



# The Next Generation Of Vaping Is Here

Insights

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*A student tells the dean of your high school that there is a girl in the library who seems very ill. The dean finds the ill student with her head down, moaning. He asks her what's wrong, and the student says she vaped and does not feel well. After calling on the school nurse to evaluate the student for any immediate threat, you question the student and learn that she is no longer in possession of the vaping device, having given it away to another student.*

*You search her locker and backpack and find three pods containing a substance you cannot identify. Eventually, the student admits to vaping "cherry spice" and claims the pods belong to her brother—who is not a student at your school. She says she bought the vaping device from another student while off campus last weekend.*

*Your school has had a series of issues involving students vaping and the dean recommends sending the community a message by expelling the student. The dean does not send the pods or the student for drug testing. Is this wise?*

## What Is Vaping?

Vaping is the use of a battery-operated device to inhale an aerosol, often containing nicotine (though not always), flavorings, marijuana, or other chemicals. The device is called an electronic cigarette, e-cigarette, e-vaporizer, or electronic nicotine delivery system (ENDS). Students may call them e-cigs, hookas, or hooka pens, among other terms.

Electronic cigarettes can resemble traditional tobacco cigarettes, cigars, or pipes, but the newer generation of products look markedly different. In fact, JUUL, considered one of the trendier brands, is a much smaller, sleeker, and more discreet e-cigarette than what you may have come to expect, and it's made to look just like a USB charger. Devices that include other features, such as those with fillable tanks, may look completely different.

Schools across the country are seeing increased vaping of a wide variety of substances among students. According to a 2017 survey issued by the National Institute on Drug Abuse:

- 8 percent of 12th-grade students reported vaping in the past year.
- 1 in 10 high school students reported vaping marijuana.

- 8 percent of 10th-grade students understood that the mist they inhaled from the vaping device contained nicotine, but 74.8 percent of 8th-graders thought it was “just flavoring.”

### **Can You Discipline A Student For Vaping?**

Given the prevalence of vaping among modern teenagers, you need to know your options when it comes to responding to e-cigarette usage. The policies in your handbook govern whether you can discipline a student for vaping. Under the “fundamental fairness” test, courts generally use a five-part test to determine whether a school’s serious discipline (including expulsion) will be upheld in the face of a challenge:

1. Is there a policy or rule that addresses or prohibits the specific behavior in question?
2. Was there a proper investigation of the alleged violation of the rule?
3. Was the accused student asked for their side of the story?
4. Was the discipline imposed in a manner consistent with both the policy and investigation?
5. Did the school act in an arbitrary or capricious manner (i.e., did it follow precedent and was the level of discipline appropriate for the circumstances)?

Because vaping is a fairly new behavior for students, many schools have not yet updated their student handbooks to prohibit vaping or the possession, use, sale, or transfer of vaping devices, pods, and other paraphernalia. Without such a policy, a school must find other potential policy violations to ensure that its discipline can be upheld in the face of a legal challenge.

Some schools attempt to claim that vaping is a violation of its drug and alcohol policy. But is it? The answer depends on the language used in the drug and alcohol policy, and whether the substance contained in the vaping device or pod falls under that language. If the student has not admitted to vaping marijuana or some other substance prohibited by your policy, and if you do not send the student or the pod for drug testing, then you cannot determine with certainty that the student violated your policy. The point is that you cannot simply assume that the student has engaged in behavior that violates a policy without supporting facts and evidence of the student’s actions to compare to your handbook policies.

### **Is Vaping Legal?**

Many states have made it illegal for a minor (under the age of 18) to possess or use a vaping device, sometimes referred to more formally as a “nicotine delivery system” in statutes and regulations. You should become familiar with your state’s laws to determine whether the behavior is illegal on school grounds. In some states, like Florida, the possession of a nicotine delivery device is technically unlawful for minors but is not defined as criminal behavior. Rather, it is classified as a civil offense, likely because the legislature wanted to avoid children being arrested by the police for what may seem like a fairly minor offense (see [Fla. Stat. § 877.112\(6\)](#)).

Whether the behavior is a crime or a civil offense is an important distinction if your school were to take the position that a student may be expelled because they engaged in *criminal* behavior. Your school's policy should track the state's statutory language by stating that students may be disciplined for criminal or *unlawful* behavior, whether or not they are charged.

### **Other Situations**

In many cases, during the investigation the student who has been caught with the vaping device will disclose the identities of additional students who have engaged in the sale or use of vaping devices off school property. You should consider the strength of the credibility of the accuser, but, again, your ability to discipline those other students will depend on whether your handbook allows your school to address off-campus behaviors. Some schools do not want to take jurisdiction over behaviors occurring outside their supervision.

### **Recommendations**

Because vaping and drug use is increasing at school campuses nationwide, you shouldn't waste any time addressing the matter. If you have not updated your student handbook policies to cover the various nuances of student behaviors relating to vaping, you should do so now. You should also review and, if necessary, tweak your policies on drug and alcohol use, tobacco and e-cigarettes, unlawful behavior, and off-duty conduct.

Your updated policies should be written with language that is broad enough to give your school the appropriate discretion to address the behaviors in question without listing every possible nuanced situation that may arise. And always remember to follow the steps of the fundamental fairness test to reduce the risk of a court overturning your disciplinary decisions.

**If you would like to receive a complimentary model policy that you can adapt for your school's use, please contact the author.**

*For more information, contact the author at [SBogdan@fisherphillips.com](mailto:SBogdan@fisherphillips.com) or 954.847.4705.*

### ***Related People***



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