

Hot Topics in Special Education Administrative Complaints

Taylor Jenkins, Tricia Craig, and Dana Johnson

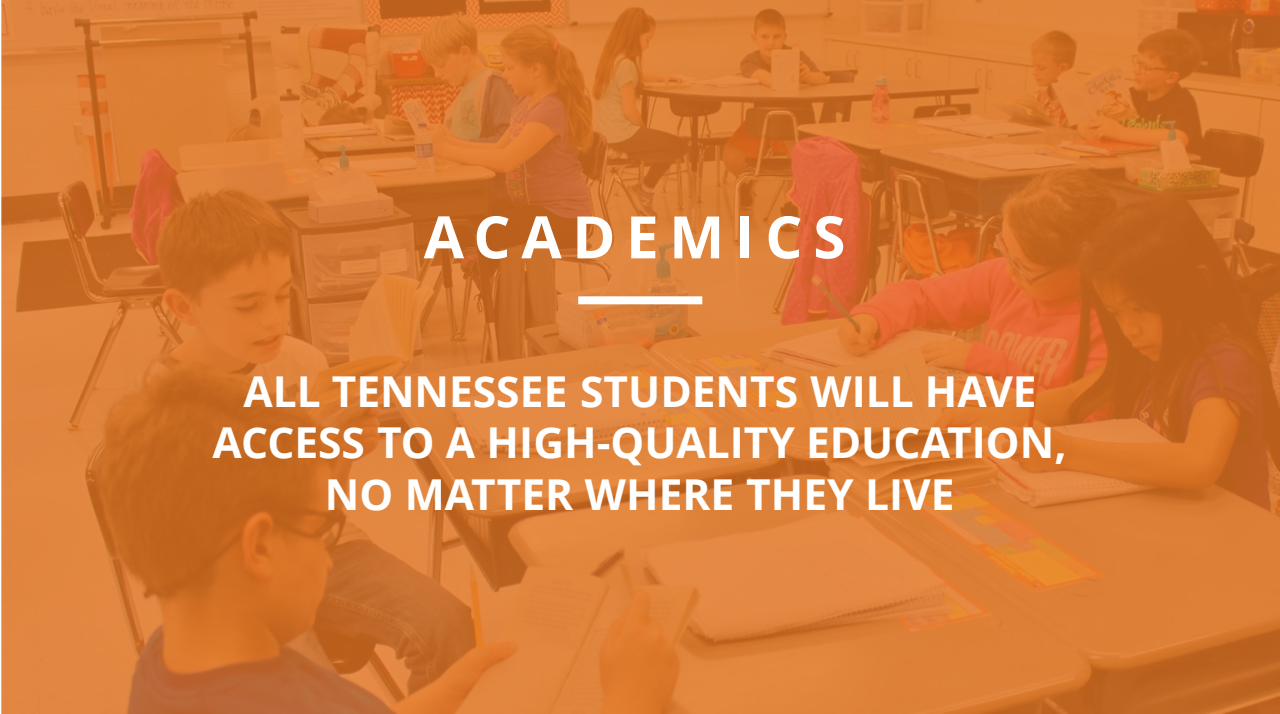
Office of General Counsel





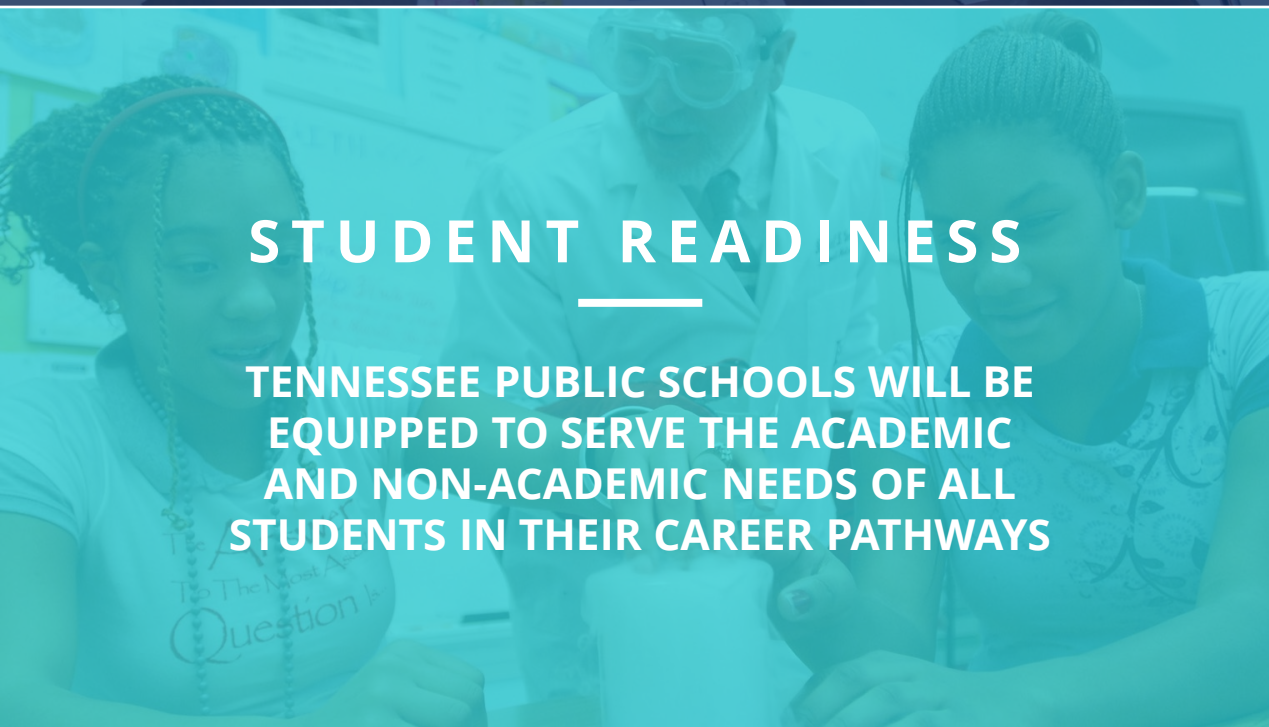
BEST FOR ALL

We will set all students on a path to success.



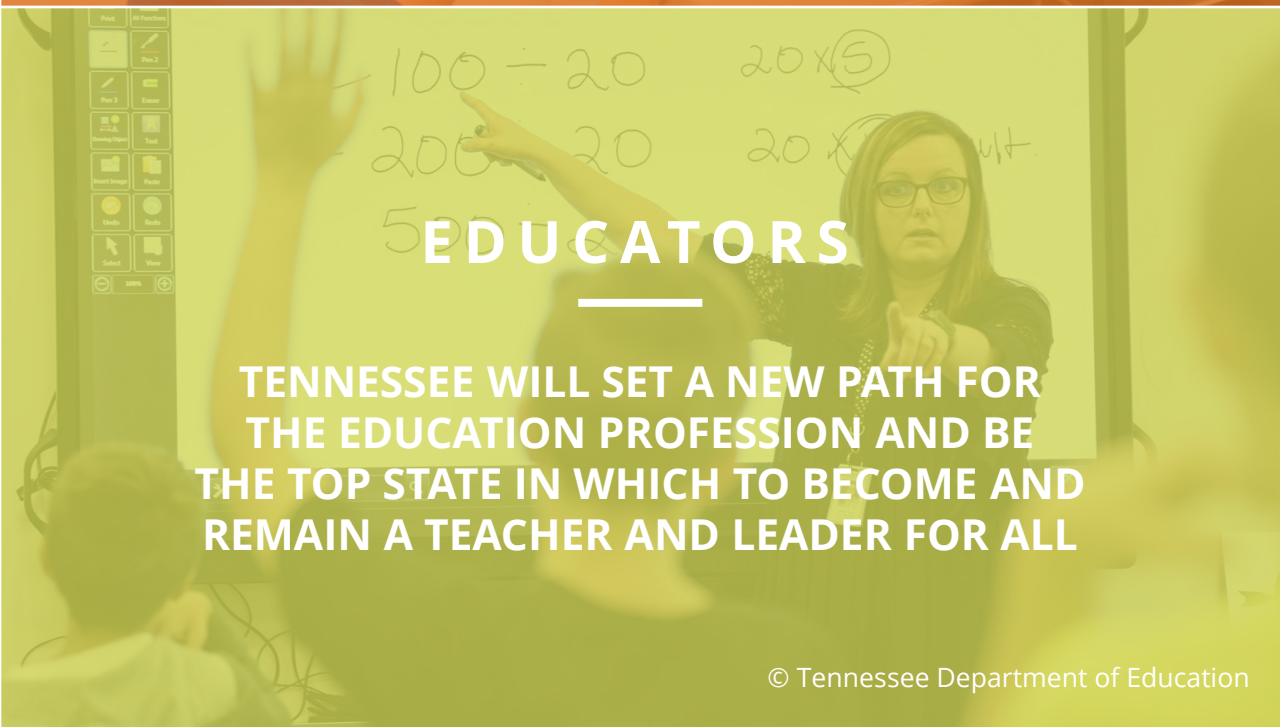
ACADEMICS

ALL TENNESSEE STUDENTS WILL HAVE ACCESS TO A HIGH-QUALITY EDUCATION, NO MATTER WHERE THEY LIVE



STUDENT READINESS

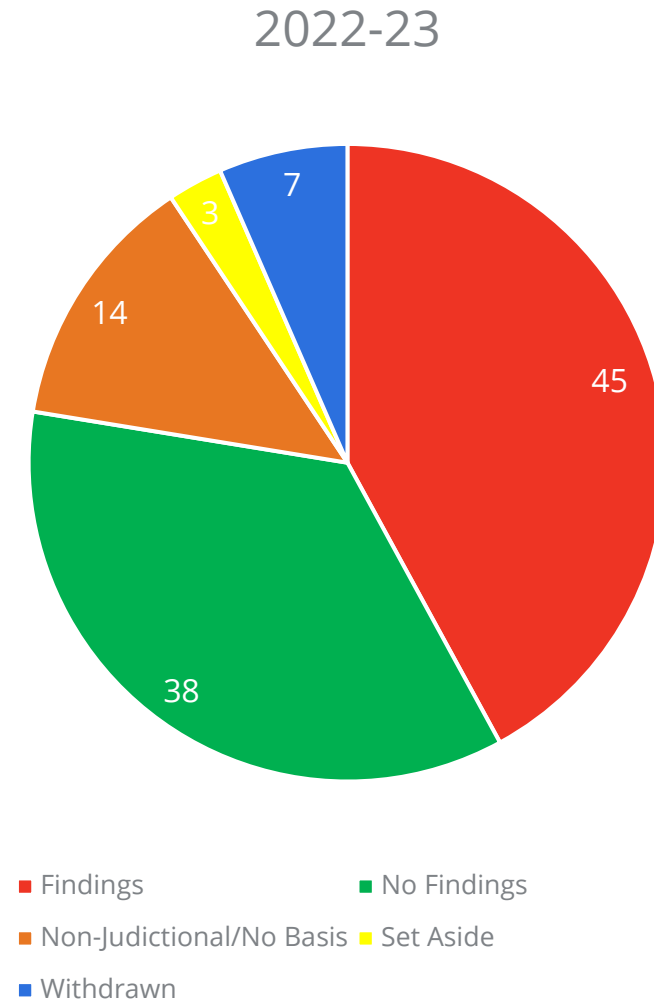
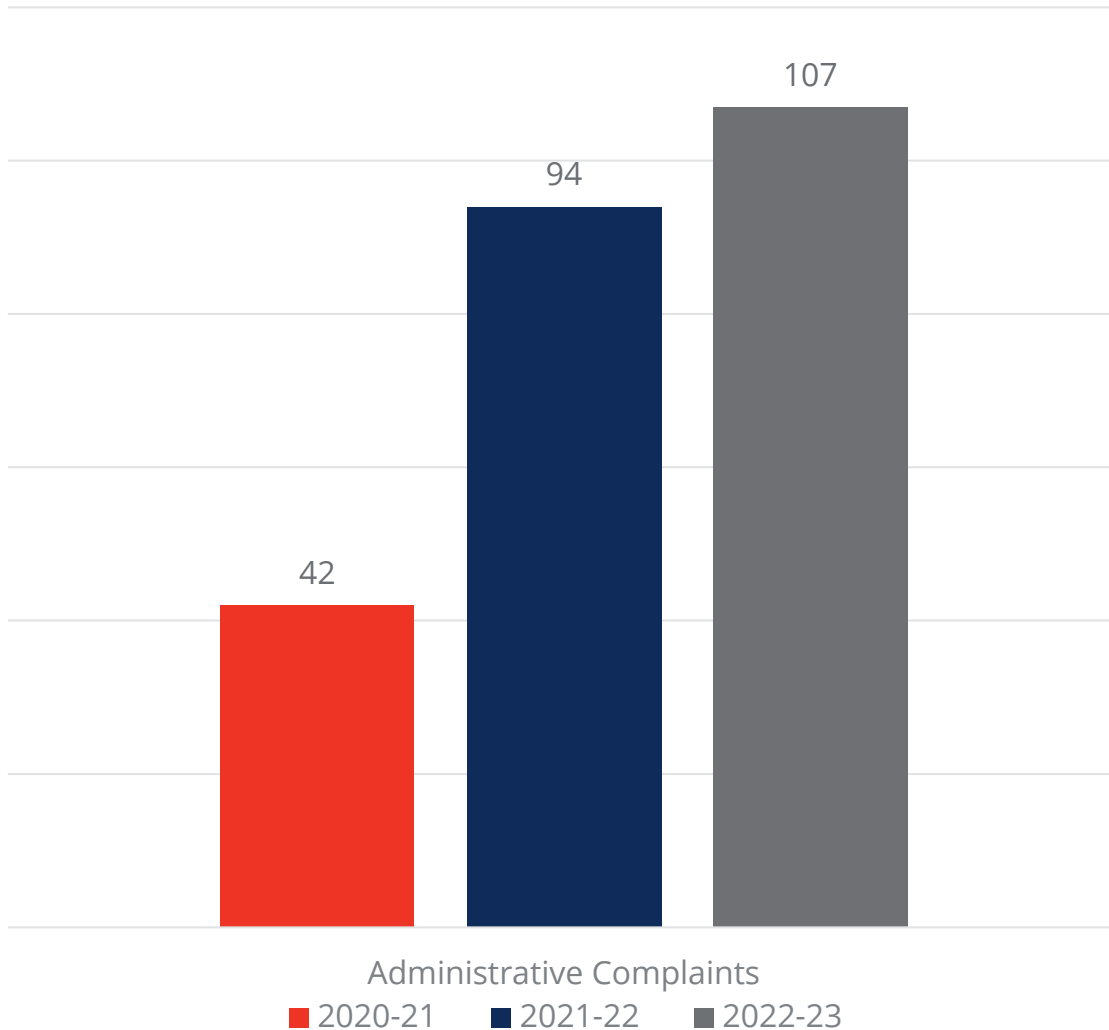
TENNESSEE PUBLIC SCHOOLS WILL BE EQUIPPED TO SERVE THE ACADEMIC AND NON-ACADEMIC NEEDS OF ALL STUDENTS IN THEIR CAREER PATHWAYS



EDUCATORS

TENNESSEE WILL SET A NEW PATH FOR THE EDUCATION PROFESSION AND BE THE TOP STATE IN WHICH TO BECOME AND REMAIN A TEACHER AND LEADER FOR ALL

Administrative Complaint Data





Agenda

- Discuss four hot topics in administrative complaints during the 2022-23 school year:
 1. The provision of a free appropriate public education (FAPE).
 2. Procedures for independent education evaluations (IEEs).
 3. Requests to inspect and review education records.
 4. Implementing discipline for zero-tolerance offenses.



The Provision of FAPE

FAPE and Administrative Complaints

- The TDOE Office of General Counsel has refined the way in which it investigates and decides administrative complaints alleging that a local education agency has deprived a student of FAPE.
 - Can the Office of General Counsel investigate substantive issues under IDEA? **YES.**
 - Can the Office of General Counsel reconsider an IEP team's decision and direct the IEP team to reconvene? **YES.**
- The TDOE Office of General Counsel can review **any alleged violation of federal or state special education law** through the administrative complaint process. *See 34 C.F.R. § 300.153(b)(1).*

FAPE and Administrative Complaints

Question B-7: If a parent wishes to challenge a public agency's decision regarding the provision or denial of FAPE to a child with a disability, may a parent file a State complaint?

Answer: Yes. As is true for State complaints challenging a public agency's eligibility determination, the Department's long-standing position is that an SEA may not refuse to resolve a State complaint alleging a denial of FAPE. This is true even if the SEA believes that the parent should file a due process complaint against the LEA or that the due process hearing process is a more appropriate mechanism to resolve such disputes. If a parent believes that the program offered or provided to his or her child with a disability does not constitute FAPE and files a State complaint instead of a due process complaint, the SEA must resolve the State complaint. This responsibility includes resolving a State complaint by a parent, who has unilaterally placed his or her child in a private school at her or her own expense, alleging a denial of FAPE.

U.S. Dep't of Educ., "[Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act](#)," (July 23, 2013).

FAPE and Administrative Complaints

Question B-8: How should an SEA resolve a State complaint challenging a public agency's decision regarding the provision or denial of FAPE to a child with a disability?

Answer: In resolving a State complaint challenging whether a public agency's decision regarding the provision or denial of FAPE to a child is correct, an SEA may need to determine not only whether the public agency has followed the required Part B procedures to reach its determination, but also whether the public agency has properly addressed the individual child's abilities and needs. Thus, the SEA would need to review any data provided by the parties to the complaint and the child's record, including evaluation data and any explanations included in the public agency's prior written notice to the parents under 34 CFR §300.503 as to why the public agency made its decision regarding the child's educational program or services (and/or refused to make an alternative decision requested by the parents or others). If necessary, the SEA may need to interview appropriate individuals to determine: (1) whether the agency followed procedures and applied standards that are consistent with State standards, including the requirements of Part B; and (2) whether the determination made by the public agency is consistent with those standards and supported by the data on the individual child's abilities and needs. The

U.S. Dep't of Educ., "[Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act](#)," (July 23, 2013).

What is FAPE?

- “To meet its substantive obligation under the IDEA, a school must offer an individualized education program (IEP) that is **reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.**” *Endrew F. v. Douglas Cnty. Sch. Dist. Re-1*, 137 S. Ct. 988 (2017).
- **“Reasonably calculated”** means that the child’s IEP team should give “careful consideration to the child’s present levels of achievement, disability and potential for growth,” but must not guarantee any specific educational outcome.
- **“Appropriate progress”** means that “every child should have the chance to meet challenging objectives.”
- **“In light of the child’s circumstances”** means that individualized decision-making is required in the IEP process.

See U.S. Dep’t of Educ., [*“Questions and Answers on U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1,”*](#) (Dec. 7, 2017).

What is FAPE not?

- LEAs are not required to meet the following requirements for a student to receive FAPE:
 - Provide the best services possible for students.
 - Maximize every student's potential.
 - Provide the specific class setting or specific program that a parent wants for their child.
 - Offer a specific educational program.
 - Guarantee any specific educational progress.

Discussion: What Could You Do?

- A 20-year-old student with a severe cognitive disability has recently enrolled in your school. At the annual IEP team meeting, the student's parents state that their goal is for the student to graduate with a regular high school diploma by the end of the school year following the student's 22nd birthday.
 - What questions would the IEP team need to answer to develop an appropriate IEP?
 - How could you explain what FAPE is to the student's parents?
 - What types of measurable annual goals could you include in the student's proposed IEP?



Discussion: What Could You Do?

- A student with a disability has had behavioral issues for years, but the student's behavior is now significantly impeding the learning of other students multiple times a day, particularly in the afternoon.
 - What could you recommend to your staff to address this student's behaviors?
 - What could you not recommend to your staff to address this student's behaviors?



Potential Response to an Administrative Complaint

- If your LEA receives an administrative complaint alleging that you have deprived a student of FAPE, consider addressing the following points in your response:
 - Did you consider parental input in developing the student’s measurable annual goals and selecting special education and related services?
 - Did you issue a thorough prior written notice explaining the decisions made at the IEP meeting?
 - Is the student making measurable progress towards agreed upon goals? Are concerns related to academics, attendance, behavior, discipline, and socialization lessening?
 - If the answer to either question is “no,” what have you done about it?

Procedures for IEEs

Hypothetical: What Went Wrong?

- A student was determined ineligible for special education and related services. The student's parents disagreed with the evaluation results.
- The student's parents requested an IEE and the LEA's agency criteria for obtaining an IEE.
- The LEA granted the request for an IEE and began looking for a qualified independent evaluator on the student's behalf. The LEA reached out to neighboring LEAs, TDOE, a local university, and two private therapy businesses, but was unable to find a qualified examiner.



Hypothetical: What Went Wrong?

- Each LEA must provide information to parents about **where an IEE may be obtained** and **the agency criteria applicable for IEEs**. See 34 C.F.R. § 300.502(a)(2).
 - Agency criteria should be readily available for distribution and available in the parent’s native language.
- While the LEA did an admirable job supporting the family, the LEA violated the law by not providing information about where the IEE could be obtained or what the agency criteria for IEEs was.



Parent Request for an IEE

- A student's parent has the right to obtain an IEE at public expense **when they disagree with an evaluation conducted by the LEA.** See 34 C.F.R. § 300.502(b)(1).
 - There is no right to an IEE if the LEA has not yet conducted an evaluation.
 - There is no right to an IEE if the student's parents fail to provide consent for an evaluation.
 - There is no right to multiple IEEs based on the same evaluation. See 34 C.F.R. § 300.502(b)(5).
- The student's parent **does not have to provide advance notice or seek prior LEA approval** before obtaining an IEE and later requesting public reimbursement. See U.S. Dep't of Educ., "Letter to Saperstone," (July 28, 1994).

LEA Response to a Request for an IEE

- In response to a request for an IEE at public expense, LEAs must either:
 1. File a due process complaint to show that the disputed evaluation is appropriate; or
 2. Ensure that an IEE is provided at public expense.
 - **Tip:** Respond in writing to the request to document the basis for your decision.

- LEAs cannot ignore the request, cannot simply deny the request, and cannot try to “cure” the request by evaluating additional areas or conducting a reevaluation in lieu of an IEE.

- LEAs can ask the student’s parent for the reason for disputing the evaluation, but LEAs cannot require the parent to respond and cannot *unnecessarily* delay a response to the request as a result of the failure to answer. See 34 C.F.R. § 300.502(b)(4).

LEA Response to a Request for an IEE

- The LEA's response must be given **“without unnecessary delay.”**
 - **Tip:** Consider developing your own policy on what constitutes a timely response.
- Whether a delay is unnecessary is fact-specific, but courts have looked more favorably on delays for the following reasons:
 - The LEA promptly acknowledges the request.
 - The LEA actively engages with the parent to answer questions and resolve minor disputes or impediments.
 - The LEA scrutinizes its own evaluation in determining whether to file due process or fund the IEE.
 - The delay is, at least in part, attributable to factors outside the LEA's control.

Agency Criteria

- Agency criteria must be consistent with the parent's right to an IEE. *See* 34 C.F.R. § 300.502(e)(2).

Allowable Criteria

- **Evaluator qualifications**
- **Geographic limitations**
- **Cost limitations**

Non-Allowable Criteria

- **Prohibiting evaluators from being affiliated with private schools or advocacy organizations.**
- **Prohibiting evaluators who have a history of testifying for parents.**
- **Requiring evaluators to have recent and extensive history in public schools.**
- **Enforcing timelines on obtaining an IEE.**

Evaluator Qualifications

- LEAs can establish agency criteria that **require independent evaluators to meet the same criteria as the school's own evaluators.**
 - For example, your LEA may require independent evaluators to hold a certain degree, license, or certificate.
- LEAs can meet the obligation to provide a student's parent "information about where an independent educational evaluation may be obtained" by developing a **list of independent evaluators** that meet the agency criteria.
 - **Tip:** If you intend to limit the parent's chosen independent evaluator to only those evaluators on the list, then the list must be exhaustive.

Geographic Limitations

- LEAs can establish agency criteria that **set a geographic limitation on where the student's parent may obtain an IEE from.**
 - **Tip:** The geographic limitation can be set forth in miles (e.g., within 75 miles from Nashville) or in descriptive terms (e.g., in Davidson County or a county bordering Davidson County). The geographic limitation can extend outside Tennessee.

Cost Limitations

- LEAs can establish agency criteria that **set a cost limitation on the IEE.**
 - **Tip:** Do not establish a cost limitation on the IEE by averaging the cost of similar evaluations in the area. The cost limitation should eliminate unreasonable and excessive fees, not slightly above average fees.
 - **Tip:** Do not establish a cost limitation on the IEE by saying the cost should be “reasonable” or “customary”.
- LEAs should address additional costs such as travel, lodging, and meals in the cost limitation.
 - **Tip:** Apply the same cost policies that you would for your own employees.

Unique Circumstances

- If a parent's selected independent evaluator does not meet agency criteria, the parent must be given an opportunity to demonstrate that there are **unique circumstances that justify the use of the parent's selected independent evaluator.**
 - **Tip:** Consider including a similar statement within the agency criteria.

Considering the Results of the IEE

- If the student's parent obtains an IEE at public expense that meets agency criteria, the LEA must **consider the results of the IEE**. See 34 C.F.R. § 300.502(c).
 - “Considered” generally means that the LEA has read the report and had some meaningful discussion about the report at an IEP team meeting.
 - There is no obligation to adopt the independent evaluator's recommendations or conclusions.

Requests to Inspect and Review Education Records

Right to Inspect and Review

- Under both the Family Educational Rights and Privacy Act (FERPA) and the IDEA, a student's parent or guardian has the **right to inspect and review their student's education records upon request.** *See* 34 C.F.R. § 99.10(a); 34 C.F.R. § 300.613(a).
- An "education record" is any record that is:
 - Directly related to the student; and
 - Maintained by an educational agency or a party acting for the educational agency.*See* 34 C.F.R. § 99.3.

Why Are We Talking About This?

- The Office of General Counsel has noticed an increase in individuals utilizing the right to inspect and review **to bolster other rights under the IDEA.**
 - Are LEAs generally required to produce progress monitoring data?
 - Are LEAs generally required to explain progress reporting data?
 - Are LEAs generally required to produce testing protocols?
 - Are LEAs generally required to produce evidence of implementing a specific educational program with fidelity?

Who Can Request to Inspect and Review?

- Under the IDEA, a **representative of the parent** may inspect and review the student's education records.
 - **Tip:** Ask for a signed release from the parent authorizing the representative to inspect and review the records.
- If the student's parents are divorced, **both the custodial parent and the non-custodial parent** may inspect and review the student's education records, unless a court order states otherwise.
 - **Tip:** Ask for a parenting agreement signed by the court. If none exists, treat the parents equally regardless of who is the custodial parent.
- If the student is over 18-years-old, **the student** may inspect and review the student's education records, unless a court order states otherwise.
 - **Tip:** Ask the student's parent or guardian if they have a power of attorney or conservatorship over the student. If so, the right to inspect reverts back to the parent or guardian.

What Is the Timeline for Responding to a Request to Inspect and Review?

- LEAs must grant a request to inspect and review education records **without unnecessary delay and in no case more than 45 calendar days** after the request.
- LEAs must expedite requests in certain situations:
 - Relevant education records must be produced upon request **before any IEP team meeting.**
 - Relevant education records must be produced upon request **before a due process resolution session or final hearing.**
 - Relevant education records must be produced upon request **before a manifestation determination review.**

Copies and Fees for Record Requests

- Neither IDEA nor FERPA require LEAs to produce copies of education records to a student's parent or representative, **unless circumstances effectively prevent parents from exercising the right** to inspect and review without being provided copies.
 - Parents of students in virtual schools may require copies to exercise the right.
 - Parents with certain occupations (e.g., armed forces) may required copies to exercise the right.
- Both IDEA and FERPA permit LEAs to charge for copies of records “if the fee does not prevent the parents from exercising the right to inspect and review records.” See 34 C.F.R. § 300.617(a).
 - **Tip:** Include the copy fee and waiver process in your district policy.
- Neither IDEA nor FERPA permit LEAs to charge for searching for or retrieving a student's records. See 34 C.F.R. § 300.617(b).

Practical Tips

1. Develop a document retention policy.
 - A document retention policy clearly states how long your school is expected to maintain certain documents.
2. Develop a policy or process for responding to requests to inspect and review education records.
 - Who decides what is “directly related” to a student?
 - Who decides what is “maintained” by the school?
 - Who decides how to grant the student’s parent access to the records?
 - Ensure that teachers or service providers are not responding to requests without your awareness.

Practical Tips

3. Be aware of important meeting or hearing dates.
 - Ensure that you have enough time to produce relevant records upon request prior to a hearing. You may need to postpone IEP team meetings or MDR meetings to ensure the student's parent has sufficient time to receive and review relevant records.

4. Keep a list or index of what documents a parent is granted access to and what documents a parent is not granted access to.
 - It can help to have documentation of when you provided access and how you provided access.
 - If you produce a copy of the records, it can help to paginate or Bates number the documents.

Practical Tips

5. Assume every document with a student's name on it can be requested by the student's parent.
 - Be very careful about what you put in writing.

6. If there is confusion about what the student's parent is requesting, stay in communication with the parent and continue to make a good-faith effort to clarify the request and to produce documents in a timely manner.

Zero-Tolerance Offenses

Zero-Tolerance Offenses

- If a student with a disability commits an offense that constitutes a zero-tolerance offense **under IDEA**, you can remand the student to an interim alternative educational setting (IAES) for up to 45 school days regardless of the outcome of the manifestation determination review.
- If a student with a disability commits an offense that constitutes a zero-tolerance offense **under state law or your local Board policy**, but does not constitute a zero-tolerance offense under IDEA, you can only remand the student to an IAES if the misconduct was not a manifestation of the student's disability.

See [34 C.F.R. § 300.530\(g\)](#).

Threat of Mass Violence

- [Public Chapter 299 of the Public Acts of 2023](#) created a new zero-tolerance law under state law.
- Tenn. Code Ann. § 49-6-3401(g)(2) now states that a student has committed a zero-tolerance offense if the student **“Threatens mass violence on school property or at a school-related activity.”**
- “Mass violence” means **“any act which a reasonable person would conclude could lead to the serious bodily injury or death of two or more persons.”** See Tenn. Code Ann. § 39-16-517.
- Remember to update your policies, procedures, and handbooks to include this change in the law!

Comparing Zero-Tolerance Offenses

Zero-Tolerance Offenses Under IDEA

1. The student carries or possesses a **weapon** to or at school, on school premises, or to or at a school function under the jurisdiction of an LEA.
2. The student has inflicted **serious bodily injury** upon another person while at school, on school premises, or at a school function under the jurisdiction of an LEA.
3. The student knowingly possesses or uses illegal **drugs**, or sells or solicits the sale of a **controlled substance**, while at school, on school premises, or at a school function under the jurisdiction of an LEA.

See [34 C.F.R. § 300.530\(g\)](#).

Zero-Tolerance Offenses Under State Law

1. The student brings a **firearm** to school or is in unauthorized possession of a firearm on school property.
2. The student commits aggravated assault or commits an assault that results in **bodily injury** upon any teacher, principal, administrator, any other employee of an LEA, or a school resource officer.
3. The student is in unlawful possession of any **drug, controlled substance analogue, or legend drug** on school grounds or at a school-sponsored event.
4. The student **threatens mass violence** on school property or at a school-related activity.

See [Tenn. Code Ann. § 49-6-3401\(g\)\(2\)](#).

Comparing Zero-Tolerance Offenses

"Weapons" Under IDEA

A **"weapon"** is a device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocketknife with a blade of less than 2.5 inches in length.

See 18 U.S.C. § 930(g)(2).

"Firearms" Under State Law

A **"firearm"** is:

1. Any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
2. The frame or receiver of any such weapon;
3. Any firearm muffler or firearm silencer; or
4. Any destructive device.
5. Such term does not include an antique firearm.

See 18 U.S.C. § 921.

Takeaways

The definition of "weapon" under federal law is much broader than the definition of a "firearm" under state law. For example, knives, scissors, cigarette lighters, or baseball bats would all likely be a zero-tolerance offense under IDEA, but would not be a zero-tolerance offense under state law.

Comparing Zero-Tolerance Offenses

“Serious Bodily Injury” Under IDEA

The student has inflicted **serious bodily injury upon another person** while at school, on school premises, or at a school function under the jurisdiction of an LEA.

“**Serious bodily injury**” means a bodily injury that involves: 1) a substantial risk of death; 2) extreme physical pain; 3) protracted and obvious disfigurement; or 4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. See 18 U.S.C. § 1365(h)(3).

“Bodily Injury” Under State Law

The student commits aggravated assault or commits **an assault that results in bodily injury upon any teacher, principal, administrator, any other employee of an LEA, or a school resource officer.**

Takeaways

There are two differences between federal and state law:

1. The definition of “serious bodily injury” under federal law is a significantly higher threshold than the definition of “bodily injury” under state law.
2. The student must inflict injury upon “another person” to constitute a zero-tolerance offense under federal law, but must inflict injury upon a “teacher, principal, administrator, any other employee of an LEA, or a school resource officer” to constitute a zero-tolerance offense under state law.

Comparing Zero-Tolerance Offenses

"Drugs" Under IDEA

The student knowingly possesses or uses illegal drugs, **or sells or solicits the sale** of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an LEA.

"Drugs" Under State Law

The student is in unlawful possession of any drug, controlled substance analogue, or legend drug on school grounds or at a school-sponsored event.

Takeaways

"Selling or soliciting the sale of a controlled substance" constitutes a zero-tolerance offense under federal law, but does not constitute a zero-tolerance offense under state law if the student does not possess the controlled substance on school grounds.

Is it a violation of federal or state zero-tolerance law?

Q1

A student with a disability brings a BB gun onto the school football field after practice.

A1

The student has likely committed a zero-tolerance offense under federal law, but not state law. The BB gun likely meets the definition of a “weapon” under federal law, but does not meet the definition of a “firearm” under state law.

Q2

A student with a disability is involved in a fight with another student. The other student suffers a broken nose as a result of the fight and misses two days of school.

A2

The student likely has not committed a zero-tolerance offense under federal law or state law. A “broken nose” likely does not meet the definition of “serious bodily injury” under federal law. Because the injured party was another student the incident does not constitute a zero-tolerance offense under state law.

Q3

A student with a disability offers to sell drugs to another student while at a football game. The student with a disability states he will deliver the drugs to the other student’s house if the other student agrees to pay him now.

A3

The student has committed a zero-tolerance offense under federal law by soliciting the sale of a controlled substance at a school function. The student has not committed a zero-tolerance offense under state law, unless he is in possession of the drugs at the football game.

Q4

A student with a disability is involved in an altercation with her boyfriend at prom. She leaves, but threatens to return to prom with a gun to shoot her boyfriend and then herself. School employees are reasonably concerned she will return and commit the action, but she does not.

A4

The student has committed a zero-tolerance offense under state law because she has threatened to commit an act which a reasonable person would conclude could lead to the serious bodily injury or death of two or more persons.

Interim Alternative Educational Settings

- The student's IEP team must select an IAES that enables the student to continue participating in the general education curriculum, albeit in another setting, and to progress toward meeting his or her annual IEP goals. See [34 C.F.R. § 300.531](#).
- An IAES can be:
 - A setting in another school in the district;
 - A different setting in the student's current school;
 - Some other setting, including the student's home.
- If the student is not making appropriate progress in the IAES, then the student's IEP team should convene a meeting to discuss a placement that will allow the student to receive FAPE.



Thank You!

Office of General Counsel Special Education Team
dispute.resolution@tn.gov

Permission is granted to use and copy these materials for non-commercial educational purposes with attribution credit to the "Tennessee Department of Education". If you wish to use these materials for reasons other than non-commercial educational purposes, please contact Joanna Collins (Joanna.Collins@tn.gov).