

# Free Appropriate Public Education: Lessons from Due Process Hearings for All Educators

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**10<sup>th</sup> Annual Focus on Inclusion Conference**

**Indianapolis, IN**

**Fed. 2-3, 2022**



In this presentation, we will  
address the provision of  
FAPE through the lens of our  
experiences as due process  
hearing Officers

# Why Should We Pay Attention to Due Process Hearings?

- Our background in hearings
- Do hearings set precedent?
- Why should we pay attention to hearings?
  - Costly: Time and expense
  - Remedies: Tuition reimbursement, Compensatory education
  - Harbinger of things to come?
- Exhaustion of Administrative Remedies

# Free Appropriate Public Education (FAPE)

- Special education & related services that are:
  - Provided at public expense
  - Meet the standards of the SEA
  - Includes preschool, elementary, or secondary education
  - Are provided in conformity with the individualized education program (IEP)

According to Senator Robert Stafford (1978), Congressional authors “**did not attempt to define ‘appropriate’ but instead we established a base-line mechanism, a written document called the Individualized Education Program (IEP)**” (Stafford, 1978, p. 75).

Providing a FAPE: Lessons  
from the Due Process  
Hearing Front

Litigation:  
The typical  
way

U.S District Courts: 94

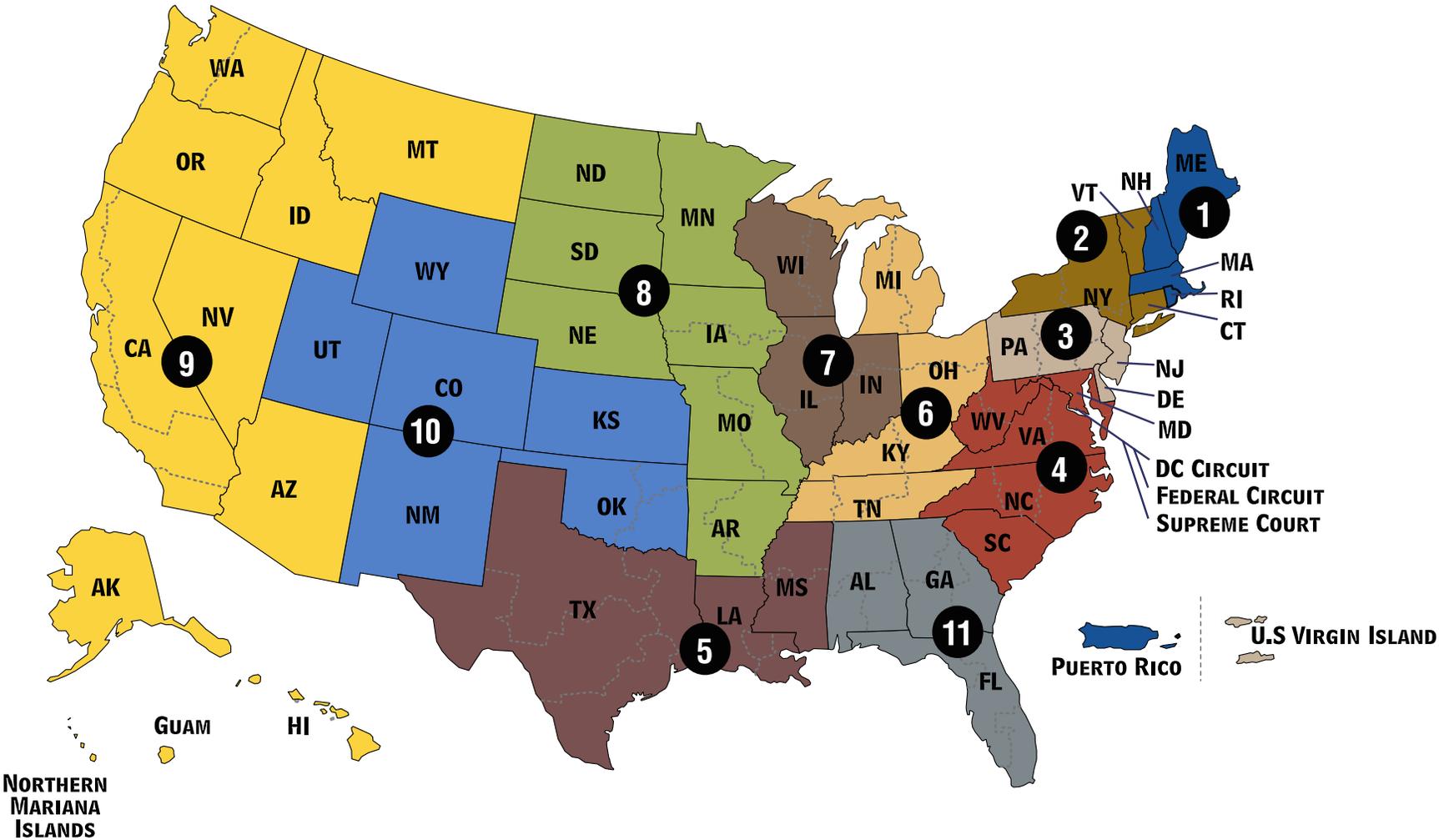


U.S Courts of Appeals: 13

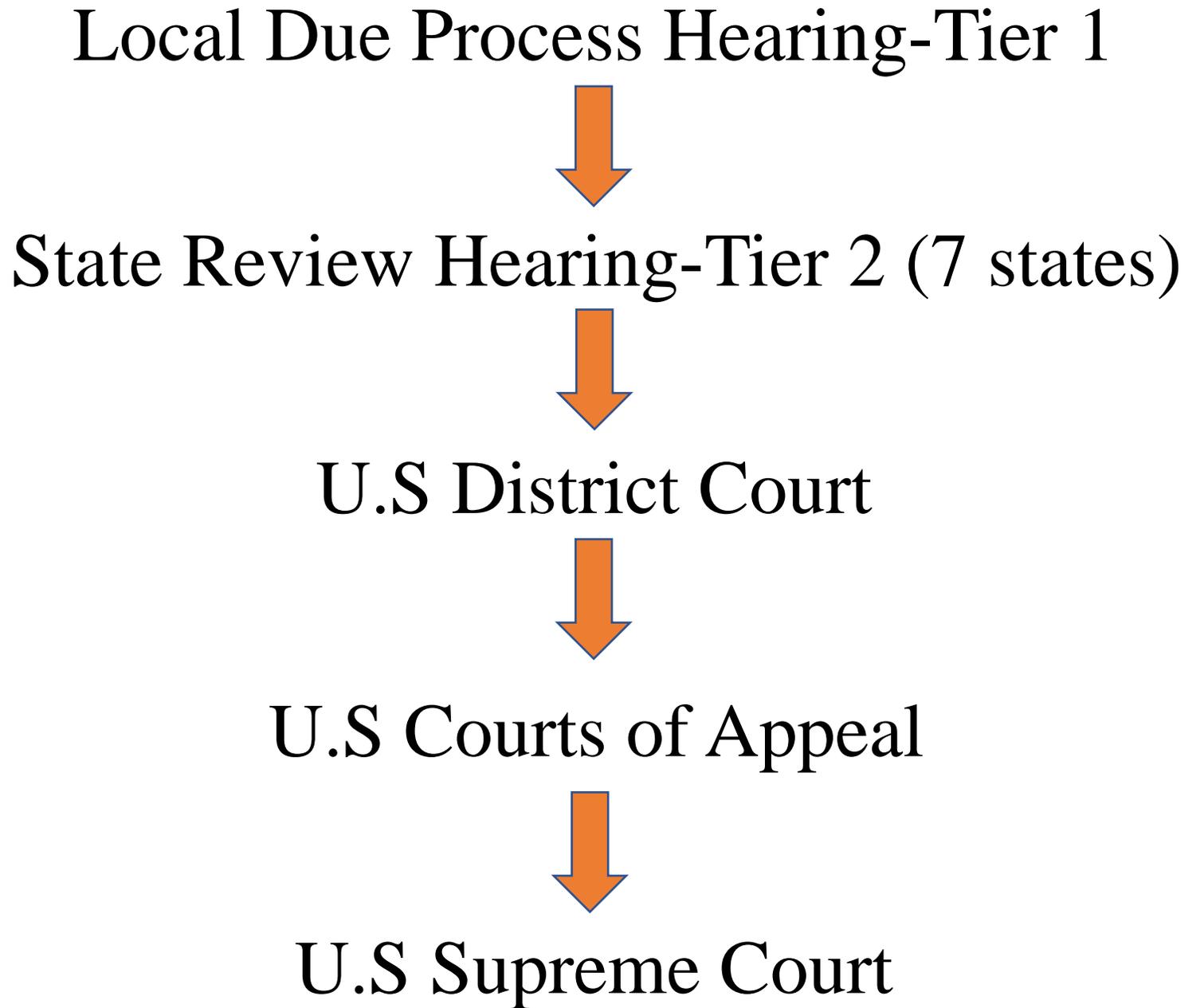


U.S Supreme Court: 1

# Geographic Boundaries of Federal District Courts



**Litigation:  
The  
“special”  
way**



# The Procedural & Substantive Standard

# Distinction

- The Procedural Dimension: Knowing what procedures the law requires and ensuring that those procedures are followed (e.g., the when and how).
- The Substantive Dimension: Focuses on the adequacy of a student's IEP in terms of its likely or actual results (e.g., the content of an IEP).

“A decision made by a hearing officer shall be made on *substantive* grounds based on a determination of whether a child received a free appropriate public education” (IDEA, 20 U.S.C. § 1415(f)(3)(E)(I))

Procedural requirements are important and must be followed, however, failure to do so will not always result in a finding against a school district.

*\*No harm, no foul\**

Procedural violations will only result in a ruling that FAPE was denied if:

- The violations impeded a student's right to FAPE
- Caused a deprivation of educational benefits
  - Significantly impeded parents' rights to participate

# What Have We Found to Be the Most Serious School District Errors?

- Procedural

- Failing to properly conduct child find activities
- Failing to conduct a full and individualized assessment
- Failing to involve a student's parents in IEP formulation and monitoring
- Predetermining program and/or placement

# Hearing Issues: Child Find

1. Did the school district have a reason to suspect that a student may be eligible under the IDEA?
2. Did the school district fulfill its evaluation obligations under the IDEA within a reasonable period of time?

# Hearing Issues: “Meaningful” Parental Involvement

The “core of the statute” is “the cooperative process that it established between and schools.”

*Shaffer v. Weast*, 546 U.S. 49, (2005).

“Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA”

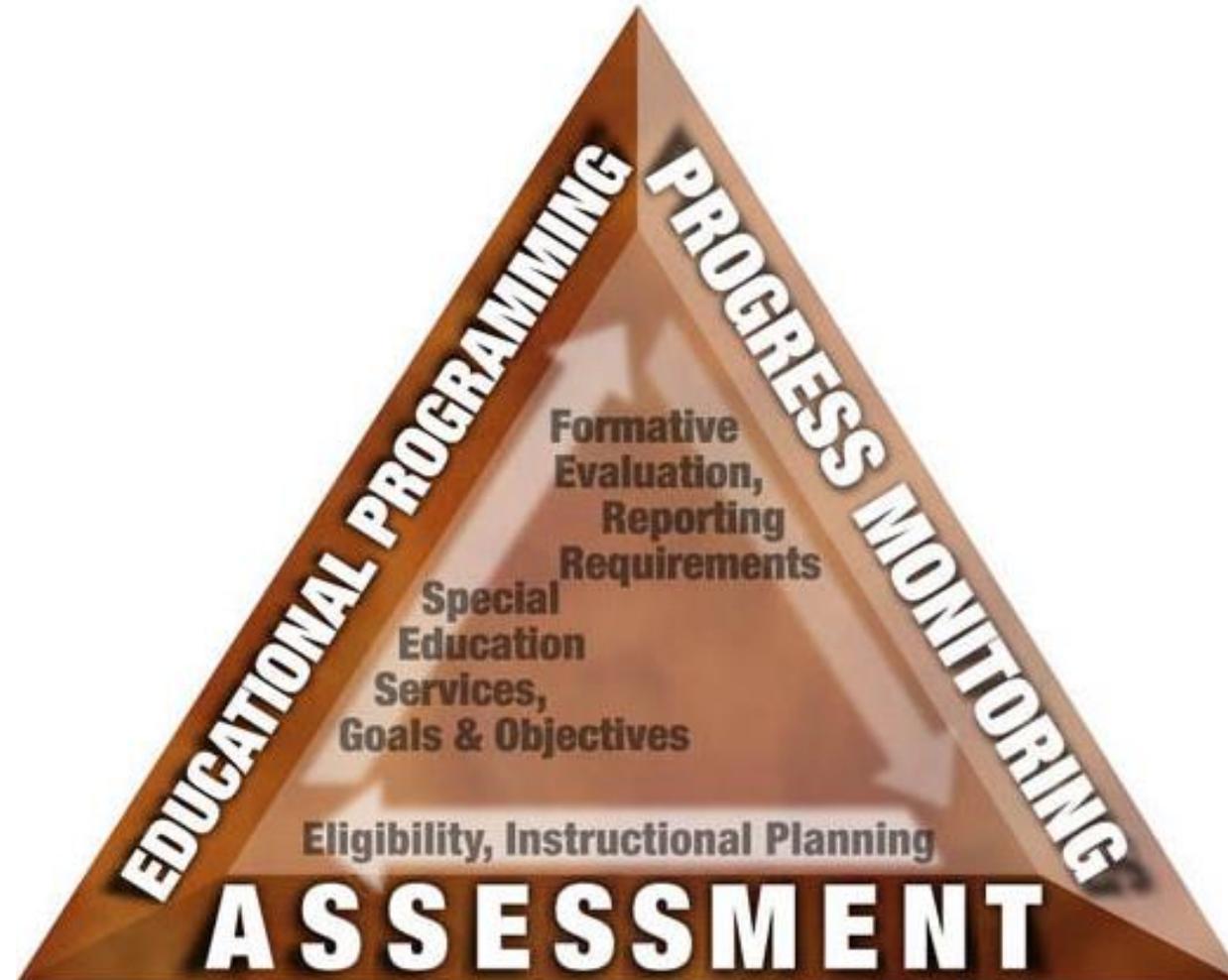
*Amanda J. v. Clark County School District*, 260 F.3d. 877 (9<sup>th</sup> Cir. 2001)

# What Have We Found to Be the Most Serious School District Errors?

- Substantive

- Failing to establish the foundation of an IEP with a complete and thorough assessment
- Internal consistency of the IEP
  - Failing to address needs identified in the PLAAFP statements in the services, goals, or both services and goals.
- Failing to craft measurable annual goals
- Failing to collect, report and use data on a student's progress

# Assessment is the Foundation of a Student's IEP



# The Internal Consistency of the IEP



Kathleen Mehfoud

-Attorney with Reed &  
Smith and Consultant to  
LRP-

- Tri-State Special Education  
Law Conference, 2015

*“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 consider advising the school district to settle.”*

“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.**”

- *Endrew F.*, 2017, p. 11-

# What Have We Found to Be the Most Serious School District Implementation Errors?

- Implementation

- Failing to implement “material” parts of the IEP as agreed upon
- U.S. Courts of Appeals in 6 Circuits have either cited or used the materiality test with respect to a denial of FAPE

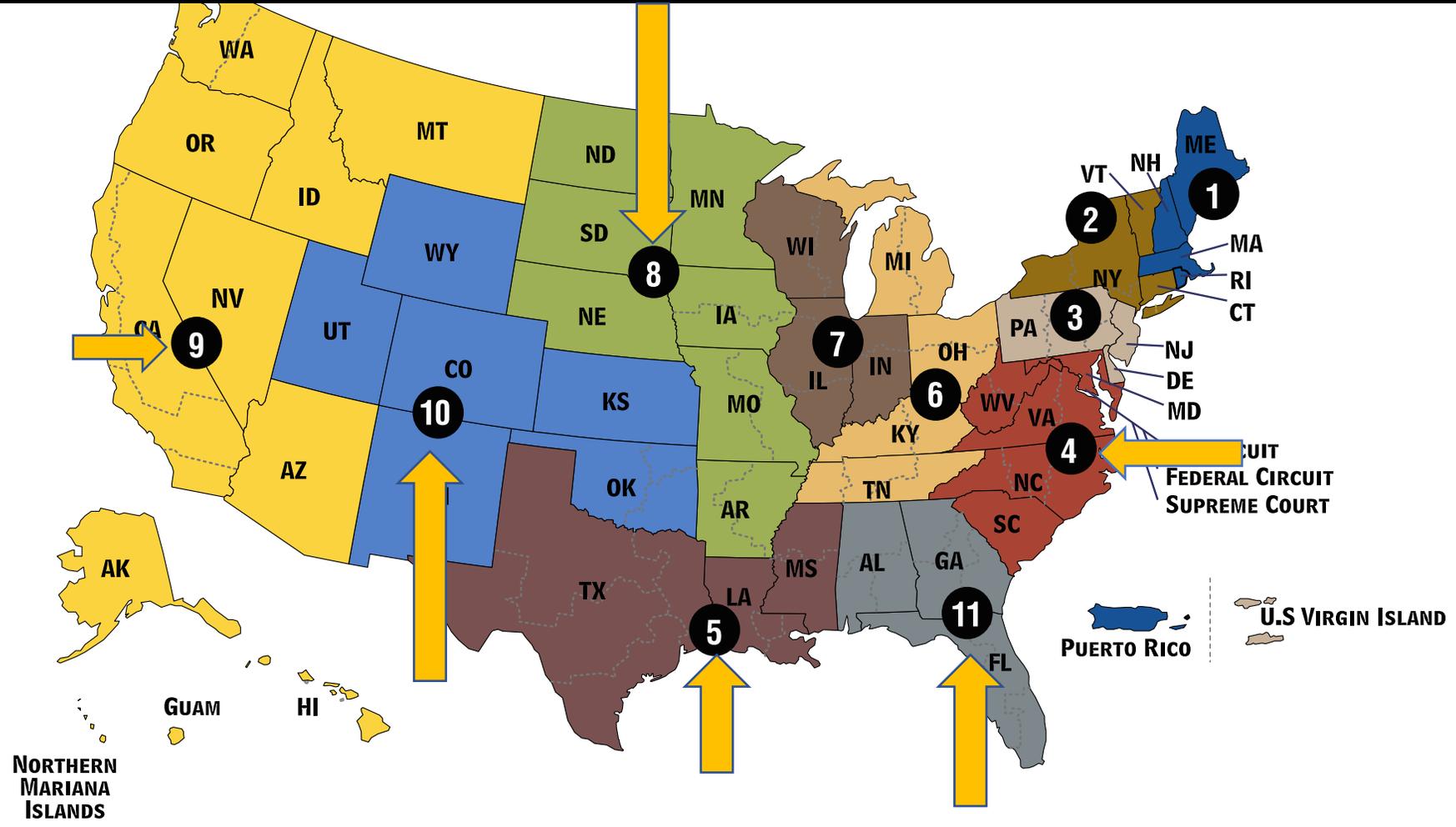
“The IEP, like a contract...embodies a binding commitment and provide notice to both parties as to what services will be provided to a student” (*M.C. v. Antelope Union School District*, 2017, p. 1197).

“These two issues-**content** (substantive) and **implementation**-are different in their **nature-plan versus action**-our analysis of shortfalls in those areas also must be different. A **material deviation** from the plan (the IEP) violates the statute.

- *J.L. v. School Board of Broward Cty, FL (2019).*

# Materiality Standard

U.S. Circuit Courts of Appeals for the 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> Circuits  
U.S. Circuit Court for the 5<sup>th</sup> Circuit-Materiality plus benefit



# Circuit Court's Addressing Implementation

- ***Sumter County School District v. Heffernan* (2011)-U.S. Courts of Appeals for the 4<sup>th</sup> Circuit**
  - “Accordingly, a material failure to implement an IEP or...a failure to implement a material portion of an IEP, violates the IDEA.”
- ***Houston ISD v. Bobby R.* (2000)-U.S. Courts of Appeals for the 5<sup>th</sup> Circuit**
  - “...(A) party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate...failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.”
- ***Neosho School District v. Clark* (2003)-U.S. Courts of Appeals for the 8<sup>th</sup> Circuit**
  - “...we cannot conclude that an IEP is reasonably to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit”( footnote #3).

# Circuit Court's Addressing Implementation

- *Van Duyn v. Baker School District* (2007)-U.S. Courts of Appeals for the 9<sup>th</sup> Circuit
  - “A material failure to implement an IEP occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP.”
- *L.J. v. School Board of Broward County, Florida* (2019)-U.S. Courts of Appeals for the 11<sup>th</sup> Circuit
  - ”A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP.”

# What is the “Per Se” Approach?

“Judges are not in a position to determine which parts of an agreed-upon IEP are or are not material. The IEP Team, consisting of experts, teachers, parents, and the student, is the entity equipped to determine the needs of a special education student, and the IEP represents this determination...Having so agreed, the school district must “provide[ ] [special education and related services] in conformity with the individualized education program.”

*(Van Duyn v. Baker School District-Dissent, Judge Ferguson, 2007)*

# “Material” Implementation Errors

- Failing to **provide the agreed upon** special education services, related services, supplementary services, or program modifications listed in the IEP when those services are necessary for a student to make progress appropriate in light of his/her circumstance
- Failing to **provide the agreed upon amount** of these services or modification listed in the IEP

**Based on Our DPH  
Experiences, What Do  
We Recommend?**

# Prerequisites

1. Don't miss the small stuff (e.g., names, dates)
2. Don't say dumb stuff!!

# Examples of “Dumb” stuff!!

- “We don’t offer extended school year to any students, therefore ESY that will not be a discussion point at the IEP meeting”
- “The IDEA doesn’t allow tutoring services”
- “This meeting shouldn’t take long. Mr. \_\_\_\_ has the IEP ready, all you need to do is sign it.”
- “I don’t modify instruction. In my class everyone is treated equally.”
- “I will have to pass this question on to the powers that be to determine if we are allowed to provide\_\_\_\_\_”.

# Recommendation #1

Understand and avoid procedural violations in the development of the IEP that could, in and of themselves, constitute a denial of FAPE.

# Recommendation #2

When developing the content of a student's IEP and subsequently reviewing and revising it, be sure that the present levels of performance and annual goals are based upon assessments and other relevant data that are current, address all of a student's needs, and inform the IEP team regarding the appropriate special education and related services.

# Recommendation #3

Ensure that annual IEP goals are appropriate, ambitious, and measurable.

# Recommendation #4

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.

# Recommendation #5

Provide frequent and systematic data-based reports to a student's parents on their child's advancement toward their goals.

# Recommendation #6

When progress reports and other data do not reflect that an annual goal will be met, reconvene the IEP team to determine why and make academic/functional changes!

# Recommendation #7

Ensure fidelity of implementation of the  
the IEP using the per se approach

# Resources

- Council for Exceptional Children: [www.exceptionalchildren.org](http://www.exceptionalchildren.org)
- Progress Center: [www.promotingprogress.org](http://www.promotingprogress.org)
- National Center on Intensive Intervention: [www.intensiveintervention.org](http://www.intensiveintervention.org)
- Center on Positive Behavior Interventions & Support: [www.pbis.org](http://www.pbis.org)
- Indiana IEP Resource Center: <https://www.indianaieprc.org>
- IRIS Center: <https://iris.Peabody.Vanderbilt.edu>
- OSEP, IDEAs that work: [www.OSEPideasthatwork.org](http://www.OSEPideasthatwork.org)
- OSEP, The Individuals with Disabilities Education Act: <https://sites.ed.gov/idea>
- OSEP, Find a center: [www.OSEPideasthatwork.org/find-center-or-grant](http://www.OSEPideasthatwork.org/find-center-or-grant)
- Understood: [www.understood.org](http://www.understood.org)
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