School Cyberlaw

PART III

Cybersystems: School Operations and Other General Issues

By David Hostetler

Not even computers will replace committees, because committees buy computers.

—SOURCE UNKOWN[1]

In theory, the technology that now automates many administrative tasks allows schools to operate more efficiently and, as a result, improve students' education. Yet, as technology use in schools proliferates, so, too, do the laws governing its use and, ironically, the administrative burdens they impose. The comment quoted above reminds us that people, not computers, are the heart and soul of a school system and must decide how best to use (or not use) technology. To make effective decisions about technology use, school administrators must understand the legal and practical implications associated with it. This article, the third and last of the series, addresses the general school operations, structures, and policies associated with managing school systems successfully by using technology. Specific topics treated include state sunshine laws and record retention requirements, school system telecommunications (the eRate), electronic reporting, services and procurement, technology education and planning, digital copyright, and acceptable use policies.[2]

State Sunshine Laws: Public Records and Open Meetings

Soon after his inauguration in 2001, President George W. Bush issued the following farewell to his e-mail correspondents: "My lawyers tell me all correspondence by e-mail is subject to open-record requests . . . the only course of action is not to correspond in cyberspace. . . . [S]adly I sign off."[3] Do citizens have the right to access government officials' e-mail and other electronic messages and files? When and to what extent are officials' electronic communications considered "meetings" and therefore subject to the state's open meetings and public records laws? The answers to these questions, like most others, depend on the specific circumstances. School officials and staff may not realize that many of the communications and files they create or receive on school computers may be subject to the state's sunshine laws.

Electronic Files as Public Records

North Carolina's public records law establishes the public's right of access to all government records except those specifically exempted. It defines *public records* as

> [a]ll documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, *electronic data-processing records*, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.[4]

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1. Source: http://www.comedy-zone.net/quotes/Science_and_Technology/computers2.htm (last visited July 28, 2004).

2. The author wishes to forewarn the reader of—maybe even apologize for—the extensive use of bullets and lists in this article. The particularly technical nature of the topic seems to warrant this format.

3. Tony Harnden, "Bush Signs Off from the Internet," *Daily Telegraph* (U.K.), March 3, 2001.

4. N.C. Gen. Stat. § 132-1 (hereinafter G.S.) (emphasis added).

The statute thus specifically covers certain electronic communications and data and establishes the following additional requirements for their storage and access:

- *Database Indexes:* Public bodies must maintain an index identifying the contents of all their databases.
- *Accessible and Reliable Data Storage:* Agencies that acquire data storage systems after June 30, 1996, must determine that the system will not impair the public's right to inspect the records maintained in that system.
- *Inspection Format:* Members of the public are entitled to receive requested documents "in any and all media in which the public agency is capable of providing them," including electronic files.[5] Agencies are not, however, required to put into an electronic medium any document not kept in such format.[6]

Exemptions from the law include student records (under state and federal law) and school personnel files (under G.S. 115C-319). A member of the public may, for example, request copies of e-mail messages stored in an individual employee's computer or in a school system's memory. But when a New Hampshire court reportedly upheld a citizen's right to demand a record of all Internet Web sites accessed by students at two schools over a two-year period, it issued the injunction on condition that the records not disclose individual student identities. A Wisconsin school system sparked controversy when it denied a similar public records request, claiming that it had deleted thousands of e-mail messages received from the public about a contemplated policy on the Pledge of Allegiance. In Tennessee, a newspaper owner investigating whether city employees were abusing their Internet privileges requested copies of all the "cookies" (i.e., computer records showing individual Internet use) contained on their computers.[7]

In another case, the Ohio Supreme Court ruled that prison officials' e-mail messages, which allegedly contained racial slurs and were sent through the prison's e-mail system, were not public records subject to disclosure under the Ohio Public Record Act. The court reasoned that the messages were "never used to conduct the business of the public office " as required by the Ohio law.[8] (The court, however, rejected the prison administration's argument that intra-agency e-mail should never be considered a public record.) It is reasonable to assume that a North Carolina court is likely to rule similarly, because G.S. 132-1 also limits the definition of public records to those "made or received . . . in connection with the transaction of public business."

Open Meetings

In North Carolina the public is entitled by law to observe the official meetings of public bodies like school boards, subject to certain exceptions. The state's open meetings law defines an *official meeting* as any "meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body" to conduct its business. The statute requires a public body to provide advance notice of when it will conduct business through electronic means and must "provide a location and means" by which members of the public may "listen" to the meeting.[9] This provision was written primarily with telephone conference meetings in mind, but it presumably applies to e-mail, "chat rooms," and other electronic forums as well.

Thus when a majority of school board members communicates via e-mail, the communications are presumably subject to the Open Meetings Act, at least if the communications are deemed to occur "simultaneously."[10] School officials should be aware of these requirements and should not use e-mail or other electronic means to circumvent the open meetings law. One South Carolina school board and its superintendent encountered difficulty when they established a private electronic bulletin board to discuss confidential and sensitive school matters. A dispute arose with a local newspaper seeking access to these electronic records under that state's sunshine law.[11]

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5. G.S. 132-6.2.

6. The extent to which an agency must manipulate its electronic data in response to a request to do so remains unclear. *See* David Lawrence, *1997–2004 Supplement to Public Records Law for North Carolina Local Governments* (Chapel Hill: UNC School of Government, 2004), 7, *citing*, *Board of Education of Newark v. New Jersey Dept. of Treasury*, 678 A.2d 660 (N.J. 1996), in which the state supreme court ruled that the agency was required to run a simple "query" in its existing database to produce the data requested by the plaintiff. The court rejected the agency's argument that performing such a query involved creating a new record; instead, because of the ease by which the document could be generated, it was more analogous to "selective copying" from the database.

7. Carl S. Kaplan, "Ruling Says Parents Have Right to See List of Sites Students Visit," *Cyberlaw Journal*, November 2000; "Treat eMail as a Public Record," *eSchool News online*, December 1, 2001, http://www.eschoolnews.com/news/browse.cfm (access to the link requires free registration); Putnam Pit, Inc. et al. v. City of Cookeville, 23 F. Supp. 2d 822 (M.D. Tenn. 1998) (subsequent case history not relevant).

8. State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't, 693 N.E.2d 789, 793 (Ohio 1998) (subsequent case history not relevant).

9. G.S. 143-318.10(d), 318.13(a). For complete information about the North Carolina Open Meetings Act, readers should review the statute and consult other available resources; *see*, *e.g.*, David M. Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers*, 6th ed. (Chapel Hill: UNC School of Government, 2002).

10. *See*, *e.g.*, Wood v. Battle Ground Sch. Dist., 27 P.3d 1208 (Wash App. 2001) (board member e-mail communications concerning termination of the plaintiff and other employees), *citing*, Blackford v. Sch. Bd. of Orange County, 375 So. 2d 578, 580 (Fla. Dist. Ct. App. 1979) (Successive meetings between school superintendent and individual school board members violated sunshine law.); Del Papa v. Bd. of Regents of the Univ. & Cmty. Coll. Sys., 956 P.2d 770, 778 (1998) (Use of serial electronic communication by quorum of public body to deliberate toward or to make a decision violates state open meeting law.).

11. "Private Web Forum Snags School Board," *eSchool News online*, October 1, 2000, http://www.eschoolnews.com/news/browse.cfm (access to the link requires free registration).

Electronic Record Retention

Public records retention laws are a lot like taxes: we prefer to avoid them; they are so complicated that complying with them requires inordinate attention to detail; and, if we procrastinate or fail to comply properly, we fear the consequences.[12] Yet we also recognize that record retention laws serve the public interest by recording the work of government and keeping government officials accountable.

When applied to electronic records, public records laws seem even more complex. Controversies involving school system electronic retention practices confirm the need for caution in order to avoid liability. In Utah, a civil liberties advocate wishing to determine which Internet filtering software best prevented access to sexually explicit Web sites sought access to school Internet logs under the state's public records law. School officials claimed the requested computer records were unavailable because all electronic records were overwritten on a monthly basis. In Madison, Wisconsin, a school official faced possible criminal prosecution following a public records request for over twenty-two thousand e-mail messages related to a controversial school board decision. School officials claimed that a week prior to the request they had deleted most of the e-mail messages to free up computer storage space.[13]

The North Carolina Archives and History Act provides that "electronic data processing records . . . regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business" are public records subject to state records retention requirements.[14] It further directs that "[n]o person may destroy, sell, loan, or otherwise dispose of any public record without the consent of the Department of Cultural Resources."[15]

Consent by the Department of Cultural Resources (DCR) is manifested in the various retention schedules established for state agencies and in special agreements entered into with individual agencies.[16] The primary schedule governing school systems is entitled, "Records Retention and Disposition Schedule: Local Education Agencies" (LEA Schedule).[17]

Several other DCR publications offer interpretive guidelines and/or suggestions regarding electronic records; these and other resources are available on the DCR Web site.[18] Some worth noting are

- "North Carolina Guidelines for Managing Public Records Produced by Information Technology Systems"[19]
- "Electronic Records" Web page[20]
- "E-mail As a Public Record in North Carolina: Guidelines for Its Retention and Disposition."[21]
- "Public Database Indexing Guidelines"[22]
- "Guidelines for Maintaining and Preserving Records of Web-Based Activities" (hereinafter, *Web Guidelines*).[23]
- "North Carolina Dept. of Cultural Resources Policy Regarding the Use of the Internet and the Use and Privacy of Electronic Mail" (hereinafter *DCR Policy*).[24] This document contains a sample agency policy delineating public records and retention principles.

Understanding the Distinctions

The method of government records disposal depends, first, on the record's classification. Understanding classification terminology is thus a first step in thinking clearly about what records may be disposed of and how to do so.

Public vs. Nonpublic Records. The public records law (as summarized above) applies only to documents deemed *public records*. Presumably, paper documents or electronic files created by agency employees that do not pertain to public or official business (e.g., those that are personal or spam e-mail or

12. The author can identify with these feelings. The law poses a test of character for all involved: for the author to sift through, organize, and write intelligibly about the subject matter; for the reader to persevere in understanding it; and for government officials who must comply with it.

13. Rebecca Flowers, "DA Eyes Agency's Failure to Release School Internet Logs: Utah Education Network Faces Sanctions for Overwriting Data It Was Ordered to Disclose," *eSchool News online*, October 1998, http://www.eschoolnews.com/news/browse.cfm (access to the link requires free registration.); "DA Probes School District's eMail Deletion," *id*., October 31, 2001.

14. G.S. 121-2(8). G.S. 132-1 (the public records statute) contains essentially the same definition with two distinctions. First, the relevant clause in 132.1 refers to documents made "pursuant to law or ordinance in connection with the transaction of *public* business by any agency," whereas 121-2(8) refers to documents made pursuant to "law *or* ordinance or in connection with *official* business" (i.e., it includes the italicized conjunction, whereas 132-1 omits it). Second, 132-1 refers to "public" rather than "official" business. It is not clear that these are significant differences.

15. G.S. 121-5(b); *cf.* G.S. 132-3, which refers to "public official" rather than "person."

16. One additional form of consent covers local amendments to regular retention schedules (e.g., adding an on-going record series such as one in use currently and in the foreseeable future or changing the provisions of the LEA schedule to fit local circumstances, particularly in the case of large-scale imaging systems). DCA also provides a form for destroying unscheduled records, primarily those with no value that are not listed on the regular schedule.

17. February 19, 1999, at http://www.ah.dcr.state.nc.us/records/local/schoolschedulefinal.pdf (last visited August 30, 2004). The author has been informed by an official at the North Carolina Department of Cultural Resources (DCR) that this schedule is due to be revised and republished in the spring of 2005.

18. http://www.ncdcr.gov (last visited August 30, 2004).

19. www.ah.dcr.state.nc.us/e-records/manrecrd/manrecrd.htm (last visited August 30, 2004).

20. http://www.ah.dcr.state.nc.us/records/e_records/default.htm (last visited August 30, 2004).

21. http://www.ah.dcr.state.nc.us/records/e_records/Email_8_02.pdf (last visited August 30, 2004).

22. http://www.ah.dcr.state.nc.us/records/e_records/pubdata/default.htm (last visited August 30, 2004).

23. For specific copying and other detailed instructions, consult the *Web Guidelines* themselves, http://ah.dcr.state.nc.us/sections/archives/rec/Website/WebPreservationGuidelines.pdf.

24. DCR, "Policy Regarding the Use of the Internet and the Use and Privacy of Electronic Mail," Sept. 1, 1999 (hereinafter *DCR Policy*), http://web.dcr.state.nc.us/Documents/Policies/EmailPolicy-1Sep99-StateRev1.htm (last visited August 30, 2004).

personal Web page downloads) are not only *not* available to the public but also should not, technically, be subject to retention requirements. DCR publications, however, do not clearly indicate whether or not state retention rules apply to such nonpublic records (even though they may be of an ephemeral value that would ordinarily be promptly discarded).[25] DCR's own internal policy does clearly note that the state *owns* such records.

> ***Electronic mail and World Wide Web pages are State owned and a public record.***
>
> Any information created on equipment owned or operated by the State is State property whether it is public or personal information. . . .
>
> . . . [A]ny information such as electronic mail messages, received World Wide Web pages, and ancillary records created on equipment owned or operated by the State is State property whether or not it meets the definition of a public record. . . . All records that are State property are subject to access by the Department, as well as by authorized State officials in other agencies. . . .
>
> . . . There is no statute or judicial interpretation that grants confidentiality to electronic records such as electronic mail messages or World Wide Web pages created or transmitted on State-owned or State-provided equipment merely because they are personal in nature.[26]

Even if DCR's interpretation is correct—that all nonpublic records created or received on state equipment are owned by and subject to inspection by the state—it is not certain that such records are subject to record retention requirements. Nonetheless, DCR schedules and guidelines do imply that they are.

Value Distinctions: Ephemeral, Short-term, Long-term, and Permanent Value

The schedules and guidelines refer to documents of differing degrees of importance with, therefore, differing retention timelines. Familiarity with some of the basic categories (even though different terms may be used) can help make better sense of the rules, as presented below.

LEA Schedule

Master Files

To the extent that electronic records fall into the same categories as their hard copy counterparts, they are subject to the same general retention requirements unless otherwise directed. As stated in the LEA Schedule, Standard 4, the general requirements apply to "electronic data processing, information processing, and word processing public records, produced by various computer system applications used in the local education agency. . . . [M]aster files may reside on magnetic tapes, magnetic disks, floppy diskettes, or optical disk." Such records may be disposed of as follows:

- Duplicate copies: erase by agency discretion.
- Back-up copies: Back up "all official master files containing public records and store the copy at a secure, protected, off-site location. Public records custodians should update these back-up files periodically by erasing and/or exchanging the tapes or disks, etc., as necessary."[27]

E-mail

DCR's schedules and other guidelines are relatively self-explanatory. The most notable provisions are as follows.

LEA Schedule, Standard 4 (c and d)

- Documents with no further reference value: "erase when reference value ends except those that specifically concern an agency's policies, procedures, directives, regulations, rules, and other information that might provide the public with evidence of the organization, functions, and accomplishments of the agency. Print to hard copy records that fit this description and follow the disposition instructions listed under Standard 1, Administration and Management Records."
- "The erasure or destruction of any other machine readable master file containing public records which is not listed above or by function elsewhere in [the LEA] schedule is not authorized."[28]

Electronic Mail as a Public Record in N.C.

- E-mail of an ephemeral or rapidly diminishing value should be destroyed.
- Check with relevant technology personnel or others who operate computer systems to ensure that such systems process e-mail in accordance with records retention schedules and provide for backups, recovery, physical and electronic security, general integrity, etc.
- Make sure that office filing systems adequately provide for proper classification of electronic files (including e-mail) in the same manner as paper.
- "Retention . . . for longer than provided in a valid records retention and disposition schedule leads to inefficiency and waste and may subject the affected unit to legal vulnerabilities."[29]

25. In an August 28, 2004 e-mail reply to the author's inquiry, one DCR official commented: "We do not include personal records that are stored on or in state equipment on records schedules."

26. *DCR Policy*.

27. DCR, "Records Retention and Disposition Schedule: Local Education Agencies," February 19, 1999 (hereinafter *LEA Schedule*), 20, http://www.ah.dcr.state.nc.us/records/local/schoolschedulefinal.pdf (last visited July 29, 2004).

28. *Id*.

29. DCR, "E-Mail as a Public Record in N.C.," http://www.ah.dcr.state.nc.us/records/e_records/Email_8_02.pdf (last visited July 29, 2004).

Frequently Asked Questions about Electronic Public Records

- E-mail represents a communications medium, not a records series.
- Most e-mail documents are minor administrative records having only brief reference value; destroy within three months of creation.
- E-mail having significant administrative, legal, research, or other value should not be maintained in an active or dynamic e-mail system, but should be transferred to an off-line digital storage medium and appropriately scheduled for retention and disposition. Such transfers permit the purging of records from the active e-mail system at regular intervals while also providing a capability for restoring the records to their original condition, without loss of format or informational content.
- Messages should remain in an e-mail system no longer than one year and preferably no longer than six months.
- Handle e-mail backups separately (from regular system backups) to avoid long e-mail retention periods.[30]

E-mail Retention Checklist[31]

- Examples of e-mail to be filed (as valuable records): those that issue policy, state decisions, outline procedures, show agency action, give guidance, are unique, or have an uncertain status.
- Examples of e-mail to be discarded (as records of ephemeral value): reservations for travel, confirmation of appointments, personal messages, transmission of other documents without comment, or junk mail.[32]

DCR also offers an "Electronic Records Production Control Self-Warranty," a self-evaluation tool "to ensure that electronic records . . . are created, reproduced, and otherwise managed in accordance with guidelines that will enhance their reliability and accuracy."[33]

Web Pages

Applying record retention rules to Web pages, especially continuously changing pages, poses extra challenges to public agencies. For instance, should every version of a school system Web page be copied and preserved for posterity? As long as the Web page is made "in connection with the transaction of public business," it is a public record and so is subject to retention rules.

DCR's "Guidelines for Maintaining and Preserving Records of Web-Based Activities" (*Web Guidelines*) notes that, in the absence of more specific guidelines, the retention rules for hard copy documents generally apply to Web pages (as they do to other electronic documents). Essentially, DCR suggests that agencies preserve Web page "snapshots," as described in the following long excerpt from the *Web Guidelines*.[34]

> **Why Take Website Snapshots?**
> Snapshots capture the look and feel of active agency websites at particular points in time and ensure that DCR, per its charge in the Public Records Act, documents agency use of the Internet over time.
>
> **Frequency of Capture**
> The frequency of website changes and revisions will vary greatly from agency to agency. Some agencies that publish fairly static versions of policies, publications, or images may not see major changes to their website design for months at a time. However, agencies with more advanced services (interactive forms, streaming video, etc.) might undergo major changes a number of times each year. Recognizing those differences, DCR recommends that website snapshots be taken at the time of each major version change to the website (different look, additional features, etc.) or at least every two (2) years, whichever occurs first. For those agencies who have a high litigation risk, we recommend that you audit every change to the site, cite the date that change occurred and whether or not that change was posted as part of the official website. This documents for legal purposes your agency's position at a particular point in time.
>
> **Website Description Form**
> DCR has prepared a standard description form [attached to the Web Guidelines] that permits government agencies to capture, easily, information about the content, format, and technical characteristics of their websites. Submission of this descriptive information, along with copies of all active source files and both electronic and hard copy versions of relevant log files that document the names of files supporting the website, will allow DCR to provide continuing access to and an historical perspective for the provision of government information and services. [Agencies may deem it efficient to capture relevant source files using website capture software. This is an acceptable alternative to identifying and capturing source files manually, as long as the files are saved as ASCII text.]
>
> **What to Include in the Website Snapshot**
> You should include all active documents available to the public that are located on the agency's web server, including

30. "Question 3. How should e-mail records be managed?" http://www.ah.dcr.state.nc.us/records/e_records/e_records_faq.htm (last visited July 29, 2004).

31. http://www.ah.dcr.state.nc.us/records/e_records/Emailchecklist.pdf (last visited August 30, 2004).

32. Some of these examples, such as personal or junk mail messages, probably do not constitute public records, because they are not generated in association with the business of the agency.

33. http://www.ah.dcr.state.nc.us/e-records/manrecrd/manrecrd.htm#AppendixB.

34. http://www.ah.dcr.state.nc.us/records/Website/WebPreservationGuidelines.pdf (last visited August 30, 2004).

copies of agency documents that exist in another form elsewhere, EXCEPT:

1. Databases
2. Files located on a web server external to the agency (e.g., another agency's website).

Presumably, Web pages (especially those not posted by schools but downloaded onto school computers) that are not public records (e.g., pages or files downloaded for personal use) or that are public records of ephemeral value may be deleted once they lose their value to the agency.

Conclusion and Recommendations

Compliance with records retention rules, especially for electronic media, can seem a daunting, messy task; but, as the saying goes, "Somebody's gotta do it." Here are some suggestions.

- Appoint an individual or group of individuals to be responsible for understanding and overseeing electronic records compliance. The school system's technology director should probably be involved in this effort and should perhaps be responsible for compliance.
- Establish systemwide record retention policies and practices.
- Communicate with school personnel and supervise implementation of these policies.
- Have technology staff monitor compliance and remind computer users regularly to conform their electronic file storage and Web page use to the system's retention policies.
- Seek DCR assistance when necessary, especially when setting up a systematic retention policy and practice.[35]

School System Telecommunications: The eRate

A longstanding concern relates to a matter of educational equity: the so-called digital divide arising from disparities in the availability of computer and Internet access for students in economically divergent school systems.[36] In an effort to bridge this divide, Congress passed the Telecommunications Act of 1996, which established the Universal Service Fund for Schools and Libraries, more familiarly known as the "eRate."[37] The fund provides discounts of 20 to 90 percent for telecommunications equipment and Internet connection charges for public and private schools. The Schools and Libraries Division (SLD) of the Universal Service Administrative Company administers the program on behalf of the Federal Communications Commission.

In 2004 the North Carolina legislature, presumably to promote maximum state use of eRate funds, adopted an appropriations bill provision requiring the State Board of Education to identify systems that have not applied for eRate funds and to encourage and assist those systems to apply.[38]

Under the Children's Internet Protection Act (CIPA), school systems that receive eRate discounts for Internet access must certify compliance with various Internet safety practices and policies.[39] In recent years, the eRate program has been the subject of much controversy and several investigations concerning allegations of fraud and exploitation by suppliers. In 2004 new regulations were approved to remedy some of the problems, and eRate disbursements were suspended indefinitely in order to tighten spending rules.[40]

Electronic Reporting, Procurement, and Services

Reporting

To capitalize on the efficiencies afforded by technology, North Carolina schools must comply with an increasing number of requirements for electronic reporting and management (e.g., the state's system for reporting fiscal, personnel, and student data via the Uniform Education Reporting System).[41]

By 2007,under the No Child Left Behind Act (NCLB), public schools will have to use electronic data management systems for decision-making and for submitting NCLB data to the federal government. The U.S. Department of Education plans to offer technical assistance and suggestions regarding, for example, the types of software programs schools should purchase to help track such key data as students' test scores, ethnic background, access to educational technology, and so on.[42]

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35. To receive guidance regarding retention rules for unique electronic media or to obtain approval for exceptions to the regular retention guidelines, contact the Division of Cultural Resources, Government Records Branch at (919) 807-7353.

36. *See, e.g.*, U.S. Department of Education, Office of Educational Technology, at http://www.ed.gov/Technology/digdiv.html (last visited July 29, 2004).

37. Telecommunications Act of 1996, Pub. L. No. 104-104.

38. SL 2004-124 § 7.30.

39. Pub. L. No. 106-554. CIPA's requirements are described in more detail in the second article in this series, "School Cyberlaw, Part II, Cybersafety: Child Protections, Privacy and Confidentiality," *School Law Bulletin* 35 (Winter, 2004): 4–5. Other resources on the eRate and the application requirements include John P. Bailey, "eRate Survival Guide—Round One Round-up: Lessons Learned during the First Application Cycle," *eSchool News online*, December 1998/January 1999, http://www.eschoolnews.com/news/browse.cfm (access to the link requires free registration.) (last visited July 29, 2004). *See also* http://www.sl.universalservice.org (visited July 29, 2004) for new information on eRate.

40. "Scandals Pummel eRate," *eSchool News online*, June 1, 2004; Stephen Labaton, "Internet Grants to Schools Halted As F.C.C. Tightens Rules," *New York Times*, October 4, 2004.

41. *See* G.S. 115C-12(18)b.

42. More information about the U.S. Department of Education's Strategic

Procurement and Services

In 2003 the North Carolina General Assembly passed a law to increase school systems' use of electronic purchasing (E-Procurement).[43] (General requirements for E-Procurement are contained in G.S. 143-48.3.) Among other things, the 2003 law

- authorizes and encourages LEAs to use the state's electronic procurement (E-Procurement) and quote service to solicit informal bids;
- requires establishment of standards for determining when LEAs are E-Procurement compliant and for the Department of Public Instruction's (DPI) E-Procurement certification process;
- establishes deadlines for minimum E-Procurement usage relative to all purchases by LEAs (e.g., *requires* 35 percent and 40 percent usage during the first and second fiscal years following certification, respectively, and *encourages* 50 percent and 70 percent usage in those years); and
- requires all LEAs to be E-Procurement certified by January 1, 2005.

Schools are also permitted, "where competition is available," to utilize the state's E-Quote service of the North Carolina E-Procurement and interactive purchasing systems to solicit and advertise bids for various goods and services.[44] Under North Carolina's Electronic Commerce Act, state agencies must maximize public access to their services and to their electronic transactions as long as it is not "impractical, unreasonable, or not permitted by laws pertaining to privacy or security."[45] For more information, readers can review the statute and rules governing these transactions, especially the state's Uniform Electronic Transactions Act,[46] or consult an attorney with expertise in the field of commercial transactions.

Technology Education and Planning

The state-mandated curriculum and the North Carolina Standard Course of Study require schools to provide students at all levels with basic technology skills; before graduating, all students are required to demonstrate computer proficiency.[47]

Federal law also establishes technology-training requirements. For instance, the NCLB contains extensive provisions for adequate technology training of students and faculty and includes a component entitled the "Enhancing Education through Technology Act of 2001."[48] This act's primary goals are "to improve student achievement through the use of technology in elementary and secondary schools" and to decrease the digital divide: "increasing access to technology resources to . . . ensur[e] that every student is technologically literate by the time the student finishes the eighth grade, regardless of the student's race, ethnicity, gender, family income, geographic location, or disability."[49] Some of the law's objectives are to

- assist states and LEAs in the "implementation and support of a comprehensive system that effectively uses technology in elementary schools and secondary schools";
- "integrate technology effectively into curricula and instruction that are aligned with challenging State academic content and student academic achievement standards";
- support "electronic networks and other innovative methods, such as distance learning"; and
- help "promote parent and family involvement."[50]

Under NCLB, recipients of federal funding must receive approval for their technology plans. In North Carolina the Commission on School Technology provides long-term planning and assessment at the state and local levels. Although it resides in the Department of Public Instruction (DPI), the commission operates independently of DPI control. Its duties are to "prepare a requirements analysis and propose a State school technology plan for improving student performance in the public schools through the use of learning and instructional management technologies."[51] To do so, it assesses schools' current levels of technology resources, establishes instructional goals and standards, and identifies professional development needs.

The commission's technology plan for the state's public schools is reviewed by several government bodies, revised, and submitted to the State Board of Education (State Board) and, for information purposes, the state chief information officer (SCIO).[52] Funds for implementing the plan are held in the state's School Technology Fund.

Each LEA then develops a local technology plan and submits it for review to the DPI and the Office of Information Technology Services (OITS), which is responsible for monitoring and evaluating the state plan to determine the "effects of technology on student learning . . . students' workforce readiness . . . teacher productivity, and the cost-effectiveness of the technology."[53] The State Board must then approve the

Plan is available at http://www.ed.gov/about/reports/strat/plan2002-07/index.html (last visited July 29, 2004).

43. S.L. 2003-147 §10.
44. G.S. 115C-222(a)(1).
45. G.S. 66-58.12.
46. G.S. 66-311 *et seq.*
47. State Board Policy HSP-F-00, NC Standard Course of Study—Computer/Technology Skills K–12 Curriculum.
48. Pub. L. No. 107-110, §§ 2112(b)(5)(B), 2401 *et seq.*
49. *Id.* at § 2402(b)(1), 2402(b)(2)(A).
50. *Id.* at § 2402(a).
51. G.S. 115C-102.6A.
52. G.S. 115C-102.6B.
53. G.S. 115C-102.7

local plan. Once it has done so, state technology funds available to the LEA may be spent to implement its plan.

Another part of the state's implementation of NCLB's technology requirements is the Business and Education Technology Alliance (the Alliance). This advisory group provides curriculum information and direction to LEAs on the types of technology and technology education needed to ensure "that the effective use of technology is built into the North Carolina School System for the purpose of preparing a globally competitive workforce and citizenry for the twenty-first century."[54] The Alliance advises the State Board on (1) creating a "vision for the technologically literate citizen for year 2025" and the means for realizing that vision; (2) establishing a technology infrastructure that provides equitable access to educational technology throughout the state; and (3) providing for the professional development needs of teachers and administrators. The Alliance reports annually to the State Board and the state legislature on its work and recommendations.

Digital Copyright

"The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[55] The ease and speed with which documents can be reproduced and distributed electronically greatly expand schools' legal responsibilities for compliance with copyright requirements. As media reports of entertainment industry lawsuits or threatened lawsuits against individuals and institutions attest, technology users—including those in schools—frequently disregard those requirements by downloading music, movies, and other media from the Internet and from each other. The reasons for this disregard are fairly clear: the ease, speed, and relative anonymity by which materials can be reproduced and stored; the law's real and perceived ambiguity and complexity; and, for individual users, limited enforcement.

Even though the rules can seem complicated, the use of common sense and adherence to a "golden rule" (i.e., treat other peoples' handiwork as you would have them treat your own) will go far to minimize liability for school users. Nevertheless, the following very brief overview of some of the rules, guidelines, and recommendations should help school officials safely navigate this area of law.

The primary law governing copyright is the U.S. Copyright Act of 1976.[56] Generally, copyright holders and their heirs have exclusive rights to copy and distribute (or license others to publish) their protected works for a period of years (normally, the lifetime of the originator plus seventy years). The act provides for civil and criminal penalties against those, including government officials, who violate its requirements.[57]

Because of these rights, school officials, teachers, and students may not copy or distribute someone else's copyrighted materials—including materials obtained or distributed via e-mail or the Internet—unless (1) the material is in the public domain, (2) the author grants permission to do so, or (3) the copying or distribution is permitted by an exception in the copyright law.

Works in the *public domain* include documents whose copyright has expired; it also includes facts, data compilations (e.g., telephone directories), ideas, concepts, theories, words, symbols, and (in the United States) government documents such as laws, legal opinions, and reports.[58] For copyrighted material, obtaining documented permission from the author or publisher is obviously the safest way to avoid copyright liability; there are various tools available for obtaining that permission.[59]

It is not always practical or desirable, however, to expend the effort or pay the cost to get approval for each classroom use of copyrighted materials. The Copyright Act provides two particularly broad and useful exemptions available to educators: the *fair use* exception in Section 107 and an instructional-and-distance learning exemption in Section 110.

Fair Use

The fair use exception in the Copyright Act applies in contexts such as "teaching, scholarship, or research" and involves application of the following four factors to determine whether the exception applies:

- The purpose and character of the use.
- The nature of the copyrighted work.
- The amount and substantiality of the portion used in relation to the work as a whole.
- The effect of the use on the potential market for the copyrighted work.[60]

The fair use doctrine was not, however, developed with electronic technology (like the Internet) in mind. Beginning

54. G.S. 115C-102.15.
55. U.S. Const., Art. 1, § 8.
56. 17 U.S.C.
57. *Id.* at § 511 expressly states that government entities and officials are not immune from liability under the Eleventh Amendment.
58. *See* Pamela Samuelson, "Digital Information, Digital Networks and the Public Domain," Conference on the Public Domain, Duke Law School, November 2001, p. 84, http://www.law.duke.edu/pd/papers/samuelson.pdf (last visited July 26, 2004).
59. There are a number of businesses that serve as clearinghouses for obtaining consent. One example can be found at http://www.copyright.com (last visited July 29, 2004).
60. 17 U.S.C. § 107 (1999).

in 1994, a group of interested persons gathered at the Conference on Fair Use (CONFU) to address the fair use of electronic information.[61] CONFU participants included ninety-three organizations representing publishers, libraries, colleges, universities, authors, artists, the entertainment industry, and others. After more than two years, CONFU established four sets of guidelines, including *Fair Use Guidelines for Educational Multimedia* (*Fair Use Guidelines*). Conference participants, however, did not unanimously endorse any of the guidelines, which were too broad for many copyright owners and too restrictive for some users, including a number of national educational organizations. Nevertheless, the educational multimedia guidelines have been endorsed or are being used on a trial basis by some educational organizations, universities, and school districts.[62]

The advice in *Fair Use Guidelines* is neither legally binding nor universally endorsed.[63] Presumably, school officials who follow it and the answers suggested to frequently asked questions (FAQs) can be reasonably sure of avoiding copyright liability. Because application of fair use is very case-specific and often ambiguous, the safe course, when in doubt, is to seek permission from the copyright owner. Below are some principles of fair use contained in the *Guidelines* (specific sections in parentheses).

Use of Copyrighted Internet Materials to Create Multimedia Presentations

- Students
  - may use portions of lawfully acquired works to prepare educational multimedia projects for their courses. (§ 2.1) Example: a history of jazz project containing biographical excerpts, portions of music or video clips, and photographs.
  - may use their multimedia projects only in the course for which the projects were created. (§ 3.1) Copies may be retained for personal portfolios of academic work.
- Educators ("faculty, teachers, instructors, and others who engage in scholarly research and instructional activities for educational institutions") (§ 1.3)
  - may use portions of lawfully acquired copyrighted works to produce multimedia projects for classroom instruction. (§ 2.2) Example: a project on traditional themes in literature using portions of poems, stories, and video/music clips.
  - may display multimedia projects in classrooms for independent and off-site (remote) study and at conferences or workshops. (§§ 3.2, 3.3)
  - may retain copies of projects in professional portfolios. (§ 3.4)
  - may use a multimedia project for up to two years after the "first instructional use for a class." After the two-year period, permission must be obtained for all copyrighted portions incorporated into the project. (§ 4.1)

Quantity Restrictions

a. Portion Restrictions

- Prose: 1,000 words or up to 10 percent.
- Poetry: Entire poems of fewer than 250 words. No more than three poems by one poet or five poems by different poets may be used in any one project. Up to 250 words of a long poem may be used but no more than three excerpts by a poet or five excerpts of different poets may be used in any one project.
- Video Clip: Up to 10 percent or three minutes, whichever is shorter; the clip may not be altered.
- Photograph or illustration: May be used in its entirety but no more than five images by a single artist or photographer. Up to 10 percent or fifteen images, whichever is less, may be used from an artist's collection.
- Musical composition: Up to 10 percent but no longer than thirty seconds.
- Database: Up to 10 percent or 2,500 fields or cell entries, whichever is less. (§ 4.2)

b. Copy Restrictions

- Up to two copies of a project: one copy on reserve for others to use for instructional purposes; one copy for preservation purposes. (§ 4.3)

c. Permission

- Permission required if a multimedia project is used for commercial purposes, if more copies than the three described above are made, or if the project will be distributed over an electronic network. (§ 5)

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61. Edwin C. Darden, ed., *Legal Issues and Education Technology: A School Leader's Guide* (National School Board Association: Alexandria, Va., 1999). The Working Group on Intellectual Property, a group established by the federal government's National Information Infrastructure Task Force, convened the conference.

62. Educational organizations *not* endorsing the Conference on Fair Use (CONFU) guidelines include the National School Boards Association, the American Association of School Administrators, the American Council on Education, the National Association of Elementary School Principals, the National Association of Secondary School Principals, the National Education Association, and the American Association of State Colleges and Universities.

Groups endorsing these guidelines include the U.S. Copyright Office, the U.S. Patent and Trademark Office, the American Association of Community Colleges, the Educational Testing Service, the American Association for Educational Communications and Technology, the American Society of Composers, Authors and Publishers, and the Creative Incentive Coalition, of which the National Council of Teachers of Mathematics is a member.

63. The CONFU guidelines were adopted (without the force of law) by the Courts and Intellectual Property Subcommittee of the House of Representatives Committee on the Judiciary in 1996.

Acknowledgment of Sources

- Must give proper credit to sources and display any copyright notice and ownership information contained in the original work. Credit information includes the author's name, the title of work, name of publisher, and the place/date of publication.
- Must include—on the opening screen of multimedia presentations and accompanying print materials—a statement that certain materials are included under the fair use exemption of the U. S. Copyright Law, have been prepared according to fair use guidelines for multimedia, and are restricted from further use. (§ 6.2)

Internet Materials Circulated to Staff Members

- Technically speaking, permission must be obtained from the owner. One commentator suggests, however, that authors grant an implied license for others to "read, download, print out, and perhaps forward on a limited basis" materials they post on the Internet.[64] To minimize problems, refer colleagues to the originator's Web site.

Copyright Protection for E-mail

- Technically, all e-mail is copyrighted, and permission from the owner is required to copy or forward the material. Practically speaking, forwarding e-mails to office colleagues is similar to the business practice of photocopying a letter and circulating it.

Incorporating Images and Information from Other Web Pages

- Incorporated materials are normally protected by copyright and require permission. However, *links* to other Web pages may be included in school-related pages without obtaining permission.

General Guidelines for School Systems and Administrators

- Inform students and staff members about basic copyright laws (e.g., post warnings prohibiting unauthorized use of copyrighted material on or near computers, conduct periodic meetings to remind students and staff about copyright issues).
- Develop systemwide copyright and acceptable use policies that outline the terms and conditions of Internet use for staff and students.

Face-to-Face and Distance Instruction

The Copyright Act (§ 7) provides more specific exceptions for in-class instruction and digital distance instruction than it does for fair use. In 1998 Congress required the U.S. Copyright Office to study and recommend changes in the law to facilitate the use of technology to promote distance education. The TEACH Act of 2002, codified as 17 U.S.C. § 110, paved the way for affording distance education many of the same protections as in-person instruction. In abbreviated form (with emphases added), Section 110 permits the following uses:

Face-to-Face (In-class) Instruction

- Works performed or displayed "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction."

Distance Education

- The performance of an entire "nondramatic literary or musical work or reasonable and limited portions of *any other work* . . . or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission," if the performance or display satisfies all four of the following conditions:

  (A) it is made or supervised by an instructor as an integral part of a class;

  (B) it is directly related to and assists with teaching the course content;

  (C) it "is made solely for, and to the extent technologically feasible," limited to reception by

  (i) students officially enrolled in the course; or

  (ii) officers or employees of governmental bodies as a part of their duties; and

  (D) the transmitting institution adopts copyright policies, notifies staff and students of copyright requirements, and seeks to prevent unauthorized retention or dissemination of the work.

These exceptions generally do not apply if—in the case of audiovisual materials—the performance is produced by means of a copy that was not lawfully obtained and if the person responsible for the performance knows, or has reason to believe, that the copy was unlawfully made. Various resources related to the TEACH Act are available.[65]

64. Georgia Harper, *The University of Texas System Crash Course in Copyright*, http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm#top/. (last visited July 29, 2004). *See also* Benedict O' Mahoney, Copyright Website, http://www.benedict.com (last visited) July 29, 2004).

65. A good example is "The TEACH Act Finally Becomes Law," a very helpful and concise summary of the law and a checklist to determine whether all the necessary conditions for relying on the TEACH Act exist in the specific school situation, http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm (last visited: July 29, 2004).

Schools as Internet Service Providers: Liability and Limitations

Because schools' computer networks act as "online service providers" (hereinafter provider[s]), school officials must also guard against liability based on the possibility that materials violating copyright will be transmitted by their networks.

The Online Copyright Infringement Liability Limitation Act (part of the Digital Millennium Copyright Act that amended the Copyright Act) limits the copyright liability of providers in four circumstances.[66]

1. *Transitory communications:* the provider acts as a data conduit, transmitting digital information from one network point to another at the user's request.
2. *System "cacheing":* the provider retains downloaded copies of materials that are later transmitted to users at their request.
3. *Storage of information:* the provider hosts Web sites containing information provided by subscribers.
4. *Information location tools:* the provider, using hyperlinks, online directories, and/or other tools, links users to sites that may contain copyrighted material.

Generally, these limitations apply when

- the material in question is processed or stored by or through an automated system;
- the providers have no knowledge of or control over the material;
- the material (in the case of file storage or cacheing) is not accessible to outsiders; and
- providers act in good faith to remove materials or restrict users when they become aware of a violation. (The law also provides immunity against liability when a provider, in good faith, disables access or removes material believed to infringe a copyright.)

Additional limitations of liability for nonprofit educational institutions acting as service providers pertain to faculty (or graduate students) who engage in research or teaching that infringes a copyright. The limitations apply when: (1) online access to required or recommended course materials containing infringed copyrighted materials has not been provided within the past three years; (2) the institution has not received more than two notifications of the faculty member's infringement over the past three years; and (3) the institution *regularly* notifies users of copyright requirements and promotes compliance with those requirements.[67]

Case Law

A recent case provides an interesting review of fair use jurisprudence in the context of free speech and standardized testing. The Chicago Board of Education filed a copyright infringement suit against one of its teachers and a local newspaper the teacher edited. The newspaper had published, in their entirety, six secure tests the board had created and copyrighted at an alleged cost of over $1 million.[68] The teacher contended that he had had to publish the entire tests to show how bad they were and asserted that doing so was a noninfringing fair use.[69]

Several fair use principles articulated by the court are worth noting.[70]

- "[T]here is no per se rule against copying in the name of fair use an entire copyrighted work if necessary."
- It may be difficult to know where to draw the line of fair use. "The fair use defense defies codification. . . . [T]he four factors that Congress listed when it wrote a fair use defense (a judicial creation) into the Copyright Act in 1976 are not exhaustive and do not constitute an algorithm that enables decisions to be ground out mechanically."
- "[T]he fair use copier must copy no more than is reasonably necessary (not strictly necessary—room must be allowed for judgment, and judges must not police criticism with a heavy hand) to enable him to pursue an aim that the law recognizes as proper, in this case the aim of criticizing the copyrighted work effectively. . . . Copyright should not be a means by which criticism is stifled with the backing of the courts."
- "The burden of proof is on the copier because fair use is an affirmative defense."

The court found that publication of the tests: (1) prevents validation, (2) raises costs because new questions must be written, and (3) potentially diminishes the quality of the tests —all of which diminish the publisher's incentive to create the

66. Digital Millennium Copyright Act, Pub. L. No. 105-304 § 202. 1998 (codified as amended at 17 U.S.C. § 512 [1998]).

67. *Id*. at § 512(e).

68. Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624 (7th Cir. 2003), *cert. denied*, 2004 LEXIS 5620 (U.S. Oct. 4, 2004). A *secure test* is a test subject to careful administration and security to allow questions to be reused; it is not distributed or sold by the publisher. As the court noted, "Reuse of questions in standardized testing is not a sign of laziness but a way of validating a test, since if performance on the same questions is inconsistent from year to year this may indicate that the questions are not well designed and are therefore eliciting random answers." *Id*. at 626.

69. *Id*. at 628–29.The court did not appreciate having to dig deeply into the case record to discern the teacher's justification for publishing the entire tests rather than selected questions. In a sardonic comment, Judge Posner cited the principle in *DeSilva v. DiLeonardi*, 181 F.3d 865, 867 (7th Cir.1999) that "a brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record." *Id*. at 630.

70. *Id*. at 628–29.

tests. [71] The following lengthy excerpt of the court's opinion vividly summarizes its analysis:

> It is not a privilege to criticize just bad works, and there is no right to copy copyrighted works promiscuously merely upon a showing that they are bad.
>
> There is more than a suspicion that Schmidt [the teacher] simply does not like standardized tests. That is his right. But he does not have the right, as he believes he does . . . to destroy the tests by publishing them indiscriminately, any more than a person who dislikes Michelangelo's statue of David has a right to take a sledgehammer to it. From the amicus curiae briefs filed in this case, moreover, it is apparent that many other teachers share Schmidt's unfavorable opinion of standardized tests. (A cynic might say that this is because such tests can make teachers look bad if their students don't do well on them.) So if Schmidt can publish six tests, other dissenters can each publish six other tests, and in no time all 44 will be published. The board will never be able to use the same question twice, and after a few years of Schmidtian tactics there will be such difficulty in inventing new questions without restructuring the curriculum that the board will have to abandon standardized testing. Which is Schmidt's goal.
>
> If ever a "floodgates" argument had persuasive force, therefore, it is in this case. And this suggests another fair use factor that supports the school board: the aspect of academic freedom that consists of the autonomy of educational institutions . . . including their authority here gravely threatened to employ standardized tests in support of their conception of their educational mission. If Schmidt wins this case, it is goodbye to standardized tests in the Chicago public school system; Schmidt, his allies, and the federal courts will have wrested control of educational policy from the Chicago public school authorities.[72]

Affirming the lower court ruling in favor of the board, the appellate court concluded that publication of the six tests was not fair use. Regarding the corresponding injunction issued by the lower court, however, the court of appeals reversed what it labeled an "appallingly bad" and overbroad injunction, requiring it to be more narrowly crafted.[73]

Another case illustrates well the serious financial consequences of copyright infringement for schools.[74] In *New Forum Publishers, Inc. v. National Organization for Children, Inc.* a publisher of middle and high school curricular software sued a Pennsylvania charter school and its management consultants for allowing students to download the plaintiff's materials without having paid for them.[75] The charter school was eventually dismissed from the suit, leaving only the management company and its officers as defendants. The court awarded the plaintiff more than $100,000, including over $30,000 in actual damages (the cost of the software multiplied by the number of students in the charter school) and more than $75,000 in attorney fees and costs.

In *CoStar Group, Inc. v. Loopnet, Inc.*, the Fourth Circuit Court of Appeals (which has jurisdiction over North Carolina), ruled that Loopnet, an Internet service provider (ISP), was not directly liable for the posting of copyrighted real estate photos on its Web site without its knowledge or consent.[76] CoStar, a national provider of commercial real estate information, sued for infringement of the copyrighted photos posted by a Loopnet user. The court ruled that the Copyright Act does not require knowledge of infringement or willful violation of copyright, but it does require "conduct." Because Loopnet was "passively storing material for users in order to make that material available to other users on request," it was not engaging in conduct. The court concluded that because Loopnet simply owned and operated the Web site and did not itself copy the photos, it was not liable for direct copyright infringement. The "automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render an ISP strictly liable for copyright infringement." The court noted that if there were a showing of "additional involvement sufficient to establish a contributory or vicarious violation of the [Copyright] Act," an ISP could become indirectly liable.[77]

Acceptable Use Policies

It appears that most school systems have adopted acceptable use policies (AUPs). An effectively written and enforced policy reduces the legal risks associated with technology use in schools. In the event that a lawsuit is filed against a school, the existence of such a policy, if it is well publicized and implemented, can demonstrate a good faith effort to minimize the risk of harm to users.

Although many schools' AUPs govern only student use, school officials should also consider applying them to employee use. Giving employees at least some guidelines could minimize future legal challenges. For example, a school system that disciplines a teacher for online gambling during

71. *Id.* at 627.
72. *Id.* at 630–31 (citations omitted).
73. *Id.* at 632.
74. The case also demonstrates the importance of taking litigation seriously. The defendants initially failed to respond to the lawsuit complaint, then retained several incompetent or disreputable attorneys (the first of whom withdrew because of disbarment proceedings for criminal conduct), and, finally, tried to represent themselves without counsel.
75. 2003 U.S. Dist. LEXIS 11702 (E.D.Pa., June 30, 2003).
76. *CoStar*, 373 F.3d 544 (4th Cir. Jun. 21, 2004).
77. *Id.* at 555.

school hours might encounter difficulty enforcing the discipline if it dismisses the teacher without a clearly established policy prohibiting such misuse.

One set of student policies failed for that reason in a case decided by a Pennsylvania federal district court. A provision of the policies required students to "express ideas and opinions in a respectful manner so as not to offend or slander others." Another prohibited the "use of computers to receive, create or send abusive, obscene, or inappropriate material and/or messages."[78] A student had been punished for posting several messages on a Web site message board regarding an upcoming volleyball game against a rival school. The messages contained profanity and disparaging remarks about students on the rival team. The court upheld the student's motion for summary judgment, finding that the policy provisions in question were too general and did not require school officials to determine whether the messages constituted a threat of substantial disruption before enforcing the provisions.[79] The court also noted that speech that offends may still be protected by the First Amendment.[80]

Most systems require students (and, sometimes, students' parents) to sign a consent form acknowledging that they have read, understood, and agreed to abide by the school's AUP. School officials must then decide what to do with students who fail to submit the form. (They might, for example, still be required to use computer resources for necessary classroom assignments but be prohibited from using the school's computers for any extracurricular purpose.) As the Internet becomes more fully integrated into the curriculum, it will be increasingly difficult to deny Internet access to students because of the academic impact of doing so.

General principles for effective AUPs include the following:

- The AUP should succinctly explain the purposes, benefits, risks, and proper uses of school-provided technology resources.
- The AUP should be flexible enough to adapt to changing technologies and circumstances but also sufficiently clear and specific to withstand a legal challenge based on overbreadth or vagueness.
- To avoid promulgating unnecessary and cumbersome policies, school officials should create succinct AUPs that refer to (or incorporate) other policies where appropriate.
- School officials should provide students and employees with regular reminders and training to ensure that the AUP is well understood and implemented.
- Schools should institute a regular (e.g., annual) review and update of their AUPs to keep pace with new needs, technologies, and laws.
- School officials developing an AUP can consult some of the many resources and sample policies available.[81]

Conclusion

Wading through some of these rather "technical" technology rules provides school officials with a taste of the complexity and difficulty of the tasks facing them. This article ends as it began, with the reminder that people, not computers, run our schools. Those administrators who strive to understand and comply with these laws will be better equipped to exercise the discernment necessary to make technology the servant rather than the master of their schools. ■

78. Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d, 698, 701 (W.D. Pa. 2003).

79. The "substantial disruption" standard was first established in the landmark case, *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969).

80. *Flaherty*, 247 F. Supp. 2d at 705.

81. For a bibliography of resources, see Edwin C. Darden, ed., *Legal Issues and Education Technology: A School Leader's Guide* (Alexandria, Va.: National School Boards Association, 1999), 18–21. *See also* Virginia Department of Education, *Acceptable Use Policies: A Handbook*, at http://www.pen.k12.va.us/VDOE/Technology/AUP/home.shtml (last visited July 29, 2004).