



# SESSION ONE

## Student and Staff e-Privacy and Disciplinary Issues

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## Computers, Cameras & Cell Phones: Student and Staff e-Privacy and Discipline

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## Introductory Scenario

- A longstanding acceptable use policy (AUP) prohibits personal use of e-mail and computers. Eventually the system purchased pagers/text messaging devices for its school leadership team. The server relaying the messages is owned by the private vendor. Although the AUP is never modified to include pagers, they are treated by supervisors as being covered by that policy.
- Over time, staff use the pagers for personal as well as official use. This is overlooked if users do not exceed their overage limits or reimburse the system overages.
- When supervisors suspect staff of sending sexually explicit messages, they requests usage records from the vendor; the records confirm their suspicions.
- The school dismisses the staff members. They sue.
- What are the legal and practical issues?

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## Introduction

- Tech challenges growing in number & variety
  - The law catching up to the practice
- CyberSafety
  - E.g., security, privacy, bullying
- CyberSpeech
  - 1st Amendment, defamation
- CyberSystems
  - E.g., public records, record retention, copyright
- CyberSchooling
  - E.g., Instructional technology, curriculum, ethics
- Session overview, logistics & limits

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### Current Legal Challenges & Hot Topics

- Cell phones:
  - The naked truth about student “sexting”
  - Text message threats, cheating
  - Student cell #s on prostitution websites
  - Increasing legal challenges to cell phone searches
- Cyber-bullying, harassment, defamation, flaming
  - Student social networking & web postings
  - Student threats, offensive statements
  - Fighting on YouTube
  - An online student suicide
- Teacher social networking & postings
  - With & about students / colleagues / NC Examples
- Expanding instructional technology use & pitfalls

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### 10 Common Pitfalls

1. Not knowing the law or recognizing a problem
2. Reacting hastily (e.g., offensive website postings)
3. Confusing or blurring legal boundaries  
E.g., on- v. off-campus use; school v. personal use
4. Improper or disproportionate discipline  
E.g., academic v. non-academic punishment
5. Failing to analogize to other school practices
6. Forgetting unique implications of e-communications  
e.g., speed, breadth, ease, manipulation of distribution
7. Forgetting the “public eye” (e.g, public e-records)
8. Policies: lacking, outdated, poorly drafted, ignored
9. Forgetting common sense
10. Forgetting the golden rule (e.g., copyright)

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### Cyberbullying & Safety

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### Sexting Scenarios

- A high school senior sends nude pictures of herself to her boyfriend. They break up and he forwards them to his friends. They are soon widely distributed and girl is severely harassed by her peers. She interviews on a local TV station to warn others about the dangers of sexting. 1 month later she takes her life
- An 18-year old forwards nude pictures of his 16-year old ex-girlfriend to her circle of friends. He is convicted of distributing child pornography and will be listed in the state's sex offender registry until he is 43.

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- A Pennsylvania D.A. threatens similar charges against several female high school students who send nude pictures of themselves to peers.
- A 60-year old Virginia asst. principal investigates allegations of student "sexting." The A.P. finds a picture of a nude student on a confiscated student cell phone. At the principal's request, the student sends a copy of the picture to the A.P.'s cell phone so he can download and store a copy on his computer as evidence. When the school refuses to retract the student's suspension, the mother contacts the police and the D.A. charges the A.P. with possession of child pornography and contributing to a minor's delinquency after the A.P. refuses to resign. (The charges are eventually dropped.)

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### Startling Sexting Stats

- 20% (of teens) have sent/posted nude/semi-nude images of themselves
- 39% send sexually suggestive messages and 44% say they get forwarded to others
- 38% say sexually suggestive messages make dating/hooking up more likely
- 75% understand that sexting can have serious consequences

Source: [www.thenationalcampaign.org/sexttech](http://www.thenationalcampaign.org/sexttech)

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### Threatening & Bullying Scenarios

- A student threatens to kill another student from the same school on a private Internet blog. The parents of the threatened student demand that the principal suspend the student who made the threat. The principal tells the parents that she does not authority or jurisdiction to discipline for private conduct occurring beyond school grounds or school-sponsored activities. Do you agree?
- Assume the same facts, except the communications are less threatening (e.g., cyberbullying) or just offensive (e.g., harassment). What then?
- What are the main issues?

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### DPI Definitions

**Bullying:** A series of deliberate and hurtful actions inflicted by one or more students who are perceived to be or are actually stronger, more confident, and/or more aggressive than the target or who simply outnumber the target.

**Social/Relationship Bullying:** covert attempts to affect the target's reputation or social standing. It may or may not include "cyberbullying," which is the use of information and communication technologies such as email, cell phone and pager text messages, instant messaging, and defamatory personal polling web sites to intentionally harm others.

<http://www.ncpublicschools.org/docs/program-monitoring/safeschools/discipline-data-reporting.ppt> 11

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### Cyberbullying

- Harmful or cruel text or images online (Center for Safe & Responsible Internet Use)
- I-Safe America findings (grades 4-8)
  - 42% bullied
  - 35% threatened
- Increasing prevalence, ease & forums
- Are the girls meaner than the boys?
- Federal government resources to address

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### Legal & Practical Remedies for Harassment and Bullying

- Non-legal
  - Notify & educate staff, parents, students
  - Contact Internet Service Providers (ISP)
- Local
  - Acceptable Use Policies, Codes of Conduct
- Federal
  - Title VI (race discrimination)
  - Title IX (gender discrimination)
- State
  - Common law claims
    - Defamation, assault, privacy invasion
  - Civil/Criminal Statute:
    - G.S. 115C-407.15, 14-196.3, 14-454 to -458

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### School Violence Prevention Act

G.S. 115C-407.15 (Sess. Law 2009-212)

- Any conduct (including e-communications)...
  - On school property, bus, or at school function
  - Places student or employee in reasonable fear for person or property or creates hostile environment
- Includes “acts reasonably perceived as...motivated by any actual or perceived...characteristic...”
  - E.g., race, religion, gender, gender identity, socioeconomic or academic status, sexual orientation, or mental/physical, developmental, or by association
- Non retaliation provision
- Employees “shall” report violations
- Students/volunteers “should” report violations
- May not restrict 1st Amendment speech rights
- Required school board policies (by 12/31/09)

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### New N.C. Cyberbullying Crime

G.S. 14-458.1 (Sess. Law 2009-551)

- Class 1 misdemeanor for intentional use of computer or network to intimidate or torment a minor by...
- Building fake profile or website
- Posing as minor in chat, text, or I.M. forum
- Posting or encouraging posting of “private, personal, or sexual information” re. minor
- Posting real or doctored image on web
- Accessing/altering computer password, data, etc.
- Repeatedly sending e-communications to minor
- Provoking another to stalk a minor
- Copying or disseminating unauthorized info re. minor
- Enlisting minor for pornography/intimidating e-mail

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### Cyberstalking

G.S. 14-196.3

Prohibits electronic communications that

1. threaten bodily harm to a person, property damage, or extortion;
2. are sent repeatedly for the purpose of “abusing, annoying, threatening, terrifying, harassing, or embarrassing any person”; or
3. Knowingly contain any false statement “concerning death, injury, illness, disfigurement, indecent conduct, or criminal conduct . . . with the intent to abuse, annoy, threaten, terrify, harass, or embarrass.”

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### “Protecting Children in the 21st Century Act”

- Part of Broadband Improvement Act (2008)
- Nationwide effort to increase public awareness re. safe Internet use by children
- E-Rate applicant (via CIPA) must certify...  
 “As part of its internet safety policy [it] is educating students about appropriate online behavior, including interacting with other individuals on social networking websites and in chatrooms and cyberbullying awareness and response.”

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### Cell Phones & Personal Electronic Devices

Personal and School-based Use by Students & Employees

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### Cell Phone Scenario

A school system policy allows high school students to possess but not use cell phones during the school day. A teacher confiscates a student cell phone when it fall out of his backpack. The teacher and assistant principal, check through the cell phone directory and open some of the voice and text messages b/c they suspect this may provide evidence of drug use. They then call some of the students in the directory to test whether those students will answer their phones in violation of the policy.

What are the issues, problems & solutions?

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### Klump v. Nazareth Sch. Dist.

425 F.Supp.2d 622 (E.D.Pa. 2006)

- Motion to dismiss denied & allowed in part:
- Claims allowed:
  - Accessing VM/Text Messages under PA law
  - Supt. Immunity may not exist;
  - Invasion of Privacy
  - 4th Amendment
  - Negligence & punitive damages
- Claims dismissed:
  - 1st Amendment
  - Tort claims against system

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### Rules for Searching

- 4th/14th Amendment law
- “Probable Cause” - for criminal searches
  - E.g., SRO’s may be subject to criminal standard
- “Reasonableness” in school context (T.L.O.)
  - Fact dependent: variable factors
  - Inception: “Reasonable Suspicion” to search
  - Scope: reasonable extent of search
- Analogizing cell searches to traditional searches
  - Book bags, cars, clothing, etc.

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**Banning Cell Phones**

*Price v. NYC Bd. of Ed.* (2008 NY Slip Op 03512)

Policy: "Beepers and other...devices are prohibited on school property, unless a parent obtains the prior approval from the principal/designee for medical reasons."

- Parents sue:
  - Ultra vires policy & arbitrary
  - Constitutional right to raise child
- Court rules for system
  - "Balancing": Parental rights/safety v. operations
  - Rational: no "constitutional right to bear cell phones"
  - Policy rationally related to legitimate purpose (strict scrutiny not required)

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• The "determination that a mere ban on cell phone use would not be sufficiently effective was not irrational. .... While the vast majority of public school children are respectful and well-behaved, it was not unreasonable ... to recognize that if adults cannot be fully trusted to practice proper cell phone etiquette, then neither can children."

• "[C]ell phone activity ... threatening discipline in the schools goes far beyond the occasional errant ring. The very nature of cell phones... permits much of that activity to be performed surreptitiously, which ... presents significant challenges to enforcing a use ban. Certainly the Department has a rational interest in having its teachers and staff devote their time to educating students and not waging a "war" against cell phones."

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**Other Cell Phone & PED Policy Issues**

- Complete or partial ban?
  - School grounds only?
  - Extra-curricular activities?
  - After-hours?
  - Emergencies?
- Discipline - types and degrees?
- Definitions: what devices covered
- Allow for emerging technologies
- Allow for exceptions and waivers
- Other?

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### Privacy and Searches re. School-owned e-Resources

- School computers, e-mail, internet access, audio/video recordings, etc.
- School ownership broadens discretion
- Key: is there an “expectation of privacy?”
  - If not, broad discretion to search
  - If so, apply “reasonableness standard”
- Include “No expectation” notices in policies, etc.
  - E.g., “The School System owns all e-resources and has the right right to control, monitor, and restrict...”
  - Therefore, “student/staff have no expectation of privacy” in use of school e-resources”
- Staff have very limited expectations

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### Off-campus/Personal Uses

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### Old Principles / New Practices

- Tinker v. Des Moines Sch. Dist. ('69)
  - Off campus or non-curricular speech
  - Vietnam armband case
  - School officials must “forecast substantial disruption of or material interference with school activities”
- Bethel Sch. Dist. v Fraser ('86)
  - On campus / school-related speech
  - Lewd student assembly speech
  - School's prevailing interest in promoting “fundamental” civic values and socially acceptable behavior; limiting offensive speech
- Hazelwood Sch. Dist v. Kuhlmeier ('88)
  - Curricular speech
  - Deleted student newspaper articles
  - Restriction re. curricular-related activity reasonably related to a legitimate pedagogical purpose

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**“Teacher Sux” Website**

J.S. v. Bethlehem Sch Dist. (S.Ct. Pa. 2002)

- Derogatory, profane, and seemingly threatening
- “Why Should She Die?”/hit man page (re. teacher)
- Images & comments about the teacher
  - Decapitation, “morphing” into Hitler, witch photo
- Results:
  - School investigates & J.S. suspended then expelled
  - No criminal charges/J.S. remains in school until expulsion
  - Teacher takes leave of absence for rest of year
  - J.S. sues under 1st Amendment

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**J.S. Analysis (cont.)**

- Who wins & why? \_\_\_\_\_
- Tinker/Bethel: how do they apply?

“[T]he advent of the Internet has complicated analysis of restrictions on speech. . . . Indeed, Tinker’s simple armband, worn silently [in a] classroom, has been replaced by J.S.’s complex multi-media Web site, accessible to fellow students, teachers, and the world.”

- Is the speech on- or off-campus speech?
  - Significance? (analysis & standard)
  - J.S.’s site “straddles the political speech in Tinker, and the lewd and offensive speech...in Fraser.”

• Held: Speech not \_\_\_\_\_, but was \_\_\_\_\_

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**A Mean Website**

Beussink v. Woodland Sch. Dist. (E.D. Mo.’98)

In a computer lab session a student opens a personal web page created by “his friend” and shows it to the lab teacher and, later, to the principal. The web site contains demeaning and vulgar criticisms about the principal, several teachers, and other school activities. The student author of the web page created it from his home computer through his AOL internet account. The principal short-term suspends the webpage’s author and the student sues.

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Beussink v. Woodland Sch. Dist.

- Holding: for the \_\_\_\_\_
  - The court issues an \_\_\_\_\_
- “The public interest is not only served by \_\_\_\_\_ Beussink’s message to be free from \_\_\_\_\_, but also by giving the students at Woodland High School this opportunity to see the .... \_\_\_\_\_ at work”

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Doninger v. Niehoff  
(2nd Cir. May 29, 2008)

Court denies preliminary injunction to student wanting to run for school office. School officials considered student’s vulgar personal blog (e.g., school administrators were "douchebags") for refusing to hold a band event at the desired time. Court rules that the student’s conduct could create a “foreseeable risk of substantial disruption.”

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Cases Favoring Students

- *Coy v. N. Canton BoE.* (N.D. Oh. 2002)
  - Skateboarder web page mocking other students
  - Student accesses his own web site during class
  - Suspension/expulsion for violating conduct code
  - *Tinker*; code overbroad/vague;
- *Killion v. Franklin Reg'l. Dist.* (W.D. Pa 2001)
  - Top 10 list & vulgar comments re. Ath. Director
- *Emmett v. Kent School Dist.* (W.D. Wash. 2/00)
  - 5 day suspension for mock student obituaries
- Other examples
  - Revoked Merit scholarship for parody of school
  - Suspension for page insulting the band teacher
  - Suspension for “Stow High School Sucks” page
  - Computer lab ban for “Chihuahua Haters” page <sup>33</sup>

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Teacher & Staff Issues

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***Quon v. Arch Wireless (revisited)***  
529 F.3d 892 (9th Cir. June 18, 2008)  
cert. granted, City of Ontario v. Quon (U.S., Dec. 14, 2009)

- Policemen pagers used for personal & sexually explicit messages
- “Computer, Internet, E-mail” policy
  - No personal use allowed
  - Pagers not included; informal coverage
  - “No expectation of privacy” clause
- Search of pager company records
  - Reveal personal, sexual text messages

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**Quon**

- Holding for plaintiffs on primary claims
- Violation of 4th amendment search rights
- Longstanding department practices conveyed “expectation of privacy,” despite contrary policy language
- Contractor records were not subject to government inspection

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### Quon (cont.)

*“The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means is a new frontier in Fourth Amendment jurisprudence that has been little explored.”*

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### Quon Legal & Policy Lessons

- Outdated policies  
(Need for policy review and revision )
- Policy flexibility
- Policy enforcement and consistency
- Supervisor knowledge and implementation  
(Need for policy training)
- Consider legal implications of new practices  
(e.g., use of contractors, records)
- Ambiguity resolved in favor of users

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### Employee Use of Computers: Key Principles

- The school is owner all computers, files etc.
- Normally has a right to monitor & search
  - Have a legitimate reason for doing so, though
- Some exceptions may exist
  - Employee’s expectation of privacy in personal e-mail?
- Give notice of lack of privacy rights in AUP
  - “users shall have no expectation of privacy”
- Though files may be searched, not all are public
  - Distinction btw. employer v. public right to view
- Monitoring is OK; be reasonable

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### Video Monitoring of Staff

- Bus driver’s privacy rights not violated by installation of video camera on bus.
- The driver had no expectation of privacy: he was in a public area where he could be viewed through the windows, he was not engaged in any private acts, and the system had a compelling interest to protect students and the driver. *Goodwin v. Moyer*, 2006 WL 839342 (M.D.Pa. 2008)

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### Audio Monitoring of Staff

- Special education teacher’s 4th Amendment privacy rights not violated by proposed audio monitoring of classroom.
- Given the information regularly disseminated by students, plus the school’s interest in classroom activities, the teacher has no reasonable expectation of privacy.

*Plock v. Bd. of Educ. of Freeport Sch. Dist.* No. 145, 07-C-50060, (N.D. Ill. Dec. 18, 2007).

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### Employee 1st Amendment Rights

- Pickering-Connick analysis
- Speech involving a “Public Concern”?
  - If no public concern --> no protection
  - *Garcetti* case: internal, job-related speech is not a public concern
- Was speech a motivating factor?
  - If not --> no protection
- Balancing of interests
  - Case specific
  - Government’s interest in orderly operations v. Employee/public’s interest in speech

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**Bowers v. Scurry**

(4th Cir. May 2, 2008) [unpublished]

- A University of Virginia human resource employee used her university e-mail to forward NAACP material in opposition to a school pay restructuring plan. The university fired the employee contending that the e-mail implied that it was an official HR communication, causing confusion to employees. The university had a policy that limited the sending of personal e-mails.
- Who prevails? \_\_\_\_\_
- Rationale: Due to \_\_\_\_\_ of Interests,

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**Employee Internet Rights & Academic Freedom**

- A school system installs filters on its network that prevent most websites that contain any sexual content. After the filters are installed, some of the system’s health and science teachers request the right to bypass the filters to perform curricular internet research dealing with human sexuality and sexual health?
- Do the teachers have a right to such access? Why?

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**Teachers & Staff Personal Web Use**

- Charlotte-Meck / Scotland Co. examples
- MySpace, blogs, etc.
- Employee First Amendment issue
  - Public Concern? Balancing of Interests
- Teacher/student communications
- Teacher personal postings
- Requiring “private” postings? Can you restrict?
- Is there a “nexus” between speech & school
  - Negative impact on teacher’s ability, school integrity, etc.?

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### 10 Tips re. Personal Postings

1. Avoid overreaction and hasty discipline
2. Track student/staff web postings
3. Inform/meet with parents and/or teacher
4. Request action by internet provider
5. Report to law enforcement...
6. Remember personal remedies and claims
7. Check your policy, 1st
8. Policies should notify of potential discipline
9. Ensure AUPs are not overbroad or vague
10. Use common sense

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### Technology Policies: Pitfalls & Principles

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### Acceptable Use Policy Pitfalls

1. Out of date; not reviewed
2. Overbroad, vague, and/or obtuse  
e.g. "offensive communications" undefined or over defined, or too cumbersome to understand
3. Too lenient or too punitive  
e.g. zero-tolerance vs. penalties undefined
4. Overly- & under-restrictive  
e.g., personal computer use
5. Not coordinated with other policies or contracts  
e.g., inconsistencies with code of conduct
6. Lack of enforcement and monitoring  
e.g., inconsistent or sporadic practices

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### “Righting” Acceptable Use Policies

1. CyberSafety Committee or CyberCzar
  - Responsible for oversight and review
2. Be concise
3. Build in flexibility
  - e.g., hearings & waivers for special circumstances
4. Coordinate with other policies
5. Put CyberSafety in Safe Schools Plans
6. Be careful about false or improper choices
  - e.g., Denying academic opportunities for not signing consent forms
7. Policies should be regularly reviewed and revised
8. Consider eliminating parental consent forms
  - ⊕ Potentially may reduce paperwork and liability <sup>49</sup>

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### A Comprehensive Tech Policy Structure

#### Characteristics & Benefits

- Consolidate all technology-related policies
- Reference other related policies (e.g., conduct codes)
- Benefits
  - Comprehensive, consolidated, cohesive, easier to update
  - Good training source

#### Proposed Policy Sections

1. General Use & Provisions
2. Student Use Policies
3. Employee Use Policies
4. Instructional Use Policies
5. Operational Use Policies
6. Board Use Policies

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### Wrapping Up

- Deliberate, document & consult
- Regularly review & revise of policies (every 3 years)
- Integrated coordination, communication, planning
- Appoint a CyberCzar or Committee
- Resources
  - UNC School of Government
  - NC School Boards Association / Education Law in NC
  - eSchool News Online
- Lex-IS Tech Law Services ([www.Lex-IS.com](http://www.Lex-IS.com))
  - Cyber e-Law Updates
  - Cyberlaw Updates & Symposia
  - Tech policy development & review
  - Tech law consulting, hotline & retainer options

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**Cyberlaw Update**  
Other Recent Developments  
(See Handout)

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