

Update on Legal Developments in Special Education: What Teachers Need to Know and Why they Need to Know it

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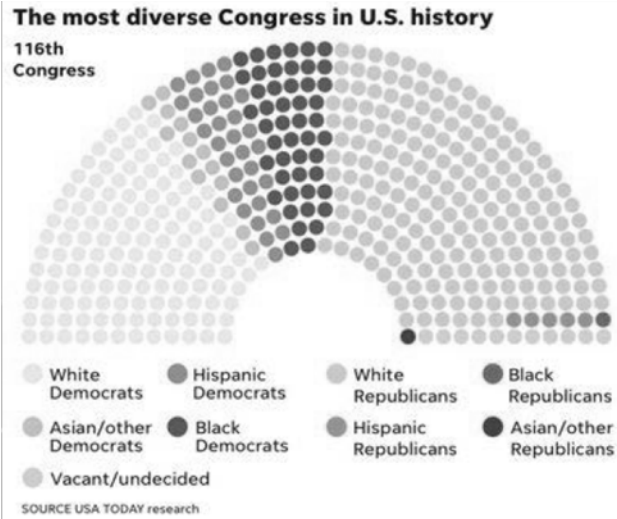
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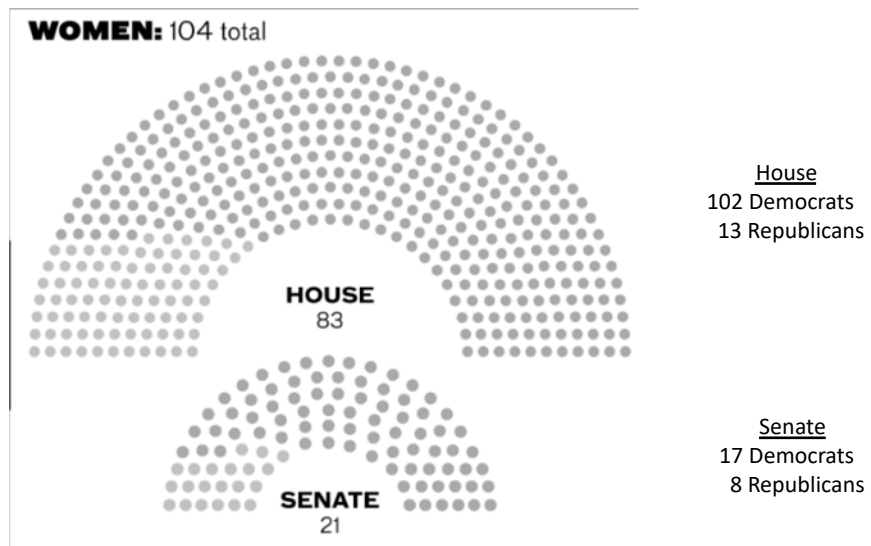
What's Happening in DC



The 116th Congress



Women in The 116th Congress



Education on the Hill



IDEA Reauthorization



IDEA Full Funding Act

- Representative Jared Huffman (D-CA) introduced the IDEA Full Funding Act H.R. 2902 – June 15, 2017.
- Senators Jon Tester (D-MT) and Chris Van Hollen (D-MD) introduced a companion bill, S. 2542 on March 13, 2018.
- Provides mandatory funding that puts federal government on a 7-year glide path to reach the 40% of the additional costs associated with educating students with disabilities.
- Currently, the federal government funding is at approximately 16% of those additional costs.

Special Education Teacher Shortage

- **48 states and the District of Columbia report a shortage of special education teachers**—with this area being the most severe shortage for most states.
- **Special education teachers leave the teaching profession at nearly twice the rate** of their general education colleagues (12.3% vs. 7.6%).
- **51% of all school districts and 90% of high-poverty school districts report difficulty** attracting qualified special education teachers.
- **42 states report a shortage** of early intervention providers, including special educators and related service providers.
- **Enrollment in teacher preparation programs is down 35%** over the last 5 years, foreshadowing an insufficient pipeline for the future.

STRIVE Act

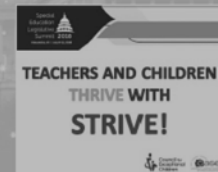
- S. 2370 (Booker, D-NJ) and H.R. 4914 (Norcross, D-NJ). (115th Congress)

- Amends Higher Education Act.

- Bill Provides:
 - Incremental loan-cancellation program.
 - Increases and extends funding for teacher training.
 - TEACH grants – increases in awards, includes early childhood teachers.
 - Subsidizes teacher certification and licensing fees.
 - Expands teacher quality partnerships grants to include early childhood educators.
 - Increases the tax deduction for school expenses and extends the deduction to early childhood educators.



U.S. Representative Norcross (D-NJ) and U.S. Senator Booker (D-NJ)



The Keeping All Americans Safe Act

- Introduced by Representatives Scott (D-VA) and Beyer (D-VA) – H.R. 7124 and Senators Murphy (D-CT), Murray (D-WA) and Van Hollen (D-MD) – S. 3626, November 2018.

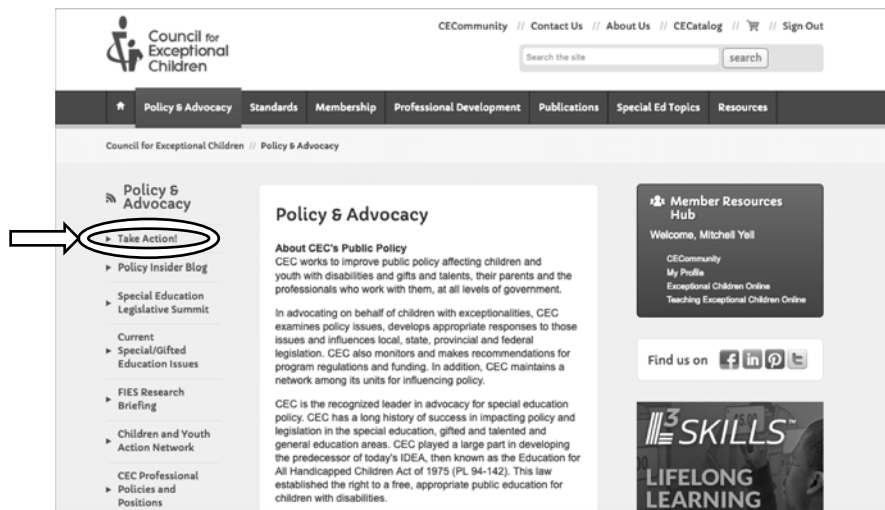
- To prohibit and prevent seclusion and to prevent and reduce the need of physical restraints in schools.

- Components of bill
 - Establishes minimum safety standards in schools
 - Supporting states to provide training and to establish monitoring and enforcement systems
 - Increasing transparency, oversight and enforcement through data

Council for Exceptional Children



Policy Advocacy



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Tell Congress to invest in education!

Tell Congress to Invest in Education Programs for Children with Exceptionalities!

Budgets are tight and Congress is under extreme pressure to keep funding to a minimum. Tell Congress that education cannot absorb any more funding cuts!

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Welcome to CEC's Legislative Action Center (LAC) Website!

Knowing that you depend on CEC's insight to develop new, innovative ideas and strengthen policy and practice, CEC's Legislative Action center is interactive, informative.

Take Action on a number of legislative issues that are important to the advancement of policies and opportunities for students with disabilities and gifts and talents and the professionals that work on their behalf.

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Thank you to all who made it out to #CEC2019 in Indianapolis, Indiana to advocate on behalf of children and youth with exceptionalities.
Feb 5, 2019

CEC Advocacy Team @CECAdvocacy
Thank you @johnsonlarose for coming back

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Policy & Advocacy

About CEC's Public Policy
CEC works to improve public policy affecting children and youth with disabilities and gifts and talents, their parents and the professionals who work with them, at all levels of government.

In advocating on behalf of children with exceptionalities, CEC examines policy issues, develops appropriate responses to those issues and influences local, state, provincial and federal legislation. CEC also monitors and makes recommendations for program regulations and funding. In addition, CEC maintains a network among its units for influencing policy.

CEC is the recognized leader in advocacy for special education policy. CEC has a long history of success in impacting policy and legislation in the special education, gifted and talented and general education areas. CEC played a large part in developing the predecessor of today's IDEA, then known as the Education for All Handicapped Children Act of 1975 (PL 94-142). This law established the right to a free, appropriate public education for children with disabilities.

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Your connection to special education policy news

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CEC is also pleased to offer up-to-date news about federal special and gifted education policy through the *Policy Insider* Blog. A complement to the weekly e-mail service, CEC's *Policy Insider* Blog features regular posts throughout the week, providing you with real-time special ed policy news.

Questions or comments? Send an e-mail to CEC's Policy and Advocacy Services team.

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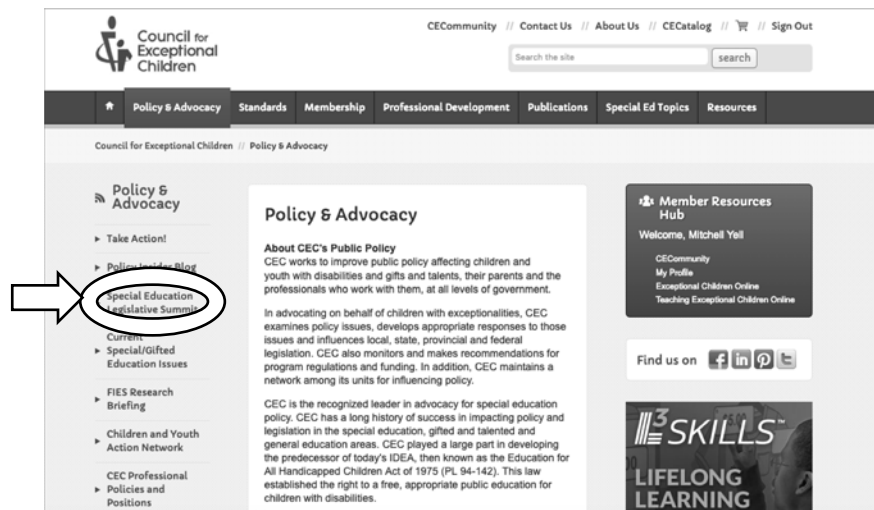
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Special Education Legislative Summit



Legislative Summit-July 7-10, 2019



“A small group of thoughtful people could change the world. Indeed, it's the only thing that ever has.”

Margaret Mead

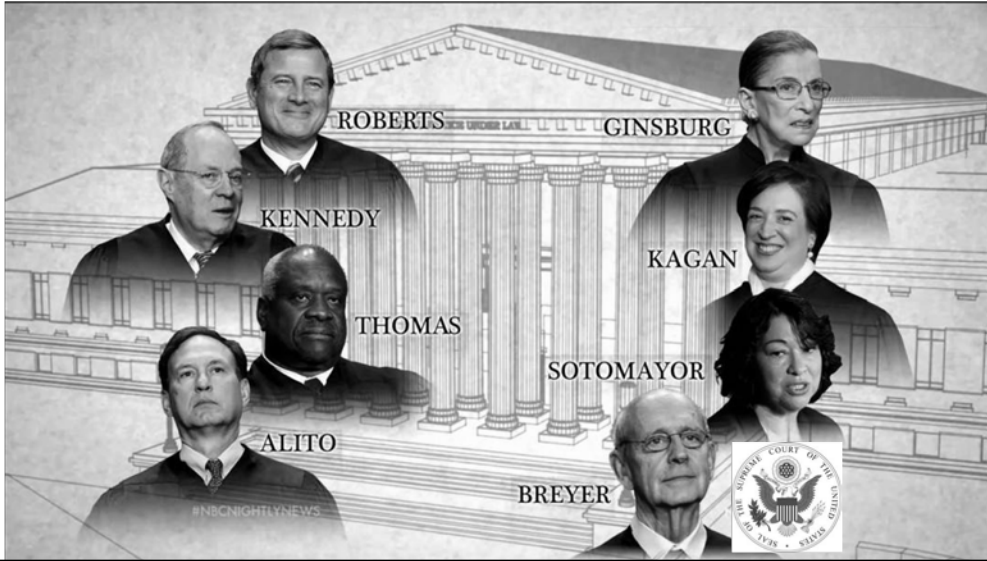
Developments in the U.S. Supreme Court



U.S. Supreme Court



Endrew F. v. Douglas County School District R1 (2017)



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Oral Arguments: January 11, 2017



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Supreme Court Ruling: March 22, 2017



In *Rowley*, “we declined...to endorse any one standard for determining when (students with disabilities) are receiving sufficient educational benefit to satisfy the requirements of the Act...“That **more difficult problem** is before us today.”

(*Endrew*, 2017, p. 1)

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The *Endrew* Educational Benefit Standard

- “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make **progress appropriate in light of the child’s circumstances.**” (*Endrew*, 2017, p. 16)
- Vacate & Remand

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The Tenth Circuit Court's Decision on Remand

- On August 2, 2017, the U.S. Circuit Court of Appeals for the tenth Circuit announced their decision on the remand
- “We therefore vacate our prior opinion, and remand to the United States District Court for the District of Colorado for further proceedings consistent with the Supreme Court’s decision.”

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The Colorado District Court's Decision on Remand-2/12/18

“I conclude that (Andrew) and his parent have met their burden to prove that the District’s **April 2010 IEP failed** to create an educational plan that was reasonably calculated to enable Petitioner to make progress, even in light of his unique circumstances. The IEP was **not appropriately ambitious** because it did not give (Andrew) the chance to meet challenging objectives”
(*Andrew*, 2018, p. 20)

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The Colorado District Court's Decision on Remand-2/12/18

“Accordingly, I reverse the Administrative Court Agency decision denying (Endrew) and his parents’ request for reimbursement of his tuition, transportation costs as well as reasonable attorneys’ fees and litigation costs” (*Endrew*, 2018, p. 20).

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Final Settlement in Endrew

- After 7 years of litigation, the Douglas County School District paid \$1.3 million from the District’s general fund to settle the case
- “The focus here needs to not be on future cases and parents suing school districts but providing students with the services they need now.” M. Whittaaker, Policy Director, NCLD.

What did the *Endrew* decision mean for students with behavioral disorders?

#1-If students' IEPs do not address a student's behavior, when necessary, that may be a violation of FAPE

IDEA on Behavior

- “in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;”
- 20 U.S.C. § 1414 (d)(2)(B)(i)

The *Endrew* District Court on Behavioral Programming in IEPs

“The District’s inability to **properly address Petitioner’s behaviors** that, in turn, **negatively impacted his ability to make progress on his educational and functional goals**, also cuts against the reasonableness of the April 2010 IEP” (*Endrew v. Douglas County School District*, 2018, p. 17).

The U.S. Department of Education on behavioral programming in IEPs

- “The Failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit and FAPE.”
- Dept. of Education, Dear Colleague Letter on Behavioral Supports in the IEP, p. 3-

Neosho School District v. Clark (2003) 315 F.3d 1022 (8th Cir. 2003)

- “...because the IEPs did not appropriately address his behavior problems, Robert was denied a free appropriate public education” (Neosho, 2003, p. 1025).
- “...no cohesive plan was in place to meet Robert’s behavioral needs supports the ultimate conclusion that he he was not able to obtain benefit from his education” (Neosho, 2003, p. 1025).

#2-The Supreme Court's educational benefit standard requires that student's IEPs are reasonably calculated to enable a student to make progress appropriate in light of his or her circumstances

“The IEP must aim to enable the child to **make progress**. After all, the **essential function of an IEP** is to set out a plan for pursuing **academic and functional advancement**”

-Andrew F., 2017, p. 11-

“A substantive standard **not focused on student progress** would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.... The IDEA demands more.” (*Endrew*, 2017, p. 11)

The Role of the Courts

"A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows **the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances**" (*Endrew*, 2017, p. 16).

How can we should that our IEPs are "reasonably calculated" to enable a student to make progress?

Recommendation #1

When developing the content of a student's IEP and subsequently reviewing and revising it, be sure that the **present levels of academic achievement & functional performance** and annual goals are based on **academic & functional** assessments and other **relevant data** that are **current**.

An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and **potential for growth” (Endrew, 2017, p. 11).**

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Caution: Inappropriate PLAAFP Statement



- If the IEP fails to assess the ‘child’s present levels of academic achievement and functional performance’ the IEP does not comply with [IDEA]. This **deficiency goes to the heart of the IEP**; the child’s level of academic achievement and functional performance is the **foundation on which the IEP must be built**. Without a clear identification of [the child’s] present levels, the IEP **cannot set measurable goals, evaluate the child’s progress and determine which educational and related services are needed**.

--*Kirby v. Cabell County Board of Education*, (S. D. W. VA, 2006), p. 694

Caution: Remember “functional needs”



- “Regular grading and advancement systems are useful (but) that model becomes less useful in the context of a child with autism or a similar disability...the concept “educational benefit **must embrace more than academic subjects**...the court must examine the IEP to determine whether it is reasonably calculated **to provide benefit in academic area and non-traditional areas critical to the child’s education.**”

--*Board of Education of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D.W.VA., 2000), p. 612

Direct Relationship

“There should be a direct relationship between the **present levels of performance and the other components of the IEP**. Thus, if the statement describes a problem with the child’s reading level and points to a **deficiency in reading skills**, the problem should be addressed under both (1) **goals** and (2) **specific special education and related services** provided to the child.” (IDEA Regulations, 1997, Appendix C, Question 36)

“The reasonably calculated qualification reflects a recognition that crafting an appropriate program of education requires a **prospective judgement** by (IEP team members), informed by their own expertise and the views of the child’s parents” -
Endrew, 2017, p. 11-

Recommendation #2

Ensure that annual **academic & functional** IEP goals are **Challenging, appropriately ambitious, and measurable.**

A child's "educational program must be **appropriately ambitious** in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but **every child should have the chance to meet challenging objectives.**" Endrew, 2017, p. 14

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"A **reviewing court may fairly expect** (school) authorities to be able to offer a **cogent and responsive explanation** for their decisions that shows the IEP is reasonable calculated to enable a child to make progress appropriate in light of his (or her) circumstances."
Endrew, 2017, p. 16

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Caution: Unambitious Goals



“The stated progress on Shannon’s goals in reading and math skills for an entire school year ensured the IEPs inadequacy from it’s inception. Even if Shannon had met her goals should would continue to fall further behind her peers. The goals were wholly inadequate. Florence County School District failed to provide Shannon Carter with a free appropriate public education.”

-Carter v. Florence County Four
17 EHLR 452(D. SC. 1991)-

Caution: Unambitious Goals



“Endrew’s April 2010 IEP that was developed was a continuation of the poor progress on his educational and functional goals of his past IEPs. And, as such, the District was not successful in creating an educational program that was reasonably calculated to enable Endrew to make progress in light of his circumstances, in order to provide him with a substantive FAPE”-*Endrew v. Douglas County School District* __ IDELR __ (D. CO. 2018)

Caution: Unmeasurable Goals



“The student’s annual goals in each IEP simply do not contain objective criteria which permit measurement of Student’s progress. . . . A goal of ‘increasing’ reading comprehension skills or ‘improving decoding skills’ is not a measurable goal an open-ended statement that the student will ‘improve’ does not meet the requirement . . . for a ‘measurable’ goal” (p.563).

-Rio Rancho Pub. Schools
40 IDELR 140 (SEA N.M. 2003)-

Recommendation #3

Continuously **monitor and measure** a child’s progress on annual goals (and objectives/benchmarks, if applicable) and maintain specific data to demonstrate that progress has been made.

Warning: Justifying Progress



"A reviewing court may fairly expect those authorities to be able to offer a **cogent and responsive explanation** for their decisions that shows **the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.**" -*Andrew F.*, 2017, p. 16-

Caution: Teacher Observation



"Although subjective teacher observation provides valuable information, **teacher observation is not an adequate method of monitoring student progress.**"

"Without supporting data, teacher observation is opinion which cannot be verified."

-*Board of Education of the Rhinebeck Central School District (39 IDELR 148, 2003)*-

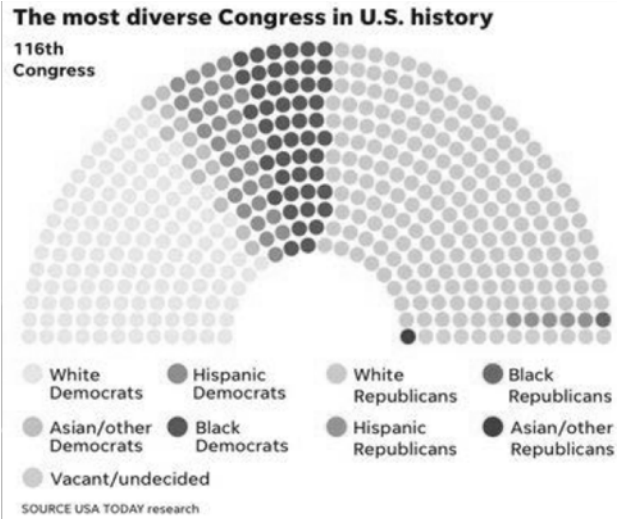
The U.S. Department of Education on the important of revising an IEP when a student is not making Progress

- “If a child is not making expected progress toward his or her annual goals, the IEP team must revise, as appropriate, the IEP to address the lack of progress”
- Questions and Answers (Q & A) on U.S. Supreme Court Decision in *Endrew F. v. Douglas County School District Re-1*

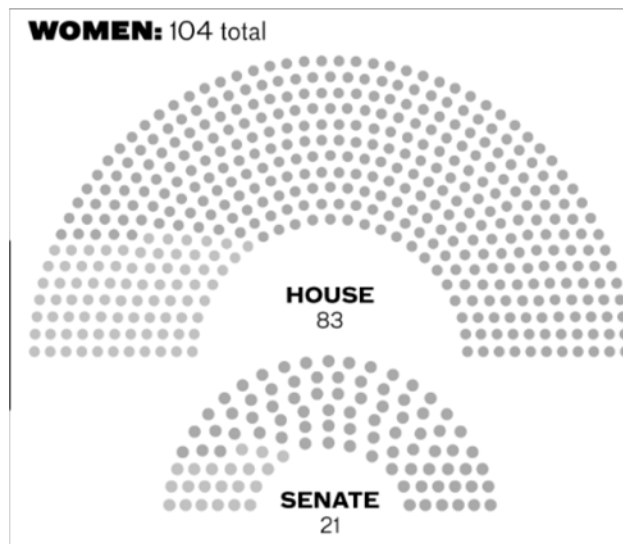
Monitoring and Reporting Progress

Kathleen Mehfound (Attorney with Reed & Smith and Consultant to LRP): “ *When I have a school district with a FAPE case the first thing I do is go to the teacher and say ‘Give me information on your student’s progress.’ If the teacher doesn’t have data, I advise the school district to settle.* ” (Tri-State Special Education Law Conference, 2015)

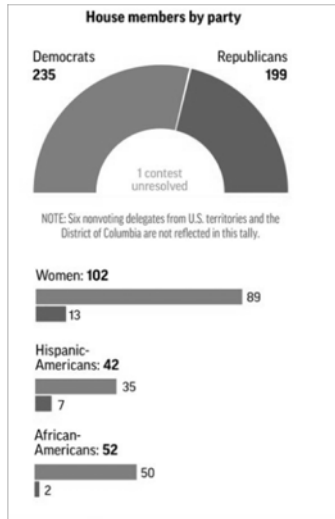
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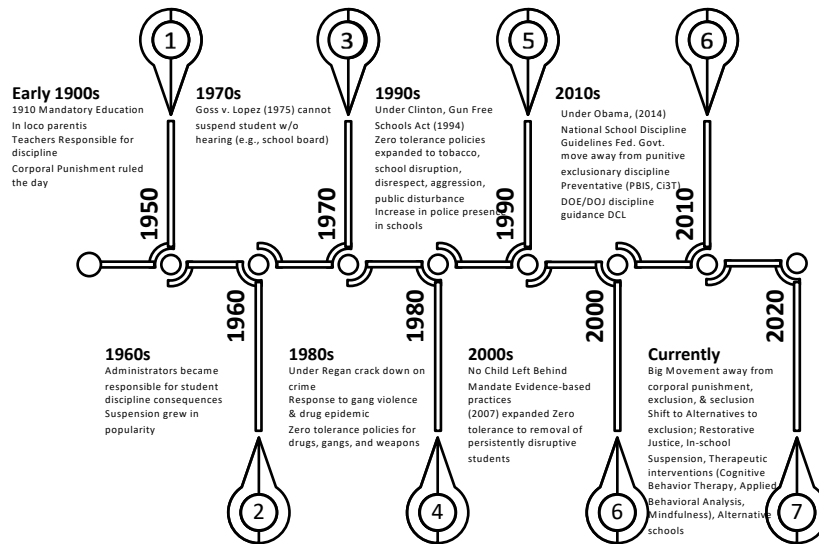
Women in The 116th Congress



House Members by Party



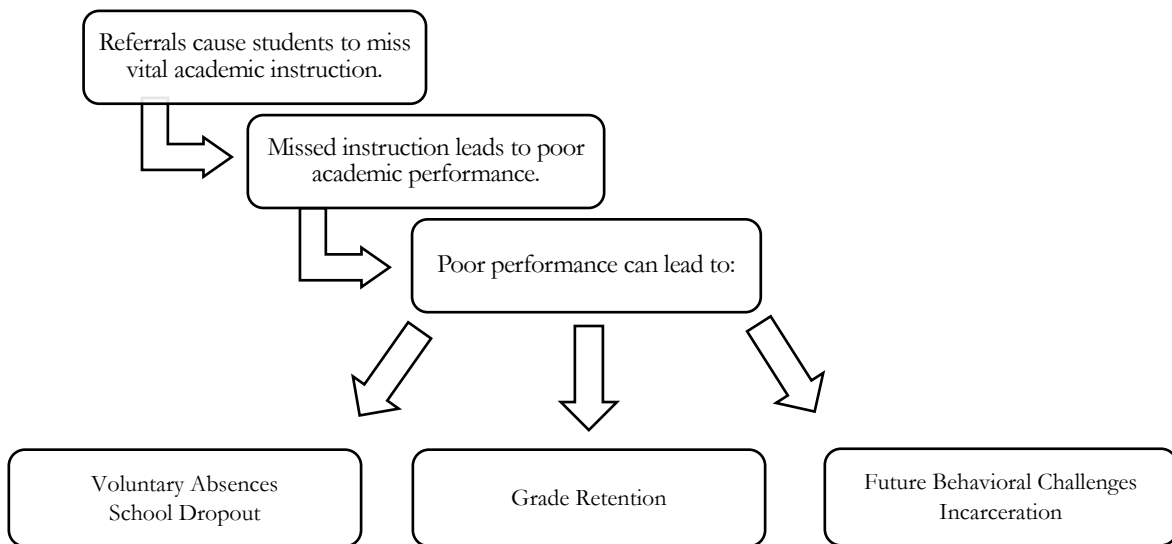
Historical Examination of School Discipline

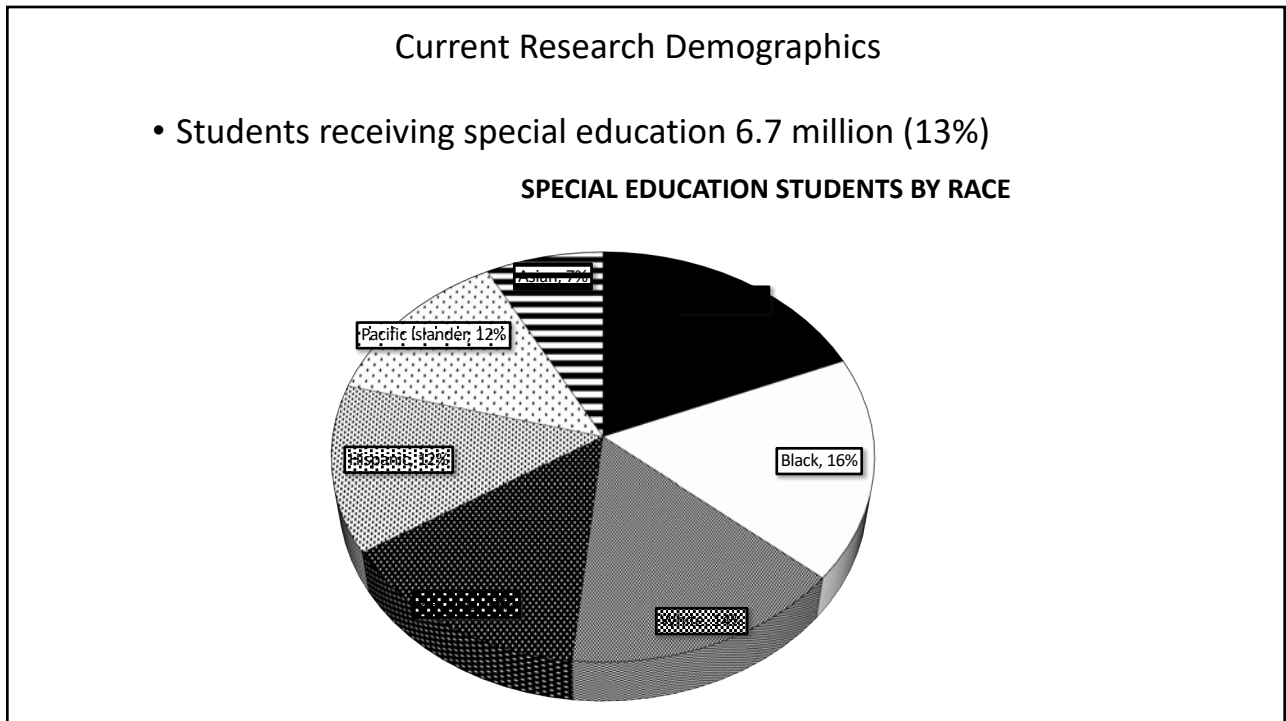
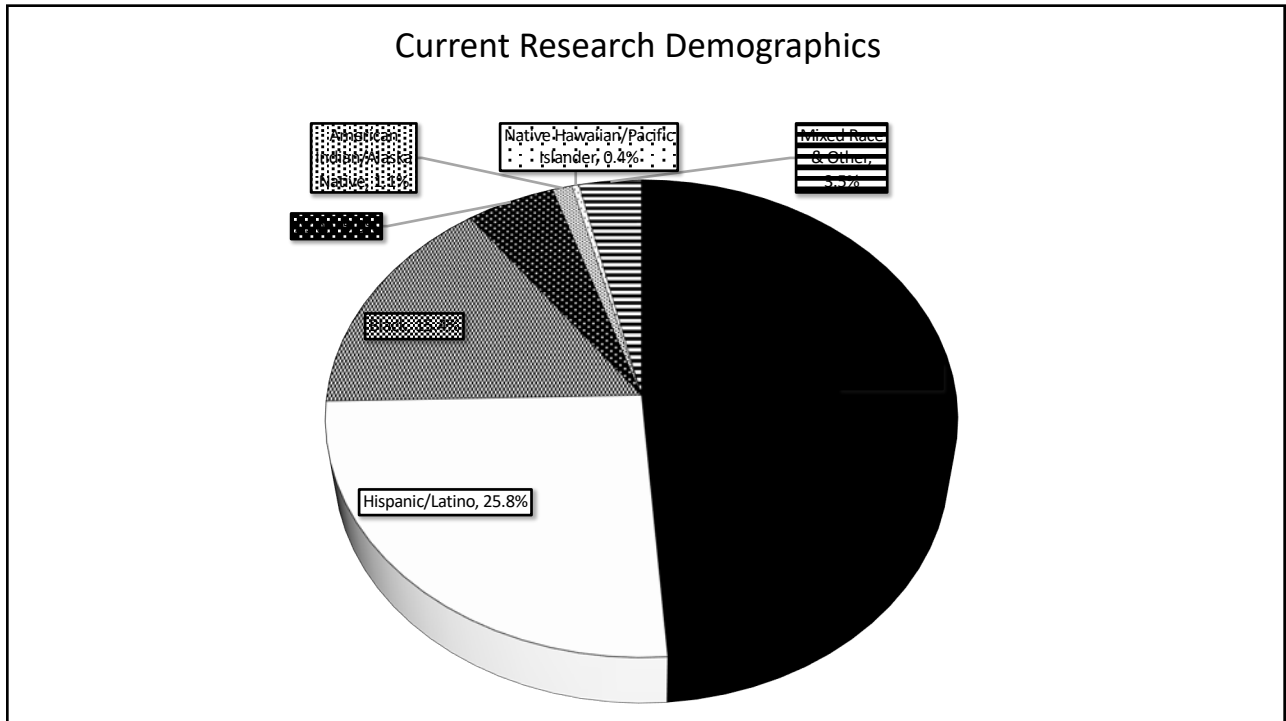


Historical Examination of Discriminatory Discipline

- Gender
 - Males
- Race/Ethnicity
 - Black Students
 - American Indian / Alaska Native Students
 - Hispanic/Latino Students
- Linguistic Ability
 - English Learners
- Exceptionality
 - Special Education
- Socio-Economic Status (SES)
 - Low SES students
 - Low SES schools

Consequences





Phase 1: General Education						
Boys and Girls						
	Enrollment Rate	Discriminatory Discipline Rate	ISS Rate	Single OSS Rate	Multiple OSS Rate	Expulsion Rate
African-American / Black	15.4%	35.9%	32.4%	36.6%	45.5%	32.3%
American Indian / Alaska Native	1.1%	1.6%	1.4%	1.7%	1.8%	1.8%
Hispanic / Latino	25.8%	22.8%	23.6%	23.2%	19.9%	21.6%
Boy						
	Enrollment Rate	Discriminatory Discipline Rate	ISS Rate	Single OSS Rate	Multiple OSS Rate	Expulsion Rate
African-American / Black	15.3%	33.3%	30.0%	33.5%	42.7%	30.8%
American Indian / Alaska Native	1.1%	1.5%	1.4%	1.6%	1.7%	1.7%
Hispanic / Latino	25.7%	22.9%	23.5%	23.5%	20.6%	22.1%
Girls						
	Enrollment Rate	Discriminatory Discipline Rate	ISS Rate	Single OSS Rate	Multiple OSS Rate	Expulsion Rate
African-American / Black	15.5%	41.1%	37.1%	42.5%	51.9%	35.8%
American Indian / Alaska Native	1.1%	1.7%	1.5%	1.7%	1.9%	2.1%
Hispanic / Latino	25.8%	22.5%	23.7%	22.7%	18.4%	20.4%

Phase 1: Special Education						
Boys and Girls						
	Enrollment Rate	Discriminatory Discipline Rate	ISS Rate	Single OSS Rate	Multiple OSS Rate	Expulsion Rate
African-American / Black		33.5%	31.0%	32.9%	39.1%	32.2%
American Indian / Alaska Native		1.7%	1.6%	1.8%	1.7%	2.0%
Hispanic / Latino		19.7%	20.0%	20.5%	17.9%	20.7%
Boy						
	Enrollment Rate	Discriminatory Discipline Rate	ISS Rate	Single OSS Rate	Multiple OSS Rate	Expulsion Rate
African-American / Black		32.3%	29.8%	31.4%	37.8%	31.6%
American Indian / Alaska Native		1.7%	1.6%	1.7%	1.7%	1.9%
Hispanic / Latino		19.7%	20.0%	20.6%	18.2%	21.2%
Girls						
	Enrollment Rate	Discriminatory Discipline Rate	ISS Rate	Single OSS Rate	Multiple OSS Rate	Expulsion Rate
African-American / Black		37.5%	34.5%	37.3%	44.2%	34.5%
American Indian / Alaska Native		1.8%	1.7%	1.8%	1.8%	2.3%
Hispanic / Latino		19.5%	20.3%	20.3%	17.0%	18.7%

FAPE for Students with Mental Health Challenges

“The Beat Goes On”

Upcoming ReThinking Policy Article

- Work of . . .
 - Carl Smith
- Mike Paget
- Mitch Yell

How Many Students Experience Mental Health Challenges?

- 21.4% of students between the ages of 13 and 18 (National Alliance on Mental Illness – NAMI)
- 13% of students ages 8-15 (NAMI)
- Another 16% who fall short of formal diagnosis (Foy & Earls, 2011)

Children's Mental Health (Center for Disease Control, 2013)

- Estimates that 13-20 percent of children living in the U.S. experience a mental disorder in a given year.
- Millions of American children live with depression, anxiety, ADHD, autism spectrum disorders, Tourette syndrome or a host of other disorders.
- In schools, early identification is critical, yet . . .

Students Experiencing Trauma

Estimates that almost a third of students (13-17) have experienced adverse childhood experiences impacting physical and mental health as adults (National Survey of Children's Health, 2012)

FAPE/Mental Health

Appeal to U.S. Supreme Court

2nd Circuit

Mr. P. and Mrs. P. v. West Hartford Board of Education (2018)

Mr. P. and Mrs. P. v. West Hartford Board of Education (2018)

- Case involving high school student whom parents contended had not received FAPE
- Alleged delay in eligibility determination and that proposed program was inadequate to meet needs
- 2nd Circuit ruled in favor of district
- Parents appealed to Supreme Court asserting that FAPE and MH needed to be clarified based on split across Circuit Courts
- District asserted that it had moved in timely manner and that differences across Circuits focused on eligibility rather than FAPE

Bottom Line

Case not accepted for review

Be that as it may . . .

What are important consideration in working with students with mental health needs? (Yell, Smith, Katsiyannis & Losinski, 2018)

Examples of “Errors”

- Failure to Identify (Child Find)
- Denial of Eligibility (Defining Educational Performance Narrowly)
- Failure to Provide Needed Mental Health Services (Related Services)

Additional Questions Smith Has . . .

- To what extent is a continuum of programs and services available for students in your district? (Provide or make provision for)

- Does your SEA lead in assuring such a continuum? (Single line of responsibility)

Felix Consent Decree (Hawaii- 1994)

State failed to provide mental health services to children, 0-20 under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act.

Two Premises of Consent Decree

- Dual or separate systems of services would not be created, one for “Felix Class” and another for other children served under IDEA or 504.
- Members of the “Felix Class” were entitled to a continuum of services including prevention and early intervention, as well as treatment services.

At what cost?

- Des Moines Register (August, 2001) - “Hawaii has spent more than \$1 billion in the past seven years trying to meet a court order to bring its care of children with behavioral and emotional problems into compliance with federal law. . . .Annual costs associated with the decree consume one-eighth of Hawaii’s general fund budget--soaring from \$45 million a year in 1994 to \$350 million this year.”

In posing a “so what” question that, perhaps, puts this discussion in perspective

Think of the youngsters who are impacted as your own child, a grandchild, a child you love. What would you want or insist be done!

This Perspective

- Moves the discussion from what we ought to do for those children
- Moves toward what we passionately believe should happen for our children
- From the “they” to “thou” (Martin Buber)
- Perhaps sharpens our advocacy side!