

"Vaping is Mandatory, Weed is Discretionary . . . What
Were They Thinking?"
Addressing the Changes to Discipline Under Chapter 37

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THE BASICS

Legal issues that apply to various disciplinary alternatives such as ISS, OSS, DAEP removals, expulsions, and JJAEP removals. Chapter 37 of the Texas Education Code controls, but look at your SCOC.

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MITIGATING FACTORS

Before assigning a student to OSS, DAEP, expulsion, or a JJAEP, a district *must consider* statutorily described potential mitigating factors in relation to the misconduct. The factors include:

- ❑ Self-defense
- ❑ Intent
- ❑ Disciplinary history
- ❑ A disability that “substantially impairs” the student’s capacity to appreciate the wrongfulness of the conduct
- ❑ The student’s status as homeless or in the conservatorship of DFPS

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SUSPENSION

The grounds for a student’s suspension are set forth in a district’s student code of conduct (SCOC).

For out of school suspension, a student may be suspended for *up to three school days* at a time.

A student *below third grade* cannot be placed in out of school suspension except for certain serious offenses involving a weapon, violence, or drugs/alcohol. However, a district may adopt and implement a positive behavior program as an alternative to traditional discipline for students below third grade.

A homeless student may not be placed in OSS unless the conduct involves drugs/alcohol, weapon offenses, or violent offenses.

The Campus Behavior Coordinator may work with the district’s homeless liaison to identify proper alternatives to OSS.

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DUE PROCESS RIGHTS-REMOVALS

- A conference with the CBC, student, parent or guardian, and teacher (if applicable), must be scheduled not later than the third-class day after removal.
- "Valid attempts" must be used to require a person's attendance.
- At the conference, the student is entitled to *written or oral notice* of the reasons for removal, an *explanation* of the basis for removal, and the *opportunity to respond* to the reasons.
- The CBC must consider the following **mitigating factors**: self-defense, intent, disciplinary history, a disability that "substantially impairs" the student's capacity to appreciate the wrongfulness of the conduct, and the student's status as homeless or in the conservatorship of DFPS.
- Mitigating factors must be considered if mandatory or discretionary.


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DUE PROCESS RIGHTS-EXPULSIONS

- Prior to expulsion, a student is entitled to notice and a hearing.
- The written notice should contain a statement of the specific charges and grounds that, if proven, would justify expulsion. Generally, the student should be given the names of the witnesses against him or her and an oral or written report on the facts to which each witness will testify.
- The CBC can accept hearsay evidence from school administrators who investigate disciplinary infractions.
- The student may have representation at the hearing. The school must make a "good faith" effort to inform the student and the parent of the time/place of hearing.
- Mitigating factors must be considered.
- Appeals can be taken to the board, and then to state district court.

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MANDATORY VS. DISCRETIONARY

When an offense is mandatory, the district is required to place the student in the DAEP or expel the student. If the offense is discretionary, it is the *district's choice* whether to take the action. The discretionary offenses are set forth in statute or in the district's code of conduct.

The district's discipline policies can be found in the F series of the school's policy manual.

Keep in mind how the due process requirements differ between DAEP removals and expulsions.

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SCHOOL ACTION

School officials may take disciplinary action regardless of whether law enforcement officials seek criminal consequences for the same misconduct.

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STUDENT WHO WITHDRAWS PENDING THE DISCIPLINARY PROCEEDINGS

If a student withdraws from school before an order of expulsion or DAEP is entered, the district may complete the proceedings and enter the order. If the student reenrolls in the district during the same or the subsequent school year, the district may enforce the order, reduced for time served. If the student enrolls in another school district, the new district may honor the order, or, if the preceding district failed to enter an order, the new district may complete the proceedings and enter an order.

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SERIOUS MISBEHAVIOR IN DAEP

A student placed in a DAEP who engages in "documented" serious misbehavior while on the DAEP campus despite "documented" behavioral interventions may be expelled.

"Serious misbehavior" means deliberate violent behavior that poses a direct threat to others, extortion (gaining of money or property through force or threat), coercion, public lewdness, indecent exposure, criminal mischief, personal hazing, criminal harassment of a student or employee.

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THE CHANGES . . .

The Texas Legislature passed some changes to the Education Code with respect to behavior and discipline. The focus of the last session was "school safety" and significant changes were addressed in light of the Uvalde tragedy.

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VAPING AND MARIJUANA

According to TEA stats, over 330,000 middle and high school students reported using vaping devices (e-cigarettes) in 2018 alone.

The number represents roughly 13% of Texas students in grades 6-12.

The number of users *quadrupled* from 2012 to 2018.

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VAPING AND THE USE OF E-CIGARETTES

HB 114 amended Section 38.006 (b) of the Education Code. By state law, school boards must prohibit students from smoking, using, or possessing e-cigarettes or tobacco products at a school-related or school-sanctioned activity on or off school property.

Most districts have adopted language in the Student Handbook.

What about adults? Can they vape?

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What is the required consequence for vaping?

Students that possess, use, sell, give or deliver e-cigarettes, including component parts, are subject to mandatory placement in the DAEP.

Students may also face discipline for the substance inside the vaping device.

The Legislature also expanded educational and support services to include e-cigs in addition to drugs and alcohol.

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Yikes, what if our DAEP is at capacity?

- If the DAEP is at capacity, the student must be placed in ISS.
- If a position becomes available at the DAEP before the expiration of the placement, then the student must be transferred to the DAEP.
- If the DAEP is at capacity and a student commits a violent offense, that would take priority.
- The school health advisory council (SHAC) is charged with recommending instruction to prevent substance abuse.

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What about marijuana?

Offenses involving THC, the psychoactive content of marijuana, require a mandatory removal to the DAEP, subject to the mitigating factors.

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Can we still use corporal punishment?

Despite legislative efforts to eliminate the use of corporal punishment, the behavior intervention may still be used if a school district so chooses through policy. Texas is one of 18 states that still authorize the use of corporal punishment.

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Other Legislative offerings . . .

- School safety initiatives (HB 3)
- Requires every Texas public school to have an armed officer, unless an exception for good cause applies. However, an alternative plan must be put into place.
- SB 838 requires schools to use part of their safety budget to place silent panic alert buttons in each classroom.
- SB 763 addresses the use of unlicensed chaplains to work in mental health roles, either as a volunteer or employee.
- HB 567 bans race-based hair discrimination.

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