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Facebook Phobia! the Misguided Proliferation of Restrictive Social Networking Policies for School Employees

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FACEBOOK PHOBIA! THE MISGUIDED PROLIFERATION OF RESTRICTIVE SOCIAL NETWORKING POLICIES FOR SCHOOL EMPLOYEES

*Janet R. Decker**

ABSTRACT

Employers have dismissed and disciplined teachers and other school employees for posting controversial material and engaging in inappropriate employee-student relationships over social networking. In response, schools have enacted policies that greatly restrict educators' social networking. This Article examines whether restrictive social networking policies are necessary. After analyzing the relevant state legislation, statewide guidance, district policies, and case law, this Article argues that restrictive policies are unwarranted and misguided. School districts have prevailed in the vast majority of the cases because they already have the legal authority to discipline employees under existing law. This Article also recommends how policymakers and school leaders could respond to school employees' social networking more effectively.

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INTRODUCTION

A special education teacher in Florida posted on Facebook that he was “super horny” and “an A++ in bed.”¹ Another Florida teacher’s Facebook post read, “I’m fairly convinced that one of my students may be the evolutionary link between orangutans and humans.”² In New Jersey, a teacher posted that homosexuality was a “sin” that “breeds like cancer.”³ With controversial posts like these attracting public scrutiny, it is no surprise that legislators and school leaders are actively creating policies to restrict school employees’ use of social networking.⁴ A Missouri law, dubbed the “Facebook Law,” restricted educators

¹ Stephanie Horvath & Kathy Bushouse, *Teachers Get Tough Lesson: Go Private on Facebook Pages*, SUN

SENTINEL (June 1, 2008), http://articles.sun-sentinel.com/2008-06-01/news/0805310363_1_teacher-s-certification-facebook-page.

² Meena Hart Duerson, *Mother Furious Her Son’s Teacher Slammed Him on Facebook, Called Him ‘Evolutionary Link Between Orangutans and Humans,’* DAILY NEWS (July 3, 2012, 10:24 AM), http://articles.nydailynews.com/2012-07-03/news/32527402_1_social-media-teacher-orangutan.

³ Viki Knox, *Union Township New Jersey Teacher, Investigated for Alleged Anti-Gay Facebook Posts*, HUFFINGTON POST (Dec. 13, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/10/13/viki-knox-union-township-_n_1009582.html; Nancy Soloman, *Friendly Advice for Teachers: Beware of Facebook*, NPR (Dec. 7, 2011, 4:52 PM), <http://www.npr.org/2011/12/07/143264921/friendly-advice-for-teachers-beware-of-facebook> (describing the controversy that ensued after Knox made anti-gay Facebook posts).

⁴ Throughout this Article, the term “employees” will be used most often; however, sometimes, the term “educator” or “teacher” will also be used. The rationale for using multiple terms is to emphasize that the issue of social networking affects *all* school employees whether they are staff, teachers, or administrators. Thus, these terms are not intended to limit the group of school employees that are at issue. Additionally, the term “social networking” will be defined broadly to include websites that allow users to create their own webpage or profile and link with others, such

from using social networking sites that allowed them to communicate privately with students.⁵ In 2011, however, a Missouri trial court found possible freedom of speech violations, and the law was later repealed.⁶

Missouri's failed Facebook Law sparked national debate concerning the rights of school employees with regard to online speech. Nonetheless, policymakers and administrators continue to advocate for and enact similar restrictive policies.⁷ Proponents of these policies believe they are necessary to regulate employees' undesirable online activity.⁸ In addition to concerns over controversial employee posts, many believe that social networking promotes inappropriate, and often secret, relationships between teachers and students.⁹

Yet opponents argue that punishing and prohibiting employees' use of social networking reaches too far and may even violate employees' constitutional rights to free expression and privacy.¹⁰ Those against restrictive policies contend that the focus should be on regulating the conduct rather than the mode of communication.¹¹ Opponents agree that school districts should be free to discipline employees for conduct that negatively impacts teaching effectiveness. However, opponents do not believe modes of communication alone—such as e-mailing, texting, or social networking—deserve to be the target of regulation. They argue that, rather than imposing stricter limits, the existing restrictions should be lifted. They contend that current laws should better align with modern technology and culture.¹²

Those challenging restrictive policies cite examples in which schools have disciplined employees for cyber behavior that is seemingly harmless. For

as Facebook (www.facebook.com), Twitter (www.twitter.com), MySpace (www.myspace.com), Pinterest (www.pinterest.com), LinkedIn (www.linkedin.com), and Instagram (www.instagram.com), as well as weblogs ("blogs") and websites that have a social networking component to them, such as YouTube (www.youtube.com).

⁵ Amy Hestir Student Protection Act, 2011 Mo. Laws 1162 (providing in relevant part, "No teacher shall establish, maintain, or use a nonwork-related Internet site which allows exclusive access with a current or former student."), *repealed by* Act of Oct. 21, 2011.

⁶ *See id.*; Mo. State Teachers Ass'n v. State, No. 11AC-CC000553, 2011 WL 4425537 (Mo. Cir. Aug. 24, 2011) (amended order granting preliminary injunction).

⁷ *See infra* Section III.

⁸ *See e.g.*, Jennifer Preston, *Rules to Stop Pupil and Teacher From Getting Too Social Online*, N.Y. TIMES (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/business/media/rules-to-limit-how-teachers-and-students-interact-online.html>.

⁹ *See, e.g., id.*

¹⁰ *See, e.g.*, Emily H. Fulmer, Note, *Privacy Expectations and Protections for Teachers in the Internet Age*, 9 DUKE L. & TECH. REV. 14, 32-61 (2010); Rachel A. Miller, Note, *Teacher Facebook Speech: Protected or Not?*, 2011 BYU EDUC. & L.J. 637, 638 (2011).

¹¹ *See, e.g.*, Mary-Rose Papandrea, *Social Media, Public School Teachers, and The First Amendment*, 90 N.C.L. REV. 1597, 1602 (2012).

¹² *See, e.g.*, Fulmer, *supra* note 10, at 65.

example, Georgia teacher Ashley Payne claimed she was forced to resign after the district received an anonymous complaint that her Facebook page included vacation pictures showing her holding a glass of wine and a mug of beer, including a post explaining that she was going to play “Crazy Bitch Bingo.”¹³ Payne claimed that nothing on her Facebook page was immoral or illegal. Further, she reasoned that she had taken special precautions by ensuring her page was private and by not “friending”¹⁴ any students.¹⁵

When faced with situations that range from mildly unprofessional conduct to serious sexual misconduct, it is no easy task to determine how schools ought to react to employees’ social networking. Administrators and policymakers are confronted with the difficult responsibility of balancing protecting school employees’ constitutional rights, safeguarding the image of teachers as role models, and preventing inappropriate employee-student relationships.

This Article offers guidance to those faced with this challenging balancing act. Specifically, it explains why restrictive employee social networking policies should not be adopted. To provide necessary background for this issue, Section II describes the two main reasons schools have enacted restrictive policies. Then, examples of restrictive social networking policies found in state legislation, statewide guidance, and district policies are summarized in Section III. In order to examine whether restrictive policies are necessary, Section IV analyzes twenty-six relevant cases. Based on the review of the case law, Section V recommends that schools adopt permissive social networking policies because existing law already addresses the concerns driving the enactment of restrictive policies. Section VI concludes by explaining why the emphasis on social networking is misguided. Instead, the focus should be on preventing sexual abuse of students and educating employees about the limits to their online activity that already exist under state and federal law.

¹³ Maureen Downey, *Court Rules Against Ashley Payne in Facebook Case. But More to Come*, GET SCHOOLED BLOG (Oct. 10, 2011, 7:36 PM), <http://blogs.ajc.com/get-schooled-blog/2011/10/10/court-rules-against-ashley-payne-in-facebook-case>.

¹⁴ “Friending” is the act of requesting access to another person’s online social presence. The act of requesting that someone be a “friend” is a way to indicate that two people share a connection on Facebook. This actualization of a real-world connection is done by sending a friend request. See William Lozito, *Facebook Linguistics: Changing the Definition of Friend/Unfriend*, NAME WIRE (Jan. 30, 2009, 8:07 AM),

http://www.namedevelopment.com/blog/archives/2009/01/facebook_lingui.html.

¹⁵ See Fulmer, *supra* note 10, at 53–54; see also *infra* Section IV(B)(2).

I. MOTIVES BEHIND RESTRICTIVE SOCIAL NETWORKING POLICIES

Schools throughout the country have proposed restrictive policies to address two main objectives – prohibition of inappropriate student-employee relationships and prevention of controversial employee online speech and behavior. The increased use of social media by school employees has led to increased anxiety surrounding these two issues, which is exacerbated by the prolific media coverage of employee infractions.

A. *Inappropriate Employee-Student Relationships*

The first concern for administrators and policymakers is that inappropriate employee-student relationships can be more easily formed online, due to the advent of e-mail, texting, and social networking sites, such as Facebook. Journalists all over the country have published accounts of teachers' sexual misconduct enabled by social networking or texting.¹⁶ For example, a 2012 *New York Times* article described a number of cases of teachers engaging in sexual misconduct with their students.¹⁷ The article described a California band teacher who pled guilty to sexual misconduct after sending more than 1,200 Facebook private messages to a student,¹⁸ and an Illinois teacher who was found guilty of sexual abuse and assault after sending over 700 text messages to a student.¹⁹ In another article, Vicki Chamberlain, the director of Oregon's Teacher Standards and Practices Commission, discussed a dramatic increase in the number of

¹⁶ See, e.g., Britni Nicole Colleps, *Texas Teacher, Found Guilty After Group Sex with 5 Students*, HUFFINGTON POST (Oct. 17, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/08/17/texas-teacher-convicted-a_0_n_1799799.html; Hannan Adely, Marlene Nannes, & Matthew Malysa, *Outbreak of Teacher Sexual Misconduct Cases*, RECORD (May 10, 2012, 6:44 AM), <http://www.standard.net/stories/2012/05/10/outbreak-teacher-sexual-misconduct-cases>; *16 New York Teachers Accused of Sexual Misconduct Still Teaching, City Struggles to Fire Them*, HUFFINGTON POST (June 6, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/04/06/16-new-york-teacher-accus_n_1409184.html; *Stephanie Cobb, Ex-Teacher, Accused of Having Sex with Student, Exchanging 12,000 Texts*, HUFFINGTON POST (Mar. 3, 2012, 12:32 AM), http://www.huffingtonpost.com/2012/03/02/stephanie-cobb-teacher-sex-with-student_n_1317240.html; Kelly K. Miller, *Aurora High School Teacher, Charged with Sexting Student*, HUFFINGTON POST (Nov. 28, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/09/28/kelly-k-miller-aurora-high_n_985813.html; *Police: Husband Killed Wife's Student Lover*, WND (Mar. 16, 2007, 10:20 PM), <http://www.wnd.com/2007/03/40665/>; Rosalind Rossi, *CPS Teacher Held on \$250,000 Bond in Sexual Assault of Student*, CHI. SUN TIMES (July 9, 2012, 6:13 AM), <http://www.suntimes.com/news/crime/13034719-418/cps-teacher-charged-with-sexual-assault-of-student.html>.

¹⁷ Preston, *supra* note 8.

¹⁸ *Id.*

¹⁹ *Id.*

complaints of teachers sexually abusing students.²⁰ She explained, “Now (teachers) can hide behind e-mail, they can hide behind social media and texting and make contacts when they're not in the immediate presence of the (student). Twenty years ago, a lot of this happened face-to-face and a lot of those opportunities weren't that frequent.”²¹

Much of the recent media attention is likely originally spurred by an *Associated Press* investigation on teacher sexual abuse that was publicized nationally in 2007.²² After reviewing disciplinary records from forty-nine states and the District of Columbia from 2001-2005,²³ the journalists found over 2,500 cases of sexual misconduct committed by public and private school employees. Approximately 1,800 of the victims were children and teenagers, and 80% of those victims were students.²⁴ To make matters worse, heightened attention has been given to the importance of transparency and accountability of the sexual abuse of students as a result of the Penn State scandal, where university administrators allegedly covered up sexual abuse perpetrated by Penn State's former assistant football coach Jerry Sandusky.²⁵

B. Controversial Employee Online Activity

The second purpose behind many restrictive social networking policies is to prevent employees from sharing controversial opinions and pictures online. The Internet has blurred the already tenuous line between school employees' professional and private lives. As a result, schools struggle to determine when they should, or legally can, regulate employees' online speech and conduct.²⁶

²⁰ Anna Canzano, *Reports of Teacher Sexual Misconduct on the Rise*, KATU.COM (June 29, 2012, 10:43 AM), <http://www.katu.com/news/specialreports/Reports-of-teacher-sexual-misconduct-on-the-rise-students-Oregon-151370805.html>.

²¹ *Id.*

²² Martha Irvine & Robert Tanner, *Sexual Misconduct Plagues US Schools*, WASH. POST (Oct. 21, 2007, 7:18 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/21/AR2007102100144.html>.

²³ *Id.* (Maine provided no disciplinary information because a Maine statute keeps offending teachers' cases secret.).

²⁴ *Id.*

²⁵ Caroline Cornish, *Sandusky Case Increases Awareness of Child Abuse Signs, Reporting Requirements*, WCHS6.COM (Oct. 9, 2012, 5:01 PM), <http://www.wcsh6.com/news/local/story.aspx?storyid=218162>.

²⁶ Schools are clearly struggling with regulation given the radically different policies and outcomes. See, e.g., Amy W. Estrada, Note, *Saving Face From Facebook: Arriving at a Compromise Between Schools' Concerns with Teacher Social Networking and Teachers' First Amendment Rights*, 32 T. JEFFERSON L. REV. 283 (2010); Fulmer, *supra* note 10; Ralph D. Mawdsley & Allan Osborne, *Teachers as Role Models: Limitation on Their Use of Social Networking*, 276 ED. L. REP. 570 (2012); Patricia M. Nidiffer, *Tinkering with Restrictions on*

Additionally, questions exist about how to delineate when private actions become part of the public domain of the Internet. The heightened interest in policing employees' outside-of-school behavior correlates with the increase in high-profile stories of educators posting inappropriate or provocative statements or pictures online. A *Washington Post* article titled *When Young Teachers Go Wild on the Web* describes the online behavior of teachers as "overtly sarcastic or unintentionally unprofessional—or both."²⁷ The article offered convincing examples, including a teacher posting a picture of talking sperm and another who said teaching in the district had taught her not to "smoke crack while pregnant."²⁸ While some of the public disgust that results from such examples seems justified, one critic has described the public focus on teachers' Internet behavior as "hysteria."²⁹ The *Washington Post* article stated that since most of the teachers featured in the article were in their twenties, they were "behaving, for the most part, like young adults."³⁰ There is no clear consensus as to whether, and under what circumstances, administrators should discipline employees for controversial or unprofessional online activities.

Yet, it is clear that school districts are reacting. Numerous employees have been fired or disciplined for their posts on social networks, and their stories have garnered national attention. A North Carolina news station simply searched for people who identified themselves as employees of the Charlotte-Mecklenburg School District on Facebook and published what it found.³¹ One teacher wrote that she was teaching "chitlins" in the "most ghetto school in Charlotte," and another said, "I hate my students."³² The television news program uncovered enough controversial posts that the district's employee relations division recommended firing two employees and disciplining five others for their online behaviors.³³ In another story that placed a school district into the national spotlight, an anonymous caller informed a local newspaper of a teacher that had

Educator Speech: Can School Boards Restrict What Educators Say on Social Networking Sites?, 36 U. DAYTON L. REV. 115 (2011); Papandrea, *supra* note 11; Miller, *supra* note 10, at 638.

²⁷ Ian Shapira, *When Young Teachers Go Wild on the Web*, WASH. POST (Apr. 28, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/27/AR2008042702213.html>.

²⁸ *Id.*

²⁹ Kristin D. Shotwell, *Secretly Falling in Love: America's Love Affair with Controlling the Hearts and Minds of Public School Teachers*, 39 J.L. & EDUC. 37, 71 (2010).

³⁰ Shapira, *supra* note 27.

³¹ Ann Doss Helms, *5 Teachers Disciplined for Facebook Postings*, CHARLOTTEOBSERVER.COM (Nov. 12, 2008), <http://www.charlotteobserver.com/2008/11/12/v-print/320138/5-teachers-disciplined-for-facebook.html>.

³² Mario Roldan, *Another CMS Teacher Faces Termination over Facebook Post*, WCNC.COM (Nov. 1, 2009, 6:06 PM), <http://www.wcnc.com/news/local/68701507.html>.

³³ *Id.*

posted pictures of her student's work and criticized the student's grammar on Facebook.³⁴

Teachers are not the only school employees gaining notoriety for their social media behaviors. Dr. June Talvitie-Siple resigned from her position supervising a high school's Science, Technology, Engineering, and Mathematics (STEM) Department after the superintendent discovered her posts referencing students as "germ bags" and their parents as "arrogant" and "snobby."³⁵ Similarly, a Connecticut superintendent was forced to resign after he discussed a confidential personnel issue on Facebook.³⁶ The school board felt the superintendent's credibility was damaged after he posted comments such as the following: "[M]y first day on-site involved counseling an administrator to retire or face termination. :)"³⁷

Not only do stories such as those described above attract undesired negative attention to schools, they also have the potential to result in unwanted litigation. For example, a mother in Illinois sued a school district after a teacher posted a picture of her seven-year-old daughter on Facebook and encouraged her friends to mock the young girl's hairstyle.³⁸ It is more common, however, for employees to file lawsuits appealing disciplinary actions taken against them, often claiming that the district violated their constitutional rights.³⁹

At times, districts have found that media attention actually made it more difficult to discipline school employees. In Florida, a high school teacher was suspended after he posted that he "almost threw up" after watching a news story

³⁴ Amanda Memrick, *Teacher Suspended After Posting Student's Work on Facebook*, GASTON GAZETTE (Sept. 14, 2012, 10:02 AM), <http://www.gastongazette.com/news/teacher-suspended-after-posting-student-s-work-on-facebook-1.7900>.

³⁵ Nancy White, *Cohasset School Official Resigns over 'Snobby and Arrogant' Comments on Facebook*, PATRIOT LEDGER (Aug. 18, 2010, 6:13 PM), <http://www.patriotledger.com/topstories/x1104157578/Cohasset-school-administrator-resigns-over-snobby-and-arrogant-comments-on-Facebook>.

³⁶ Allison Manning, *Educators Advised to be Cautious on Facebook Profiles*, EDUC. WK. 8 (Sept. 29, 2010).

³⁷ Shawn R. Beals, *Windsor Locks Superintendent Resigns as Part of Settlement*, HARTFORD COURANT (Sept. 15, 2010), http://articles.courant.com/2010-09-15/news/hc-windsor-locks-teleca-0916-20100915_1_facebook-posts-facebook-messages-chairwoman-patricia-king.

³⁸ See Cheryl Burton, *Teacher Allegedly Mocks Student on Facebook*, ABC7CHICAGO.COM (Mar. 31, 2011, 4:39 AM), <http://abclocal.go.com/wls/story?section=news/local&id=8044485>; see also Martha Neil, *Mom Sues Schools, Says Teacher Posted Her Daughter's Photo on Facebook, Publicly Mocked Hairstyle*, ABAJOURNAL (Apr. 6, 2011, 12:03 AM), http://www.abajournal.com/news/article/mom_sues_school_says_teacher_posted_her_daughters_photo/.

³⁹ See, e.g., *Rubino v. City of New York*, 34 Misc.3d 1220(A), 2012 WL 373101, at *1 (N.Y. Sup. Ct. Feb. 1, 2012) (appealing a school district's disciplinary action against a teacher in response to her controversial Facebook post).

about same-sex unions.⁴⁰ However, after receiving national news coverage, the conservative Liberty Counsel represented the teacher, the American Civil Liberties Union (ACLU) supported him, and the teacher was reinstated.⁴¹ The teacher has continued to vocal about his beliefs, stating, “I teach God’s truth ... [I] try to teach and lead my students as if Lake Co. Schools had hired Jesus Christ himself.”⁴²

Considering the serious problem of employee sexual misconduct and the embarrassing issue of controversial employee cyber behavior, one can understand why legislators and administrators would be motivated to create social networking policies. However, the question remains: whether *restrictive* policies that limit employees’ use of social media are necessary to resolve the problems those policies were designed to address.

II. RESTRICTIVE SOCIAL NETWORKING POLICIES

With the growing popularity of the Internet, many lawmakers and school leaders continue to question whether teachers and other school employees should be forbidden from friending and communicating with students on social networking sites like Facebook. While no federal legislation on the subject exists, many versions of state legislation, state guidance, and district policies have been proposed, enacted, criticized, and even rejected altogether.

A. State Legislation

Some states have enacted permissive legislation requiring every district to adopt a policy on social networking; however, only two states have enacted restrictive legislation that specifically limits school employees’ use of social networking statewide.⁴³ In 2009, Louisiana became the first state to pass such a

⁴⁰ Jerry Buell, *Florida High School Teacher, Suspended for Anti-Gay Facebook Posts*, HUFFINGTON POST (Oct. 19, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/08/19/jerry-buell-florida-high-_n_931941.html.

⁴¹ Erica Rodriguez & Martin E. Comas, *Lake Reinstates Teacher after Facebook Comments about Gays*, ORLANDO SENTINEL (Aug. 24, 2011), http://articles.orlandosentinel.com/2011-08-24/features/os-jerry-buell-gay-facebook-end-20110824_1_anti-gay-comments-reinstates-social-studies.

⁴² *Id.*

⁴³ Katie Ash, *Policies Target Teacher-Student Cyber Talk*, EDUC. WK. (Nov. 4, 2009), available at http://www.edweek.org/ew/articles/2009/11/04/10communication_ep.h29.html. Utah provides guidance to educators regarding which practices they should adopt. See generally Jean Hill, *Social Networking & Texting for Educators*, UTAH ST. OFF. OF EDUC. (2010), available at <http://www.schools.utah.gov/sars/DOCS/disability/socialnwork.aspx>.

restrictive law.⁴⁴ While it has been criticized,⁴⁵ the Louisiana law still stands.⁴⁶ In 2011, the Missouri General Assembly and Governor Jay Nixon also approved legislation that regulated Missouri school employees' use of social networking; however, the restrictive provisions were repealed before the law went into effect.⁴⁷

The Louisiana law requires districts to develop policies prohibiting teacher-student social networking occurring on unapproved networks.⁴⁸ In other words, teachers and students cannot communicate through electronic means other than through school-provided structures, such as school e-mail and school-sponsored websites. As one reporter wrote, the law "essentially makes Facebook contact with students illegal."⁴⁹ Unless the school board has expressly provided an exception for employee-student contact to occur between "immediate family member[s]," the law requires all electronic employee-student communication to be related to "educational services."⁵⁰ Essentially, the law is designed to discourage employees from using personal electronic devices or social networking sites to communicate with students.⁵¹ Specifically, the statute states:

[A]ll electronic communication by an employee at a school to a student enrolled at that school relative to the educational services provided to the student shall use a means provided by or otherwise made available by the school system for this purpose and prohibit the use of all such system means to electronically communicate with a student for a purpose not related to such educational services except communication with an immediate family member if such communication is specifically authorized by school board policy.⁵²

⁴⁴ Ash, *supra* note 43.

⁴⁵ *Id.*

⁴⁶ La. Rev. Stat. Ann. § 17.81(Q)(2)(a)–(j) (2009).

⁴⁷ Press Release, Mo. Governor Jay Nixon, Gov. Nixon to Ask General Assembly to Repeal Provision of SB 54 on Teacher-Student Communication (Aug. 26, 2011), *available at* http://governor.mo.gov/newsroom/2011/Gov_Nixon_to_ask_General_Assembly_to_repeal_provision_of_SB_54_on_teacher_student_communication.

⁴⁸ Rev. Stat. Ann. § 17.81(Q)(2)(a)–(j) (2009).

⁴⁹ Bob Sullivan, *Teachers, Students and Facebook, a Toxic Mix*, REDTAPE CHRON. BLOG (Oct. 22, 2010, 7:00 AM), http://redtape.nbcnews.com/_news/2010/10/22/6345537-teachers-students-and-facebook-a-toxic-mix?lite.

⁵⁰ La. Rev. Stat. Ann. § 17.81(Q)(2)(b).

⁵¹ See Ash, *supra* note 43; see also Lynsey Stewart, *Why Can't We Be "Friends"? Student-Teacher Relationships in the Facebook Age*, 17 PUB. INT. L. REP. 22, 23 (2011).

⁵² La. Rev. Stat. Ann. § 17.81(Q)(2)(b).

As a result of the legislation, Louisiana school districts were required to change their employee policies and practices.⁵³ Employees must now report any electronic communication using non-school-provided means⁵⁴ and can be fired for failing to comply.⁵⁵ Governor Bobby Jindal explained that the law does not prohibit the use of electronic devices, but rather, simply requires a “system of documentation.”⁵⁶ Yet, the law stipulates that electronic communication is defined to include many modes of communication including text messages and social networking.⁵⁷ The Governor defended the law by stating, “[t]his new law is an important step to help protect our children from abusive and plainly inappropriate communications from educators.”⁵⁸ Similarly, protecting children was the purpose behind another Louisiana law passed in 2012, which targeted sexual offenders rather than teachers.⁵⁹ Both of the Louisiana laws restricting educators’ and sexual offenders’ use of social networking still stand today.

Missouri was the second state to approve statewide regulations restricting school employees’ use of social networking. Missouri’s law was dubbed the “Facebook Law,”⁶⁰ but the portion targeting social networking was only one section of the entire bill that was formally known as the “Amy Hestir Student Protection Act.”⁶¹ Amy Hestir was raped by her junior high school teacher in

⁵³ See, e.g., Sandra Barbier, *St. Charles School Board OK's Electronic Communications Policy for Teachers, Students*, NOLA.COM (Oct. 7, 2009, 10:58 PM), http://www.nola.com/education/index.ssf/2009/10/st_charles_school_board_oks_el.html; Sandra Barbier, *St. John Schools to Weigh Electronic Communication Policy Mandate*, NOLA.COM (Oct. 1, 2009, 5:00 AM), http://www.nola.com/education/index.ssf/2009/10/post_6.html; Kia Hall Hayes, *Electronic Communications Policy Endorsed for St. Tammany Schools*, NOLA.COM (Oct. 2, 2009, 5:30 AM), http://www.nola.com/education/index.ssf/2009/10/electronic_communications_poli.html.

⁵⁴ La. Rev. Stat. Ann. § 17.81(Q)(2)(c).

⁵⁵ *Id.* at § 17.81(Q)(2)(c)-(d).

⁵⁶ See Ash, *supra* note 43.

⁵⁷ La. Rev. Stat. Ann. § 17.81(Q)(2)(a).

⁵⁸ Sullivan, *supra* note 49.

⁵⁹ See *Revised La. Facebook Ban for Sex Offenders Passed*, FIRST AMENDMENT CENTER (May 16, 2012), <http://www.firstamendmentcenter.org/revised-la-facebook-ban-for-sex-offenders-passed> (explaining that a federal court found a similar Louisiana law unconstitutionally overbroad). Federal courts have also ruled similar sexual offender social networking laws as unconstitutional in Indiana and Nebraska. See Charles Wilson, *Facebook Sex Offenders Ban Ruled Unconstitutional by Indiana Court*, HUFFINGTON POST (Jan. 23, 2013, 4:17 PM), http://www.huffingtonpost.com/2013/01/23/facebook-sex-offenders_n_2536097.html.

⁶⁰ Katherine Bindley & Timothy Stenovec, *Missouri 'Facebook Law' Limits Teacher-Student Interactions Online, Draws Criticism and Praise*, HUFFINGTON POST (Oct. 3, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law_n_916716.html.

⁶¹ 2011 Mo. Laws 1162.

1980. Despite a police investigation, the teacher was never criminally charged.⁶² In response, the Missouri legislature passed a law with the primary aim of responding to sexual abuse of students by teachers.⁶³ Missouri was also motivated to address this issue after a 2007 *Associated Press* report⁶⁴ found that eighty-seven Missouri teachers had lost their licenses between 2001 and 2005 due to “sexual misconduct,” including inappropriate contact with students over the Internet.⁶⁵ Many educators supported the portion of the law that required school districts to disclose situations where teachers had abused students.⁶⁶

However, many Missouri educators were vehemently opposed to § 160.069 of the law, which stated, “No teacher shall establish, maintain, or use a non-work-related Internet site which allows exclusive access with a current or former student.”⁶⁷ The Missouri State Teachers Association (MSTA) filed a lawsuit to prevent this portion of the law from going into effect.⁶⁸ Specifically, MSTA argued that the law is “so vague and overbroad that the Plaintiffs cannot know with confidence what conduct is permitted and what is prohibited and thereby ‘chills’ the exercise of First Amendment rights”⁶⁹ MSTA contended that § 160.069 violated the free exercise and association rights of teachers who were also youth leaders at churches and would no longer be able to use social networks to communicate with students.⁷⁰ Pursuant to the Due Process Clause of the Fourteenth Amendment, MSTA argued that § 160.069 violated the liberty rights of teachers who were also parents of children because it infringed upon their “freedom of personal choice in family matters.”⁷¹ Additionally, MSTA argued the law violated the Equal Protection Clause of the Fourteenth Amendment because it

⁶² Conor Friedersdorf, *Let Teachers and Students Be Facebook Friends*, ATLANTIC (Aug. 9, 2011, 10:40 AM), <http://www.theatlantic.com/national/archive/2011/08/let-teachers-and-students-be-facebook-friends/243324/#>.

⁶³ See Bindley & Stenovec, *supra* note 60.

⁶⁴ Irvine & Tanner, *supra* note 22; see also Alan Scher Zagier, *Missouri Teachers Protest Facebook Ban, Argue Limits Education and Dialogue*, HUFFINGTON POST (Oct. 5, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/08/05/missouri-teachers-protest_n_919282.html.

⁶⁵ *Id.*

⁶⁶ See Eyder Peralta, *Missouri Outlaws Student-Teacher Facebook Friendship*, NPR (Aug. 2, 2011, 3:28 PM), <http://www.npr.org/blogs/thetwo-way/2011/08/03/138932276/missouri-outlaws-student-teacher-facebook-friendship>.

⁶⁷ 2011 Mo. Laws 946.

⁶⁸ Petition for Injunctive and Declaratory Judgment at 3, *Missouri State Teachers Ass’n v. State of Missouri*, No. 11AC-CC00553 (Cir. Ct. of Mo., Cole County 2011).

⁶⁹ *Id.*

⁷⁰ *Id.* at 4.

⁷¹ *Id.* at 5.

prohibited teachers from using commonly-used electronic means of communication, but did not impose those same restrictions on sexual predators.⁷²

Two days prior to the law going into effect, on August 26, 2011, the Circuit Court of Cole County, Missouri held that § 160.069 of the law would have a “chilling effect” in violation of teachers’ First Amendment rights.⁷³ The Court stated that “the breadth of the prohibition is staggering.”⁷⁴ It reasoned that social networking is used “extensively” by educators and may be the sole or primary form of communication with their students.⁷⁵ As written, the Missouri law would prohibit parents who are teachers from communicating with their children over social networks.⁷⁶ Because the statute would have a chilling effect on a fundamental right and would cause immediate and irreparable harm, the Court issued a preliminary injunction that prevented § 160.069 from being enforced.⁷⁷ On August 26, 2011, Missouri Governor Jay Nixon asked the General Assembly to repeal the provision about teacher-student social media communication stating, “In a digital world, we must recognize that social media can be an important tool for teaching and learning.”⁷⁸ The relevant provisions were repealed, but in response, a new law requiring districts to implement social media policies was enacted.⁷⁹ Thus, the onus to create constitutionally sound policy shifted from the state legislature to potentially less-equipped administrators.⁸⁰ Allowing local school leaders to develop policy that is individualized for their districts may sound appealing; however, without proper guidance, many are likely to create unconstitutional policies. Missouri State Representative Jay Barnes cautioned, “What I’m afraid that we’re doing is we’re taking one big unconstitutional law and we’re telling 529 different school districts to act to adopt a policy We just trade one big unconstitutional ball of wax for 529 little balls of wax.”⁸¹

⁷² *Id.* at 6.

⁷³ Missouri State Teachers Ass’n v. State of Missouri, No. 11AC-CC0053 (Cir. Ct. of Mo., Cole County 2011).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 3.

⁷⁸ Press Release, Mo. Governor Jay Nixon, *supra* note 47.

⁷⁹ Stewart, *supra* note 51, at 24.

⁸⁰ See David A. Lieb, *Missouri Repeals Law Restricting Teacher-Student Internet and Facebook Interaction*, HUFFINGTON POST (Oct. 21, 2011, 6:06 PM), http://www.huffingtonpost.com/2011/10/21/missouri-repeals-law-rest_n_1025761.html (discussing the program director of the American Civil Liberties Union of Eastern Missouri’s criticism that the new legislation simply “pass[ed] the buck” and did not solve the real issue of creating constitutional policy).

⁸¹ Jason Rosenbaum, *Missouri House Approves Fix in the State ‘Facebook Law’*, ST. LOUIS BEACON (Sept. 23, 2011, 9:58 AM),

B. Statewide Guidance

Unlike Missouri and Louisiana, most states have not enacted legislation that restricts school employees' use of social networking.⁸² Instead, many state organizations and departments of education have issued guidance and model policies.⁸³ Because guidance does not have the same authority as legislation, it offers districts greater flexibility. For instance, what a community considers inappropriate may vary depending on whether the school is located in an urban or rural area.⁸⁴ Nonetheless, many districts in Massachusetts, Mississippi, Texas, Arkansas, Virginia, and Washington have simply adopted restrictive policies that mirror the state guidance.

In 2010, the Massachusetts Association of School Committees (MASC) created a Model Policy for "Facebook and Social Networking Sites" that stated, "teachers may not list current students as 'friends' on social networking sites"; "[a]ll e-contacts with students should be through the district's computer and telephone system, except [in] emergency situations"; and "[t]eachers will not give out their private cell phone or home phone numbers without prior approval of the district."⁸⁵ The Model Policy stated that periodic Internet searches would be conducted and when teachers were found to be in violation of the policy, it could result in dismissal "for failure to exercise good judgment in on-line conduct."⁸⁶ In 2012, two years after the policy was proposed, the director of MASC reported that some Massachusetts districts had adopted it as written and other districts had modified it to suit their needs.⁸⁷

Restrictive policies may also appear as part of ethical guidelines issued by state departments of education. For example, the Mississippi Board of Education adopted a revised Educator Code of Ethics and Standards of Conduct in 2011 that lists "electronic communication such as texting" and "invitation to social

https://www.stlbeacon.org#!/content/15177/missouri_house_approves_fix_in_the_state_facebook_law.

⁸² *Contra* Estrada, *supra* note 26 (advocating that other states adopt legislation that attempts to remedy some of the issues that were inherent in Missouri's Facebook law).

⁸³ *See, e.g.*, VIRGINIA BOARD OF EDUCATION, FINAL REVIEW OF PROPOSED GUIDELINES FOR THE PREVENTION OF SEXUAL MISCONDUCT AND ABUSE IN VIRGINIA PUBLIC SCHOOLS (2011), available at http://www.doe.virginia.gov/boe/meetings/2011/03_mar/agenda_items/item_h.pdf; Mississippi Educator Code of Ethics and Standards of Conduct (revised Jan. 20, 2011), available at http://www.jackson.k12.ms.us/teachers/mde_educator_ethics_conduct.pdf.

⁸⁴ *See* Manning, *supra* note 36, at 8.

⁸⁵ VIRGINIA BOARD OF EDUCATION, *supra* note 83, at 3.

⁸⁶ *Id.*

⁸⁷ *Editorial: Friend or Foe?*, DAILY HAMPSHIRE GAZETTE (July 24, 2012), <http://www.gazettenet.com/2012/07/24/friend-or-foe?SESS64321d3e00312637231fb946081f7483=gnews>.

networking” alongside “rape” as examples of what may constitute “unethical conduct.”⁸⁸ The Texas Educators Code of Ethics clarifies that to be prohibited, the type of electronic communication must be “inappropriate.”⁸⁹ It states, “[t]he educator shall refrain from inappropriate communication with a student or minor, including, but not limited to, electronic communication such as cell phone, text messaging, e-mail, instant messaging, blogging, or other social network communication.”⁹⁰

A statewide policy written for Arkansas teachers was not part of the state’s Code of Ethics; however, the Arkansas Professional Licensure Standards Board stated that the “cautionary guidelines” were intended to help educators use social networking in a manner that was “consistent with the spirit and intent of the *Code of Ethics for Arkansas Educators*.”⁹¹ The guidelines recommended that educators use school-issued social networking and instructed that they do so only during school hours.⁹²

The Virginia State Board of Education attempted to adopt a restrictive policy with guidelines for preventing sexual misconduct and abuse. Initially, the proposed policy banned texting and social networking between school employees and students.⁹³ However, during the public comment period, the board received mostly critical responses to the proposed policy.⁹⁴ Therefore, the board adopted revised guidelines that were more permissive, instructing local districts to collaborate with parents to develop policies and practices that “deter misconduct by...defining parameters for electronic communications and social networking between educators and students...”⁹⁵

In Washington, multiple districts have adopted a single restrictive policy that was provided by the National School Board Association’s Council of Attorneys.⁹⁶ The policy states that unprofessional conduct includes “[m]aintaining

⁸⁸ MISSISSIPPI BOARD OF EDUCATION, *supra* note 83.

⁸⁹ 19 TEX. ADMIN. CODE § 7-247.2(3)(I) (2010), *available at* [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=19&pt=7&ch=247&rl=2](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=19&pt=7&ch=247&rl=2).

⁹⁰ *Id.*

⁹¹ VIRGINIA BOARD OF EDUCATION, *supra* note 83, at app. C at 13.

⁹² *Id.*

⁹³ *See, e.g., id.* at app. A at 1.

⁹⁴ *Id.* at app. A. In the development of Virginia’s Guidelines, the Board of Education reviewed policies from Texas, Massachusetts, Mississippi, Louisiana, Arkansas, and the National School Boards Association’s Council of Attorneys. *See id.* at app. C.

⁹⁵ VIRGINIA BOARD OF EDUCATION, GUIDELINES FOR THE PREVENTION OF SEXUAL MISCONDUCT AND ABUSE IN VIRGINIA PUBLIC SCHOOLS (2011), *available at* http://www.doe.virginia.gov/boe/guidance/safety/prevent_sexual_misconductabuse.pdf.

⁹⁶ *See, e.g.,* MERIDIAN SCHOOL DISTRICT, MAINTAINING PROFESSIONAL STAFF/STUDENT BOUNDARIES, BOARD PROCEDURE 5253 (2010), *available at*

personal contact with a student outside of school by phone, e-mail, Instant Messenger or Internet chat rooms, social networking Web sites, or letters (beyond homework or other legitimate school business) without including the parent/guardian.”⁹⁷ Also, “social networking with students for non-educational purposes” is listed as an activity that creates an “appearance of an impropriety.”⁹⁸ According to the policy, these activities should be avoided, pre-approved by an administrator, or reported to an administrator if they do occur.⁹⁹

C. District Policies

A variety of individual school districts have also adopted restrictive social networking policies. In Ohio’s Dayton Public School District, teachers are forbidden from friending students on Facebook or “respond[ing] to student-initiated attempts at conversation through nondistrict approved media, whether personal or professional accounts.”¹⁰⁰ The district’s policy is in response to the Ohio School Board Association’s recommendation that districts prohibit “[f]raternalization between district staff and students via the Internet, personal e-mail accounts, personal social networking websites and other modes of virtual technology...”¹⁰¹

After explaining that “the lines between professional and personal endeavors are sometimes blurred,”¹⁰² the New York City Department of Education (NYCDOE) released social media guidelines that stated that employees should not communicate with students on “personal social media” sites, like

<http://www.meridian.wednet.edu/board/Policies%20and%20Procedures/5000%20-%20Personnel/Procedures/Procedure%205253%20Maintaining%20Professional%20Boundaries.pdf>; TACOMA PUBLIC SCHOOL DISTRICT, MAINTAINING PROFESSIONAL STAFF/STUDENT BOUNDARIES, REGULATION 5243R (2011), *available at* <http://www.tacoma.k12.wa.us/information/schoolboard/Policy%20Manual/5243R.pdf>; Yelm Community Schools, Maintaining Professional Staff/Student Boundaries, Policy 5253, *available at* <http://www.ycs.wednet.edu/Page/26>.

⁹⁷ VIRGINIA BOARD OF EDUCATION, *supra* note 83, at app. C at ll. Districts in Washington appear to be adopting NSBA’s model policy almost verbatim.

⁹⁸ *Id.* at app. C at 12.

⁹⁹ *Id.* The policy also requires training to occur for new staff within three months of employment and current employees once every three years.

¹⁰⁰ Margo Rutledge Kissell, *Local Teachers Banned from ‘Friending’ Students on Facebook*, DAYTON DAILY NEWS (Aug. 31, 2011, 8:09 AM), <http://www.daytondailynews.com/news/news/local/local-teachers-banned-from-friending-students-on-f/nMtkR/>.

¹⁰¹ *Id.*

¹⁰² NYC Department of Education Social Media Guidelines at 1 (Spring 2013), *available at* <http://schools.nyc.gov/NR/ronlyres/BCF47CED-604B-4FDD-B752-DC2D81504478/0/DOESocialMediaGuidelines20120430.pdf>.

Facebook or Twitter,¹⁰³ but could create pages on “professional social media” for educational purposes.¹⁰⁴ However, employees must obtain supervisor permission and parents must offer written permission before their children can participate in classroom social networking pages.¹⁰⁵ The NYCDOE policy has been criticized for being overly broad and creating an unrealistic burden on administrators.¹⁰⁶ According to a NYCDOE spokesperson, the policy does not address cell phone and text message usage because banning phone communication could prevent a student in distress from being helped by a teacher.¹⁰⁷ However, policies in some districts, such as Paramus, New Jersey, do prohibit teachers from giving students their cell phone numbers or calling students without prior parental authorization.¹⁰⁸

Other district policies extend beyond student-teacher communication. The Pascagoula Mississippi School District’s policy not only states that “[f]raternalization via the Internet between employees (faculty or staff) and students is prohibited” but also addresses communication between two employees, as well as between teachers and parents.¹⁰⁹ It requires that any “official” communication from “Teacher to Parent, Teacher to Student, [or] Staff to Staff” must occur via the school’s e-mail system.¹¹⁰

Elsewhere, restrictive district policies have been proposed, but quickly criticized. In May 2012, a proposed policy in Manchester, Connecticut was attacked for stating that employees must “use appropriately respectful speech”¹¹¹ and “use caution” when mentioning school employees.¹¹² Claiming that the policy was overly broad and vague, the ACLU of Connecticut requested that the board

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2, 4 (distinguishing that there are two exceptions for contact on personal social networks for contact: 1) between relatives and 2) in emergency situations).

¹⁰⁵ *Id.* at 2-3.

¹⁰⁶ David W. Chen & Patrick McGeehan, *Social Media Rules Limit New York Student-Teacher Contact*, N.Y. TIMES (May 1, 2012), http://www.nytimes.com/2012/05/02/nyregion/social-media-rules-for-nyc-school-staff-limits-contact-with-students.html?pagewanted=all&_moc.semityn.www.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Pascagoula School District, *Acceptable Use Procedures: Use of Social Networking Media at 14* (Sept. 2012), *available at* <http://curriculum.psd.ms/aup/AUP2007ALL.htm>.

¹¹⁰ *Id.* at 11.

¹¹¹ Jesse Leavenworth, *ACLU Says Proposed Manchester Social Media Policy Violates Free Speech*, HARTFORD COURANT (May 24, 2012), http://articles.courant.com/2012-05-25/community/hc-manchester-school-social-media-0525-20120525_1_social-media-school-board-school-rules-and-regulations.

¹¹² Letter from David McGuire, Staff Att’y, ACLU of Conn., to Chris Pattacini, Chair of the Manchester Bd. of Educ. (May 25, 2012), *available at* <http://www.acluct.org/downloads/manboe052512.pdf>.

reject the proposed policy.¹¹³ The board tabled the vote until the district's attorney collaborated with the ACLU to draft a new constitutionally-compliant policy, which was later approved.¹¹⁴

In South Dakota, the Rapid City Area School District proposed a policy that would ban employees from friending students unless they are relatives, and would require coaches and other school employees to either send group texts and e-mails or copy their supervisor on non-group communication with students.¹¹⁵ However, employees complained that they would no longer be able to perform daily functions with efficiency.¹¹⁶ For instance, one internship supervisor who monitors sixty students often used text messaging to answer quick questions while her students were at their internship placements.¹¹⁷ In light of the criticism, the policy was sent back to the school attorney for revision.¹¹⁸

III. CASES INVOLVING SCHOOL EMPLOYEE ONLINE ACTIVITY

To determine whether restrictive policies are needed, cases involving the online speech and behavior of pre-kindergarten–12 school employees must be analyzed. If the cases show that no legal doctrine exists to address the problems of inappropriate employee-student relationships and controversial employee social networking, then restrictive policies may be necessary.¹¹⁹ Additionally, if the cases demonstrate that courts are sympathetic to employees who challenge their discipline for controversial cyber speech and behavior, restrictive policies may be needed.¹²⁰ However, if the case law demonstrates that adequate law exists and courts favor school districts, a conclusion may be drawn that restrictive policies are unnecessary.

¹¹³ Leavenworth, *supra* note 111.

¹¹⁴ Manchester Board of Education Meeting Minutes at 9 (Oct. 22, 2012), *available at* <http://boe.townofmanchester.org/minutes/minutes102212.pdf>.

¹¹⁵ Lynn Taylor Rick, *School District Revamping Technology Policy*, RAPID CITY J. (Feb. 20, 2012, 5:30 AM), http://rapidcityjournal.com/news/school-district-revamping-technology-policy/article_4a02cb34-5b5c-11e1-8cb4-001871e3ce6c.html.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See* MARTHA M. MCCARTHY, NELDA H. CAMBRON-MCCABE, & SUZANNE E. ECKES, *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 6 (7th ed. 2013) (explaining that courts usually defer to school board decisions unless they act in contradiction to existing law).

¹²⁰ *See id.* at 3 (discussing that the legislature may amend laws if it disagrees with courts' interpretation of the law).

This area of litigation has rarely been examined. The relevant legal analysis thus far, has only focused on a portion of the relevant cases.¹²¹ Many legal scholars have devoted their analysis on how the general public employee-speech precedent applies or should apply to social networking, which is a relevant and important inquiry.¹²² However, an analysis of the comprehensive body of cases that specifically involve pre-kindergarten–12 school employees' online activity has yet to be completed. Since the cases involving school employee online behavior are relatively new and are often settled outside of court, evaluating case law on this topic has limitations.¹²³ However, a rather comprehensive body of litigation exists that deserves analysis. In an effort to fill the gap in the existing literature, the following discussion examines twenty-six cases,¹²⁴ involving pre-

¹²¹ See generally Kathleen Conn, *Regulating Teacher Speech Online: School Officials' Prerogative or First Amendment Violation*, 289 EDUC. L. REP. 455 (2013) (discussing eight online employee cases); Giulia M. diMarzo, *Why Can't We Be Friends? The Banning of Teacher-Student Communication via Social Media and the Freedom of Speech*, 62 AM. U. L. REV. 123 (2012) (discussing two online employee cases); Mawdsley & Osborne, *supra* note 26 (discussing two online employee cases); Papandrea, *supra* note 11 (discussing two online employee cases); Miller, *supra* note 10, at 638 (discussing two current events involving teachers' Facebook usage that later became lawsuits); Nidiffer, *supra* note 26 (discussing three online employee cases); Fulmer, *supra* note 10, at 32-62 (discussing four online employee cases).

¹²² See, e.g., Estrada, *supra* note 26; Nidiffer, *supra* note 26; Papandrea, *supra* note 11. These legal scholars analyze the prevailing precedents surrounding public employee speech including the following cases: *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988); *Connick v. Meyers*, 461 U.S. 138 (1983); *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), and *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). It is relevant and vital to realize, however, that most of these cases involve plaintiffs who are not school employees—*Garcetti*, *Connick*, *Tinker*, and *Hazelwood* for example—and none of them involve public-employee Internet speech. Thus, this Article's analysis, which includes case law from pre-kindergarten-12 school employee-plaintiffs who have been disciplined for cyber-speech and behavior, fills a gap in the existing literature.

¹²³ Miller, *supra* note 10, at 654. However, Miller does not provide support for his conclusion that most cases settle outside of court.

¹²⁴ *Zellner v. Herrick*, 639 F.3d 371 (7th Cir. 2011); *Richerson v. Beckon*, 337 F. App'x. 637 (9th Cir. 2009); *U.S. v. Postma*, 275 F. App'x 865 (11th Cir. 2008); *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008); *U.S. v. Bailey*, 377 F. Supp. 2d 268 (D. Me. 2005); *Munroe v. Central Bucks Sch. Dist.*, No. 02:12-CV-3546(CMR), 2012 WL 3624078 (E. D. Pa. Aug. 6, 2012); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140 (E. D. Pa. Dec. 3, 2008); *Zellner v. Cedarburg Sch. Dist.*, 731 N.W.2d 240 (Wis. 2007); *San Diego Unified Sch. Dist. v. Comm'n on Prof'l Competence*, 124 Cal. Rptr. 3d 320 (Cal. Ct. App. 2011); *Placanica v. State*, 693 S.E.2d 571 (Ga. Ct. App. 2010); *State v. Romer*, 821 N.W.2d 778 (Iowa App. 2012); *Wax v. Horne*, 844 So. 2d 797 (Fla. Dist. Ct. App. 2003); *Coughlin v. Arlington Pub. Sch.*, No. 12-P-240, 2013 WL 1975662 (Mass. App. Ct. May 15, 2013); *Commonwealth v. Maccini*, 22 Mass.L.Rptr. 393 (Mass. Super. Ct. 2007); *Land v. L'Anse Creuse Pub. Sch. Bd. of Educ.*, No. 288612, 2010 WL 2135356 (Mich. Ct. App. May 27, 2010); *In re O'Brien*, No. 108-5/11, 2013 WL 132508

kindergarten–12 school employees as litigants.¹²⁵ The purpose of reviewing the cases is to identify whether restrictive policies are needed. Therefore, cases have been categorized in a manner that parallels the motives for creating restrictive policies. The first category features six cases involving inappropriate employee-student relationships and the second category highlights twenty cases in which controversial employee cyber speech and behavior were at issue.

A. *Inappropriate Employee-Student Relationship Cases*

It may come as no surprise that courts have upheld the discipline of teachers who have used the Internet as a means to form sexual relationships with students. At the same time, however, courts have also upheld dismissals and license revocations of teachers who have not formed sexual relationships, but communicated with students in an unprofessional manner.

To begin, a review of the relevant published cases uncovered three cases where teachers were convicted of sex crimes after using the Internet to engage in illegal sexual contact with students. In 2007, a Wisconsin appellate court found a high school teacher could be criminally culpable after the teacher sent sexually explicit messages to a student in an Internet chat room.¹²⁶ In 2010, a Georgia appellate court upheld a criminal stalking conviction of a forty-year-old science teacher.¹²⁷ The teacher had entered into a sexual relationship with a sixteen-year-old former student after instant messaging her on the Internet.¹²⁸ In 2012, an Iowa appellate court upheld the conviction of a former substitute teacher who used MySpace to communicate with minors and was charged with sexual exploitation by a school employee.¹²⁹ The court was unsympathetic to the defendant's argument that he did not have a current teacher-student relationship with one of his victims.¹³⁰

(N.J. Super. Ct. App. Div. Jan. 11, 2013); *In re* Tenure Hearing of Donahue, 2008 WL 553029 (N.J. Super. Ct. App. Div. Mar. 3, 2008); *Rubino v. City of New York*, 965 N.Y.S.2d 47 (App. Div. 2013); *Bd. of Educ. of N.Y. v. Hershkowitz*, 308 A.D.2d 334 (N.Y. App. Div. 2002); *Stueber v. Gallagher*, 812 So. 2d 454 (Fla. Dist. Ct. App. 2002); *State v. Ebersold*, 742 N.W.2d 876 (Wis. Ct. App. 2007); *Alderman v. Pocahontas Cnty. Bd. of Educ.*, 675 S.E.2d 907 (W. Va. 2009). Information about the remaining four cases involving Payne, Murmer, D'Amico, and Hoover was obtained via secondary sources.

¹²⁵ Only public school employee cases are reviewed; however, private school employee cases also exist. *See, e.g.*, *Savoie v. Lawrenceville Sch.*, No. L-2215-03, 2013 WL 1492859 (N.J. Super. Ct. App. Div. Apr. 12, 2013).

¹²⁶ *Ebersold*, 742 N.W.2d at 877.

¹²⁷ *Placanica*, 693 S.E.2d at 572.

¹²⁸ *Id.*

¹²⁹ *Romer*, 821 N.W.2d at 778.

¹³⁰ *Id.*

In addition to criminal convictions, courts have upheld three dismissals of teachers who inappropriately communicated with students over the Internet. For instance, even after a district violated a collective bargaining agreement that required a union representative to be present at disciplinary investigations, a New York appellate court upheld the district's decision to dismiss a tenured teacher who admitted he had sexually explicit online conversations with a student.¹³¹ The court reasoned, "public policy precludes applying the procedural requirements of a labor agreement...."¹³²

Similarly, a federal district court in Connecticut held that school administrators had not violated a high school English teacher's constitutional rights when they fired him after discovering his MySpace profile.¹³³ After receiving student complaints about Jeffrey Spanierman's MySpace profile, a guidance counselor told the teacher that his profile was inappropriate.¹³⁴ Specifically, the counselor was concerned that Spanierman was interacting like a peer with the students and had included pictures of naked men on his profile.¹³⁵ After the conversation, Spanierman deactivated the profile and created a new, virtually identical profile under another name.¹³⁶ When his new profile was discovered, the district investigated the matter and eventually informed Spanierman, a non-tenured teacher, that his contract would not be renewed for the following year.¹³⁷ In his 42 U.S.C. § 1983¹³⁸ deprivation-of-rights claim against the district, Spanierman argued that his equal protection, substantive due process, and procedural due process rights under the Fourteenth Amendment, as well as his free speech and association rights under the First Amendment, were violated.¹³⁹ The court held that Spanierman did not have a protected property interest as a non-tenured teacher; he had not adequately compared himself to a similarly situated teacher; and he failed to show a connection between protected speech or association rights and adverse employment action.¹⁴⁰ The court did not state that having a MySpace profile was inherently disruptive, but instead found that the teacher's unprofessional rapport, as illustrated by posts about "'getting any' (presumably sex)" and "a threat made to a student (albeit a facetious one)

¹³¹ Bd. of Educ. of N.Y. v. Hershkowitz, 308 A.D.2d 334 (N.Y. App. Div. 2002).

¹³² *Id.* at 336.

¹³³ Spanierman v. Hughes, 576 F. Supp. 2d 292, 304 (D. Conn. 2008).

¹³⁴ *Id.* at 298.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 299, 301.

¹³⁸ Plaintiffs use §1983 to allege constitutional violations and/or violations of federal statutes by persons acting "under color" of state law. 42 U.S.C. § 1983 (2012).

¹³⁹ *Spanierman*, 576 F. Supp. 2d at 299.

¹⁴⁰ *Id.* at 300-31

about detention,” warranted his dismissal.¹⁴¹ The court stated, “the Plaintiff would communicate with students as if he were their peer, not their teacher. Such conduct could very well disrupt the learning atmosphere of a school, which sufficiently outweighs the value of Plaintiff’s MySpace speech.”¹⁴²

In another case where a teacher was communicating with students in an unprofessional manner, a Florida appellate court upheld the permanent revocation of her teaching certificate after she e-mailed her students sexually suggestive jokes laced with profanity.¹⁴³ While the teacher argued that she should only be suspended, the Florida Education Practices Commission revoked her license for soliciting students for their e-mail addresses to send the jokes and failing to recognize her actions were inappropriate.¹⁴⁴ In sum, courts have not favored teachers in situations where they use the Internet as a platform for forming inappropriate relationships with students, even when there is no evidence that the relationship was an illegal sexual relationship.

B. *Controversial Employee Online Activity Cases*

A review of case law involving school employees’ online activity indicates that even when the online conduct does not involve students directly, courts have almost unanimously upheld school-employee criminal convictions, dismissals, and other forms of discipline.

1. Employee Controversial Online Activity Involving Students

Although there are numerous media accounts of districts disciplining teachers for referencing students in online posts,¹⁴⁵ only three cases appear in case law.¹⁴⁶ In the first case, first-grade teacher Jennifer O’Brien was dismissed after posting two statements on Facebook.¹⁴⁷ In one post, she stated, “I’m not a teacher—I’m a warden for future criminals!”¹⁴⁸ As a result, many parents

¹⁴¹ *Id.* at 312.

¹⁴² *Id.* at 313.

¹⁴³ *Wax v. Horne*, 844 So. 2d 797, 798 (Fla. Dist. Ct. App. 2003).

¹⁴⁴ *Id.*

¹⁴⁵ See Meena Hart Duerson, *Mother Furious Her Son’s Teacher Slammed Him on Facebook, Called Him ‘Evolutionary Link Between Orangutans and Humans,’* N.Y. DAILY NEWS (July 3, 2012, 10:24 AM), <http://www.nydailynews.com/news/national/mother-furious-son-teacher-slammed-facebook-called-evolutionary-link-orangutans-humans-article-1.1106921>; Shapira, *supra* note 27; Soloman, *supra* note 3; Roldan, *supra* note 32.

¹⁴⁶ *In re O’Brien*, No. 108-5/11, 2013 WL 132508, at *1 (N.J. Super. Ct. App. Div. Jan. 11, 2013); *Rubino v. City of New York*, 965 N.Y.S.2d 47 (App. Div. 2013); *Munroe v. Central Bucks Sch. Dist.*, No. 02:12-CV-3546 (CMR), 2012 WL 3624078 (E. D. Pa. Aug. 6, 2012).

¹⁴⁷ *In re O’Brien*, 2013 WL 132508, at *1.

¹⁴⁸ *Id.*

complained, approximately twenty-five parents protested outside of the school, and one parent threatened to remove her child from the school.¹⁴⁹ The district charged O'Brien with "conduct unbecoming a teacher."¹⁵⁰ Because it involved an employment issue, the case was first appealed to an Administrative Law Judge (ALJ).¹⁵¹ O'Brien contended that her online posts were protected by the First Amendment; however, the ALJ reasoned that the value of protecting her speech did not outweigh "the district's need to operate its schools efficiently."¹⁵² Although O'Brien argued that her inappropriate posts were only a momentary lapse of judgment, the ALJ responded that O'Brien was unapologetic and continued to maintain that there was nothing inappropriate about her conduct.¹⁵³ The ALJ decided in favor of the district, stating, "[i]t becomes impossible for parents to cooperate with or have faith in a teacher who insults their children and trivializes legitimate educational concerns on the Internet."¹⁵⁴ On appeal, O'Brien claimed that dismissal was too harsh a punishment due to her tenured status, and continued to claim that her speech was constitutionally protected.¹⁵⁵ Despite the fact that O'Brien had a twelve-year, unblemished career, the New Jersey appellate court upheld her dismissal.¹⁵⁶ It deferred to the ALJ's decision, noting that O'Brien's speech, which essentially expressed job dissatisfaction, did not deserve First Amendment protection.¹⁵⁷ Additionally, based on the evidence, the appellate court held that dismissing the tenured teacher was not "arbitrary, capricious and unreasonable."¹⁵⁸

Unlike O'Brien, the next teacher's dismissal was not upheld. One day after a local student drowned on a school field trip, teacher Christine Rubino posted on Facebook, "[a]fter today, I'm thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are all the devils (sic) spawn!"¹⁵⁹ After an investigation, the district charged Rubino with "misconduct, neglect of duty, and conduct unbecoming her profession," and a hearing officer recommended the teacher be dismissed.¹⁶⁰ In response, Rubino requested that a

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *2.

¹⁵¹ *Id.*

¹⁵² *Id.* at *2-3.

¹⁵³ *Id.* at *3.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at *4.

¹⁵⁶ *Id.* at *5.

¹⁵⁷ *Id.* at *4.

¹⁵⁸ *Id.* at *5.

¹⁵⁹ *Rubino v. City of New York*, 34 Misc.3d 1220(A), 2012 WL 373101, at *1 (N.Y. Sup. Ct. Feb. 1, 2012) *aff'd*, 965 N.Y.S.2d 47 (App. Div. 2013).

¹⁶⁰ *Id.* at *2. One of Rubino's friends claimed she had written the posts, but later recanted when she discovered she could go to jail for perjury. *Id.* at *3.

New York trial court vacate the hearing officer's opinion on three grounds: it was "arbitrary and capricious," it violated her First Amendment right to free speech, and it was "shocking to one's sense of fairness."¹⁶¹ The court did not address the merits of Rubino's First Amendment claim. The hearing officer had already held that Rubino's posts on Facebook were not protected speech because Rubino "posted the comments as a teacher and that the comments did not pertain to a matter of public concern."¹⁶² However, the court explained, "termination of petitioner's employment is inconsistent with the spirit of the [F]irst [A]mendment."¹⁶³

The court determined that the hearing officer's decision was not "arbitrary and capricious," but did hold that termination was excessively harsh.¹⁶⁴ Specifically, the court relied on the three facts: 1) Rubino had an "unblemished" fifteen-year history of employment with the district; 2) she did not intend to injure any students; and 3) there was no evidence that any injury occurred.¹⁶⁵ Moreover, the court found that Rubino's assumption that only her adult Facebook friends would see the post was reasonable.¹⁶⁶ The court also acknowledged that Rubino's comments were "repulsive" but were only "an isolated incident of intemperance."¹⁶⁷ The court ordered the district to revoke the dismissal and invoke a lesser penalty. In response, the district suspended Rubino for two years without pay.¹⁶⁸ On appeal, the appellate court affirmed the trial court's decision that termination was too harsh.¹⁶⁹ The court provided four main justifications: Rubino's inappropriate post was a single incident; the post was not available to her students or to the general public; Rubino was remorseful; and she promised never to do something like this again.¹⁷⁰ In the end, the tenured teacher was not dismissed; however, she endured a two-year unpaid suspension, a substantial consequence for two inappropriate and impulsive Facebook posts.

The third case involves a teacher's personal blog. A Pennsylvania high school English teacher, Natalie Munroe, described her students as "frightfully

¹⁶¹ *Id.* at *4.

¹⁶² *Id.* at *5.

¹⁶³ *Id.* at *7.

¹⁶⁴ *Id.* at *8.

¹⁶⁵ *Id.* at *7.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Susan Edelman, *Break for Rant Teacher*, N.Y. POST (July 11, 2012, 4:17 AM), http://www.nypost.com/p/news/local/brooklyn/break_for_rant_teacher_y8wTocdmugqZ3JTZLShPOM.

¹⁶⁹ *Rubino v. City of New York*, 965 N.Y.S.2d 47, 48 (App. Div. 2013).

¹⁷⁰ *Id.*

dim,” “whiny,” and “rat-like ” on her blog, which only had nine followers.¹⁷¹ Munroe contended that the purpose of the blog was to keep in touch with friends.¹⁷² After the administration discovered her blog posts, the school district suspended Munroe without pay for two weeks. When she returned to work, the school honored student requests not to be assigned to Munroe’s classes. The principal eventually fired Munroe due to “instruction and assessment performance issues,”¹⁷³ despite describing Munroe in a previous letter of recommendation as a “fantastic” teacher whom he “respect[ed] both personally and professionally.”¹⁷⁴ Critics of the decision argued that the district strategically used the evaluation process to fire Munroe arguing that the district did not have solid legal grounds to do so.¹⁷⁵ After the blog was discovered, Munroe’s colleagues ostracized her.¹⁷⁶ Her administrators determined she needed to undergo an improvement process where they repeatedly made unannounced classroom observations and required her to turn in daily lesson plans.¹⁷⁷

Munroe filed a 42 U.S.C. § 1983 lawsuit, claiming that the district violated her First Amendment rights when they harassed and retaliated against her for her blog.¹⁷⁸ She cited many examples of the school’s retaliation and argued that these acts would “deter a person of ordinary firmness” from exercising free speech rights.¹⁷⁹ Munroe sought back-pay, front-pay, compensatory damages, punitive damages, and reinstatement with full benefits dating back to her termination.¹⁸⁰ The school district argued that Munroe was not deterred in exercising her free speech because her blog posts and public media appearances only increased after school officials discovered her blog.¹⁸¹ In response, Munroe contended that her speech was constitutionally protected because she was speaking as a private

¹⁷¹ *Munroe v. Central Bucks Sch. Dist.*, No. 12–03546, 2014 WL 3700325, *1 (E.D. Pa 2014).

¹⁷² Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Complaint at 3, *Munroe v. Central Bucks Sch. Dist.*, No. 02:12-CV-3546(CMR), 2012 WL 3624078 (E.D. Pa. 2012) [hereinafter *Munroe Plaintiff’s Memorandum*].

¹⁷³ Kate Fratti, *Kate: Blogging Teacher Being Taught a Lesson?*, COURIER TIMES NEWS (July 5, 2012, 10:13 AM), http://www.phillyburbs.com/blogs/news_columnists/kate_fratti/blogging-teacher-being-taught-a-lesson/article_68456dd7-1357-5d95-8660-7d762038d19a.html.

¹⁷⁴ *Munroe Plaintiff’s Memorandum*, *supra* note 172, at 2.

¹⁷⁵ Fratti, *supra* note 173.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Defendants Central Bucks Sch. District, N. Robert Laws and Abram Lucabaugh’s Brief in Support of Their Motion to Dismiss Plaintiff’s Complaint at 3, *Munroe v. Central Bucks Sch. District*, No. 2:12-CV-035462-CMR, 2012 WL 3029132 (E.D. Pa. 2012) [hereinafter *Munroe Defendants’ Brief*].

¹⁷⁹ *Munroe Plaintiff’s Memorandum*, *supra* note 172, at 11.

¹⁸⁰ *Munroe Defendants’ Brief*, *supra* note 178, at 1.

¹⁸¹ *Id.* at 10.

citizen, as her private blog was not written “in connection with her official duties as a high school English teacher,” and she never identified the students, the school, or the district.¹⁸² The U.S. District Court of Pennsylvania granted the district’s motion for summary judgment.¹⁸³ The court applied *Pickering v. Board of Education* where the U.S. Supreme Court established a balancing test that weighs the public employee’s free speech rights with the employer’s interest in running an efficient school when employees speak on matters of public concern.¹⁸⁴ The district court concluded that the content and tone of Munroe’s speech was different than the speech of employees who had enjoyed protection in previous cases.¹⁸⁵ For example, the court provided examples from Munroe’s blog where she discussed adding notes to her students’ grades such as “A complete and utter jerk in all ways. Though academically ok, your kid has no other redeeming qualities”; “Just as bad as his sibling. Don't you know how to raise kids?”; “Liar and cheater”; and “Utterly loathsome in all imaginable ways.”¹⁸⁶ The court reasoned that Munroe’s discussion related to matters of public concern could not be separated from the demeaning comments that attracted considerable public criticism.¹⁸⁷

2. Employee Controversial Online Activity Not Involving Students

In situations that do not involve students, but do involve illegal cyber-behavior, school employees have not been successful in their appeals of criminal convictions and dismissals. A Massachusetts high school math teacher, who used the screen name “MRAM107TEACHER,” was charged with possession of child pornography.¹⁸⁸ At trial, he was unable to convince the court to suppress the evidence despite it being seized in violation of a state wiretap law.¹⁸⁹ Similarly, a Maine elementary school teacher who accessed child pornography on school computers unsuccessfully sought to reduce his conviction of possession of child pornography to aberrant behavior.¹⁹⁰ In Florida, an elementary school teacher failed in his attempt to have his sentence reduced after receiving 210 months for possession of child pornography.¹⁹¹

¹⁸² *Munroe Plaintiff’s Memorandum*, *supra* note 172, at 9.

¹⁸³ *Munroe v. Central Bucks Sch. Dist.*, No. 12–03546, 2014 WL 3700325, *1 (E.D.Pa 2014).

¹⁸⁴ *Id.* at *5.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *4.

¹⁸⁷ *Id.* at *5.

¹⁸⁸ *Commonwealth v. Maccini*, 22 Mass. L. Rptr. 393 (Super. Ct. 2007).

¹⁸⁹ *Id.*

¹⁹⁰ *U.S. v. Bailey*, 377 F. Supp. 2d 268 (D. Maine. 2005).

¹⁹¹ *U.S. v. Postma*, 275 F. App’x 865 (11th Cir. 2008).

In addition to criminal convictions, courts generally support school districts' disciplinary actions for employees' inappropriate e-mails and improper use of school computers. Ironically, a computer ethics teacher was dismissed for conduct unbecoming of a teacher after writing a number of sexual e-mails to his supervising principal from his school e-mail account.¹⁹² The teacher challenged his dismissal, but a Massachusetts appellate court held for the school district.¹⁹³ In a similar case, a New Jersey appellate court upheld the dismissal of a tenured librarian and media specialist who was also dismissed for conduct unbecoming a teacher.¹⁹⁴ The employee claimed she was surfing pornographic websites to test a problem with the school's Internet filter; however, the court disagreed because a number of sexually explicit e-mails were found that she had never reported to her superiors.¹⁹⁵ Similarly, a high school art teacher's license was revoked after he was accused of accessing "teenage oriented pornography" on school computers.¹⁹⁶ The teacher appealed, alleging due process violations, but a Florida appellate court upheld the revocation because the teacher failed to raise these violations on appeal,¹⁹⁷ and further explained that the teacher would have nonetheless been unsuccessful on the merits of his appeal.¹⁹⁸

In Wisconsin, a teacher, who was dismissed for accessing pornography on school computers, sought an injunction to prevent a local newspaper from accessing a CD containing pornographic images and a list of the materials he had accessed.¹⁹⁹ The teacher asserted a copyright exception to the Open Records law, but the Wisconsin Supreme Court held that the public interest in complete, open access outweighed the need to protect the teacher's reputation and privacy.²⁰⁰ In a separate case, the same teacher brought a 42 U.S.C. § 1983 action against the district arguing that his free speech and due process rights were violated.²⁰¹ The teacher argued that the computer search was done in retaliation against his union affiliation and his public criticism of the district.²⁰² The Seventh Circuit Court of Appeals held that the teacher was provided a fair hearing and that his search for pornography was a legitimate reason for termination.²⁰³

¹⁹² Arlington Pub. Sch. V. Coughlin, 26 Mass. L. Rptr. 472 (Super. Ct. 2010).

¹⁹³ Coughlin v. Arlington Pub. Sch., 83 Mass.App.Ct. 1131 (2013).

¹⁹⁴ *In re* Tenure Hearing of Donahue, 2008 WL 553029 (N.J. Super. Ct. App. Div. 2008).

¹⁹⁵ *Id.*

¹⁹⁶ Steuber v. Gallagher, 812 So. 2d 454, 456 (Fla. Dist. Ct. App. 2002).

¹⁹⁷ *Id.* at 455.

¹⁹⁸ *Id.* at 455 n.1.

¹⁹⁹ Zellner v. Cedarburg Sch. Dist., 731 N.W.2d 240, 242 (Wis. 2007).

²⁰⁰ *Id.* at 250-54.

²⁰¹ Zellner v. Herrick, 639 F.3d 371, 373 (7th Cir. 2011).

²⁰² *Id.* at 378-79.

²⁰³ *Id.* at 379-80.

Courts have also upheld dismissals where employees' inappropriate cyber-behavior occurred off-campus. A California school district, for instance, fired a middle school dean of students after an anonymous caller reported the dean's graphic "men seeking men" Craigslist post that included obscene text and photos of genitalia.²⁰⁴ The district argued that it had sufficient grounds to terminate the administrator for "immoral conduct" and "unfitness for service."²⁰⁵ In the dean's appeal, the California appellate court affirmed, holding that the district had provided sufficient evidence to support the termination.²⁰⁶ The appellate court highlighted the principal's testimony that she had lost confidence in the dean's ability to serve as a role model.²⁰⁷ The court also found that the dean's Craigslist post had an adverse effect on the students and teachers at the school.²⁰⁸ Further, the court was concerned that the dean failed to recognize the seriousness of his misconduct because the dean did not believe the post would have a detrimental impact on his professional responsibilities if students viewed it.²⁰⁹

Yet, other employees are concerned about their online privacy and take special precautions to prevent students from accessing their social networking. A Georgia teacher claims, in her pending litigation, that she kept her online activity private from her students. The teacher, Ashley Payne, claims she was forced to resign because her Facebook page included pictures showing her holding alcoholic drinks, captioned with the expletive "bitch."²¹⁰ The principal and assistant principal met with Payne after the superintendent received an anonymous e-mail from someone claiming to be a parent of one of Payne's students.²¹¹ The e-mail stated that Payne had friended the student on Facebook and complained that the content on Payne's Facebook page was inappropriate.²¹²

Payne asserted she had taken special precautions by not friending students and by activating the privacy features on her Facebook account.²¹³ Yet, the principal alleged Payne initially claimed ignorance regarding whether any students were her friends on Facebook.²¹⁴ Payne claimed that the administration

²⁰⁴ San Diego Unified Sch. Dist. v. Comm'n. on Prof'l Competence, 124 Cal. Rptr. 3d 320, 322-24 (Ct. App. 2011).

²⁰⁵ *Id.* at 322.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 326.

²⁰⁸ *Id.* at 327.

²⁰⁹ *Id.* at 329.

²¹⁰ Downey, *supra* note 13.

²¹¹ Lona Panter, *Teacher Files Appeal in Facebook Lawsuit*, BARROW COUNTY NEWS, May 5, 2013.

²¹² *Id.*

²¹³ Fulmer, *supra* note 10, at 53-54.

²¹⁴ Panter, *supra* note 211.

had told her that she could either resign or be suspended; however, the principal claimed he told Payne that she had options.²¹⁵ The principal admitted that he had “expressed doubts as to Ms. Payne’s ability to overcome a [district] investigation given the nature of her behavior.”²¹⁶ Payne submitted a letter of resignation, but her attorney later asked the district to reinstate her. The district refused the request because another teacher had been hired to fill her position.²¹⁷ In 2009, Payne filed a lawsuit focused on due process violations as compared to free speech violations.²¹⁸ In 2013, the trial court granted the district’s motion for summary judgment, but Payne has filed a notice of appeal with the Georgia Court of Appeals.²¹⁹

In three additional lawsuits where plaintiffs focused on First Amendment violations, courts have been unsympathetic.²²⁰ In the first case, the Ninth Circuit Court of Appeals held that a school employee’s First Amendment rights were not violated when the district disciplined her for her blog.²²¹ Tara Richerson was an instructional coach and curriculum specialist who disparaged colleagues and administrators on her blog.²²² After the district’s director of human resources received several complaints from Richerson’s co-workers, she transferred Richerson to a classroom teaching position.²²³ Richerson argued that the transfer was in retaliation to her protected speech.²²⁴ The court agreed with Richerson that the transfer was an adverse employment action and that some of her speech was protected because it expressed a matter of public concern.²²⁵ However, the court reasoned that the district could legally discipline Richerson because the U.S. Supreme Court held in *Pickering v. Board of Education* that employees could be

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Payne alleged that she was illegally denied a state-mandated hearing for being unjustly suspended without cause; however, the trial court held for the district. *Id.* In 2011, she amended her complaint, “arguing that she was deprived of property rights without due process....” *Id.*; accord Downey, *supra* note 13; MCCARTHY, MCCABE, & ECKES, *supra* note 119, at 306 (postulating that if Payne was explicitly fired for her Facebook pictures, then it is unlikely the district would prevail).

²¹⁹ Panter, *supra* note 211.

²²⁰ A third First Amendment case exists, but is not included in this discussion because the court did not analyze the teacher’s First Amendment claim. In *Weathers v. Lafayette Parish Sch. Bd.*, 520 F. Supp 2d 827, 828-29 (W.D. La. 2007), a substitute teacher filed a 42 U.S.C § 1983 lawsuit claiming her rights to free speech and expression were violated because her dismissal was predicated on her website where she posted controversial “contemporary, feminist art.”

²²¹ *Richerson v. Beckon*, 337 F. App’x 637, 639 (9th Cir. 2009).

²²² *Id.* at 638.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

disciplined for speech that involves matters of public concern if that speech damages relationships with co-workers and interferes with job performance.²²⁶

Similarly, Norman Alderman also disparaged his supervisors on a website that he operated.²²⁷ Alderman publicized that the purpose of his website was to “provid[e] citizens with a forum for criticizing public officials and is ‘dedicated to the task of exposing dishonest [and] corrupt...public officials.’”²²⁸ Alderman was upset that he was being transferred from a central office position to a teaching position and criticized the superintendent and treasurer on his website, calling them “cockroaches” and “common thieves of public money.”²²⁹ He alleged that funds were improperly used and that board members were adulterers.²³⁰ At his transfer hearing, Alderman again made similar claims. He was later terminated for insubordination.²³¹ Alderman appealed his termination, which was initially upheld in administrative court but then reversed by the trial court.²³² However, the West Virginia appellate court ultimately held that termination was proper.²³³ The appellate court reasoned that Alderman’s speech was not constitutionally protected because it was not about a matter of public concern.²³⁴ The court explained that even if the speech were a matter of public concern, it still would not be protected because it was made with knowledge that the speech was false²³⁵ and would “disrupt discipline among coworkers and destroy feelings of loyalty and confidence.”²³⁶

In another First Amendment case, a student teacher, Stacey Snyder, claimed a university violated her free speech rights by refusing to certify her to become a teacher.²³⁷ Snyder posted comments and pictures on her MySpace profile that her supervising teacher interpreted as insubordinate and unprofessional.²³⁸ One picture showed Snyder holding what she admitted was an alcoholic drink with a caption that read, “drunken pirate.”²³⁹ The supervising teacher was concerned because Snyder previously told students about her social networking profile after the supervising teacher had advised her not to invite students into her personal

²²⁶ *Id.*

²²⁷ Alderman v. Pocahontas Cnty. Bd. of Educ., 675 S.E.2d 907, 912 (Va. 2009).

²²⁸ *Id.* at 911-12.

²²⁹ *Id.* at 912.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 914.

²³³ *Id.* at 921.

²³⁴ *Id.* at 918.

²³⁵ *Id.*

²³⁶ *Id.* at 919.

²³⁷ Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140, at *1 (E.D. Pa. Dec. 3, 2008).

²³⁸ *Id.* at *6.

²³⁹ *Id.*

life.²⁴⁰ Ultimately, Snyder was not granted her degree in education.²⁴¹ She brought suit against the university, arguing that she was entitled to injunctive relief.²⁴² The U.S. District Court for the Eastern District of Pennsylvania applied the free-speech precedent applicable to teachers.²⁴³ It held that Snyder's online speech was not protected under *Pickering* because she was not speaking as a private citizen on matters of public concern.²⁴⁴

3. Controversial Online Material Not Posted by Employees

The last subset of case law includes cases not directly involving students, like the prior section; however, these four cases are unique because they are the only cases in which the employees did not personally post the controversial material online. One teacher prevailed in her lawsuit and the other three teachers received monetary settlements.

In the first case, a middle-school teacher, Anna Land, was dismissed after pictures of her pretending to perform fellatio on a male mannequin during a bachelorette party surfaced on a website.²⁴⁵ Land did not know the pictures were taken of her, nor did she consent to them being posted online.²⁴⁶ Two years after the pictures were posted, Land learned that students had gained access to them and she asked that they be removed from the website.²⁴⁷ Nevertheless, the district dismissed Land for “engaging in lewd behavior” that violated community standards and “undermined her moral authority and professional responsibilities as a role model for students.”²⁴⁸ In appealing the dismissal, Land argued that there was no “reasonable and just cause” for her discharge, which was required due to her tenured status.²⁴⁹ The Administrative Law Judge (ALJ) upheld the dismissal, but the State Tenure Commission reversed.²⁵⁰ The board appealed to the Court of Appeals of Michigan, but the court agreed that Land should not be dismissed.²⁵¹ After reviewing relevant precedent, the court concluded that in cases where discipline was upheld, “there has been a nexus between the off-duty conduct and

²⁴⁰ *Id.* at *5.

²⁴¹ *Id.* at *8.

²⁴² *Id.* at *2.

²⁴³ *Id.* at *15.

²⁴⁴ *Id.* at *14-16.

²⁴⁵ *Land v. L’Ance Creuse Pub. Sch. Bd. Of Educ.*, No. 288612, 2010 WL 2135356, at *1 (Mich. May 27, 2010).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at *2.

the teacher's on duty performance.²⁵² The court also stated, “where there is no professional misconduct, the notoriety of a tenured teacher's off-duty, off-premises, lawful conduct, not involving students or school activities, by itself, will not constitute reasonable and just cause for discipline.”²⁵³

Unlike Land’s case, the other three cases settled before final adjudication. The first of the three cases involved a Virginia high school teacher who had been dubbed the “butt-printing artist” because he created artwork with his buttocks and genitals.²⁵⁴ In 2003, the teacher, Stephen Murmer, demonstrated how he created his artwork on a cable television show.²⁵⁵ He was dressed in a thong swimsuit and bathrobe, but he attempted to hide his identity by wearing a disguise and using a pseudonym.²⁵⁶ A recording of this television show was ultimately posted to YouTube, but not by Murmer.²⁵⁷ In 2004, the administration of Murmer’s high school launched an investigation into his private artwork after school officials discovered Murmer’s website, where he promoted his artwork.²⁵⁸ Murmer volunteered to delete some information from his art website and the district did not discipline him.²⁵⁹ Two years later, the high school principal and associate superintendent met with Murmer to once again discuss his artwork.²⁶⁰ They claimed teachers had reported classroom disruptions as a result of students discussing the YouTube video.²⁶¹ Murmer was suspended,²⁶² and ultimately the school board unanimously voted to terminate Murmer for “conduct unbecoming of a teacher.”²⁶³ By this time, the national media was reporting on the story,²⁶⁴ and Murmer obtained the legal assistance of the ACLU of Virginia to file a lawsuit against the school. In his 42 U.S.C. § 1983 lawsuit, Murmer claimed his First Amendment rights were violated because his artwork was protected speech

²⁵² *Id.* at *6.

²⁵³ *Id.* at *7. In *Land v. L'Anse Creuse Public Sch. Bd. of Educ.* No. 141375, 789 N.W.2d 458 (Mich. 2010), the Michigan Supreme Court denied the board’s appeal.

²⁵⁴ Associated Press, *Va. School Board Fires ‘Butt-printing’ Art Teacher*, NBCNEWS.COM (Jan. 10, 2007, 5:21 AM) http://www.msnbc.msn.com/id/16557455/ns/us_news-education/t/va-school-board-fires-butt-printing-art-teacher/;

see also Nidiffer, *supra* note 26, at 135.

²⁵⁵ Complaint at ¶ 22, *Murmer v. Chesterfield County School Board*, *available at* <http://www.acluva.org/docket/murmer.html>.

²⁵⁶ *Id.* at ¶ 23.

²⁵⁷ *Id.* at ¶ 26.

²⁵⁸ *Id.* at ¶ 30.

²⁵⁹ *Id.* at ¶ 26-33.

²⁶⁰ *Id.* at ¶ 36-38.

²⁶¹ *Id.* at ¶ 40.

²⁶² *Id.* at ¶ 45-53.

²⁶³ *Id.* at ¶ 56.

²⁶⁴ *Id.* at ¶ 57.

made as a private citizen on a matter of public concern.²⁶⁵ Over a year after the lawsuit was filed, Murmer reached a settlement with the district in which the district paid him \$65,000.²⁶⁶

In the next settled case, Ginger D'Amico, a Pennsylvania teacher, was suspended without pay for thirty days after someone posted a Facebook picture of her at a bachelorette party that included a stripper.²⁶⁷ The party was hosted by D'Amico for a co-worker, and most of the guests were school employees. The ACLU of Pennsylvania threatened to sue the district for disciplining D'Amico for constitutionally-protected behavior that occurred within the privacy of the teacher's home.²⁶⁸ In response, D'Amico and the district reached a settlement where she received back-pay, damages for emotional distress, and attorneys' fees.²⁶⁹

The final case involves a Texas high school teacher who received a \$14,850 settlement after agreeing to resign from the district.²⁷⁰ Similar to the teachers from Virginia and Pennsylvania, Tamara Hoover did not post the controversial photos herself. Instead, her girlfriend, a photographer, posted nude pictures of Hoover on the girlfriend's photography website.²⁷¹ The district argued that the teacher failed to conform to "standards of professional conduct"; however, Hoover's attorney contended the photos could be within the realm of the content Hoover teaches.²⁷² As an art teacher, Hoover stated she was not concerned about her students viewing the photos because the nude human form is typical in art study.²⁷³ The

²⁶⁵ *Id.* at ¶ 63. The complaint also alleged unconstitutional prior restraint because the teacher was instructed not to speak about his artwork. ¶ 68-74.

²⁶⁶ Press Release, American Civil Liberties Union, Fired Art Teacher Wins \$65,000 Settlement from Chesterfield County School Board (March 7, 2008), available at <https://www.aclu.org/free-speech/fired-art-teacher-wins-65000-settlement-chesterfield-county-school-board>.

²⁶⁷ Press Release, American Civil Liberties Union of Pennsylvania, Settlement Reached With School District Over Teacher Who Was Suspended Over Photo With Stripper at Bachelorette Party (Aug. 17, 2010), available at <https://www.aclu.org/free-speech/settlement-reached-school-district-over-teacher-who-was-suspended-over-photo-stripper-ba> [hereinafter *Bachelorette Party Settlement*].

²⁶⁸ Letter from Witold J. Walczak, Legal Director, Am. Civil Liberties Union of Pennsylvania, to Dr. Philip J. Savini, Jr., Superintendent, Brownsville Area School District (Feb. 1, 2010), available at <http://www.aclupa.org/downloads/LtrBASD210.pdf>.

²⁶⁹ *Bachelorette Party Settlement*, *supra* note 267.

²⁷⁰ Press Release, Austin Indep. Sch. District, Statement from AISD on the Proposed Settlement with Former Austin High School Art Teacher (Aug. 17, 2006), available at <http://archive.austinisd.org/newsmedia/releases/index.phtml?more=1114> [hereinafter *Austin Settlement*].

²⁷¹ Michael May, *Hoover: Caught in the Flash*, AUSTIN CHRON., (June 23, 2006), <http://www.austinchronicle.com/news/2006-06-23/378611/>.

²⁷² *Id.*

²⁷³ *Id.*

district argued that the case was not about Hoover's First Amendment rights, but still clarified that "such rights are not absolute."²⁷⁴ According to the district, the dispute was instead about whether Hoover could be "an appropriate role model and effective classroom teacher" after "explicit nude photographs" of her in "sexually suggestive poses" appeared on the Internet and viewed by students and families.²⁷⁵ Since the case settled, it is uncertain which position would have been more convincing to a court. Nonetheless, when Hoover's case is combined with the other three cases, it may be meaningful that the teachers who did not personally post the controversial material either prevailed in litigation or received monetary settlements.

IV. RESTRICTIVE POLICIES ARE UNNECESSARY UNDER EXISTING LAW

After reviewing this larger body of litigation, it is clear that courts typically uphold some level of punishment for school employees engaging in controversial cyber speech or inappropriate online conduct.²⁷⁶ Therefore, it appears, according to existing case law, that legal doctrine already exists to regulate the issues that restrictive social networking policies are attempting to address. Specifically, as described in this section, districts have adequate legal authority to discipline employees for inappropriate student relationships and controversial cyber speech and cyber behavior. Instead of restrictive policies, districts should adopt permissive policies that do not attempt to extend the law, but instead clarify the existing legal limits surrounding employee social networking.

A. *Law Governing Inappropriate Employee-Student Relationships*

State and federal law already regulates inappropriate employee relationships regardless of whether the relationships were formed via social networking or through face-to-face interaction. Every state has a statute that outlines the reasons for which employees can be dismissed, and many include the catch-all provision "for other good and just cause."²⁷⁷ A few relevant grounds for dismissal include immorality and unprofessional conduct.²⁷⁸ Additionally, individual states outline expectations for ethical teacher conduct in their state educator codes of professional responsibility; some of these expectations are also codified in state

²⁷⁴ Press Release, *supra* note 270.

²⁷⁵ *Id.*

²⁷⁶ *See supra* Part IV.

²⁷⁷ MCCARTHY, MCCABE, & ECKES, *supra* note 119, at 367.

²⁷⁸ *Id.* at 368-375; *see also* Jason Fulmer, *Dismissing the "Immoral" Teacher for Conduct Outside the Workplace—Do Current Laws Protect the Interests of Both School Authorities and Teachers?*, 31 J. L. & EDUC. 271, 272-74 (2002).

law.²⁷⁹ State statutes requiring school employees to report child abuse also mandate that illegal sexual relationships with students be reported.²⁸⁰ Finally, under state law, school employees can also be held criminally culpable for inappropriate conduct with students.²⁸¹

Along with state law, federal law ensures that employee-student relationships are regulated. Title IX of the Education Amendments of 1972 prohibits gender discrimination, including sexual harassment of students in educational institutions that receive federal funds.²⁸² To ensure that districts are actively preventing inappropriate employee-student relationships, the U.S. Supreme Court developed a two-part test in *Gebser v. Lago Vista* to clarify school district liability.²⁸³ According to *Gebser*, districts can be held liable if school officials 1) had actual knowledge of the harassment and 2) were deliberately indifferent to the teacher's misconduct.²⁸⁴

This Article reviewed six cases where online activity led to inappropriate or illegal employee-student relationships.²⁸⁵ In each case, the courts upheld the discipline, dismissal, or criminal conviction of the school employee. In order to hold these employees accountable, restrictive social networking policies were neither addressed nor needed. Rather, courts justified their decisions through application of existing state and federal law.²⁸⁶

B. Law Governing Controversial Employee Online Activity

Like regulations governing employee-student relationships, state and federal laws exist to regulate controversial employee cyber speech and cyber behavior. The same state dismissal statutes and ethic codes that apply to inappropriate employee-student relationship cases also provide districts with the legal authority to discipline employees for online social networking posts, blog entries, and other controversial material that appears online. However, the federal law governing employee cyber speech and cyber behavior is quite different.

Starting with cyber speech, courts have applied relevant U.S. Supreme Court precedent governing school employee speech regardless of whether the

²⁷⁹ See Regina Umpstead, et al., *Educator Ethics: A Comparison of Teacher Professional Responsibility Laws in Four States*, 42 J.L. & EDUC. 183, 184 (2013).

²⁸⁰ MCCARTHY, MCCABE, & ECKES, *supra* note 119, at 271.

²⁸¹ See, e.g., Ind. Code § 35-42-4-3 (2014).

²⁸² 20 U.S.C. § 1681 (2012).

²⁸³ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

²⁸⁴ *Id.*

²⁸⁵ See *supra* Part IV(A).

²⁸⁶ See *supra* Part IV(A).

employees' speech occurs online or face-to-face.²⁸⁷ When applying the First Amendment, the U.S. Supreme Court has carved out a variety of limitations to public employees' freedom of speech rights. Based on this precedent, the first step to analyzing a school employee speech case is to determine whether the employee was speaking as a public or private person.

If the employee is speaking as a private citizen, the district can discipline the employee for speech if there are legitimate grounds for discipline outside of the constitutionally-protected speech (e.g., poor work performance),²⁸⁸ or if the speech relates to a personal grievance in the school setting (e.g., a complaint about work conditions).²⁸⁹ Also, as outlined in *Pickering*, a school district may discipline employees speaking as private citizens if their speech involves a matter of public concern (e.g., political, social, or other community concerns), only if the speech also 1) impairs teaching effectiveness; 2) interferes with relationships with superiors or coworkers; or 3) jeopardizes the management of the school.²⁹⁰

However, the U.S. Supreme Court's guidance differs when school employees are speaking in their role as employees rather than private citizens. If the employee's cyber speech could be seen as school-sponsored expression, according to *Hazelwood v. Kuhlmeier*, the school can censor the speech.²⁹¹ Importantly, in *Garcetti v. Ceballos*, the Court held that if public employees are speaking pursuant to their official job duties, then their employers may discipline them.²⁹² Since the 2006 decision, multiple lower courts have applied *Garcetti's* "pursuant to their official duties" standard to pre-kindergarten-12 school employees.²⁹³ The *Garcetti* majority did not address how its decision applied to

²⁸⁷ See, e.g., *Richerson v. Beckon*, 337 F. App'x. 637, 638 (9th Cir. 2009); *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 304 (D. Conn. 2008); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140 (E. D. Pa. Dec. 3, 2008); *In re O'Brien*, No. 108-5/11, 2013 WL 132508 (N.J. Super. Ct. App. Div. Jan. 11, 2013); *Rubino v. City of New York*, 965 N.Y.S.2d 47 (App. Div. 2013); see also MCCARTHY, MCCABE, & ECKES, *supra* note 119, at 284 (explaining that some courts have applied *Garcetti*; whereas others have applied *Pickering* and *Connick*).

²⁸⁸ See, e.g., *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977).

²⁸⁹ See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983).

²⁹⁰ *Pickering v. Board of Education*, 391 U.S. 563, 571-73 (1968).

²⁹¹ *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988) (holding that student-written articles in a school newspaper were school-sponsored and are therefore not protected student speech).

²⁹² *Garcetti v. Ceballos*, 547 U.S. 410, 421-23 (2006).

²⁹³ See, e.g., *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 338 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 3068 (2011); *accord Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478-79 (7th Cir. 2007); *Montle v. Westwood Heights Sch. Dist.*, 478 F. Supp. 2d 377, 382 (E.D. Mich. 2006); *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 382 (E.D.N.Y. 2007). *But see Sheldon v. Dhillon*, 2009 WL 4282086, at *3 (N.D. Cal. Nov. 25, 2009) (noting that the Ninth Circuit has not yet applied *Garcetti* to classroom speech).

pre-kindergarten-12 environments,²⁹⁴ but in Justice Souter's dissent, he noted concerns about the decision's ramifications for academic freedom.²⁹⁵ Therefore, because the public employee in *Garcetti* was not an educator, questions remain regarding how *Garcetti* applies to school employees' speech.²⁹⁶

Similar to cyber speech, the law governing employees' private behavior relates to employee privacy cases, regardless of whether the behavior occurs online. Generally, public employees have the "right to be free from unwarranted governmental intrusions in their personal activities."²⁹⁷ The U.S. Supreme Court interprets this right to fall under both the Ninth and Fourteenth Amendments.²⁹⁸ When examining whether districts can legally discipline employees for conduct occurring outside of school, courts must analyze the "location of the conduct" and the "nature of the activity."²⁹⁹ Many times, districts cite state laws that allow teachers to be dismissed if their conduct is considered immoral. However, districts must also show a nexus between the employees' private behavior and their teaching effectiveness.³⁰⁰

This Article reviewed twenty cases where employees posted controversial content online.³⁰¹ In fourteen cases, the courts upheld the discipline or dismissal of the school employee. In four cases, the districts were less successful after disciplining employees for online material that was not posted by the employee,³⁰² and one lawsuit exists where the case is still pending.³⁰³ Thus, once again, the districts in the majority of these cases successfully defended their discipline of employee online speech and behavior by applying existing federal and state law.

C. Permissive Social Networking Policies

Because districts have been able to discipline employees under the existing law, there is no need to extend the law to further restrict or prohibit school employee social networking at the state or district levels. Instead, districts need guidance about how to prevent and respond to inappropriate employee online

²⁹⁴ *Garcetti*, 547 U.S. at 425.

²⁹⁵ *Id.* at 429-430 (Souter, J., dissenting).

²⁹⁶ See generally Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209 (2008).

²⁹⁷ MCCARTHY, MCCABE, & ECKES, *supra* note 119, at 299.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 304.

³⁰⁰ See, e.g., *Teacher Standards & Practices Comm'n v. Bergerson*, 153 P.3d 84, 89 (Or. 2007); see also MCCARTHY, MCCABE, & ECKES, *supra* note 119, at 369-72.

³⁰¹ See *supra* Section VI(B-C).

³⁰² See *supra* Section IV(B)(3). Although Christine Rubino successfully appealed her dismissal, the district still prevailed in disciplining her for her Facebook activity.

³⁰³ See Panter, *supra* note 211.

activity. When left without guidance, many districts appear to be adopting restrictive policies by default. The districts are likely reacting to anxiety about what a *few* employees *might* do. These policies are problematic because they greatly restrict the social networking of *all* employees by attacking the mode of communication, and not the conduct. Therefore, restrictive policies do not mirror the legal authority districts have under existing law. In fact, these restrictive policies have the effect of chilling speech and can be unconstitutionally overbroad or vague.³⁰⁴ Instead of attempting to extend the law, districts should implement employee Internet policies in order to provide an official and consistent way to communicate expectations for employee conduct and the consequences that will occur if employees violate those expectations.³⁰⁵ By adopting permissive social networking policies, districts can achieve these two goals without running afoul of the law.

D. Nexus Test

Legal scholars rarely offer district-level policy guidance but instead encourage greater legislative intervention and clearer judicial standards.³⁰⁶ However, a few scholars propose a “nexus test” that could be incorporated into district policy.³⁰⁷ The test examines the following factors:

- (1) whether the teacher knowingly and directly initiated communication with students for non-school related matters, (2) whether the teacher intended or intentionally disregarded the possibility that students would see his or her postings, and (3) whether the nature of the communication itself reflected

³⁰⁴ See DiMarzo, *supra* note 121, at 147-62; Papandrea, *supra* note 11, at 1635-37; Elise Rosen Puzio, Note, *Why Can't We Be Friends?: How Far Can the State Go in Restricting Social Networking Communications Between Secondary School Teachers and Their Students?*, 34 CARDOZO L. REV. 1099, 1103 (2013); Jose M. Delgado, Comment, “Chill Out” Mrs. Robinson: *First Amendment Implications of Limiting Private Teacher-Student Electronic Communication*, 45 ARIZ. ST. L.J. 299, 300 (2013).

³⁰⁵ See Kathleen Conn & Perry A. Zirkel, *Legal Aspects of Internet Accessibility and Use in K-12 Public Schools: What Do School Districts Need to Know?*, 146 EDUC. L. REP. 1, 29-34 (2000).

³⁰⁶ Conn, *supra* note 121, at 476; Fulmer, *supra* note 10, at 65-68 (arguing that courts should use an approach that maximizes the level of protection for school employee Internet speech); Miller, *supra* note 10, at 663-64 (contending that the speech doctrine, as applied to school employees’ social networking, needs to be revised and clarified); Nidiffer, *supra* note 26, at 139-40 (recommending courts stop applying *Pickering* to social networking cases and instead, apply *Hazelwood*); Papandrea, *supra* note 11, at 1603 (arguing that *Garcetti* should be narrowly construed to only apply when employees are communicating with “students for school-related purposes”).

³⁰⁷ Papandrea, *supra* note 11, at 1637-41; Conn, *supra* note 121, at 476.

inappropriate teacher-student communication, such as discussions of sexually suggestive or sexually explicit topics.³⁰⁸

This nexus test may be a succinct way for districts to clarify when an employee's online activity warrants discipline.³⁰⁹ Based on this Article's analysis of twenty-six cases, employees successfully challenged their discipline in four cases because they had not personally posted the controversial material. If the districts in these cases would have first applied the nexus test, they would have identified that the first component, intentional distribution, was not met.

By incorporating a permissive social networking policy that includes the nexus test, employees will be notified of the important factors that cause social networking to become problematic. By applying the nexus test to individual situations, districts will have a better understanding of the many gradations of social networking. That is, teachers like Ashley Payne who post innocuous content,³¹⁰ and take special precautions to keep their cyber-behavior private, or who do not repeatedly post unprofessional content, should not be treated in the same manner as teachers like Jeffrey Spanierman who post sexually explicit content,³¹¹ who seek out students over social networking, and who continue to post inappropriately after being reprimanded. As the court determined in Christine Rubino's case,³¹² districts must take individual circumstances into consideration when determining employee punishment.

If districts do incorporate the nexus test in social networking policies, it may be useful to define "communication" to include *all* different types of controversial online activity that appeared in the case law. Namely, it should be clear that the policy includes photographs, videos, text messages, e-mails, instant-messages, blog entries, and posts on social-networking sites such as Twitter, Facebook, and MySpace. Additionally, since many of the cases reviewed did not involve students directly, it may be helpful to revise the third factor of the nexus test to read,

whether the nature of the communication itself reflected a) inappropriate teacher–student communication, such as discussions of sexually suggestive or sexually explicit topics, or b)

³⁰⁸ Conn, *supra* note 121, at 476 (summarizing the factors courts should analyze as suggested by Papandrea).

³⁰⁹ *See id.* (suggesting that the nexus test could be incorporated into legislation, school district policy, or court deliberation).

³¹⁰ *See supra* Section IV(B)(2).

³¹¹ *See supra* Section IV(B)(1).

³¹² *See Rubino v. City of New York*, 34 Misc.3d 1220(A), 2012 WL 373101, at *6 (N.Y. Sup. Ct. Feb. 1, 2012).

unprofessional communication that has negatively impacted the employee's ability to perform his/her job responsibilities effectively, such as discussions that speak derogatorily about students, parents, supervisors, or colleagues.

In sum, districts do not need restrictive policies because they already have adequate authority under the law to discipline and dismiss employees for problematic conduct arising from social networking. As an alternative, policymakers and administrators could create permissive social networking policies in order to clarify and communicate how the existing law already restricts employee speech and conduct. Adopting restrictive policies that attempt to extend the law by regulating the mode of communication are unneeded and unwise for several reasons: they run the risk of being unconstitutional;³¹³ they can be interpreted as condescending to education professionals;³¹⁴ they discount the many benefits of social media;³¹⁵ and they place unrealistic burdens on administrators and educators.³¹⁶

CONCLUSION

The focus of policymakers and school leaders on restrictive social networking policies is misguided. Although the advent of social networking has, in some instances, resulted in inappropriate student-employee relationships and controversial employee online activity, restrictive policies are not the best solution to this problem. Some of the existing restrictive policies have been criticized and some have even been found unconstitutional by the courts. In

³¹³ See DiMarzo, *supra* note 121, at 147-62; Papandrea, *supra* note 11, at 1635-37; Puzio, *supra* note 304, at 1103; Delgado, *supra* note 304, at 300.

³¹⁴ See, e.g., Associated Press, *Mo. Teachers Face Social-media Crackdown*, FIRSTAMENDMENTCENTER.ORG (Aug. 5, 2011), <http://www.firstamendmentcenter.org/mo-teachers-face-social-media-crackdown> (reporting that one Missouri teacher wrote an e-mail to the Governor stating "I am not a pervert and don't wish to be treated as one. I am very responsible with my Facebook pages and don't appreciate being assumed to be a danger to my students.").

³¹⁵ Sarah Kessler, *The Case for Social Media in Schools*, MASHABLE (Sept. 29, 2010), <http://mashable.com/2010/09/29/social-media-in-school/> (identifying a number of educational benefits including increased engagement, access to safe and free social media tools, and improved collaboration); see also Puzio, *supra* note 304, at 1104-1106.

³¹⁶ See Letter from David McGuire, ACLU Attorney, to Chris Pattacini, Chair of Manchester Board of Education (May 25, 2012), *available at* <http://www.acluct.org/downloads/manboe052512.pdf> (stating "[a]n average Manchester school employee will not be able to determine what speech 'falls under applicable constitutional protections' when First Amendment experts - lawyers, judges, law professors - cannot agree on the subject.").

reviewing the large body of litigation surrounding school employee online activity, it is clear that courts uphold employee discipline, dismissal, or criminal convictions in a majority of cases. The school districts prevailed in social networking cases because the districts already have substantial authority under current legal doctrine to discipline and dismiss employees based on online speech and behavior.

Because federal and state law already addresses the motives behind restrictive policies, policymakers and administrators should instead favor permissive social networking policies, and focus on regulating the undesired conduct itself, not the mode of communication. Instead of reacting to problematic employee social networking after it has occurred, more attention should be devoted to prevention and education. Namely, policymakers and administrators should focus on preventing sexual abuse of students and educating employees about unprofessional social networking.

In order to more effectively address sexual abuse of students, it is important to remember that inappropriate employee-student relationships existed well before the Internet. Simply preventing educators from using social networking is unlikely to reduce sexual abuse of students. Perpetrators who sexually abuse children are usually well aware of the illegality of their conduct. Therefore, it is very unlikely that they would abide by a policy forbidding them from contacting students over the Internet.³¹⁷ Ironically, when sexual perpetrators use social networking to form relationships with students, it may allow schools, parents, and law enforcement to more easily monitor the communication, intervene, and then successfully prosecute using the electronic records as evidence.

Instead of being hysterical³¹⁸ or technophobic³¹⁹ in response to educators' social networking use, the reaction should focus on developing more effective measures to prevent and respond to sexual abuse of students. Policymakers may need to regulate how districts handle teachers' sexual misconduct internally.³²⁰ School officials often fear that they will be held personally accountable when a teacher is suspected of sexual abuse.³²¹ They want to avoid public scrutiny and

³¹⁷ See, e.g., *Doe v. Northside I.S.D.*, 884 F. Supp. 2d 485 (W.D. Texas 2012) (analyzing the school's liability where a teacher used district computers to form an inappropriate sexual relationship with a student via MySpace and Facebook in violation of school's policy).

³¹⁸ See Shotwell, *supra* note 29, at 71.

³¹⁹ Frank LaMonte, *Louisiana Joins "Technophobia" Craze with Restraints on Teacher-Student Communications*, STUDENT PRESS L. CENTER (Nov. 16, 2009), <http://www.splc.org/wordpress/?p=308>.

³²⁰ Irvine & Tanner, *supra* note 22 (summarizing Shakeshaft's opinion that school leaders fear public embarrassment as much as the perpetrators do).

³²¹ *Id.*

fear that victims, teachers, or teachers' unions will file lawsuits.³²² Carol Shakeshaft, an expert on sexual abuse in schools, cautions, "[Districts] might deal with [sexual abuse of students] internally, [by] suspending the person or having the person move on, so their license is never investigated."³²³ This phenomenon, where sexual offenders continue to teach in other districts, has been named "passing the trash" or the "mobile molester."³²⁴ Several states are attempting to remedy this problem by requiring districts to report all allegations of sexual misconduct to the office in charge of teacher licensure; however, enforcement of these laws is inconsistent and national coordination of these efforts is lacking.³²⁵ Improved systems are needed in order to track teachers who have abused students so that they are unable to cross state and district boundaries to teach again.³²⁶ Specifically, school boards need a national database of school employees who have been accused of sexual misconduct. By drafting restrictive social networking policies, legislators and school leaders may believe they are responding to the problem of inappropriate employee-student relationships; however, in order to truly address the sexual abuse of students, substantial changes in policy and practice must occur.

Similarly, restrictive policymaking will not necessarily prevent employees from engaging in controversial speech or conduct over the Internet. Instead of punishing employees after the fact, districts should prioritize training employees about how to use social networking in a professional manner. It is likely that "the vast majority of teachers possess the common sense not to post content on social networking sites that will discredit their professional reputation."³²⁷ However, numerous examples have been described in the media and case law of some school employees' carelessness and inappropriateness while using social networking. Therefore, permissive social networking policies that clarify the ethical and professional responsibilities of employees are needed. Yet, much more than mere policy formation is crucial to solving the problem. Districts must also increase professional development about these issues. Employees are held to a heightened standard as role models but teacher-preparation programs usually provide limited or no training about ethics and professional responsibilities.³²⁸ By providing professional development programming on social networking, employees will have a chance to digest the content and ask questions about the

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Estrada, *supra* note 26, at 283.

³²⁸ Umpstead et al., *supra* note 279, at 183.

complicated legal doctrine that limits their freedom of speech and privacy rights. In sum, policymakers and administrators should focus efforts on preventing the unwanted conduct rather than fearing Facebook and other social networking tools.