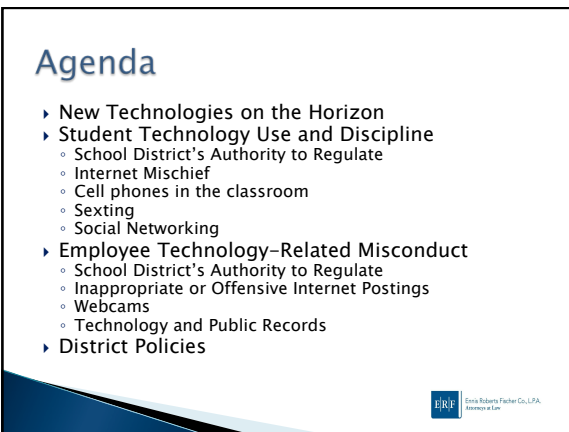


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Strategies for Managing Your eNightmares

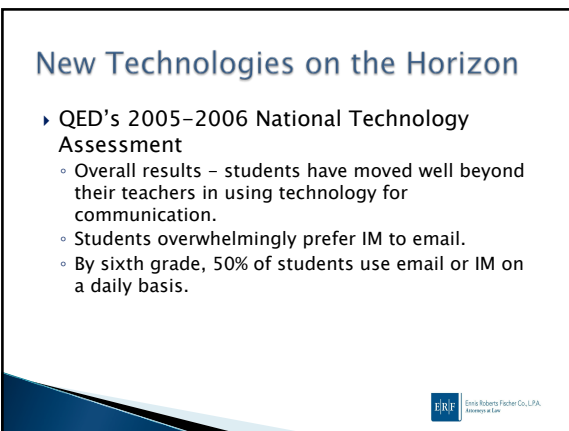
Presented by: William Deters II



Agenda

- ▶ New Technologies on the Horizon
- ▶ Student Technology Use and Discipline
 - School District's Authority to Regulate
 - Internet Mischief
 - Cell phones in the classroom
 - Sexting
 - Social Networking
- ▶ Employee Technology-Related Misconduct
 - School District's Authority to Regulate
 - Inappropriate or Offensive Internet Postings
 - Webcams
 - Technology and Public Records
- ▶ District Policies

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New Technologies on the Horizon

- ▶ QED's 2005–2006 National Technology Assessment
 - Overall results – students have moved well beyond their teachers in using technology for communication.
 - Students overwhelmingly prefer IM to email.
 - By sixth grade, 50% of students use email or IM on a daily basis.

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New Technologies on the Horizon


- ▶ MTV/AP Survey
 - What do students own?
 - 81% have a cell phone with camera (15% more have a cell phone without a camera)
 - 60% have a laptop
 - 76% have an iPod or other MP3 player
 - 71% have a digital camera
 - What do they do with it?
 - 53% use the internet to get news
 - 76% use technology for social networking
 - 88% send/receive e-mails (similar #s for text messaging)

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New Technologies on the Horizon

- ▶ Not all technologies are bad!
 - E-readers and digital text books
 - Open source curriculum development and sharing (www.curriki.org)
 - Tech-based monitoring and assessment tools
 - Video and web conferencing
 - Distance learning and remote access
 - Learning communities and electronic collaboration
- ▶ The challenge: how do you integrate new technologies to enhance the classroom experience yet maintain the safety and integrity of the school community?

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Student Discipline and Technology

A Common Scenario . . .

- ▶ A student creates an offensive or threatening web page, Facebook profile, etc., at home using a personal computer.
- ▶ The target is another student or school staff member.
- ▶ Somehow, the message reaches campus and causes a stir.
- ▶ The district tries to punish the student for the behavior, and the student appeals the discipline.
- ▶ Outcome? It depends . . .



Student Discipline and Technology

- ▶ Things to consider:
 - Student free speech rights
 - The school district code of conduct
 - School policies in place
 - Level of disruption at school caused by off campus behavior
 - Possible opportunity to send a message to school community
 - Past practice



Student Discipline and Technology

- ▶ The purpose of traditional discipline
 - Counteract misconduct by means of suspension or expulsion in order to ensure a safe and stable learning environment.
- ▶ Authority to regulate student conduct
 - Ohio Revised Code 3313.20 and R.C. 3313.47 authorize a Board of Education to adopt rules and regulations to manage and control the conduct of students and others on and off school property.



Authority to Regulate Off-Campus Conduct

- ▶ Give students proper notice about off-campus behavior:
 - "This code of regulations applies while a student is in the custody or control of the school; on school grounds or closely proximate thereto; while at a school-sponsored function or activity or on school-owned; or provided transportation vehicles. In addition, the Student Code of Conduct governs a student's conduct at all times, on or off school property, when such student conduct is connected to activities or incidents that have occurred on district owned or controlled property; is reasonably related to the health and safety of other students and/or school employees; is directed at a district official or employee or the property of the official or employee; or such conduct would unreasonably interrupt the educational processes of the _____ Schools."

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Regulation of Student Speech

- ▶ Student misconduct involving technology usually implicates free speech rights in some way.
- ▶ A board of education may restrict a student's speech, including online speech, in several general circumstances:
 - The speech causes a disruption or genuine likelihood of disruption to the educational mission of the school.
 - Speech constitutes a "true threat", defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."
 - The speech is offensive to prevailing community standards by reason of being vulgar, lude, indecent, racist, or is otherwise inappropriate in a school setting.

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Internet Mischief

- ▶ Common types of misconduct:
 - False profiling
 - Websites and Slam sites
 - Blogging
 - Cyberbullying and harassment of students and staff
 - Sexting
 - Inappropriate staff-student relationships
 - Unauthorized copying or misuse of district logos, photographs
 - Hacking
- ▶ Schools have the most authority to discipline the last two types of behavior because they involve possible damage to or misuse of school district property.

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Internet Mischief

► Case Law Examples

- *Kowalski v. Berkeley County Schools* (4th Cir. 2011) – Court upheld discipline of a student who created a Myspace page called “Students Against Sluts Herpes” that targeted another student. The district disciplined the student for violating policies against harassment and bullying. Court concluded the student orchestrated an attack on a classmate in a manner that was sufficiently connected to the school environment so as to implicate school’s authority to discipline speech which caused material and substantial interference and invaded the rights of the other student.
- *Bottom line: thoroughly document disruption to the school environment as a result of the online behavior. Courts will look at specific facts to determine whether a disruption occurred. This can be a very subjective determination!*

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Internet Mischief

► Case Law Examples

- *Layshock v. Hermitage School District* (3rd Cir. 2011), and *J.S. v. Blue Mountain School District* (3rd Cir. 2011) – Court overturned discipline of students who created false profiles of school principals. The profiles contained vulgar and offensive language, false accusations of drunkenness and pedophilia. The court held the speech was protected by the first amendment.
- Blue Mountain School District intends to appeal to the Supreme Court.
- *Bottom line: courts are often willing to protect offensive and hurtful speech if it occurs off campus and a district cannot prove that it sufficiently disrupted the educational process.*

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Internet Mischief

► UPDATE:

- NSBA has filed an Amicus Brief urging the U.S. Supreme Court to hear student off-campus online speech cases – in particular the consolidated case of *Blue Mountain School District* and *Layshock*.
- NSBA filed its brief because it wants the Court to issue a definitive standard that can be used by courts and school officials for how to deal with off-campus speech issues.
- Interestingly, the Supreme Court refused to hear a similar case involving a former high school student who was denied an opportunity to run for student council after she posted critical and mildly vulgar comments about school officials online.

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Internet Mischief

Case Law Examples

- *Wynar v. Douglas County School District (D. Nev. 2011)*— district court upheld expulsion of a student who sent an instant message to a friend outlining an attack on the school. The message contained detailed information about how the student would stage an attack, what weapons he would use, and when it would occur. The court determined that the district could reasonably forecast a disruption in the education process as a result of such a threatening message.
- *Bottom line: when a student's speech is violent or threatening to members of the school community, a school can assume a substantial disruption will occur. The more detailed the threat, the better!*



Internet Mischief

Strategies

- Make sure your code of conduct is as broad as possible and authorizes you to reach off campus behavior.
- Document any disruption that occurs as a result of off-campus behavior.
 - Disrupted classes, slow Internet connection, damaged computer systems, etc.
 - Thoroughly document concerns about "reasonably foreseeable" disruptions if the behavior goes without discipline.
- Consider alternative routes
 - Trigger anti-bullying policies and procedures, contact parents and police, encourage a defamation lawsuit, etc.
- Require students to sign an acceptable use policy every year, and keep the signed copies.
 - This will support discipline if the website in question is accessed using school computers or ipads.
 - Update the policy on a regular basis.
- Do not overreach on the extent of the discipline!



Cyberbullying

- Cyberbullying/cyberharassment: sending or posting harmful or intimidating text, messages or images over the internet or an electronic device.
- September 2009 edition of *School Climate Matters* found that 15 percent to 35 percent of students have been victims of cyberbullying.
- iSafe.org, a nonprofit organization dedicated to Internet safety, surveyed 13,000 students and discovered 22% of students know someone who has been bullied online.
- The public looks to schools more and more to address bullying and cyberbullying that occurs amongst the student body, even if it happens off campus.



Cyberbullying

- ▶ **Ohio's Anti-bullying Law**
 - The backbone of the legislation requires each school district board of education to adopt a policy prohibiting harassment, intimidation, or bullying of any student on school property or at a school-sponsored activity.
 - Cyberbullying and cyberharassment should be mentioned in the anti-bullying policy, and should play a role in training programs and prevention initiatives.
- ▶ **Districts should also include a provision regarding Internet bullying in the student code of conduct.**

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Cyberbullying

- ▶ **House Bill 155 (currently in the Education Committee)**
 - Requires districts to expand their anti-bullying policies to prohibit harassment, intimidation, or bullying by electronic means.
 - Specifies that anti-bullying policies must include:
 - A statement providing for possible suspension of students who engage in cyberbullying;
 - Means for making anonymous reports of incidents;
 - Disciplinary procedures for students who make false reports; and
 - Strategies for protecting persons from harassment or retaliation after a report has been made.
 - Directs school districts to review anti-bullying policy annually (you should do this anyway!).
 - Requires districts to make available to students and parents an explanation of the seriousness of cyberbullying.
 - Requires districts to provide training on their anti-bullying policies as a part of the in-service training required for all teachers, administrators, counselors, nurses, and school psychologists.

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Cyberbullying

- ▶ ***J.C. ex rel. R.C. v. Beverly Hills Unified School District* (C.D.Cal. 2010)** – Court held that a district could not discipline students who met at a restaurant after school and posted a cruel video on YouTube in which they made fun of a classmate. The video could not be accessed by staff or students at school, nor could the district verify that the video was ever viewed at school.
- ▶ **Remember, even if you cannot formally punish off campus bullying, you can still conduct an investigation under your anti-bullying policy and contact parents.**
 - You may even report behavior to police if students are threatened in any way.

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Cell Phones in the Classroom

- ▶ Ohio Revised Code 3313.753 permits boards to adopt policies prohibiting students from "carrying" pocket pagers and other electronic communication devices in any school building or on school grounds.
 - May have exceptions in policy but must specify the disciplinary measures to be taken for violations.
- ▶ No significant case law in Ohio.
- ▶ Court in NY (2008) held that a rule banning cell phones on school grounds does not violate the constitutional right of parents to provide for the care, custody, and control of their children.

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Cell Phones in the Classroom

- ▶ Strategies
 - Develop a policy on the appropriate use of mobile devices at school and actually enforce it.
 - There is no reason cell phone use is ever needed during the school day.
 - Consider "if we see it, we confiscate it!"
 - Provide notice in the policy that the administration may search cell phones if they are under reasonable suspicion that the search will reveal violation(s) of school rules.
 - Discipline staff who refuse to enforce rules.
 - DO NOT attempt to interfere with cell phone reception (e.g. Faraday Cages).

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Cell Phone Search and Seizure

- ▶ Search and Seizure Standard
 - Real world: probable cause/warrant
 - School World
 - **Justified at its inception**
 - Reasonable grounds for believing the search will turn up evidence that the student is violating or has violated the law or rules of the school.
 - AND
 - **Reasonable In Scope**
 - Measures used in search must be related to the search objective.
 - Search should not be overly broad or excessively intrusive in light of the age and sex of the student and the nature of the infraction.

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Cell Phone Search and Seizure

- ▶ Possession of a cell phone in violation of school policy is not sufficient justification to conduct a search of its contents.
 - Remember, you need reasonable suspicion to search!
 - If a cell phone is taken away because a student improperly brought it to class, there is no right to search the contents because there is no suspicion that the phone contains anything that violates school policy or the law.



Cell Phone Search and Seizure

- However, if you have reasonable suspicion that information concerning a violation of school policy or the law is contained in the phone, it is permissible to conduct a limited search to find that information.
 - For instance, an administrator overhears a student brag that she and several other students took pictures of themselves doing drugs in the school bathroom on their cell phones. The administrator also witnesses the student showing pictures of something on her cell phone to another student during the conversation.
 - The administrator could search that student's phone for the alleged pictures.
 - He could not search through the student's contacts or web history, however.



Cell Phone Search and Seizure

- ▶ Bottom Line:
 - No fishing expeditions!
 - Must be a nexus between:
 - Basis for initiating the search,
 - What the intent of searching the phone is, i.e. what one hopes to find, and
 - Where one is searching in the cell phone.



Cell Phone Search and Seizure

► Strategies

- Train staff.
 - It is best for administrators to conduct the search.
 - More than one staff member should be present.
- Consider a policy of confiscation every time a cell phone is seen during the instructional day.
 - Call central office, and possibly district attorneys to discuss possibility of conducting a search.
- Have staff provide a brief write-up of circumstances surrounding seizure of the phone.
 - These facts are critical to determine if a search is appropriate and the extent of the search.
- Evidence goes stale fast!



Sexting

- “Sexting” is the act of sending, receiving, or forwarding sexually suggestive messages, photos, or images via cell phone, computer, or other digital device.
 - These messages, photos, and images are often further disseminated through e-mail and internet-based social networking websites beyond the original intended recipients.
- An MTV/Associated Press survey found that one third of users age 14–24 have received emails or text messages containing sexual words or images.



Sexting

- In Ohio, sexting can result in state felony charges for producing, distributing or possessing child pornography. R.C. 2907.323
 - In some cases across the country, individuals have been put on sexual offender lists.
- Senate Bill 103, currently in the Ohio Senate, would:
 - Make it illegal for a minor to create, receive, exchange, send or possess a photograph, video or other material that shows themselves or a minor in a state of nudity.
 - Any violation would be a misdemeanor of the first degree.



Sexting

► Strategies

- Adopt a student discipline policy regarding sexting.
- Be aware of the intersection of anti-bullying and anti-harassment policies with regard to sexting.
 - Especially with sexual harassment, enforcement from Feds is increasing significantly.
 - You have sexual harassment policies/procedures – use them as appropriate.
- Increase awareness of and education concerning sexting and the associated harassment/bullying.



Sexting

► Strategies

- Enforce school rules regarding cell phone use.
 - Punishing possession of images at school is entirely separate from punishing the creation of the images.
- Involving criminal authorities can be a way to show you take a problem seriously – but don't count on the criminal authorities successfully prosecuting.
- The parents of all students involved should be informed immediately.
 - Involve parents of all students, no matter the age of the student.



Sexting

► Strategies

- If there is a rumor of students sexting:
 - The student's cell phone should not be searched without the consent of the student and parents.
- If a teacher sees by chance or is shown evidence of sexting on a cell phone:
 - A search of the opened/read text messages on the cell phone would be justified and reasonable in scope.
 - It is highly recommended, as with other cell phone searches, that another administrator be present when the cell phone is searched.
- Do not save pictures on an employee's work computer. There have been several cases where employees have been charged with child pornography for failing to remove inappropriate images obtained in an investigation from their computers.



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Employee Technology- related Misconduct




Employee Technology-related Misconduct

- ▶ Employees, like students, will occasionally misuse technology.
- ▶ Frequent types of misconduct:
 - Inappropriate or offensive postings on personal websites and social sites.
 - Use of school district hardware to access inappropriate or illegal website content or conduct personal business during the work day.
 - Inappropriate staff-student relationships.
 - Cell phone texting with colleagues and students during work hours.




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Public vs. Private Employers

- ▶ Public employers are “state actors” and cannot violate constitutional rights.
 - Private employers are not subject to the same constraints.
- ▶ All employers (of a minimum size) are subject to anti-discrimination laws that can in practice look like free speech protections.
 - E.g. protection against religious discrimination could protect religious expressions by employees.



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Employees and Labor Union Rights

- ▶ The NLRB has argued in a series of recent cases that employers cannot discipline employees for posting comments online which relate in some way to the terms and conditions of employment or that seek to involve other employees in work-related issues, even if those postings are offensive or portray the employer in a negative way.
- ▶ School districts do not fall under the jurisdiction of the NLRB.
- ▶ Nonetheless, how might this impact school districts?



Protected Speech on the Internet

- ▶ Can you discipline the following behavior?
 - A teacher posts derogatory comments about students on her Facebook page, referring to children as criminals and herself as the warden.
 - A teacher hosts a bachelorette party at her house and hires a male stripper. Several other teachers are at the party. Someone snaps a photo of the teacher dancing with the stripper, and posts it on a social media website. One other teacher is visible in the background.
 - An employee who is involved in labor negotiations has been bashing the school district on his Facebook page, and the district wants to stop the behavior.



Protected Speech on the Internet

- ▶ Can you discipline the following behavior?
 - An employee posts pictures on her Flickr page depicting illegal drug use. The name on the album containing the pictures is "Partying with my Friends", dated last weekend. The employee is depicted in some of the photos, but is never shown using drugs.
 - A teacher frequently emailed a student that was in his English class and also in a club that he advised. Initially the emails concerned school-related matters, but became more personal in nature. The student's mother called the principal and complained.



Protected Speech on the Internet

- ▶ There is no bright line rule for when an employer may discipline employees for off-duty behavior.
 - The ACLU stated it may happen when the employee's actions substantially harm the employer or affect the employee's ability to do his or her job.
- ▶ Keep in mind that all individuals licensed by the state of Ohio must comply with the Licensure Code of Professional Conduct for Ohio Educators.
 - Behavior deemed unbecoming the teaching profession can result in suspension or revocation of a teaching license.
 - Online misconduct may trigger state action!



Employee Technology-related Misconduct

- ▶ Also consider:
 - Regular staff who do not generally use the computer during the work day use a vacant computer to access the Internet (janitors, etc.).
 - Substitutes access the Internet to check personal email during classroom time.
 - Coaches text students about personal matters.
- ▶ How do you monitor this type of behavior?
 - Do these individuals sign an acceptable use policy, or does the district post the policy near computers?
 - Do you have other policies in place to deal with misconduct?
 - How about past practice?



Webcams

- ▶ *Robins v. Lower Marion School District (February 2010)*
 - A relatively wealthy Pennsylvania school district provided laptop computers to all of its high school students in an effort to bridge the technology gap between its wealthier and poorer students. Students would use the laptops throughout the school day and take them home to complete homework. Supposedly in an attempt to find missing laptops, the district remotely accessed the laptops and used webcams to view students inside their own homes. They took over 66,000 pictures of students!
 - A student found out about the remote surveillance when he was confronted by an assistant principal who cited a laptop photo of the student in which the school thought he was selling drugs. The student claimed the school took these pictures of him without his permission, and his parents claimed the school mistook a piece of candy for drugs.
 - The parents filed a lawsuit against the district for violating the student's privacy rights.



Webcams

- ▶ Case resolution:
 - The school district paid \$610K to settle the case.
 - Additionally, the district accumulated approximately \$1.2M in attorney and forensic expert fees.
 - The district paid significant amounts for salaries of employees placed on paid leave.
 - They were forced to sue the insurance carrier over coverage as well.
 - The federal government conducted a criminal investigation against the district and its employees.
 - *Bottom line: do not use district issued technology to "spy" on students or otherwise invade their privacy, however tempting it might be!*



Technology and Public Records

- ▶ *State ex rel Bowman v. Jackson City School District* (May 5, 2011)
 - A teacher was disciplined for inappropriate use of the school district email system. She had sent an excessive number of emails to personal friends during the time when she should have been teaching.
 - The appellant in the case made a public records request for the personal emails, and the school district denied the request on grounds that the emails were not public records.



Technology and Public Records

- ▶ *State ex rel Bowman v. Jackson City School District* (May 5, 2011)
 - An email is a public record if:
 - It is a document, device or item;
 - Created or received by the public entity;
 - That documents the organization, functions, policies, decisions, procedures, operations or other activities of the office.
 - The Ohio Fourth District Court of Appeals determined that emails easily met the first two requirements. The court also concluded that the emails served as the basis for the teacher's discipline, and therefore documented a public decision.
 - *Bottom Line: while personal emails are generally not considered public records, if they are used as part of an investigation to make a decision about discipline, they may be considered public records.*



Policies to Consider

- ▶ Acceptable Use Policy
- ▶ Acceptable Use Policy for Network Administrators
- ▶ Social Media Policy
- ▶ Texting Policy
- ▶ Contact me if you would like to receive any of our model policies!



Acceptable Use Policy

- ▶ Districts should require all students and staff to sign acceptable use policies that limit Internet and technology-related activities on school grounds.
 - It should include definitions of acceptable online behavior and access privileges.
 - Policies should include a statement that staff and students have NO expectation of privacy when using school computers, devices or a school computer account.
 - Internet use in schools should be for educational and business purposes only.
 - Policies should also include potential discipline for violations of AUP.



Acceptable Use Policy

- ▶ Strategies
 - Agreements should be signed by staff, students, and parents on a yearly basis.
 - Keep these records!
 - Regular assessment of the use of the Internet and student/staff misuse is essential.
 - Reliance upon filtering and blocking is not enough.



AUP for Network Administrators

- ▶ Computer network administrators have privileges and responsibilities that other users do not have.
- ▶ Some districts have adopted a separate AUP for network administrators that includes additional responsibilities and restrictions, such as:
 - Maintain confidentiality of private electronic files discovered during an investigation.
 - Restrict access to privileged supervisory accounts.
 - Faithfully execute all hardware and software license agreements.
 - Create passwords to protect systems using strong password methodology.



Social Media Policy

- ▶ Social media policies provide a set of guidelines for social media use and put employees on notice of behavior that may result in discipline.
- ▶ Why social media policies?
 - Social media is a powerful communication tool that has a significant impact on organizational and professional reputations.
 - Because social media blurs the lines between personal voice and institutional voice, school districts have a keen interest in setting parameters for a staff member's use of social media.
 - However, there is a fine line between managing and overreaching!



Social Media Policies

- ▶ Are they enforceable?
 - Little legal guidance on the topic.
 - Remember, employees still receive first amendment free speech protections.
 - Several recent NLRB cases indicate that an employee can be disciplined for violation of a social media policy as long as the speech is not in any way considered concerted activity.
 - Even if they are not enforceable, they may still be worth having!



Texting Policy

- ▶ Occasionally, staff members use cell phone texting to contact students about school related matters.
 - Coaches notify students of cancelled practices, etc.
- ▶ As with any other technology, there are risks associated with allowing staff and students to text each other.
- ▶ Texting policies provide guidance as to when texting is permitted between staff and students, and what types of messages are unacceptable and could result in discipline.





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