

AWSA SLATE CONFERENCE

School Technology Policies, Practices, and Protocols

[A Guide to the PowerPoint Presentation]

Presented By:

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Mr. Strang chairs the firm's School Law Practice Group and is the Managing Shareholder of its Madison office.

Mr. Strang has extensive experience in school, labor and employment law issues, including labor relations, collective bargaining, family and medical leave, arbitration, employment policies and contract negotiations. He works with large and small private sector companies as well as public sector entities and practices at the agency, circuit court and appellate court levels.

Areas of Experience

- School Law
- Labor and Employment, including contracts, personnel policies, family and medical leave, collective bargaining, grievance arbitration, disability accommodation, wage and hour issues, unemployment and worker's compensation

Professional and Community Involvement

- State Bar of Wisconsin (Past Committees: Professionalism, Legislation, and Judicial Independence; Current Committee: Continuing Legal Education)
- State Bar of Wisconsin (Board of Directors, Labor & Employment Law Section 1998-2001)
- Wisconsin Academic Decathlon Board of Directors
- CESA Foundation Board of Directors
- Former President, Wisconsin School Attorneys Association
- General Counsel to the Wisconsin Technical College Boards Association

Articles, Publications and Lectures

- Contributing Author, "Public Sector Labor Law Relations in Wisconsin"
- Guest Lecturer, Wisconsin Manufacturers and Commerce, Wisconsin Association of School District Administrators, Wisconsin Association of School Superintendent's Assistants, and Association of Wisconsin School Administrators
- Chair, State Bar of Wisconsin Employment Law Conference

Education

- J.D., University of Wisconsin-Madison, 1985
- B.A., University of Wisconsin-Madison, 1982

Admitted to Practice

- State of Wisconsin
- Wisconsin Supreme Court
- United States Court of Appeals for the Seventh Federal Circuit
- United States District Court for the Western District of Wisconsin

Slides 1 and 2

I. ACCEPTABLE USE POLICIES

A. Why We Should Still Care (About An Issue That Has Been Talked To Death):

1. The AUP is still the primary policy by which we regulate technology use. This is so in spite of districts having any number of other policies that regulate behavior and professional conduct.
2. In any dispute over acceptable use (particularly where employment or employee rights are involved) your acceptable use policy will be sliced, diced, dissected, challenged, and any number of other things, none of them good.

Computer and other technology records make proving that specific behavior or misconduct has occurred far easier and escaping detection far more difficult. Saying “I didn’t do it” or “it didn’t happen that way” isn’t a likely option in a number of these situations.

When jobs are on the line, the case will quickly morph into a challenge about how the school district has failed to communicate and educate, how its policy cannot be understood, and how its application is selective.

3. Our AUP’s can always be improved and, like the law itself, these policies chase technologies that often change faster than policymaking processes can keep up.

B. Why This List Is Instructive (Even If Remarkably Obvious)

1. Identify covered technology. Faculty and staff use a greater number of technologies for instructional and administrative purposes. When we look at our AUP’s, they will identify desktop computers, but will they identify school district laptops, cell phones, readers (e.g., kindle), iPads, cameras, and other equipment?
2. Define and/or describe legitimate purposes. Sometimes the stress point of an AUP is that it dwells only on what is prohibited. AUP’s should also define legitimate use in policy terms and state that the policy will be interpreted in light of those purposes.

3. Identify prohibited conduct and omissions. AUP's are best when they are modernized to capture our increasingly interactive culture, but are drafted to acknowledge that the policy is illustrative, not all-encompassing:
 - a. Prohibited uses (such as personal commercial enterprise)
 - b. Prohibited content (such as nudity, obscenity, or pornographic content)
 - c. Prohibited conduct (such as excessive use unrelated to work, conduct that affects the integrity of district technology, and other unacceptable acts)
 - d. Prohibited participation (such as furthering, conspiring, encouraging, or failing to report prohibited conduct). For example, the policy must address situations involving receipt of inappropriate materials, solicitation of such materials, encouraging distribution, and failure to report violations.
4. Account for relevant laws. Clearly laws such as CIPA need to be acknowledged. But other laws that can be breached by technology misuse (and are perhaps less obvious in this context) can bear referencing, such as pupil record confidentiality laws, defamation, and civil invasion of privacy.
5. Address use of personal technology.
 - a. Your faculty and staff will use personal technology while at school.
 - b. They may do improper things when they do so or, at least, share information that you do not want to have circulate.
 - c. They will be identified as having done what they did while they are at work for the school. For example, an employee might send an e-mail and attachment on or through personal technology that the district cannot monitor, but its recipients can see that it came from a district employee during the work day, and it can be forwarded from there. This does not help the district's public relations.

6. Identify special restrictions on how, when, and from where employees can access district technologies (and if certain technologies are not to be accessed or access is not to be attempted).
7. Identify interpreting authorities. The policy must make clear who is charged with its interpretation and enforcement, and the level of authority such interpretations have.
8. Disclaim privacy interests of users (but acknowledge the privacy of certain subjects).
 - a. Remind them that the district can review any activity on or with its technology that it wishes to, may do so for any reason or randomly, and no expectation of privacy exists.
 - b. Also, remind them that what they create, send, receive, etc., is a public record, and it may be a record that is subject to disclosure if it is requested by a member of the public (and they should not count on being shielded by the “personal e-mail” exception that our Supreme Court identified in Wisconsin Rapids).
 - c. Also, remind users that there are privacy interests that they must respect in the course of using district technology. For example, pupil record privacy under FERPA and Wis. Stat. § 118.125 must be respected in sending or forwarding any information covered by these statutes. In addition, there may be confidential district information that cannot be sent or forwarded.

A critical nuance: These privacy and confidentiality issues don't stop with using district technology. Faculty and staff are required to respect these limitations even when using their own technology on their own time, whether they are blogging, on Facebook, or other pursuit, and our AUP should say so.

9. Assign responsibility for knowledge and for updating.

- a. You may choose to distribute your AUP every year, obtain signatures, and retain signed AUP's for your files. If you go to this length, it is -- relatively speaking -- less important to assign responsibility for updated policies.

However, some schools get a sign-off at the time of hire, and after that will expect employees to check on line for the updated versions of the policy. If this is your approach (and I'm not saying that it should be) say so: specifically state that employees get a copy at the time of hire and that, thereafter, it is their job to review the policies on line at the start of the year to familiarize themselves with any changes (note: this is different for professionals than for hourly employees).

- b. Make clear that employees bear the responsibility for knowing and understanding this policy and see to it that your sign-offs reflect this assignment.

10. Warn of consequences for violations.

11. Make clear that the policy does not purport to itemize all inappropriate or unacceptable conduct involving use of school district technology.

This is a delicate balance to strike in policy language. The district will not want to be unfair and suggest that violations of the policy are a function of whim or so random that an employee cannot conform his/her conduct to the policy.

Nevertheless, employees should understand that not all inappropriate conduct can be expressly identified or, put another way, we don't need a policy to expect employees to know better when it comes to certain conduct (like accessing pornography on a regular basis).

II. COMMON PITFALLS OF ACCEPTABLE USE POLICIES

Slides 3 and 4

A. Publication and Distribution

1. The mediums used to publish the AUP can be inconsistent. Further, it is published periodically as it is updated.
2. Overkill is good:
 - a. Sign off on distribution (at least initially).
 - b. Post
 - c. Distribute as part of back to school information packets
 - d. Distribute electronically

*Do this every year. You want people to actually complain that you keep hammering this *ad nauseum*. And then you're going to save the complaints.
3. Republish the AUP whenever you change it.
4. Use your printer! The records that prove you've given adequate notice and provided appropriate information should be stored electronically, but you won't always be able to find them at crunch time. This issue deserves an old fashioned, 3-ring binder backup.
5. Involve your employees' associations in the technology committee that prepares your plan for submission to DPI and encourage direct communications with members about the committee's work (perhaps a less able strategy, depending on status of current labor issues).
6. This is an administrative team issue. It cannot be left to the Technology Dept., it cannot be left to the Superintendent, it cannot be left to the building administrators, or any other, single administrative group. Everyone plays a role and everyone has to act as a check and balance on completing the publication/distribution process.

B. Faculty and Staff Acknowledgement:

Yes, I encourage:

1. An initial sign-off acknowledging receipt of the AUP, responsibility to regularly check district policies for updates, and knowledge of the mediums that will be used for active updating, if any (e.g., "...I also acknowledge that this policy may be redistributed to me periodically and/or when revised by e-mail or other electronic means, and that by signing I represent that I will review such information and will advise the administration directly if I have any questions...").
2. Attendance/sign in procedures for meetings where the AUP is distributed.

C. Prohibitions Must Include...

The problem here is that any number of policies focus on the internet and are written that way.

However, modern filtering and blocking technology often means that problematic content, e.g., comes in as an e-mail attachment, involves use of personal technology while at school, etc.

*See PowerPoint for remaining remarks on this section.

III. PUPIL DISCIPLINE

A. Standards for Pupil Expulsion

Slides 5 and 6 (Review)

The message of this discussion is not "let's head back to our districts and throw everybody out!" The message, instead, is to understand the limitations of school district authority in addressing certain types of misconduct.

These statutory standards define the limits of our authority to sanction pupil misconduct in a way that abridges pupil rights, including misconduct with technology.

These standards are not the only methods for sanctioning misconduct in terms of student privileges, but there may be separate impediments to doing so in, e.g., the co-curricular code, the pupil code of conduct, and other policies on student behavior (my message: make deliberate, rather than accidental decisions).

Pupil conduct and misconduct with personal or district technology raises two critical points:

1. Conduct that does not occur at school has to have an effect at school or on certain, protected personnel (namely to threaten or to actually endanger the property, health, or safety of others).
2. The concept of “proximate cause”
 - a. I am introducing a legal concept that—as a technical matter--doesn’t really apply.
 - (1) This is a legal concept and not one that really comes from school law.
 - (2) You won’t find it in any case about pupil expulsion and, frankly, you won’t find it in any case about pupil First Amendment rights to say nasty things about other students on their computers, in their homes, in their bedrooms on a Saturday night.
 - (3) The courts haven’t identified it by name in this context and they shouldn’t: strictly speaking, it isn’t truly applicable in this class of cases, given that -- in the situations that concern us -- free speech rights often hang in the balance.
 - (4) It’s a tort law concept; one that we usually read about when people are suing other people for, e.g., negligence.
 - b. So why is it a helpful illustration if not an applicable legal principle?
 - (1) Proximate cause identifies circumstances where we hold people responsible for events that they cause or set in motion, either through their own negligence or deliberately.

- (2) Example: The case of the negligent docking and securing of the boat (where the boat was not tied off properly, came off its moorings, floated down the river, and caused an expensive chain reaction of boat crashes).
- (3) Proximate cause considers things like:
 - Cause
 - Forseeability
 - Rational outcomes of deliberate actions

There is an old poem that reads: "I shot an arrow into the air, it fell to Earth, I know not where." Proximate cause theory holds that, wherever your arrow fell to Earth is your fault, even if you didn't mean for it to fall where it did.

While no perfect synthesis of every pupil discipline decision can be constructed, decision makers seem to say that a pupil may be held responsible if they deliberately set events in motion that clearly would have on-campus impacts (the remaining question being whether those impacts meet any standard that must be satisfied to justify sanctions, such as endangering others while at school or while under the supervision of school authorities).

B. Cyber-bullying

Slide 7

1. DPI Guidance
2. DPI Model Policy

*Both acknowledge cyber-bullying. Both identify the dramatic effects of bullying and the responsibility that districts bear for addressing it. Nevertheless, the guidance and later policy are cautious (as they should be) about what off-campus conduct falls under the bullying policy (and that is the issue: on-campus conduct is obviously subject to district sanction and the issue is the extent to which off-campus conduct can be regulated).

3. DPI review of expulsion decisions suggest that conduct that is directed at the schoolyard or has the effect of endangering persons at school will meet the standard if the link is direct and not tenuous.

Slide 8 (Review)

4. DPI standards do not speak to privilege issues and properly so. Consequently, there may be conduct that would not merit, e.g., school suspension or expulsion, but a school district could consider revoking a privilege without offending the right to free speech (provided the district hasn't foreclosed itself from doing so by limiting reviewable conduct or possible remedies through policies, codes of conduct, or other local rule).

Slide 9 (Review)

5. Evidence of off-campus conduct that helps us find "proximate cause"
 - a. Was cyber-activity furthered at school through texting, forwarding, gossip, or other means?
 - b. Were the communications circulated at school?
 - c. Were images of the school (e.g., pictures) used as part of or to further the activity?
 - d. Was any part of the information circulated assembled at school?
 - e. Was the creation of the information planned while at school?
 - f. Was any district technology or other instruments/materials used to further the cyber-bullying?
 - g. Does the content convey threats?
 - h. Does the content call for or encourage on campus action?

Slides 10-11

(Examples of common types of misconduct)

Slides 12-15

(Examples of behavior that is not protected and case illustrations)

Slide 16-18

C. Cell Phone Issues

1. State statutes. At one point, state law prohibited two-way communications devices. Current law permits school boards to adopt policies governing use of cell phones at school and requires schools to provide all pupils with a copy of its rules on an annual basis.
2. School districts need to be careful to regulate any device that can be used for communications. Although we generally think in terms of cell phones, a variety of devices and technologies can be used for communications, and those communications will at least sometimes involve bullying, academic dishonesty, or other behaviors school district wish to curtail.

Slide 19

3. Confiscating a cell phone or other electronic communication device:

Remember, a cell phone is property (and can be very expensive property). A school district is still the government and confiscation of property cannot occur without due process. Further, confiscation and retention of a cell phone -- even when there is sufficient basis for doing so under district policy -- must conform to certain protocols.

For this reason:
 - a. Confiscating the cell phone for the day, to be returned at the end of the day to the pupil or parent (if the pupil is a minor) is legitimate. However, retaining the cell phone for longer as a sanction is probably not permitted.

- b. A cell phone can be retained for such time as is necessary to complete an investigation into violations of school policy with the phone. But...
- c. There must be reasonable suspicion to review the contents of a cell phone. A simple conversation that may violate the school's usage policy (and that might justify temporary confiscation) does not, without more, constitute evidence of drug transactions, academic misconduct, or other behavior that might warrant more invasive investigative techniques.
- d. Once there is reasonable suspicion, a cell phone's contents may be reviewed to the extent necessary to investigate the conduct in question. In addition, some school districts that take the position that no such suspicion is needed if the school district's policy makes cell phones on campus a privilege that can be made subject to certain rules, including a right of inspection; however, this point is more debatable.
- e. Where reasonable suspicion exists, a school district may use other information that it obtains when it reviews the cell phone's contents if the information was obtained within the scope of permissible review, even if it is not related to the matter that the school district was investigating.