department of Labor (DOL) and OSHA regarding the electronic recordkeeping rule, citing regulatory overreach and concerns over the anti-retaliation portion of the rule. You serve as Chairman of the Chamber of Commerce's OSHA Subcommittee. The Subcommittee's May 2017 agenda includes the agenda item: "Status of Legal Challenge to OSHA Injury/Illness reporting regulation with anti-retaliation supplemental." The agenda closes with: "Developing recommendations for new OSHA Assistant Secretary beyond just undoing various Obama administration actions and regulations." Given the apparent conflicts between these two roles, what assurances can you provide that you will seek to preserve and fully implement all components of the electronic recordkeeping rule, including the anti-retaliation measures?

Answer. Again, should I be confirmed, I will abide by the laws enacted. The Injury and Illness regulation is under court challenge, and I will examine the rule in light of any instructions by the court.

*Question 16.* Do you have specific, articulable concerns with the anti-retaliation measures?

Answer. If I am confirmed, I will consult with the professional career staff at OSHA to determine if there are concerns about the anti-retaliation measures. As stated in my response to question 12, no employee should be subjected to illegal retaliation in the workplace for exercising a legal right they possess.

*Question 17.* Please describe FedEx's internal whistleblower program to assure that the company learns of and acts responsibly against any illegality. OSHA's Directorate of Whistleblower Protection Programs (DWPP) faces many structural and financial restrictions, making it difficult to enforce the 22 Federal whistleblower statutes that it administers. An audit by the DOL Office of Inspector General in September 2015 concluded that while OSHA has improved its administration of Whistleblower Programs, OSHA must continue to strengthen its efforts. Specifically, the OIG found that OSHA was not consistently reviewing complaints in a complete, sufficient, and timely manner; OSHA had not updated its manual and training to reflect the most recent program updates; more than 70 percent of investigations were not conducted within statutory timeframes; and OSHA did not timely and adequately communicate alleged violations to OSHA's enforcement units or to other Federal agencies with jurisdiction to investigate the allegations. What concrete actions would you take as Assistant Secretary to increase the effectiveness of OSHA's Directorate of Whistleblower Protection Programs?

Answer. FedEx is committed to legal compliance, including prohibiting any form of retaliation. Information about the FedEx Whistleblower Program and FedEx Alert line is available on its Investor Relations web page under Governance and Citizenship. If confirmed, I look forward to discussing this issue with the Department's OSHA staff to review OSHA's program to determine what can be done to increase its effectiveness. If confirmed, I look forward to discussing this issue with the Department's OSHA staff to review the program to determine what can be done to increase its effectiveness.

*Question 18.* In 2016, OSHA made substantial improvements to its Whistleblower Investigations Manual. However, questions remain about effective enforcement of the manual. As Assistant Secretary, what actions would you take to ensure that OSHA whistleblower investigators are in compliance with the updated manual?

Answer. If confirmed, I look forward to discussing this and many other issues with the Department's OSHA staff.

*Question 19.* Outside OIG review, there never has been an independent audit of regional compliance and performance enforcing the 22 corporate whistleblower laws for which OSHA's DWPP is responsible. All attempts have been met with intense resistance, including charges of associated retaliation. As Assistant Secretary, will you support holding DWPP to the same standards of accountability that a business organization must pass? Toward that end, would you support an independent national audit of regional compliance with consistent national standards, to ensure greater accountability across the regional offices?

Answer. If confirmed as Assistant Secretary, I will expect all OSHA directorates to maintain high professional standards.

*Question 20.* Last year Secretary Perez ordered a "top to bottom" investigation of DWPP, sparked by the agency's failure to act on whistleblower complaints in 2010 by Wells Fargo employees warning of the same abuses regarding fraudulent opening of accounts and other abuses exposed in 2016. In 2017, DOL halted the investigation. Will you commit to resuming a complete investigation of why DWPP failed to properly investigate and address whistleblower complaints at Wells Fargo and other financial institutions?

Answer. If confirmed, I look forward to being briefed on this situation and review what actions might be necessary to correct the problem.

*Question 21.* Delays of three to 6 years at initial DWPP investigations leave whistleblower rights suspended because whistleblowers cannot pursue a due process appeal until DWPP has ruled. As Assistant Secretary, would you support the authority for the DWPP to close a case at the complainant's request if the regional office has not completed its investigation within the stated regulatory deadlines? Alternatively, would you permit the complainant to pursue an administrative due process appeal if there is no decision within 60 days, analogous to the "kick out" provision allowing whistleblowers to go to court for jury trials in there as not been final DOL action within 180-210 days. In general, would you support structural reform so that whistleblower rights are not frozen during lengthy OSHA delays?

Answer. OSHA's twenty-two whistleblower statutes have different statutory requirements related to timelines and appeals. If confirmed, I would be committed to following the legal framework outlined in each of these statutes.

*Question 22.* Section 11(c) of the OSH Act has more complaints than all other combined whistleblower statutes enforced by DOL. Yet this law remains as originally drafted in 1970 and is generally regarded to be in need of updating. The Protecting America's Workers Act would modernize section 11(c) by establishing consistency with the procedures and burdens of proof for all relevant whistleblower laws enacted since 2002. As Assistant Secretary, would you support this reform to establish consistent standards within DOL-administered whistleblower laws?

Answer. If I am confirmed, I would be committed to following the legal framework outlined by Congress to enforce OSHA's whistleblower statute.

*Question 23.* OSHA has issued two new standards to better protect workers exposed to respirable crystalline silica, including one for construction and one for general industry and maritime. Worker inhalation of silica can lead to an incurable lung disease known as silicosis, lung cancer, chronic obtrusive pulmonary disease, and kidney disease. OSHA announced it will begin enforcing the standard for general industry and maritime on June 23, 2018. If confirmed as Assistant Secretary, will you commit to protecting workers against these life-threatening diseases through full implementation and enforcement of the new silica standards? Will you commit to continue enforcing the rule and vigorously defending the rule as written against all legal challenges by business groups-including not scaling back any portion of the rule?

Answer. It is my understanding that on September 23, 2017, OSHA began enforcing the silica standard in the construction industry. I also understand the legal challenge related to the regulation is awaiting a decision by the court. If confirmed, I would examine the court's decision to determine how OSHA would proceed with the regulation.

*Question 24.* As Assistant Secretary, how would you ensure the full implementation and enforcement of the general industry and maritime silica standard on the projected timeline?

Answer. It is my understanding that on September 23, 2017, OSHA began enforcing the silica standard in the construction industry. OSHA has a variety of ways to ensure compliance with any standard the agency issues. If confirmed, I would work with career staff to provide compliance assistance, outreach, written materials, and other agency resources to help the regulated community achieve compliance.

*Question 25.* In January 2017, OSHA issued a final rule to modernize the beryllium workplace exposure limit in general industry, in addition to the construction and shipyard trades. Beryllium is known to cause cancer and other fatal diseases, such as chronic beryllium disease of the lungs, when even very low levels are inhaled. According to OSHA, its beryllium rule would save 94 lives and prevent 46 new cases of chronic beryllium disease each year. Yet, in June 2017 OSHA issued a proposal to rescind all ancillary provisions from its final beryllium rule for construction and shipyard workers. OSHA also announced that it would not enforce any of the provisions in the final beryllium rule for construction and shipyard employers while its new proposal is under consideration. As Assistant Secretary, would you support withdrawal of OSHA's proposal to rescind the beryllium rule for construction and shipyard workers?

Answer. I also understand OSHA's beryllium is facing a legal challenge from several industry sectors. If confirmed, I will examine the state of the legal issues related to implementation of the beryllium regulation.

*Question 26.* Worker exposure to extreme heat can result in occupational illnesses and injuries, as severe as heat stroke and death if not promptly treated. NIOSH has repeatedly recommended that OSHA adopt a standard to protect workers from dangerous heat-related effects. Meanwhile, the U.S. Military and a growing number of states have implemented heat stress standards. As Assistant Secretary, would you support OSHA adopting a heat stress standard for workers?

Answer. I believe OSHA has effective educational materials regarding best practices, as well as timely and effective communication efforts on heat illness awareness and awareness. If I am confirmed, I look forward to learning more about the success of these efforts and any additional efforts that may be needed from the Department's OSHA staff.

*Question 27.* In the U.S., nurses and health care workers suffer from work-related musculoskeletal disorders (MSDs) at a rate much higher than the average worker. The Department of Veterans Affairs and a growing number of states have implemented safe patient handling procedures to reduce MSD injuries, and in 2015 up to a quarter of hospitals had adopted voluntary programs, through the use of equipment and training. According to OSHA, "reducing injuries not only helps workers, but also will improve patient care and the bottom line." As Assistant Secretary, would you support OSHA adopting safe patient handling standards?

Answer. If confirmed, I would examine the issues surrounding safe patient handling, existing OSHA regulations, and consult with career OSHA staff to determine gaps in this area.

*Question 28.* In 2017 the Government Accountability Office (GAO) issued the report: Workplace Safety and Health: Better Outreach, Collaboration, and Information Needed to Help Protect Workers at Meat and Poultry Plants, U.S. Gov't Accountability Off., GAO-18-12, (2017). GAO made several recommendations to OSHA to improve the agency's efforts to secure safe working conditions for workers in the meat and poultry processing industries. On October 5, 2017, OSHA issued a response that stated, "GAO's recommendation to conduct additional offsite interviews, however, is challenging in terms of witness cooperation, resources, and CSHO safety. Moreover, each inspection requires a flexible approach to address unique workplace hazards. OSHA cannot commit to routinely asking about bathroom access during each inspection at a meat or poultry processing facility. As we mentioned, OSHA does not routinely ask questions about any potential hazards that go beyond the scope of a complaint inspection, unless those hazards are in plain sight." See *id.* at Appendix III It is has been a longstanding OSHA practice to conduct offsite interviews when workers fear retaliation for cooperating with OSHA inspectors at the worksite. Indeed, OSHA's Field Operations Manual provides, "If necessary, interviews may be conducted at locations other than the workplace." See Field Operations Manual at 3-17, Occupational Safety and Health Administration (Aug. 2, 2016) available at <https://www.osha.gov/OshDoc/Directive—pdf/CPL—02—00—160.pdf>. Will you commit that when evidence suggests offsite interviews are necessary to secure witness cooperation or prevent retaliation, you will require such interviews?

Answer. If confirmed, I will examine inspection protocols with career OSHA staff, as necessary, to determine the best approach to securing the information needed to complete the inspection. Inspectors will be expected to follow the standard operating procedures related to gathering evidence and witness interviews.

*Question 29.* Contrary to OSHA's assertion, regarding bathroom access at meat or poultry processing facility inspections, CSHOs are already instructed to ask workers about specific topics. See *id.* (instructing CSHOs to ask workers about advance

notice of OSHA inspections). Given GAO's deeply disturbing findings on these workers' access to bathrooms, do you believe that OSHA should adopt GAO's recommendation? If not, why not?

Answer. If confirmed, I will examine the GAO report and discuss the findings with career and regional staff to understand OSHA's response. And, if appropriate, change the agency's position.

*Question 30.* OSHA's statement that it "does not routinely ask questions about any potential hazards that go beyond the scope of a complaint inspection, unless those hazards are in plain sight" is deeply troubling. If true, it would represent a significant departure from OSHA's practices in carrying out Regional Emphasis Programs (REPs). Indeed, in an August 19, 2016 court filing, OSHA said of the REP for poultry processing facilities in the region that GAO focused on, "The REP, in targeting 16 of the most common hazards in the poultry processing industry, mandates OSHA expand all unprogrammed inspections of poultry processors in Region IV (comprising Georgia and several nearby states) stemming from one of the 16 hazards to a programmed inspection for all 16 hazards." See The Secretary of Labor's Objections to the Report and Recommendation to Grant Respondent's Motion to Quash at 7-8, *In the Matter of the Establishment Inspection of: Mar-Jac Poultry, Inc.*, No. 16-192 (N.D. Ga. filed Aug. 19, 2016) (emphasis added). Further, the now-effective REP for poultry processing facilities in Region IV states, "Area offices will normally conduct inspections for all complaints, formal or non-formal, which contain allegations of potential worker exposure to poultry processing hazards. In addition and where applicable, all unprogrammed inspections will be expanded to include all areas required by this emphasis program." See OSHA Regional Notice: Regional Emphasis Program (REP—for Poultry Processing Facilities CPL 18/09 (CPL 04) at 3, Occupational Safety and Health Administration (Oct. 30, 2017) (emphasis added) available at <https://www.osha.gov/dep/leps/RegionIV/>.

Will you commit that, if confirmed, you will continue to expand unprogrammed inspections as outlined under the emphasis program?

Answer. If confirmed, I will examine the GAO report and discuss the findings with career and regional staff to understand OSHA's response. And, if appropriate, change the agency's position.

*Question 31.* During your tenure at FedEx, the company opposed provisions in the Dodd Frank law to strengthen Sarbanes Oxley whistleblower protections. Please describe how FedEx has complied with the Sarbanes Oxley requirement that every publicly traded corporation have a whistleblower hotline to the Audit Committee of its Board of Directors. What is its record of results, including the volume of disclosures and the number of corrective actions?

Answer. FedEx is committed to legal compliance, including prohibiting any form of retaliation. Information about the FedEx Whistleblower Program and FedEx Alert line is available on its Investor Relations web page under Governance and Citizenship.

*Question 32.* Do you agree with the goals of OSHA's silica and beryllium standards, being to reduce the incidence of lung disease caused by exposure to silica and beryllium?

Answer. OSHA's permissible exposure limits are designed to reduce worker exposure to harmful chemicals.

*Question 33.* Under the Obama administration, OSHA pursued robust transparency in enforcement by issuing press releases detailing enforcement actions taken and citations issued by the agency. Should DOL continue to issue press releases detailing enforcement actions and citations? Do you believe transparency can have a deterrent effect?

Answer. If done with transparency, consistency, and fairness, yes, issuing press releases can be an effective communication tool.

*Question 34.* In June 2010, OSHA initiated the Severe Violator Enforcement Program (SVEP), which identifies companies that have repeated serious violations of health and safety standards. Do you support the SVEP? Should OSHA continue the SVEP?

Answer. The Severe Violator Enforcement Program can be an effective tool in improving safety and health in certain workplaces provided it is transparent, consistent, and fair.

*Question 35.* OSHA relies on its Special Emphasis Programs to respond to workplace safety problems that are unique to or unacceptably prevalent in particular industries, regions, or local areas. These programs ensure that OSHA is using its enforcement resources in a targeted, effective manner to combat hazards causing

worker injuries and deaths where they are most likely to occur. Do you support the use of Special Emphasis Programs? Will you commit to use new Special Emphasis Programs when data suggest dangerous safety trends in particular industries or regions?

Answer. Special Emphasis Programs can be an effective tool in improving safety and health in certain industries, regions, or local areas provided they are transparent, consistent, and fair.

*Question 36.* In January of this year, OSHA issued a rule to protect workers from unsafe exposure to beryllium, which is linked to lung cancer and chronic beryllium disease. However, under President Trump, OSHA has proposed weakening the rule. OSHA has proposed revoking the additional protections the rule affords workers beyond establishing a permissible exposure limit. These protections—called “ancillary provisions”—include requirements for exposure assessment, methods for controlling exposure, respiratory protection, personal protective clothing and equipment, house-keeping, medical surveillance, hazard communication, and recordkeeping. Will you commit to a thorough review of the comments submitted in response to this proposal? If credible evidence suggests that revoking the requirements of the ancillary measures could lead to increased exposure to unsafe concentrations of beryllium, will you refuse to move forward with any such revocation?

Answer. I understand OSHA’s beryllium regulation is facing a legal challenge from several industry sectors. If confirmed, I will examine the state of the legal issues related to implementation of the beryllium regulation.

*Question 37.* This January, OSHA determined that workers exposed to beryllium are at a significant risk of developing chronic beryllium disease (CBD) and lung cancer. How serious do you consider beryllium-caused cancer? Should combating it be high on OSHA’s priority list?

Answer. I take all exposure limit issues seriously. I do not intend to prioritize one chemical over another, but work to ensure all OSHA standards are protective of employees.

*Question 38.* For fiscal year 2016, the average initial Federal OSHA penalty for a serious violation was about \$5,100, reduced to an average of \$2,400 after settlement. A serious violation under the OSH Act is a condition that presents a substantial probability of causing death or serious physical harm. In cases involving fatalities, the typical total penalty was \$7,000. Do you believe that \$2,400 for a serious violation, or \$7,000 for a violation involving the death of a worker, is too high?

Answer. No.

*Question 39.* In 2015, all workplaces in states under Federal OSHA (as opposed to state run OSAs, which started this approximately a year later) began reporting to OSHA every incidence of a severe work related injury to their employees—such as an amputation or an injury or illness that required that the worker be hospitalized. In the first 2 years of reporting from the 29 states under Federal OSHA, FedEx had the 7th highest number of severe injuries reported. As FedEx Ground’s Vice President of Safety, Sustainability and Vehicle Maintenance, what additional steps if any did you take to address this injury rate?

Answer. FedEx provides information and training to its station management regarding how to respond to serious accidents. First and foremost, that information and training is geared toward ensuring the injured individual receives prompt and proper treatment. Additionally, FedEx cooperates with law enforcement and investigating agencies in connection with their investigation of the accident, and FedEx conducts their own review of the accident to identify possible root causes, which FedEx then address to ensure a similar accident does not occur in the future.

40. A review of FedEx enforcement history and search of OSHA’s inspection data base shows that since 2001 there were more 300 Federal and state OSHA inspections of FedEx facilities that resulted in one or more violations of OSHA standards. In almost every case where FedEx has been cited for violations of OSHA standards, including in cases of employee fatalities, the company has contested these citations. Is it your policy to contest OSHA violation citations? If so why?

Answer. FedEx is committed to cooperating fully with OSHA, and it evaluates each OSHA citation on a case-by-case basis. It is not FedEx’s policy to contest OSHA violation citations.

41. Please provide the amount of fines and penalties assessed to FedEx by OSHA between 2001 and the present, along with the amount of fines and penalties paid after contesting and appealing those citations.

Answer. Information responsive to this question is publicly available and can be obtained on OSHA's website, at the following link: <https://www.osha.gov/pls/imis/establishment.html>

*Question 42.* FedEx has experienced three fatalities in as many years. What did you learn, and what steps did you take in response to these tragedies to better protect your employees and improve your company's safety program?

Answer. FedEx has invested in sustaining robust training and daily communications programs designed to raise awareness of potential safety issues and industry best safety practices. FedEx's training and communications are routinely updated to incorporate key learnings and latest developments that could impact workplace safety and health.

*Question 43.* OSHA previously had as part of its regulatory agenda creating a standard preventing workers from being hit and run over by vehicles that are backing up. However, OSHA under the Trump administration removed that standard from its agenda. Please provide the steps that FedEx takes to address the risk of injury from vehicles that are backing up, including whether FedEx vehicles have backup cameras.

Answer. Many FedEx trucks have backup cameras, and FedEx champions the adoption of numerous transportation safety technologies proven to reduce accidents and make our workplaces and highways safer. FedEx supports Federal mandates for proven transportation safety technology, where those mandates are clear, practical and have reasonable timelines for implementation.

*Question 44.* In written comments filed with OSHA in March 2010 in response to a request for views from stakeholders on OSHA programs and policies, you recommended that OSHA, "Balance the 'stick and carrot'" and "favor carrot use." As Assistant Secretary, what specific steps will you take to better encourage use of the "carrot"?

Answer. As I mentioned in my testimony, both compliance assistance and enforcement are necessary tools, but they are not mutually exclusive. As specified in the OSH Act, OSHA operates a balanced program of enforcement, compliance assistance, training, outreach, and voluntary collaborative programs to maximize its effectiveness. I would work with career staff to provide compliance assistance, outreach, written materials, and other agency resources to help the regulated community achieve compliance.

*Question 45.* FedEx Ground operations depend on the services of tens of thousands of drivers who are either independent contractors or work for independent service providers.

- a. Does FedEx have safety and health standards or policies that it requires these contractors to follow, and if so what are those standards and policies?
- b. Are they part of a written agreement between FedEx and its contractors?
- c. Does FedEx conduct oversight to determine if these standards and policies are complied with? If so, how is this oversight conducted?
- d. How are these standards and policies enforced?

Answer. FedEx Ground contracts with nearly 6,000 locally owned businesses for various transportation, pickup and delivery services. Each of these businesses contractually agrees to incorporate a safety program and to comply with all applicable Federal and state laws regarding the safety of their operations and the well-being of their employees. FedEx Ground is proud of the fact that its innovative business model has enabled thousands of entrepreneurs to own independent businesses while providing a valued service to millions of customers. FedEx reviews vendor relationships for contract compliance. FedEx takes appropriate action responding to businesses that do not fulfill contractual safety requirements, up to and including contract termination.

*Question 46.* Regarding the role of OSHA enforcement, in your view, were the enforcement policies followed by the Obama administration too aggressive or appropriate? If too aggressive, explain in what way and list what specific enforcement policies you believe to have been too aggressive.

Answer. Enforcement is only one "tool" OSHA has to improve workplace safety and health. The question is whether that tool is being used as efficiently and effectively as possible—along with the other tools it has at its disposable—in pursuing OSHA important mission. If confirmed, I look forward to discussing this and many other issues with the Department's OSHA staff.

*Question 47.* The National Institute for Occupational Safety and Health has linked a deadly lung disease known as 'popcorn lung' to an artificial butter flavoring chemical called diacetyl. In recent years, OSHA has failed to issue a standard to protect workers from exposure to diacetyl, relying on the OSH Act's General Duty

Clause to cite employers regarding diacetyl overexposures. Will you support an OSHA standard to minimize worker exposure to diacetyl?

Answer. If confirmed, I will consult with career staff to examine what action the agency has taken to minimize worker exposure to diacetyl.

*Question 48.* Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing guidance?

Answer. If confirmed, I will follow the law as it relates to public rulemaking and guidance changes.

*Question 49.* What is your opinion about whether minority members of the HELP Committee have the authority to conduct oversight of OSHA?

Answer. It is my understanding that various committees and their members, spanning both chambers of Congress, have jurisdiction over the Department of Labor and its constituent agencies, such as OSHA, including an oversight role in addition to legislative, budgeting and, in the case of the Senate, the advice and consent role for nominations.

*Question 50.* If confirmed, do you agree to provide briefings to members of the HELP Committee, including minority members, if requested?

Answer. If confirmed, I look forward to maintaining an open dialog with you and your congressional colleagues regarding all aspects within OSHA.

*Question 51.* If confirmed, do you commit to answer promptly any letters or requests for information from individual members of the HELP Committee including request for OSHA documents, communications, or other forms of data?

Answer. If confirmed, I will provide responses to all Members of Congress.

#### SENATOR WHITEHOUSE

*Question 1.* Please list the OSHA rules issued under the previous Administration that you supported and continue to support.

Answer. As I mentioned in my testimony, if no comments were submitted to any proposed rule there were no concerns.

*Question 2.* Given your extensive history and experience working for employers, what assurances can you provide that you will adequately undertake enforcement activities to protect employees and the public interest?

Answer. As a safety professional I have worked every day to ensure the safety and health of our company's employees. Along with my safety teams, we have established policies and procedures to meet or exceed compliance with all applicable safety and health regulations to include Federal DOT, FAA, and OSHA regulations.

*Question 3.* Please list the three most significant cases in which you successfully obtained relief for an individual who brought a claim against an employer. Why were those cases significant to you?

Answer. Given my position for the last 17 years, I'm not sure I understand the nature of the question.

*Question 4.* Please detail a safety issue from your experience that put employers and employees (or their representatives) at odds with one another.

Answer. I have always advocated for an inclusive approach to safety issues.

*Question 5.* Do you commit to not using non-commercial airplane or helicopter travel paid for at taxpayer expense?

Answer. If confirmed, I will fully comply with all Federal Government travel policies.

#### SENATOR BALDWIN

Mr. Mugno, as I mentioned at your nomination hearing, I have been extensively involved in calling OSHA's attention to Greif Inc. and its subsidiary, Mid-America Steel Drum Company, a barrel refurbishing company with operations in Wisconsin. I was disappointed that you did not provide complete answers to my questions at the hearing, despite advanced materials on the matter being supplied to Department of Labor Legislative Affairs. As I mentioned, I have faced significant challenges when trying to bring the workplace safety issues at the company to the attention of OSHA. My experience has given me the impression of an agency that appears hesitant to use its statutory authority to its fullest extent. I'd like to ask you some questions about what you will do to address my concerns.

*Question 1.* How will you encourage OSHA staff to use their statutory authority to its fullest extent and encourage staff to issue violations that are sufficient to protect workers and incentivize employers to comply with the law?

Answer. If confirmed, I look forward to discussing this and many other issues with the Department's OSHA staff and working with them to make certain that the appropriate measures are in place to help ensure the safety of all workers. As specified in the OSH Act, OSHA operates a balanced program of enforcement, compliance assistance, training, outreach and voluntary collaborative programs to maximize its effectiveness.

*Question 2.* Do you believe OSHA's investigation into Mid-America Steel Drum and its parent company Greif Inc. have been carried out thoroughly and efficiently?

Answer. I am not sufficiently familiar with the specific facts regarding OSHA's case to provide an informed answer on this specific matter. My knowledge of this matter is only limited to news reports. If confirmed, I will discuss this with the Department's OSHA staff.

*Question 3.* If you were Administrator, how would you have handled the referrals to investigate the additional facilities differently?

Answer. I am not sufficiently familiar with the specific facts regarding OSHA's case to provide an informed answer on this specific matter. It would be necessary for me to review the case files to understand what actions were (or were not) taken by OSHA and why.

*Question 4.* If confirmed, will you agree to prioritize the investigation into this company?

Answer. If confirmed, I look forward to learning more about the events and history surrounding this case and working with OSHA staff to make certain that the appropriate prioritizations for inspections are in place to help ensure worker safety.

*Question 5.* If confirmed, will you commit to examining the referral process that delayed inspections into the St. Francis and Oak Creek facilities for months?

Answer. Yes.

*Question 6.* I have called on OSHA to expand its investigation of Greif to include barrel refurbishing operations nationwide, as the Department of Transportation has already done. If confirmed, will you expand the investigation to all Greif barrel refurbishing facilities throughout the nation?

Answer. If confirmed, I look forward to discussing this and many other issues with the Department's OSHA staff and working with them to make certain that the appropriate prioritizations for inspections are in place to help ensure worker safety.

*Question 7.* In April, OSHA cited Mid-America Steel Drum for 15 'serious' violations at its Milwaukee facility. The violations included the mixing of unknown reactive chemicals and exposing employees to reactive chemical hazards. Audio recordings of the corporate safety manager, provided by a whistleblower, suggested the violations were willful. However, OSHA declined to cite the company for willful violations, claiming the recordings (just 2 years old) could not be included as part of the current investigation. This was in spite of the fact that the recordings showed that the current violations were the same ones that OSHA had previously called on the company to fix 2 years prior. It appears that OSHA is looking for reasons to avoid issuing willful citations as opposed to pursuing the evidence that points to a willful violation.

a. Do you believe that repeating the same violation that a company was previously penalized for constitutes a willful violation?

b. How would you utilize the authority to issue willful violations?

Answer. I am not sufficiently familiar with the specific facts regarding OSHA's case to provide an informed conclusion on this question. As a general matter, I believe there would be a number of factors to consider. If confirmed, I look forward to discussing this with the Department's OSHA staff.

SENATOR WARREN

*Question 1.* Even when OSHA is fully funded, it cannot inspect every workplace every year. What types of inspections will be the highest priority to OSHA, and which industries will you prioritize?

a. What data will you use to make such determinations?

Answer. If confirmed, I look forward to discussing this and many other issues with the Department's OSHA staff. Clearly a prioritization process must be used to address the highest risks responsible for the highest number of fatalities and serious injuries occurring. The prudent approach in addressing these is using the appropriate "tools" provided under the OSH Act—enforcement, compliance assistance, training, outreach, and voluntary collaborative programs—in order to maximize life saving effectiveness and improvement. Timely actionable accurate data is key in making these decisions.

*Question 2.* What metrics will you use to assess the effectiveness of the OSHA's enforcement efforts?

Answer. Timely actionable accurate data is key in identifying and setting the appropriate metrics, and determining their effectiveness, when using all the "tools" provided under the OSH Act—enforcement, compliance assistance, training, outreach, and voluntary collaborative programs. If confirmed, I look forward to discussing this and many other issues with the Department's OSHA staff.

*Question 3.* Will you continue ongoing debarment proceedings against Federal contractors who have violated the law?

Answer. If confirmed, I will follow the Departments procedures regarding debarment actions for Federal contracting.

*Question 4.* Will you promise to continue the Department's ongoing investigation of OSHA whistleblower violations at Wells Fargo?

Answer. If confirmed, yes, I look forward to being briefed on this situation and review what next actions might be necessary.

*Question 5.* Will you commit to pursue all penalties allowed by law for employers who put their workers in harm's way?

a. Will you commit to pursuing criminal penalties, including jail time, for employers who willfully violate OSHA and cause the death of an employee?

Answer. As I stated in my testimony before the committee, if confirmed, yes, I will work with the Solicitor's Office and the Department of Justice when facts and circumstances warrant.

*Question 6.* In June, OSHA's new Silica Rule, which will save hundreds of lives by protecting the 2.3 million workers exposed to silica in their workplaces from diseases like silicosis and lung cancer, went into effect, and enforcement in the construction industry has begun.<sup>1</sup> Will you commit to ensuring that the upcoming compliance date for Maritime and General Industry are implemented as currently set forth in the final rule?

a. Will you commit to enforcing this rule and inspecting workplaces to ensure that this rule is being properly implemented?

Answer. On September 23, 2017, OSHA began enforcing the silica standard in the construction industry. The court challenge related to the regulation is awaiting a decision by the court. If confirmed, I would examine the court's decision to determine how OSHA would proceed with the regulation.

*Question 7.* On February 22, the Senate repealed OSHA's "Volks Rule" using a resolution of disapproval under the congressional Review Act. The rule clarifies OSHA's authority to hold employers accountable for their continuing obligation to maintain accurate injury and illness records for 5 years. As a result, underreporting of workplace injuries and illnesses will skyrocket and the odds that a worker is increased on the job will increase.

a. If confirmed, how will you enforce OSHA's recordkeeping requirements in the absence of this important rule?

b. How will you ensure that the DOL's statistics on workplace injury rates remain accurate, considering that employers will not be required to maintain accurate records after 6 months?

Answer. It is my understanding the Occupational Safety and Health Act continues to require employers to maintain records for 5 years and the DC Circuit Court only overturned an attempt to apply a continuing violation that would have exceeded the Act's 6-month statute of limitations. If confirmed, however, I look forward to discussing these and many other issues with the Department's OSHA staff to ensure employers comply with the law regarding the recording and recordkeeping of injuries and illnesses in the workplace in order to ensure all workers are protected.

*Question 8.* Now that congressional Republicans and President Trump have rescinded the Fair Pay and Safe Workplaces Executive Order, what authorities does OSHA have to ensure that contracting agencies have access to and can consider prior labor violations in procurement decisions (as Federal law and acquisition regulation requires)?<sup>2</sup> Will you implement these authorities?

<sup>1</sup>"OSHA's Final Rule to Protect Workers from Exposure to Respirable Crystalline Silica." Occupational Safety and Health Administration. United States Department of Labor. Online at: <https://www.osha.gov/silica/factsheets/OSHA-FS-3683-Silica-Overview.html>.

<sup>2</sup>41 U.S.C. § 6706; 41 U.S.C. § 6504; 41 U.S.C. § 3144; Manuel, K. "Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures." congressional Research Service (January 4, 2013). Online at: <https://fas.org/sgp/crs/misc/R40633.pdf>.

Answer. OSHA enforcement actions are publicly available on the OSHA website. If confirmed, I will ensure this data base continues to remain public while being transparent, consistent, and fair. I will also ensure OSHA is available to address inquiries from the agency's Federal partners regarding such information.

*Question 9.* Some large Federal contractors have reportedly continued receiving large Federal contracts after being caught committing serious violations of labor laws, in some cases resulting in the deaths of workers, but, during your confirmation hearing, you did not clarify whether you believe these companies should be eligible for additional Federal contracts.<sup>3</sup>

- a. Do you believe that the Department of Labor should award contracts to companies that have violated health and safety laws?
- b. If you believe that violators should in some cases be eligible for contracts, what specific criteria should the government use to assess their eligibility?
- c. Will you commit to informing contracting officers in other government agencies of OSHA violations committed by companies bidding on Federal contracts?

Answer. Federal procurement laws govern the selection of Federal contractors. If confirmed, I will follow the law to provide the agency's Federal partners information needed to meet those contracting laws.

*Question 10.* Please describe your views on the role of public information on specific OSHA violations in safety and health law enforcement, especially to deter future violations.

- a. Will you commit to preserving all existing public sources of data on OSHA inspections and labor law violations?
- b. For the first several months of the Trump administration, OSHA broke with longstanding practice, with no public explanation, by almost completely halting public press releases related to serious violations of health and safety laws. While OSHA has begun issuing some press releases regarding violations since May, it appears to be doing so at a far less frequent rate than it did during the previous administration.
  - i. Do you believe that public press releases on serious OSHA violations are beneficial to America's employers and workers?
  - ii. If confirmed, will you commit to ensuring that OSHA issues a press release every time a company is cited for a major violation, as previous Democratic and Republican administrations have done?
    1. If not, why not?

Answer. As I stated in the hearing, the use of press releases and other such communications are useful education and awareness tools. If confirmed, I look forward to discussing this with the Department's OSHA staff with a particular focus on transparency, consistency, and fairness in the use of these tools.

*Question 11.* In addition to issuing fewer press releases, OSHA removed from its homepage a list of names of workers who died on the job, other data on workplace deaths, and a video explaining workers' right to request an inspection.

- a. Do you believe that concealing this information is conducive to deterring OSHA violations? Do you believe that it encourages or discourages to report violations and request inspections?
- b. Will you commit to recommitting OSHA to full transparency and reversing these decisions to hide data and useful information for workers?

Answer. If confirmed, I will discuss this with the Department's OSHA staff and examine these actions with a focus on transparency, consistency, fairness, and any privacy concerns for a worker or their family.

*Question 12.* Will you commit to enforce occupational health and safety regulations against The Trump Organization if the company violates these laws and harms its employees?

Answer. If confirmed, I will enforce occupational health and safety regulations on all entities OSHA has jurisdiction to do so.

*Question 13.* What is your specific plan for insulating yourself and OSHA from conflicts of interest related to OSHA actions that may impact the Trump Organization?

Answer. If confirmed, I will enforce occupational health and safety regulations on all entities OSHA has jurisdiction to do so.

<sup>3</sup> <https://www.revealnews.org/blog/u-s-navy-coast-guard-continue-awarding-contracts-to-vthalter-despite-safety-lapses/>

*Question 14.* Will you commit to recusing yourself from any OSHA inspections or enforcement actions related to FedEx? What is your specific plan for insulating yourself from any conflicts of interest related to your former employer?

Answer. The ethics agreement letter I signed addresses this issue and I will abide by it. Recusal from such actions is just common sense. If confirmed, I will fully comply with all Federal Government ethics policies, including conflict of interest policies, and will rely on the Department's Designated Agency Ethics Officer for guidance.

*Question 15.* Do you support President Trump's proposed elimination of the Susan Harwood Training Grants program, which provides workers in dangerous jobs with life-saving information such as how to protect themselves from chemical hazards, prevent falls, and guard themselves against dangerous machines?<sup>4</sup>

a. If so, why?

b. If not, will you commit to aggressively advocating for funding for these grants?

Answer. As a nominee, I have not participated in any budget discussions. Additionally, my familiarity with this program is limited. If confirmed, I will confer with Department's OSHA staff to learn more about the program.

*Question 16.* In 2005, the U.S. Chamber of Commerce expressed support for a bill that would, according to the Chamber, "give employers an incentive to use independent safety consultants to conduct inspections and assist in fixing workplace safety problems."<sup>5</sup> Do you believe that it is a good idea for the government to allow safety inspections to be conducted by consultants paid by employers, rather than OSHA inspectors?

a. If not, will you commit to publicly advocating against such policies if you are confirmed?

Answer. I stated in my opening statement before the committee, that by leading and facilitating transparent discussions between all safety professionals—the career experts at OSHA, as well as those from the various sectors—OSHA could improve safety and health in workplaces quicker. If confirmed, I would encourage all ideas and proposals—such as the one mentioned above—to learn if it could effectively and efficiently expand the OSHA toolbox to improve workplace safety and health.

*Question 17.* The Chamber also supported a bill that would, according to the Chamber "give employers the right to correct a violation within 72 hours before a citation could be issued."<sup>6</sup> Do you believe that employers in violation of OSHA should be able to avoid receiving a citation just by rectifying the violation within several days?

a. If not, will you commit to publicly advocating against such policies if you are confirmed?

Answer. Again, as stated above and if confirmed, I would lead in a manner that would encourage all ideas and proposals that could effectively and efficiently improve safety and health in the workplaces. If ever considered, such a specific proposal would have to require specific use or non-use criteria. I would look forward to learning more from the career OSHA safety professionals as well as other offices in the Department on any such proposal.

*Question 18.* You reportedly said in 2006 that "We've got to free OSHA from its own statutory and regulatory handcuffs" and that OSHA should consider sunsets for some regulations.<sup>7</sup> If you still believe this, please list:

a. All statutes that you believe OSHA should be "freed" from;

b. All OSHA regulations that you believe should be revoked; and

c. All regulations that you believe should be subject to sunset provisions.

Answer. I am an advocate for periodic review of all safety and health standards. I contend this is necessary so standards do not become problematic or ineffective. However, if they do become outdated, then they should be revisited, revised, or retired. Permissible exposure limits (PELs) are an example of requirements in need of this attention. The fast changing workplace along with technologies not envisioned when many regulations were implemented may dictate some regulations be revisited, revised, or retired.

<sup>4</sup><https://www.bna.com/no-deep-cuts-n73014451453/>

<sup>5</sup><https://www.uschamber.com/press-release/us-chamber-supports-senate-osha-reform-measures>

<sup>6</sup>Id.

<sup>7</sup><http://www.businessinsurance.com/article/20060521/ISSUE01/100018988>

*Question 19.* At an “OSHA Listens” meeting in 2010, you said that OSHA should balance the “stick and carrot” but favor use of the carrot. Could you explain what you meant by this?

a. Do you believe that OSHA has the statutory authority to prioritize “carrot use” over enforcement? If so, where?

Answer. As I mentioned in my testimony, both compliance assistance and enforcement are necessary tools, but they are not mutually exclusive. As specified in the OSH Act, OSHA is authorized to use enforcement, compliance assistance, training, outreach, and voluntary collaborative programs to maximize its effectiveness. These multiple avenues currently exist for OSHA and employers to engage with each other in their mutual goal to improve workplaces. They include the Alliance Program, The Strategic Partnership program, the Voluntary Protection Program, the Challenge program, and the SHARP program. The balanced use and expansion of all these effective tools should be encouraged and supported.

*Question 20.* In 2014, a Federal judge ruled that FedEx’s policy requiring workers to call their supervisors before seeking medical treatment for injuries on the job was illegal.<sup>8</sup>

a. Were you involved in the creation or enforcement of this policy?

b. Do you believe that such policies are more likely to help or hurt the safety and health of workers?

c. How if it all do you believe OSHA should revise its policies to “look harder at the employee?”

Answer. The facts in this matter occurred prior to my arrival at FedEx Ground. Additionally, FedEx’s policy prohibits retaliation and provides employees multiple avenues to report concerns that they are being retaliated against for reporting a workplace injury or for seeking medical treatment for a workplace injury.

#### SENATOR HATCH

Question 1. You have spoken much about a position in which I agree strongly, that OSHA should be focused on compliance assistance, rather than harsh enforcement. However, whenever a workplace runs afoul law and causes serious injury or repeatedly does not take steps to be in compliance, enforcement and penalty must step in. With the Severe Violator Program (SVEP), please share with me the process you will take to reexamine the features to create the right balance of enforcement and compliance.

Answer. As I mentioned in my testimony, both compliance assistance and enforcement are necessary tools in ensuring regulatory compliance and safe and healthy workplaces for America’s workers. However, those tools are not mutually exclusive. As specified in the OSH Act, OSHA is authorized to use enforcement, compliance assistance, training, outreach, and voluntary collaborative programs to maximize its effectiveness. These multiple avenues currently exist for OSHA and employers to engage with each other in their mutual goal to improve workplace safety and health. They include the Alliance Program, The Strategic Partnership Program, the Voluntary Protection Program, the Challenge Program, and the SHARP Program. The balanced use and expansion of all these effective tools should be encouraged and supported. Concerning the Severe Violator Enforcement Program (SVEP), it too can be an effective tool in ensuring compliance and improving safety and health in certain workplaces provided it is used in a transparent, consistent, and fair manner.

[Whereupon, at 12:15 p.m., the hearing was adjourned.]

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<sup>8</sup><http://www.wci360.com/news/article/judge-upbraids-fedex-over-work-injury-rules>